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* 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, 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.

[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, 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.

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 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 (paragraphs 9 and 37 of the Order) 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, p. 9 and p. 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, paragraph 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.

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

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.

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, paragraph 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 (Order, paragraph 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 necessary 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 this Court proceedings and 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 disclosed 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:

> "If 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, 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 of 27 January 2014, para. 178). As the Court says in the present Order -

> "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 a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed." (Order, paragraph 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, paragraph 27; see also paragraph 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 paragraph 42 of the Order).

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, paragraph 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, paragraph 47). On that basis, the Court has ordered Australia to seal the seized material (Order, paragraph 55 (2)) and ensure that its content is not in any way used to the disadvantage of Timor-Leste (Order, paragraph 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.