INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands
Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928
Website: www.icj-cij.org

Press Release
Unofficial

No. 2015/12
6 May 2015

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

The Court authorizes the return of all the documents and data seized on 3 December 2013 by Australia from the business premises of a legal adviser to Timor-Leste

THE HAGUE, 6 May 2015. By an Order dated 22 April 2015, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, decided to grant Australia's request for the modification of the Order indicating provisional measures rendered on 3 March 2014 in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia).

The operative part of that Order reads as follows:

"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."

*

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 claimed, in particular, that these items were taken from the business premises of a legal adviser to Timor-Leste (Collaery Lawyers), allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. It stated that the seized material included, 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.

It is recalled that, by Order of 3 March 2014, the Court 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."

By letter dated 25 March 2015, Australia indicated that it wished to return the documents and data seized. It accordingly requested the modification of the second provisional measure indicated by the Court in its Order of 3 March 2014. Australia requested the Court "to exercise its power under Article 76 (1) of the Rules to authorise 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". In its written observations on that request, Timor-Leste took note of Australia's request and stated that it "would have no objection" to the modification of the said Order for that purpose.

In order to rule on Australia's request, the Court first had to ascertain whether, in light of the facts brought before it by that State, the situation calling for the indication, in March 2014, of the provisional measures at issue had since changed. In its Order of 22 April 2015, the Court observed that the said measures were required because of Australia's refusal to return the documents and data seized and detained by its agents. It noted that Australia had now notified the Court of its intention to return the material in question and that Timor-Leste had raised no objections to that course of action. In view of Australia's change in position, the Court was therefore of the opinion that there had been a change in the situation that gave rise to the above-mentioned measures, indicated in its Order of 3 March 2014.

The Court then considered the consequences to be drawn from that change in situation in respect of the measures previously indicated. It noted that the return of the seized documents and data, and any copies thereof, would be in accordance with part of the third submission of Timor-Leste presented in its Application and in its Memorial. It observed, however, that such return could only be effected on the basis of a further decision, whereby the Court would authorize the transfer of that material and specify the modalities for that transfer. It therefore took the view that the change in situation was such as to justify a modification of the Order of 3 March 2014.

Accordingly, the Court authorized the return of the seized documents and data, while maintaining the obligation for Australia to keep that material under seal until its transfer had been completed under the supervision of a representative appointed for that purpose by Timor-Leste. It

further requested that it be duly informed of the return and of its date. The Court also pointed out that the modification of the Order of 3 March 2014 was without effect on the first and third measures indicated in that Order, which would continue to have effect until the conclusion of the present proceedings, or until further decision of the Court.

*

Composition of the Court

The Court was composed as follows: 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.

Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge ad hoc Callinan appended a declaration to the Order of the Court. A summary of that opinion and the full text of that declaration are annexed to this press release.

*

Full text of the Order and history of the proceedings

The full text of the Order can be found in the case file on the Court's website (under the heading "Contentious Cases"). A summary of the previous steps in the proceedings (from 17 December 2013 to 3 September 2014) can be found in the most recent version of the Court's Annual Report (2013-2014, paras. 184-196), available in electronic format on the Court's website (under the heading "The Court"). A summary also appears in press release 2014/28, which can be found under the heading "Press Room".

*

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the

International Criminal Tribunal for the former Yugoslavia (ICTY, an ad hoc court created by the Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an independent judicial body composed of Lebanese and international judges, which is not a United Nations tribunal and does not form part of the Lebanese judicial system), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

Information Department:

Mr. Andrey Poskakukhin, First Secretary of the Court, Head of Department (+31 (0)70 302 2336)
Mr. Boris Heim, Information Officer (+31 (0)70 302 2337)
Ms Joanne Moore, Associate Information Officer (+31 (0)70 302 2394)
Ms Genoveva Madurga, Administrative Assistant (+31 (0)70 302 2396)

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, Judge Cançado Trindade begins by pointing out that, although he has concurred in the adoption of the present Order, for standing in agreement with the resolutory points of its dispositif, he does not entirely share the reasoning of the Court which has led to its decision, and feels thus obliged to lay on the records the foundations of his own personal position on the relevant issues raised herein. Provisional measures of protection, to start with, are, in his understanding, endowed with an autonomous legal regime of their own. The present Order should thus 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.

2. The Court is entitled to indicate or order provisional measures of protection that go beyond what was requested, in terms distinct from those of the request (Article 75(2) of its Rules). In his view, the Court, as master of its procedure and jurisdiction, can indicate or order provisional measures of protection sponte sua; it can perfectly act ex officio in this domain, — which Judge Cançado Trindade has been conceptualizing, in the adjudication of successive cases before the ICJ, as the autonomous legal regime of provisional measures of protection. The Court can take a more proactive posture (under Article 75(1) and (2) of its Rules) within this legal regime, in the light also of the principle of the juridical equality of States.

3. The Court is on safer ground, — he continues, — if it acts, not on the basis of unilateral assurances or "undertakings" on the part of States, but of its own initiative and terms, attentive to the legal nature and the effects of provisional measures of protection. As these latter purport to prevent (further) irreparable harm, — Judge Cançado Trindade adds, — there is no room for indulging into an exercise of balancing the interests of the contending parties. Furthermore, arguments of alleged "national security", such as the ones in the present case, cannot be made the concern of an international tribunal. 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).

4. In Judge Cançado Trindade's view, the ICJ should have taken and kept custody itself of Timor-Leste's seized documents, in its own premises in the Peace Palace at The Hague, so as to have them promptly returned, duly sealed, to Timor-Leste, whom they belong to. It 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 his perception, "contrary to what the Court says in the present Order, the situation itself has not at present changed. Animus is not a synonym of factum" (para. 7). What has now changed, is not the objective situation in the present case, but rather the state of mind, as to the return of the seized documents and data to whom they belong to.

5. In any case, — he proceeds, — 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). There are elements in the evolving case-law of the ICJ on provisional measures seeking to enhance the authority of its initiative to indicate or order such measures of protection. According to Judge Cançado Trindade, 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, — as shown by 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.

6. In our days, the progressive development of international law in this domain 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. In his 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. Judge Cançado Trindade then warns that advances in this domain cannot be achieved in pursuance of a voluntarist conception of international law international legal procedure. In his view, "[t]he 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" (para. 11). Provisional measures of protection appear nowadays with "a character, more than precautionary, truly tutelary. Provisional measures of protection constitute nowadays a true jurisdictional guarantee of a preventive character" (para. 12).

7. Judge Cançado Trindade concludes that the expanding autonomous (not simply "accessory") legal regime of provisional measures of protection, with its relevant preventive dimension, "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 distinct from those ensuing from breaches as to the merits of the case)". In his understanding, the ICJ 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" (para. 13).

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.

_____