INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(TIMOR-LESTE *v.* AUSTRALIA)

REQUEST FOR THE MODIFICATION
OF THE ORDER INDICATING PROVISIONAL MEASURES
OF 3 MARCH 2014

ORDER OF 22 APRIL 2015

2015

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

QUESTIONS CONCERNANT LA SAISIE ET LA DÉTENTION DE CERTAINS DOCUMENTS ET DONNÉES

(TIMOR-LESTE c. AUSTRALIE)

DEMANDE TENDANT À LA MODIFICATION
DE L'ORDONNANCE EN INDICATION DE MESURES CONSERVATOIRES
DU 3 MARS 2014

ORDONNANCE DU 22 APRIL 2015

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REQUEST FOR THE MODIFICATION OF THE ORDER INDICATING PROVISIONAL MEASURES OF 3 MARCH 2014

ORDER

Present: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judges* ad hoc Callinan, Cot; *Registrar* Couvreur.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in 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 its Application, Timor-Leste claims, in particular, that these items were taken from the business premises of a legal adviser to Timor-Leste (Collaery Lawyers) in Narrabundah, in the Australian Capital Territory, allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. It states that the seized material includes, *inter alia*, documents, data and correspondence between Timor-Leste and its legal advisers relating to an *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia.

2. On 17 December 2013, Timor-Leste, referring to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court, also submitted a request for the indication of provisional measures.

3. After hearing the Parties, the Court, by an Order of 3 March 2014, indicated the following provisional measures:

> "(1) 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;
>
> . . . . . .
>
> (2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;
>
> . . . . . .
>
> (3) 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." (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 161, para. 55.)

4. By an Order of 28 January 2014, the Court fixed 28 April 2014 and 28 July 2014 as the respective time-limits for the filing in the case of a Memorial by Timor-Leste and a Counter-Memorial by Australia. The Memorial and Counter-Memorial were filed within the time-limits thus fixed.

5. By letters dated 17 June 2014, the Parties were informed that the oral proceedings would open on 17 September 2014.

6. By a joint letter dated 1 September 2014, the Agents of Timor-Leste and Australia requested the Court "to adjourn the hearing set to com-

mence on 17 September 2014, in order to enable the Parties to seek an amicable settlement". The Agents also raised the possibility that the Parties might jointly seek a variation of the Order indicating provisional measures of 3 March 2014. By letters dated 3 September 2014, the Registrar informed the Parties that the Court had decided, pursuant to Article 54 of the Rules of Court, to grant their joint request to postpone the oral proceedings.

7. By a letter dated 25 March 2015, Australia indicated that it "wishe[d] to return the materials removed from the premises of Collaery Lawyers on 3 December 2013, which are the subject of the present proceedings" and are listed in the Schedule to the above letter. Australia accordingly requested modification of the Order of 3 March 2014, pursuant to Article 76 of the Rules of Court. The Registrar communicated a copy of that request forthwith to the Government of Timor-Leste.

8. By letters dated 25 March 2015, the Registrar informed the Parties that the time-limit within which Timor-Leste could submit written observations on Australia's request had been fixed as 10 April 2015. Timor-Leste filed such observations on 27 March 2015.

* * *

9. The request for modification of the Order of 3 March 2014, presented by Australia, concerns the second provisional measure indicated therein, namely that "Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court". Australia requests the Court "to exercise its power under Article 76 (1) of the Rules to authorize the removal of the materials from their current location, where they have been kept under seal, and to allow their return still sealed to Collaery Lawyers".

10. In its written observations, Timor-Leste takes note of Australia's request and states that it "would have no objection to an appropriate modification of the second provisional measure for this purpose".

* *

11. Article 76, paragraph 1, of the Rules of Court reads as follows:

> "At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification."

12. In order to rule on Australia's request, the Court must therefore first ascertain whether, in light of the facts now brought before it by that

State, there has been a change in the situation which called for the indication of certain provisional measures in March 2014. If so, it must then consider whether such a change justifies the modification or revocation of the measures previously indicated.

*

13. The Court will begin by determining whether there has been a change in the situation calling for the measures indicated in its Order of 3 March 2014.

14. The Court recalls that the above-mentioned measures were required because of Australia's refusal to return the documents and data seized and detained by its agents. It observes that, in its letter of 25 March 2015, Australia has now notified the Court of its intention to return the documents and data in question. The Court further notes that, in its written observations, Timor-Leste raises no objections to this course of action or to the corresponding provisional measures being modified accordingly. In view of Australia's change in position regarding the return of the documents and data, the Court is of the opinion that there has been a change in the situation that gave rise to the measures indicated in its Order of 3 March 2014.

*

15. The Court must now consider the consequences to be drawn from that change in situation in respect of the measures which were indicated in the Order of 3 March 2014.

16. In that Order, the Court found 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, it 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".

The Court took note of the written undertaking by the Attorney-General of Australia dated 21 January 2014, whereby he declared that no part of the Australian Government would have access to the material seized, but the Court also observed that the Australian Government envisaged the

possibility of making use of that material in certain circumstances involving national security. The Court thus concluded that there remained an imminent risk of irreparable harm (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, pp. 157-159, paras. 42-48).

17. The Court notes that the return of the documents and data seized, and any copies thereof, would be in accordance with part of the third submission of Timor-Leste presented in its Application (*ibid.*, p. 148, para. 2) and in its Memorial. However, it observes that such return could only be effected on the basis of a "further decision" (point 2 of the operative part of its Order of 3 March 2014 (see paragraph 3 above)), whereby the Court would authorize the transfer of that material and specify the modalities for that transfer.

18. In view of the foregoing, and in reaching its decision on Australia's request, the Court takes the view that the change in situation is such as to justify a modification of the Order of 3 March 2014. Taking account of the Parties' agreement regarding the return of the seized documents and data, which, by necessary implication, includes any copies thereof, the Court considers that it should now authorize such return, while maintaining the obligation for Australia to keep under seal that material until its transfer has been completed under the supervision of a representative appointed for that purpose by Timor-Leste. The Court must be duly informed that the return has been effected and at what date that return took place.

19. The modification resulting from the present Order is without effect on the measures indicated in points 1 and 3 of the operative part of the Order of 3 March 2014 (see paragraph 3 above), which will continue to have effect until the conclusion of the present proceedings, or until further decision of the Court.

* * *

20. The decision rendered in the present proceedings in no way prejudges any question relating to the merits of the case. It leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

* * *

21. For these reasons,

THE COURT,

(1) Unanimously,

Authorizes the return, still sealed, to Collaery Lawyers of all the documents and data seized on 3 December 2013 by Australia, and any copies thereof, under the supervision of a representative of Timor-Leste appointed for that purpose;

(2) Unanimously,

Requests the Parties to inform it that the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, has been effected and at what date that return took place;

(3) Unanimously,

Decides that, upon the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, the second measure indicated by the Court in its Order of 3 March 2014 shall cease to have effect.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of April, two thousand and fifteen, 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*) Ronny ABRAHAM,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge *ad hoc* CALLINAN appends a declaration to the Order of the Court.

(*Initialled*) R.A.
(*Initialled*) Ph.C.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Antônio Augusto CANÇADO TRINDADE.

DECLARATION OF JUDGE *AD HOC* CALLINAN

1. I have voted in favour of the Order. There are, however, observations that I wish separately to make.

2. Australia has submitted that any Order that the Court now makes should be dispositive of the whole proceedings brought by Timor-Leste. In my opinion, the Court does not have before it sufficient material, and has not received submissions detailed enough to enable a properly informed decision to be made in respect of that submission by Australia.

3. One reason why this is so may be because Timor-Leste's outstanding claims (if any) require for their consideration further and more explicit articulation.

4. Having regard to the desirability of prompt and efficient final resolution of all justiciable disputes, I would favour the taking of all necessary steps, whether or including by such articulation or otherwise, by both Parties to bring the proceedings in this Court to a conclusion.

5. I would emphasize, however, that this declaration is not intended as an impediment in any way, to the resolution of the dispute by the Parties without further recourse to the Court.

(Signed) Ian CALLINAN.