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Provisional Measures Issued by International Courts and Tribunals

Fulvio Maria Palombino
Roberto Virzo
Giovanni Zarra *Editors*

Springer

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Chapter 1
Introduction

Roberto Virzo

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Abstract This introduction provides a critical discussion of some problematic aspects of the Resolution on provisional measures adopted by the Institute of International Law on 8 September 2017. The remainder of the introduction presents the plan and aims of the book.

Keywords Provisional Measures · International Courts and Tribunals · Resolution of the Institut de Droit International · Typical Functions of Provisional Measures · Atypical Functions · Plausibility · Human Rights

The present volume takes its cue from the recent proliferation of provisional measures—which we can briefly define as interim orders issued at the end of incidental proceedings, often with the aim of safeguarding the object of the proceedings or to ensure that the subjective rights in question are duly safeguarded—awarded by international courts and tribunals. Indeed, notwithstanding the crucial role that these orders have in international proceedings, the subject has rarely been meaningfully debated in its entirety in monographs[1] or collected volumes.[2]

It is not by chance, indeed, that these orders attracted the attention of the *Institut de Droit International* (IDI, or Institute of International Law), which, trying to offer a systematization of the subject of provisional measures, on 8 September 2017, during its session in Hyderabad, adopted a Resolution[3] (the "Resolution"). However, while, as clarified in the report by rapporteur Lord Collins of Mapesbury, the Resolution aims at encompassing a broad range of provisional measures—dealing not only

[1] A notable exception is given by Miles 2017.

[2] Exception made for works focusing on specific tribunals, see e.g. Rosenne 2005.

[3] For a comment on the Resolution, see Ruozzi 2018, pp. 1182 *et seq*.

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with "public international law, private international law, international commercial arbitration and some universal principles of private law",[4] but also with provisional measures issued by domestic courts—it fails to take into account important trends as well as a number of problematic issues emerging from the abundant international case law on the matter.

A significant example of the reasons leading to the above criticisms is given by the approach that the Resolution assumes with respect to the functions and purposes of provisional measures. More specifically, guiding principle 1 mentions the objective of "maintain[ing] the *status quo* pending determination of disputes" or "preserv[ing] the ability to grant final effective relief"; guiding principle 2 refers to the purpose of avoiding "irreparable injury […] caused to the rights in dispute before final judgment"; and guiding principle 4 alludes to the need to "[prevent] the aggravation of the dispute". In this regard, it is arguable that the IDI has oversimplified the matter, without taking into account both the peculiarities of provisional measures in the different contexts, and the great number of purposes which may lead to the adoption of a provisional measure.

Hence, it seems worth trying to offer another systematization of the function and purposes of provisional measures. In this regard, a useful approach to this issue may be to distinguish between "typical" or "atypical" orders. In the cases where the functions of interim measures are envisaged in the statutes, constitutive instruments or procedural rules of international courts and tribunals, they may be considered as typical, while if they are the result of a choice made by adjudicators beyond the powers expressly attributed to them, provisional measures may be defined as atypical. The worthiness of the issuance of an atypical function of provisional measures shall be necessarily analysed on a case by case basis.

Looking at the IDI Resolution through the lens of this distinction, we might assume that the purpose referred to in guiding principle 2 usually falls within the first category—i.e., it is a *typical* function—because provisional measures aimed at preserving the rights of the parties pending the dispute are usually recognized by legal sources regulating international courts and tribunals. Suffice it to recall, in this connection, that the International Court of Justice (ICJ), under Article 41 of its Statute,[5] has "the power to indicate (…) any provisional measures which ought to be taken to preserve the respective rights of the parties". Also falling within this category is the ability "to grant final effective relief" mentioned in guiding principle 1, since Article 57(3)(*e*) of the Statute of the International Criminal Court (ICC) allows the Pre-Trial Chamber "to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims".[6] Finally, the purpose of "maintain[ing] or restor[ing] the status quo pending determination of the dispute" is laid down in Article 26(2)(*a*) of the Arbitration Rules 2012 of the Permanent Court of Arbitration (PCA).

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[4] Institut de Droit International, Session of Hyderabad, Third Commission, Provisional Measures, Final Report, Rapporteur Lord Collins of Mapesbury, p. 268, para 12.

[5] See Chap. 6 by Wittich in this volume.

[6] See Chap. 8 by Kovács in this volume.

On the other hand, provisional measures issued with the purpose of "preventing the aggravation of the dispute" are not usually envisaged in the statutes or procedural rules of international courts and tribunals and they might, therefore, be considered as atypical.[7] However, this circumstance has never restrained international adjudicators, who have usually issued provisional measures with this purpose. Indeed, the necessity not to aggravate the dispute is a factor that the International Tribunal for the Law of the Sea (ITLOS) always takes into account when ordering provisional measures,[8] and which the ICJ regards as an "additional" purpose of interim measures to be pursued in all the cases where it is necessary.[9]

Furthermore, in addition to those enshrined in the Resolution, an analysis of relevant instruments and international case law reveals that it is possible to envisage other functions and purposes of provisional measures. In this regard, it is possible to mention interim measures issued for the prevention of serious harm to the environment[10]—a purpose which reflects the considerable development of international environmental law in the past decades—as well as provisional orders having the goal of "provid[ing] a means of preserving assets out of which a subsequent award may be satisfied".[11] As for the "atypical function" category, it is worth recalling here that in the *Arctic Sunrise* and *Enrica Lexie* cases, the ITLOS, pending the constitution of an arbitral tribunal under Annex VII UNCLOS, prescribed provisional measures for the purpose of preventing prejudice to "the carrying out of any decision which the arbitral tribunal may render".[12] This is a purpose mentioned in Article 26(2)(b) of the PCA Arbitration Rules 2012, but not in the United Nations Convention on the Law of the Sea (UNCLOS),[13] under which the provisional measures were ordered.

Moving to the requirements for the issuance of provisional measures, the Institute of International Law did not analyse the concept of "plausibility", a controversial

[7] But see Article 26, para 1 of PCA, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment.

[8] Virzo 2018, pp. 156–158.

[9] ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2006, para 96.

[10] Article 26, para 1 of PCA, Optional Rules, *supra* note 7. Moreover, the only footnote in the Resolution reminds us that "[t]here may be independent purposes of provisional measures that are expressly provided for in relevant instruments, such as the prevention of serious harm to the marine environment under Article 290, para (1) of the United Nations Convention on the Law of the Sea or the prevention of damage to fish stocks under Article 31, para (2), of the Agreement on Implementation of the Law of the Sea Convention with respect to straddling and highly migratory fish stocks, adopted on 4 August 1995".

[11] Article 26, para 2, *c)* of PCA, Arbitration Rules 2012; Article 17, para 2, *c)* of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. Besides, some commercial arbitration awards have gone as far as to order Mareva injunctions against banks or other entities so as to freeze the assets of one of the parties. See Chap. 13 by Zarra in this volume.

[12] *The "Arctic Sunrise" Case (The Netherlands v. Russia)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, para 98; *The "Enrica Lexie" Incident (Italy v. India)*, ITLOS Case No 24, Provisional Measures, Order of 24 August 2015, para 141.

[13] Montego Bay, 10 December 1982; entry into force: 16 November 1994.

and vague criterion, which in the past few years has taken on increasing importance in provisional measures decisions, especially in the case law of the ICJ.[14]

Some other criticism may be moved to the Resolution, if we specifically look at the dispute settlement mechanism set forth by the UNCLOS and, precisely, in light of the ITLOS' competence to prescribe provisional measures pending the constitution of an arbitral tribunal pursuant to Annex VII of the Convention. Indeed, the second part of guiding principle 6 of the Resolution states that "[a]n order for provisional measures […] is binding" and that it "is subject to modification or discharge *by the court or tribunal which made it*" (emphasis added). This means that guiding principle 6 does not adequately take into account the fact that, according to the last sentence of Article 290(5) UNCLOS, "the [arbitral] tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures" previously issued by the ITLOS. The lack of consideration of the ITLOS practice by Guiding principle 6 is even more surprising if one considers that Article 290(5) has been applied on several occasions,[15] and that in the famous *Southern Bluefin Tuna*, *MOX Plant* and "*Enrica Lexie*" cases, the arbitral tribunals to which the disputes were submitted revoked, confirmed or modified the measures ordered by the ITLOS.

Dwelling a little longer on the UNCLOS dispute settlement system, it is worth observing that, during the IDI discussions leading to the 2017 Resolution, Judge Wolfrum drew attention to one of the aspects on which the Resolution is silent. In his remarks on the report prepared by Lord Collins of Mapesbury, he pointed out that "there were a number of cases in international law where orders for provisional measures directly or indirectly settled the dispute".[16] Indeed, in *Land Reclamation by Singapore in and around the Strait of Johor* and *Ara Libertad*, the execution of the provisional measures ordered by the ITLOS (to which negotiations, carried out pending the arbitration proceedings, followed) led to the two disputes being resolved through agreements, rather than adjudicated in court.[17]

Another trend which is not taken into account by the Resolution concerns the increasing consideration that international judges have given to human rights in the issuance of provisional measures. This happened in particular when it had to be

[14] Tanaka 2018, p. 194: "The vagueness of the test may entail the risk of undermining predictability of an order of the Court with regard to provisional measures".

[15] *Southern Bluefin Tuna cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Case Nos. 3 and 4, Provisional Measures, Order of 27 August 1999; *The MOX Plant case (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia/Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003; *The ARA Libertad* case *(Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012; *The "Arctic Sunrise" Case*, *supra* note 10; *The "Enrica Lexie" Incident*, *supra* note 10; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019; *The M/T "San Padre Pio" Case (Switzerland v. Nigeria)*, ITLOS Case No. 27, Provisional Measures, Order of 6 July 2019. See also Chap. 7 by Marotti in this volume.

[16] Institut de Droit International, Session of Hyderabad, Third Commission, Plenary Session, Provisional Measures, Report, p. 108.

[17] *Supra* note 14 and Virzo 2018, pp. 160–161.

decided what constitutes an "irreparable prejudice" justifying an interim order. This trend regards not only specialized human rights courts,[18] but also other international courts and tribunals. In recent provisional measures, the ICJ has duly taken into account the rights of individuals.[19] E.g., in its order in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court specified that a prejudice can be considered irreparable "when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress".[20] Similarly, in the case concerning *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*, the Court ordered the United States of America to remove unilateral sanctions that could "have a serious detrimental impact on the heath and lives of individuals on the territory of Iran".[21]

From all of the above, it is clear that, even though the authoritative Resolution of the Institute of International Law is certainly to be praised for its "broad comparison of the law and practice of international and national courts", the subject of provisional measures before international courts and tribunals lends itself to further investigation. This volume—resulting from a very successful conference held in Benevento on 14 December 2018—seeks to supply it by bringing together distinguished international litigation experts and brilliant young researchers in international law, all of whom we thank for their contributions.

The first part will give an overview of the general features of provisional measures in international adjudication, addressing the interim nature of provisional measures,[22] their autonomy,[23] the requirements for their issuance,[24] and the increasing humanisation of provisional measures.[25] The following three parts of the book will look in detail at the law and practice of different international courts and tribunals with respect to provisional measures, pointing out any cross-references between the various decisions examined, in the hope that, despite the variety of approaches, a number of common trends will emerge. Finally, Fulvio Maria Palombino will build

[18] Besides, as noted by Pascale in this volume, the Final Report of the Institute of International Law makes just a few brief references to the Inter-American Court of Human Rights and the European Court of Human Rights, without giving any consideration to other regional bodies, such the African Commission and the African Court on Human and Peoples' Rights.

[19] ICJ, *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018, Separate Opinion of Judge Cançado Trinidade, para 65.

[20] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, para 69.

[21] *Alleged violations of the 1955 Treaty*, *supra* note 18, para 91.

[22] See Chap. 2 by Thirlway in this volume.

[23] See Chap. 4 by Rieter in this volume.

[24] See Chap. 3 by Le Floch in this volume.

[25] See Chap. 5 by Sparks and Somos in this volume.

on the conclusions reached by the individual chapters, bringing the volume to an appropriate close.[26]

On behalf of all the editors, I would like to especially thank Caterina Milo and Gustavo Minervini for their precious editorial work. Without their support this volume would have never seen the light. A special thank you also to Donato Greco for the support given in the organization of the Conference which led to this volume.

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[26] See Chap. 16 by Palombino in this volume.

Part I
General Features of Provisional Measures in International Adjudication

Chapter 2
Provisional Measures: How "Provisional" Is "Provisional"?

Hugh Thirlway

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Abstract Article 41 of the ICJ Statute provides that the Court may indicate any provisional measure in order to preserve the rights of the parties. While these measures cease to have effect if the claim is dismissed, it is apparent that—in the meantime—they may affect the respondent's interests. In this respect, a case may arise in which the measures required to prevent irrevocable damage to the claimed rights of the applicant, will cause an irrevocable damage to the rights of the respondent. Moving from an analysis of various ICJ cases in which compliance with provisional measures *could have caused* an irrevocable damage to the respondent's interests, this chapter tries to shed light on this thought-provoking issue by investigating on the possible international responsibility of the applicant.

Keywords state responsibility · Article 41 · ICJ case law · interests of the parties

Article 41 of the ICJ Statute confers upon the Court "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". What is meant by "provisional"?

The words that follow make it clear that this signifies that the measures are just a holding operation, to avoid the applicant's interests being compromised before the court can rule. This is well expressed in the French text of the Statute by the words "mesures conservatoires".[1] There is however an additional implication of the word

[1] In a very early draft of what became Article 41, "conservatoires" was translated as "protective": see ICJ *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, para. 105.

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"provisional": that an Order indicating measures is not a final determination of the facts and law of the case, that when the merits are examined, it may be found that they are otherwise; this is conveyed in the French text by the phrase "à titre provisoire". The most that the Court will be able to do at the preliminary stage is to satisfy itself that it has "prima facie" jurisdiction, and that the claim (or the right) asserted is "plausible".[2]

When the Court does give its final judgment, after having granted provisional measures, it may uphold the claim (*in toto* or to a limited extent) with the consequence that the measures become merged in the obligations of the respondent under that judgment. There are however other possible outcomes, to be examined in this paper, which may to some degree exemplify the old saying that "[c]e n'est que le provisoire qui dure".

The Court may find that it has no jurisdiction to rule on the claim;[3] or it may find that the claim is inadmissible. Or it may find that it has jurisdiction, and the claim is admissible, but that it is not well-founded on its merits; and this finding may be on the basis that the facts have not been shown to be as claimed, and as would be required for the claim to be valid. And finally, dismissal of the case may be because the claim, while it looked "plausible" enough, as a matter of law, at the provisional measures stage, turns out to be unfounded in law.

Any measures indicated cease to have effect if the claim is dismissed; but they will or may have had effect on the respondent's interests in the meantime. The designation "provisional" therefore does not necessarily mean that their impact is limited in time and self-effacing.

Until the ICJ decision in *LaGrand*,[4] since the measures were regarded as no more than an indication, a recommendation, by the Court, and thus not deemed to be binding, the respondent could avoid having to take any action, or to refrain from a contemplated action, that would compromise its interests, at the risk, of course, of being subsequently found to have persisted in illegal conduct, but not of being held to have breached a separate—binding—obligation of compliance with the Court's Order. On the post-*LaGrand* view, however, as a matter of law, the party concerned has to comply, at whatever cost, even if the compelled action would cause irreversible prejudice to its interests. It is noteworthy that when the Court decided in *LaGrand*

[2] The word "plausible" in this context is a comparatively recent usage in the terminology of the Court's decisions, and perhaps not an entirely happy one. The origin of the term (in Latin) meant "suitable to be applauded", and it then developed in English to mean "suitable to be believed"; but it tended to convey an implication of "*apparently* valid, but not necessarily so" (cf. the title *Plausible Legality* given to a work by Rebecca Sanders, recently published by OUP, commenting on the use made by the US of dubious appeals to legality). In ICJ usage it was initially attached to the "claim" to a right, but more recently the right claimed has itself been described as "plausible". While one sees what is meant, a right is not something that may or may not be "believed", like a claim: surely it either exists, or it doesn't?

[3] An Order indicating measures always includes a text on these lines: "Whereas 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, and leaves unaffected the right of the Governments of [the Parties] to submit arguments in respect of those questions".

[4] *LaGrand (Germany v. United States of America)*, Order of 3 March 1999.

that measures were binding, it was faced with a situation when the harm to be provisionally averted—the execution of two men—was utterly irrevocable, while the injury to the US if it were later established that it had stayed the execution when in fact it had been fully entitled to proceed, was little more than symbolic

If the Court, on examining the merits, then finds that its provisional view of the facts and the law was correct, then any prejudice to the respondent's interests through compliance with the measures will have been apparent only, as it was not legally entitled to act in the way that it was contemplating. But what if the Court takes a different view at the merits stage?[5] Or if it takes the view that it does not possess jurisdiction in the case? The respondent may well have suffered damage to its interests through compliance (or it may of course have taken the risk of *not* complying, precisely to avoid this). Does this constitute injury, in the sense of damage resulting from infringement of the respondent's rights? Does the respondent then have any claim for reparation against the other party? Or even against the Court?

The question has not yet arisen in any case in which measures have been requested. There have however been several ICJ cases in which compliance with the measures requested would have caused prejudice of a measurable, sometimes substantial, economic significance.[6]

– In the case of *Passage through the Great Belt*, where measures were requested by Finland directing Denmark to stop construction of its planned bridge over the Belt, Denmark argued that to interrupt the construction works would have involved Danish interests in losses of some US$453 million.[7] No measures were indicated, on the grounds that the construction works would not have reached a stage where passage would have actually been impeded until 1994, and it was generally recognized that the judgment on the merits would have been given by then. That judgment, which was never given,[8] might have upheld Finland's claim, in which case Denmark would presumably have had to demolish the greater

[5] As a British judge once remarked when one of his earlier decisions was cited to him, "The matter does not appear to me now as it appears to have appeared to me then" (Baron Bramwell in *Andrews v. Styrup*, 26 Law Times 204, 206).

[6] This situation did not arise in any of the few cases in which the PCIJ was asked to indicate provisional measures.

[7] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Written Observations by the Government of the Kingdom of Denmark relating to the Request for indication of Provisional Measures of 28 June 1991, para. 69.

[8] The case was in fact settled by agreement, and the Application withdrawn; but the terms of settlement are not on record. According to an informed observer, however: "One consideration on which there was agreement was that the sum should correspond to adjustments that Finnish offshore industry should make to existing oil rig designs so as either to enable their passage through the Sound (which has a minimum depth of 7.7 m) or through the Great Belt in a partially installed condition … The Danish side agreed to pay a sum of 80 million Danish kroner, while the Finnish side agreed to withdraw its Application to the ICJ. Each country issued a press release: the Danish referred to 'compensation', but the Finnish one specifically 'denied that the payment was made as compensation for violating Finnish rights'…" Koskenniemi 1993 (It appears however that the money was divided between Finnish shipbuilding companies). Denmark did not modify its bridge in order that in future Finnish oil-rigs would be able to pass under it: the passage height of the completed

part of works, and reconstruct in such a form as not to impede passage. During the provisional measures phase, Denmark argued that "any claim by Finland could not be dealt with by an order for restitution but could only be satisfied by damages inasmuch as restitution in kind would be excessively onerous".[9] The Court responded in its Order on the request for measures that

> if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded a priori of a judicial finding that such works must not be continued or must be modified or dismantled.[10]

- In the *Aegean Sea Continental Shelf* case, the object of the measures was to stop Turkey carrying out seismic tests in a disputed area of the Aegean; measures were not indicated. If they had been, the interruption of the tests would probably have had some impact, but probably have been no more than a minor inconvenience: it was the implication that the relevant areas appertained to Turkey that was important to Greece.
- In the case of *Pulp Mills on the River Uruguay*, Argentina asked that Uruguay be directed to halt construction of the mills. During the oral proceedings it was stated by Uruguay that to do so would have involved "irreparable damage to Uruguay's economy" and a loss of "more than $1.5 billion in foreign investment by ENCE and Botnia [the companies developing the mills]".[11] The Court did not find that the indication of measures was required in the circumstances shown. However, it observed that

> [I]n proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make; whereas the Court points out that their construction at the current site cannot be deemed to create a fait accompli…[12]

and it recalled its earlier dictum, in the *Great Belt* case, quoted above.

- In the case of *Construction of a Road in Costa Rica*, the requested measures were, essentially, the stopping of that construction, on the grounds that they were causing the deposit of sedimentation in the San Juan River, part of Nicaragua's sovereign territory. It was contended by Costa Rica (inter alia) that "si les mesures conservatoires demandées sont ordonnées, un grave préjudice sera porté aux droits du Costa Rica",[13] but no details were given, more emphasis being placed on the right of Costa Rica to act as it saw fit on its own territory. The measures were

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bridge is 65 m, and this was also, according to Finland's Request for Provisional Measures, the planned height at the time of that Request.

[9] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, para. 31.

[10] *Ibid*.

[11] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Verbatim record CR 2006/49, p. 33 (Reichler).

[12] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order of 13 July 2006, para. 78.

[13] ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Verbatim record CR 2013/29, para. 30 (Kohen).

refused by the Court on a *de minimis* basis: it appeared that the works were responsible for a very low percentage (2–3%) of the sedimentation, which "seems too small a proportion to have a significant impact on the river in the immediate future".[14]

Thus in none of these cases were measures granted, though in the *Great Belt* case this was because the request was held to be premature, and it seems possible that, absent that circumstance, measures would have been indicated. Since the case was settled out of court and withdrawn, this can however only be speculation. These cases however serve to show that the scenario of a respondent state suffering an economic impact—and even an irreversible impact—from measures which, it may subsequently be argued, should never have been granted, is not by any means a fantasy.

In the *Great Belt* case, the Court observed that provisional measures are "only justified if there is urgency in the sense that action prejudicial to the rights of *either party* is likely to be taken before [the Court's] final decision is given".[15] The meaning appears to be that measures could be requested by the party whose rights were threatened, whether it was the applicant or the respondent, though in the nature of things it would be likely to be the applicant. The principle is however the avoidance of prejudice to the rights of either party; and the situation we are envisaging, the possibility of which in the abstract might not be immediately apparent, is where it is the measures to prevent action prejudicial to the rights of one party that would themselves involve, or direct, action prejudicial to the rights of the other.

Let us consider a hypothetical situation based on the facts of the *Great Belt* case, ignoring the question of the three years' delay, and also on the post-*LaGrand* basis that any measures indicated would be binding. Concentrating on the Finnish claim, and reserving for the present any question of balancing the rights of the parties, let us suppose, first, that at the measures stage the Court had decided that the existence of the right claimed by our Finland was plausible,[16] and that the Danish bridge interfered or would interfere with the exercise of that right. On the basis of the Court's warning in the actual case, as to the possibility "of a judicial finding that such works cannot be continued, or must be modified or dismantled",[17] it is reasonable to suppose that the Court would have ordered the temporary discontinuance of the works to the extent that, if completed, they would interfere with Finland's exercise of the plausible right claimed, with the consequent economic loss to Denmark noted above.

But now let us suppose also that at the merits stage the decision of the Court was to reject Finland's claim: that it concluded that the "plausible" contention of the existence of the right of passage was no more than that—plausible—and that on

[14] ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 13 December 2013, para. 34.

[15] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, para. 23 (emphasis added).

[16] Though that term had not yet come into use at the time of the *Great Belt* case. In this respect, see *supra* note 2.

[17] *Ibid*., para. 31.

a more far-reaching examination the right turned out not to have existed, or not in such a form or degree as to be affected by the Danish works. Denmark would be free to continue the bridge construction, but would have suffered very considerable financial loss, through no fault of its own.

It is no defence to a legal *claim* that to meet it would involve the defendant state in serious, or even irreparable, damage to its interests. If rights are being infringed, they must be respected whatever the impact on the responsible state; otherwise it would be possible to, as it were, buy the right to commit a breach of the other state's rights. Similarly, a court that is asked to direct a party to comply with its legal obligations has, in principle, no power to refuse to do so, once it is satisfied that these obligations exist. But the grant of provisional measures is a discretionary matter; and at the measures stage there is no certainty that a right or rights exist, the exercise of which the Court should facilitate. There must be *some* justification shown: this is the justification of the "plausibility" test, which has in the past been given other forms of expression. But no verbal formula can get round the problem: the Court does not at this stage know enough to reach a conclusion with certainty, but has to take *some* decision.

A case may therefore arise in which it is contended that measures are required to prevent irrevocable damage to the claimed rights of the applicant, but that the appropriate measures would, it is contended in response, cause irrevocable damage to the rights of the respondent. The situation recalls the old puzzle: "What happens if an irresistible force meets an immoveable object?" The answer of course is that this is a logical impossibility: either the force is not irresistible, or the object is not immoveable; and similarly, the parties' *rights* cannot be incompatible in this way—once they are ascertained. The rights in any legal system are co-ordinated by that system, which excludes—or should exclude—any conflict. But at the provisional measures stage it could well be that such a conflict presents itself: and it is impossible to know in advance which are the prevailing rights.

As long ago as the *Hostages* case, the Court observed, with reference to Article 75 of the Rules, that it "must at all times be alert to protect the rights of both the parties in proceedings before it."[18] In the *Temple (Interpretation)* case, the Court indicated measures addressed to both parties, even though the respondent had not requested this, to prevent irreparable damage from occurring to either party's nationals or territory.[19] Irreparability was thus present on both sides; but in that case it was not the measures that risked causing irreparable damage, but the events they were designed to prevent.

In the *Avena* case, the US (respondent) drew attention to the similar observation in the *Great Belt* case, already noted, that Article 31 of the Statute required the Court to preserve the rights "of either party"; on this basis it suggested that doing so would (in the case at bar) involve weighing up the respective interests of the two

[18] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Order of 15 December 1979, para. 29.

[19] ICJ, *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)*, para. 61.

parties against each other.[20] The Court's response was, first, that any such weighing up could only balance the claims of each party *made in the proceedings*, and no other rights or interests of the one or the other party[21] (To revert to the *Great Belt* problem, Denmark's right to construct the bridge, and to that extent to interfere with passage, *was* a right in issue in the proceedings). However, the Court then pointed out, following *LaGrand*, that it would not be imposing "a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law",[22] as the US was suggesting; it would merely be postponing a single execution. In any event such prohibition would, as a provisional measure, be only temporary, and not therefore in itself a source of irremediable damage.

In the *Treaty of Amity* case, in response to a contention presented by the US similar to that in *Avena*, the Court recognized that it did have to consider, inter alia, "the impact of the requested measures on the rights of the Respondent".[23] It found itself able to hold, on the one hand, that "certain of the rights of Iran […] that it has found plausible are of such a nature that disregard of them may have irreparable consequences", and on the other, that by the indication of the measures requested to protect these, measures addressed to the meeting of humanitarian needs only, no irreparable prejudice would be caused to the US. Thus it was able to say, in effect, that an allegedly irresistible force would not, in the case before it, actually meet an allegedly immoveable object, so the encounter could take place without it being first ascertained whether it was the irresistibility or the immovability that was defective. But the possibility of double irreparability, discussed above, remains, and may yet be encountered by the Court in practice.

If the Court, after indicating provisional measures to protect a claimed right, subsequently holds that the applicant did not have that right after all,[24] could it be argued that, by claiming it and by seeking provisional measures to protect it, the Applicant had committed a wrongful act that had caused damage to the Respondent?[25] There are no evident precedents in international law for the municipal law concept of vexatious litigation;[26] and that concept does not in any event, in municipal

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[20] ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order of 5 February 2003, para. 47.

[21] *Ibid*., para. 48.

[22] *Ibid*., para. 47.

[23] ICJ, *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Order of 3 October 2008, paras 87 and 94.

[24] If however the Court merely holds that it does not have jurisdiction, it remains possible that the Applicant has a perfectly valid legal claim, and therefore it cannot be shown to have committed a wrongful act. Nevertheless, might it still be said that by invoking the protection of the Court in the absence of a valid jurisdictional basis, the applicant has caused harm to the respondent?

[25] Assuming, of course, that such damage can be proved. If the Court itself had taken the initiative, under Article 75, para. 1, of the Rules of Court, to raise the question of possible provisional measures, this probably would perhaps absolve the party benefitting from the measures from any responsibility if they turned out to be unjustified.

[26] Defined as "filing a lawsuit with the knowledge that it has no legal basis, with its purpose to bother, annoy, embarrass and cause legal expenses to the defendant".

systems, seem to entail the possibility of a claim for damages against the vexatious litigant by his adversary. According to Article 2 of the ILC Draft Articles on State Responsibility, "[t]here is an internationally wrongful act of a state when conduct consisting of an action or omission: (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of the state." It is difficult to say that states are under an obligation not to seek provisional measures in circumstances in which, *ex post facto*, it can be said that there was no ground for doing so—but only *ex post facto*.[27]

Another puzzle: suppose that measures are indicated, but the Respondent, confident of its case, chooses not to comply with them. At the subsequent stage, the Court reverses itself (no jurisdiction, or no merits); the measures are vacated. If non-compliance has caused damage to the Applicant, is there any responsibility on the Respondent? Since *LaGrand*, the measures, while they are in force, are binding: if that means anything, the Respondent was, *at the relevant time*, in breach of a legal obligation, imposed by the Court's Order. This obligation is conceptually different from the obligation that the Applicant vainly asserted in the proceedings, and has been found not to exist. A claim on such grounds by the Applicant would be a bold move, but cannot be said to be quite without merit.

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A course of action that the ICJ might well consider, in a case where the respondent could show that to comply with measures, of the kind that the applicant was seeking, would cause irreversible damage to the respondent, would be to indicate measures conditionally, requiring from the requesting party an undertaking to compensate the other party in the event that the measures proved to be unjustified.

The justice of such indemnification has been recognized in municipal legal systems. In general, it is apparently universally recognized that any monies paid under a provisional order must be repaid if the order turns out to have been unjustified; and in the context of the English High Court, for example, where "interim injunctions" correspond to provisional measures Orders, it is required that

> Any order for an injunction, unless the court orders otherwise, must contain: (1) […], an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.[28]

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[27] If bad faith were shown, it might be otherwise: imagine that in a parallel case to the *Pulp Mills* case the deutero-Uruguay could show that the purpose of the proceedings had been solely to protect the deutero-Argentinian pulp industry from competition, and not to protect the environment.

[28] Practice Direction 5.1. The practice in Germany, in the event of the rescinding of an *einstweilige Verfügung*, is similar. In French law, a *"jugement d'avant dire droit"* does not rank as *res judicata*, but must nevertheless be executed: there seems no authority concerning the implications for consequent losses of the defendant if the final judgment is in his favour. In US law, preliminary injunctions are more rarely granted than in England; and "in each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences" (*Winter v. National Resources Defense Council*, 129 S.Ct. 365 (2008) 555 U.S. 7, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91). Elkind 1981, pp. 26–28, cites parallels to provisional measures in French, German, Swiss, English, Japanese and US law, as they then stood, but does not deal with the question of injury to the respondent due to compliance with a revoked measure.

This would clearly cover the situation envisaged; though in the ICJ context, an undertaking given, at the direction of the Court, directly to the respondent might be more conveniently enforceable. This, it is suggested, is an option available to the Court, and worth considering in appropriate cases. There is probably no need for a *general* provision for this possibility, e.g. in the Rules of Court or a Practice Direction, since the potential injustice to the respondent here discussed would only arise in a limited number of cases (as is clear from the fact that it has not yet happened!) Article 75, para. 2, of the Rules already enables the Court to order measures to be taken by the requesting party; this would normally be at the stage of the initial request, but is not subject to any time-limitation, so the Court, in the context of a request for measures, could give directions to both parties.

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Chapter 3
Requirements for the Issuance of Provisional Measures

Guillaume Le Floch

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Abstract Provisional measures in international law are regulated by each court's own rules. The provisions are usually written in a very general fashion and often only authorise courts to take provisional measures which they consider necessary or appropriate. Nevertheless, the relevant practice shows that different judicial bodies have formulated similar requirements for the issuance of provisional measures. This chapter aims at shedding some light on the requirements arising from the peculiar character of provisional measures. In this respect, it is contended that international courts and tribunals enjoy a considerable margin of appreciation when examining a request for provisional measures.

Keywords requirements · margin of appreciation · admissibility of the claim · *fumus boni juris* · urgency · irreparable prejudice

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3.1 Introduction

Legal provisions governing provisional measures are usually written in a very primitive way and in very general terms. Especially, requirements for the issuance of provisional measures are rarely precise. Most often, legal provisions merely authorise international courts and tribunals to take provisional measures if they consider, for example, "necessary",[1] "appropriate under the circumstances",[2] "if it considers that circumstances so require"[3] or "if it considers that the circumstances so require".[4]

However, certain provisions are more detailed. They set forth specific requirements that must be present before the court of the tribunal can prescribe provisional measures. That is the case for instance of Article 290, para 5 of the United Nations Convention on the Law of the Sea (UNCLOS). According to this provision, any court or tribunal may prescribe provisional measures "if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires". That is also the case of Article 63, para 2 of the American Convention on Human Rights (ACHR). This article intends to confine the prescription of provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons". This provision is almost entirely reproduced in Article 27, para 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights.[5]

In general, the aims and purposes of provisional measures are clear from the text. Their goal is to ensure that effective execution of the final judgment is possible in case the main action succeeds. However, those provisions leave a large degree of discretion to judges in the assessment of the requirements for the issuance of provisional measures. As a result, international courts and tribunals are allowed to create their own objective test as to when circumstances so require measures to be taken.[6]

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[1] Article 279 of the Treaty on the functioning of the European Union (TFEU).

[2] Article 290(1) of the United Nations Convention on the Law of the Sea (UNCLOS).

[3] Article 41(1) of the Statute of the International Court of Justice; Article 278 of the TFEU.

[4] Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID).

[5] "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

[6] This is more of less explicitly acknowledged by Article 18(1) of the Acuerdo de Complementación Económica Nº 18 entre la República de Argentina, la República Federativa de Brasil, la República del Paraguay y la República Oriental del Uruguay. According to this provision, "[e]l Tribunal Arbitral podrá, a solicitud de la parte interesada y en la medida en que existan presunciones fundadas de que el mantenimiento de la situación ocasionaría daños graves e irreparables a una de las partes, dictar las medidas provisionales que considere apropiadas, según *las circunstancias y en las condiciones que el propio Tribunal establezca*, para prevenir tales daños" (emphasis added).

Besides, the different Rules of procedure do not further specify the requirements for the issuance of provisional measures. The only exception are the Rules of procedures of the Court of Justice[7] and the Rules of procedure of the General Court.[8] Under these provisions, requests for the indication of provisional measures "shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for". One has nevertheless to note that, regardless of these requirements, both courts apply another condition not mentioned in their Rules of procedure: the balance of convenience or balance of interests. This confirms that international courts and tribunals have a great deal of latitude.[9]

However, this is not to say that there are no clear requirements. On the contrary, all international courts and tribunals have attempted to define precisely in their case law the conditions for a party to obtain provisional measures.[10] In other words, the requirements for provisional measures to be granted constitute a praetorian construction. It is a judge-made law.[11]

[7] Article 160(3).

[8] Article 156(4).

[9] One has to note that in their rules of procedure, there might be formal requirements that a request for provisional measures must comply with. For instance, at the ICJ, the request for indication of provisional measures must be written and "shall specify the reasons therefore, the possible consequences if it is not granted, and the measures requested" (Article 73 of the Rules of Court; see also ITLOS, Article 89, para 3 of the Rules of the Tribunal). At the ECtHR, "[a]ny request lodged with the Court must state reasons. The applicant must in particular specify in detail the grounds on which his or her particular fears are based, the nature of the alleged risks and the Convention provisions alleged to have been violated. A mere reference to submissions in other documents or domestic proceedings is not sufficient. It is essential that requests be accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions, together with any other material which is considered to substantiate the applicant's allegations. The Court will not necessarily contact applicants whose request for interim measures is incomplete, and requests which do not include the information necessary to make a decision will not normally be submitted for a decision. Where the case is already pending before the Court, reference should be made to the application number allocated to it. In cases concerning extradition or deportation, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official case-reference number. The Court must be notified of any change to those details (date and time of removal, address etc.) as soon as possible" (Practice Directions, Requests for interim measures, I). Moreover, "[r]equests for interim measures under Rule 39 should be sent by facsimile or by post. The Court will not deal with requests sent by e-mail" (*Ibid.*, II). See also Article 160, para 4 of the Rules of procedure of the Court of Justice with reference to Articles 120–122 and Article 104 of the Rules of procedure of the General Court with reference to Articles 43 and 44. See on this topic: Le Floch 2008, pp. 67–73.

[10] Brown 2007, p. 139. However, International Centre for settlement of investment disputes (ICSID) tribunals "have not necessarily articulated a uniform test when dealing with requests for interim relief, and the approaches adopted tend to vary with the facts of the case": Kaufmann-Kohler and Antonietti 2010, p. 529.

[11] ICJ Practice Directions XI refers to "the criteria for the indication of provisional measures as stipulated in the Statute, Rules and *jurisprudence of the Court*" (emphasis added).

International courts and tribunals are very different one from the others. For example, the International Court of Justice and the Court of Justice of the European Union are worlds apart. The first is known as the World Court whereas the second is more like a municipal court in that it serves a relatively integrated group of states. Despite those differences, international courts and tribunals, in general, have broadly formulated similar requirements for the issuance of provisional measures. This is not surprising, bearing in mind that those requirements are linked to the nature of provisional measures. On the one hand, provisional measures are subordinated to proceedings on the merits. It is a purely incidental procedure. As a result, provisional measures cannot be sought outside of a case that is pending before the court or the tribunal.[12] Thus, some conditions arise from the ancillary character of the provisional measures (Sect. 3.2). On the other hand, provisional measures are incidental to the main proceedings.[13] That is why international courts and tribunals have identified substantive requirements for granting provisional measures (Sect. 3.3).

3.2 Requirements Arising from the Ancillary Character of Provisional Measures

Provisional measures are designed to preserve the rights which might be adjudged on the merits. Therefore, applicants must be precluded from obtaining, by means of provisional measures, measures to which they would not be entitled due to the lack of jurisdiction or due to the inadmissibility or the unfounded nature of the main claim. However, a detailed review of each of these issues would render provisional measures proceedings redundant. Moreover, provisional measures are provisional in character and should neither amount to an interim judgment,[14] nor prejudice the decision of the substance of the case.[15] It is a leitmotiv that can be found in almost all orders for provisional measures.[16] That is why international courts and tribunals, as

[12] Nevertheless, it should be pointed that under Article 290(5) of UNCLOS, in case of absent contrary agreement by the parties, ITLOS may order provisional measures pending the constitution of an annex VII or VIII arbitral tribunal. Furthermore, pursuant to Article 63(2) of the ACHR, the IACtHR may act at the request of the Commission "with respect to a case not yet submitted to" it. In these two cases, the judicial body which decides upon the request of provisional measures is not the one which decides on the merits of the case.

[13] On the autonomy of provisional measures, see Chap. 4 by Eva Rieter in the present book.

[14] PCIJ, *Factory at Chorzów (indemnities)* (*Germany v. Poland)*, Provisional Measures, Order of 21 November 1927.

[15] Article 39(4) of the Statute of the CJEU.

[16] See for instance: ICJ, *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018, para 101; *The M/T "San Padre Pio" Case (Switzerland v. Nigeria)*, ITLOS Case No. 27, Provisional Measures, Order of 6 July 2019, para 135; CJEU, Case C-149/95 P(R), *Commission v. Atlantic Container Line and others*, Order of 19 July 1995, para 22; IACtHR, *Matter of the Nicaraguan Center for Human Rights and the Permanent Commission of Human Rights (CENIDH-CPDH) regarding Nicaragua*, Adoption of Urgent Provisional Measures, Order

a compromise, carry out a *prima facie* assessment of the main claim (Sect. 3.2.1). In addition, some of them make sure that there is a link between the measures required and the substantive rights of the parties (Sect. 3.2.2).

3.2.1 Prima Facie *Evaluation of the Main Claim*

According to the court or the tribunal concerned, an applicant for provisional measures must demonstrate that the international court or tribunal has *prima facie* jurisdiction over the parties (Sect. 3.2.1.1), that the request is *prima facie* admissible (Sect. 3.2.1.2) and that the rights sought to be protected are plausible (Sect. 3.2.1.3).

3.2.1.1 Jurisdiction *Prima Facie*

According to the well-established case law of the ICJ, the Court "may indicate provisional measures only if there is, *prima facie*, a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case".[17] Much has been written about the requirement of *prima facie* jurisdiction.[18] The terms of the debate are well-known. On the one hand, given the fact that provisional measures are an incidental procedure, they can be indicated in principle only if the Court has jurisdiction over the merits. But on the other hand, if the parties have to wait for the ICJ to carry out a full examination of a jurisdiction issue—which is a very complex task in some cases—, this would mean a long delay without any protection. In that case, provisional measures proceedings would be deprived of their interests. That is why the International Court of Justice had to find a middle way between these two extremes.[19]

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of the President of 12 July 2019, para 53; ACtHPR, *In the Matter African Commission on Human and Peoples' Rights v. Republic of Kenya*, Provisional Measures, Order of 15 March 2013, para 24.

[17] See for example: ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional measures, Order of 14 June 2019, para 15. This requirement had been established for the first time in the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* case: ICJ, Provisional measures, Order of 5 July 1951, p. 93. The PCIJ has not been confronted with this problem. Indeed, it never had to indicate provisional measures against explicit objections to its jurisdiction (except where the jurisdiction issue had already been ruled upon).

[18] See for instance: Mendelson 1972–1973, pp. 262–264; Merrils 1977, pp. 86–109; Oxman 1987, pp. 341–342; Dominicé 2002, pp. 383–395; Rosenne 2002, pp. 515–544.

[19] However, theoretically, it did not have to. The power of the Court to prescribe provisional measures, indeed, derives from Articles 35 (accession by States to the Statute) and 41 (power to indicate provisional measures) of the Statute, not Article 36 (jurisdiction of the Court). In other words, the power of the ICJ to prescribe provisional measures and the one to deal with the merits of the case are certainly based on the consent of the States. Nevertheless, such consent does not occur at the same moment. The power to indicate provisional measures is an autonomous grant of jurisdiction. See ICJ, *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)*, Judgment of 22

The *prima facie* jurisdiction requirement was then followed by other international courts and tribunals. Some did not get the choice because it is enshrined in the tribunal's founding instrument. That is the case of Article 290 of UNCLOS. It incorporated directly the *prima facie* jurisdiction standard established by the World Court. It may be seen as a consolidation or codification of the law developed previously by the practice of the World Court.[20] As a result, ITLOS and Annex VII tribunals have embraced this requirement.[21] Others have deliberately chosen to endorse this requirement such as ICSID Tribunals[22] and the African Court on human and peoples' rights.[23] In contrast, CJEU, ECHR or IACHR did not need to resort to this requirement. This is certainly due to the facts that objections to jurisdiction are normally not raised before those courts.[24] However, if the question of jurisdiction is raised, they would probably address the issue by making a *prima facie* assessment.[25]

July I952, pp. 102–103. See also on this topic: Briggs 1960, p. 229; Dubisson 1964, p. 225; ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Interim Protection, Order of 11 September 1976, Separate Opinion Mosler, p. 25; Thirlway 1994, p. 18; Le Floch 2008, p. 93; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination supra* note 17, Separate Opinion Abraham, para 9.

[20]Treves 1997, p. 361. Judge Jimenez de Arechaga did not share that view. According to the former president of the ICJ, Article 290(1) "imposes a new and additional condition (…) Such an explicit requirement would, in case of objection by one party, necessarily call for an express pronouncement or decision on the issue, after hearing the parties. Thus, to impose the need for a separate pronouncement on the question of jurisdiction, even on a *prima facie* basis, may delay considerably the actual indication of interim measures": Jimenez de Arechaga 1978, p. 237.

[21]See for example: *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS No. 2, Provisional Measures, Order of 11 March 1998, para 29; *The "Enrica Lexie" Incident (Italy v. India)*, ITLOS No. 24, Provisional Measures, Order of 24 August 2015, para 48.

[22]See for instance: *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para 55; *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on Claimant's Application for Provisional Measures and Temporary Relief, 15 February 2017, para 111.

[23]See for instance: ACtHPR, *In the matter of African Commission on Human and Peoples' Rights v. Libya*, Provisional measures, Order of 15 March 2013, para 10; ACtHPR, *Tembo Hussein v. United Republic of Tanzania*, Provisional Measures, Order of 11 February 2019, para 8.

[24]It should also be remembered that the European Convention on Human Rights does not empower the Court to prescribe provisional measures. Until the *Mamatkulov and Askarov v. Turkey* case, provisional measures were considered non-binding: ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para 128.

[25]See for example: CJEU, Case C-118/83 R, *CMC Cooperativa Muratori e Cementisti and others v. Commission of the European Communities*, Order of 5 August 1983, para 37. Jo M. Pasqualucci expressed the same thoughts concerning the IACHR: "When the case is before the Inter-American Court, any objections to the Court's jurisdiction to order provisional measures would be made at the preliminary objections stage of the proceedings. The Inter-American Court should resolve any objections by making a *prima facie* determination of jurisdiction. The necessity for immediate action should encourage the Court to follow the relevant precedent of the ICJ (…) A prima *facie*

The threshold of *prima facie* jurisdiction is rather low[26] in the sense that all that is needed, at this stage, is to establish that the court or the tribunal "might" have jurisdiction over the merits.[27] In other words, it "needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal".[28] Nevertheless, if this requirement is not satisfied, the court or the tribunal will reject the request of provisional measures. In practice, this is rather unusual. For example, it never happened at the ITLOS while at the ICJ, it only happened twice in more than 70 years: in the *Legality of Use of Force* cases[29] and in the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*.[30] In a much more exceptional manner, it may also lead to the removal from the general list as soon as the court or the tribunal manifestly lacks jurisdiction. That is what happened at the ICJ in the *Legality of Use of Force (Yugoslavia v. Spain)*[31] and *Legality of Use of Force (Yugoslavia v. United States of America)*.[32]

3.2.1.2 *Prima Facie* Admissibility of the Claim

The assessment of the admissibility of the main application in the framework of a request for provisional measures largely involves the same issues as the assessment of the jurisdiction of international court or tribunal. Inadmissibility is an obstacle to proceedings on the merits just as the lack of jurisdiction. Nevertheless, it is a consideration which is not really taken into account by international courts and tribunals with the exception of the Court of Justice of the European Union.

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basis of jurisdiction would accord with the Inter-American Court's holding that, when the case has not yet been submitted to the Court, it is not necessary that a petition even be filed before the Inter-American system for the Commission to request that the Court issue provisional measures. It is only necessary that a *prima facie* possibility of a grave and urgent violation of human rights is shown": Pasqualucci 2013, p. 255.

[26] See: Rosenne 2005, p. 122.

[27] ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Interim Protection, Order of 17 August 1972, para 17; ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Interim Protection, Order of 17 August 1972, para 18. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court took it upon to clarify that it "has given the matter the fullest consideration compatible with the requirements of urgency imposed by a request for the indication of provisional measures": ICJ, Order of 10 May 1984, para 25.

[28] *Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures of 2 September 2008, para 55.

[29] See for example: ICJ, *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, para 45.

[30] ICJ, *Armed Activities on the Territory of' the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, para 89.

[31] ICJ, *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, para 35.

[32] ICJ, *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, para 29.

In principle, the Court of Justice and the General Court consider that "the admissibility of the main application should not be examined in the framework of an application for interim measures. It should be examined when the Court considers the main application".[33] In other words, it ought to be reserved for the examination of the main claim so as not to prejudge that claim. Nevertheless, when "it is contended that the main application from which the application for interim measures is derived is manifestly inadmissible, it seems necessary to establish grounds for concluding *prima facie* that the admissibility of the main application cannot be completely ruled out".[34] Because of the urgency of the proceeding of provisional measures, such examination of the admissibility of the main application is necessarily summary.[35]

In the past, there have been a couple of questions on the degree of control exercised by the European Courts in assessing the requirement of *prima facie* admissibility. There seemed to be divergent lines of jurisprudence for a while.[36] Nowadays, the situation is clearer. As indicated by the General Court, "in the context of proceedings for interim relief, the admissibility of the main action can only be assessed on a *prima facie* basis, the aim being to examine whether the applicant has adduced sufficient elements which justify the *prima facie* conclusion that the admissibility of the main action cannot be excluded. The judge hearing the interim measures action should only declare that action inadmissible where admissibility of the main action can be wholly excluded. Otherwise, to rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not, *prima facie*, wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that action".[37] Moreover, too much emphasis should not, in any case, be placed on this issue. Indeed, rejection of an application for provisional measures on the basis of the manifest inadmissibility of the main action is somewhat exceptional.[38]

The Court of Justice and the General Court are the only ones to take clearly into account the *prima facie* admissibility of the main claim. This issue was however once discussed at the ICJ. In the *Land and Maritime Boundary* case, Nigeria raised objections to the admissibility of the claims of Cameroon. According to it, the application

[33]CJEU, Case 351/85 R, *Fabrique de fer de Charleroi vs. Commission*, Order of 22 April 1986, para 13.

[34]CJEU, Case 221/86 R, *Groupe des droites européennes vs Parliament*, Order of 18 September 1986, para 19. Naturally, the finding of inadmissibility of the main application entails the inadmissibility of the request of provisional measures: CJEU, Case C-64/93, *Donatab and others v. Commission*, Order of 28 June 1993, para 20. However, it is quite rare that the question arises in that order.

[35]See for example: CJEU, Case C-300/00 P(R), *Federación de Cofradías de Pescadores de Guipúzcoa and others v. Council*, Order of 12 October 2000, para 35; CJEU, Case T-31/07 R, *Du Pont de Nemours (France) and others v. Commission*, Order of 19 July 2007, para 107.

[36]See: Pescatore 1987, p. 330; Pastor and Van Ginderachter 1989, pp. 588–595; Jacobs 1994, pp. 47–48.

[37]CJEU, Case T-37/04 R, *Região autónoma dos Açores v. Council*, Order of 7 July 2004, para 110.

[38]Da Cruz Vilaça 1998, p. 273.

was "not even *prima facie* admissible".[39] As a result, the Court had to deal directly with this issue.

In a recital, the ICJ stated that "[w]hereas without ruling on the question whether, faced with a request for the indication of provisional measures, the Court must, before deciding whether or not to indicate such measures, ensure that the Application of which it is seised is admissible *prima facie*, it considers that, in this case, the consolidated Application of Cameroon does not appear *prima facie* to be inadmissible in the light of the preliminary objections raised by Nigeria".[40] Two general remarks can be made from this statement. As a first step, the Court, broadly speaking, declined to reach the issue.[41] As a second step, it nevertheless stressed that the application of Cameroon does not appear *prima facie* to be inadmissible. Therefore, the ICJ uses a negative formulation as regards the question of admissibility which contrasts with "the usual 'positive' determination that *there is* in a given case a *prima facie* basis upon which the Court's jurisdiction might be founded".[42] In the *Nuclear Test* cases, the ICJ implicitly acted in the same way. It held "that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded"[43] (positive formulation) and that "it cannot be assumed a priori (…) that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application"[44] (negative formulation). There is no explanation to justify this distinction. In the absence of more details, it is hard to draw definitive conclusions.[45] As Cameron Miles observed, "it is uncertain whether the Court considers *prima facie* admissibility to be an essential condition for the award of interim relief, and thus whether it is to be considered one

[39] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures, Order of 15 March 1996, para 32.

[40] *Ibid.*, para 33.

[41] According to Judge Ranjeva, it is because of the military character of the measures prescribed that the Court has asked itself on a possible additional condition for the indication of provisional measures, *id est* the *prima facie* admissibility of the principal application: Declaration Ranjeva, *ICJ Report* 1996, p. 29.

[42] Sztucki 1997, p. 347.

[43] ICJ, *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, para 17; *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 June 1973, para 18.

[44] *Nuclear Tests (Australia v. France)*, *supra* note 43, para 23. Although the Court did not refer to the world admissibility, this is precisely what this is all about. See also: *Nuclear Tests (New Zealand v. France)*, *supra* note 43, para 24.

[45] However, one has to note that since the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Courts added to the traditional formula that the "decision 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 merits themselves" that it also in no way prejudges "any questions relating to the admissibility of the Application": ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures, Order of 8 December 2000, para 77.

of the minimum features of the power to grant provisional measures in international law".[46]

Except for the European Court of Justice, international courts and tribunals have not really incorporated considerations of *prima facie* admissibility in their practice.[47] However, things are different as regard *prima facie* case on the merits.

3.2.1.3 *Prima Facie* Case on the Merits: *Fumus Boni Juris*

Under the Rules of the Court of Justice and of the General Court, an application for provisional measures "shall state (…) the pleas of fact and law establishing a *prima facie* case for the interim measure applied for".[48] According to settled case law, this condition—referred to as *fumus boni juris*—relates to the probability that the main action may be considered well founded. The likelihood of success on the merits of the underlying claim is thus required for provisional measures to be granted by the Court of Justice of the European Union. Given that this requirement is open to multiple interpretations, the question of what degree of control the European judges hold over *fumus boni juris* arises. In this field, changes have taken place in the Court's jurisprudence.

[46] Miles 2017, pp. 165–166. Academic opinion is divided on this issue. Some consider that the ICJ must refrain from prescribing provisional measures if there is a real and substantial possibility that the request may be inadmissible, while others insist that it is particularly difficult to assess the question of admissibility—even *prima facie*—at the provisional stage. See on this topic: Kolb 2013, pp. 624–625.

[47] Concerning the IACHR, Thomas Buergenthal considered that "[t]he fact that a case might at some stage of the proceedings be determined by the Court to be inadmissible will not affect its power to grant provisional measures so long as it has jurisdiction over the parties. If that were not so, it would make no sense whatsoever to authorize the Court to issue provisional measures in cases not yet referred to it which, at that stage, would *ipso facto* be inadmissible under Article 61(2) of the Convention": Buergenthal 1994, p. 76. As regards ITLOS, its case law is not really clear. On the one hand, the Tribunal never referred to the requirement of *prima facie* admissibility. On the other hand, it verifies that the obligation to exchange views under Article 283 of UNCLOS is fulfilled which seems to be a question of admissibility. In its separate opinion in the *Louisa* case, Judge Paik stated that "[a]nother procedural condition that the Tribunal must examine in order to determine its *prima facie* jurisdiction is whether the Applicant's claim is admissible. The Respondent contends that the Applicant failed to satisfy at least two conditions in this regard: the obligation to exchange views under Article 283 of the Convention and the exhaustion of local remedies under Article 295 of that instrument". According to Cameron Miles, "to the extent that questions of admissibility are asked and answered by ITLOS as part of provisional measures calculus, the Tribunal has not employed a reduced standard of review, but has rather examined the requirement of Article 283(1) in full. It may be argued that this is due to the ability of the Tribunal to establish that Article 283(1) has been met with relative ease, permitting a complete examination of the point without risking further damage to rights *pendente lite*": Miles 2017b, p. 167.

[48] Articles 160(3) and 156(4).

At the beginning, the Court conducted a thorough examination of the *fumus boni juris* (strong *prima facie* case[49]). For example, the ECJ was able to require that "it should be clearly apparent that there exists a strong presumption that the application in the main action is well-founded"[50] or that "at first sight the original case appears manifestly well founded".[51] This interpretation was unduly restrictive.[52] That is why the Court finally changed its mind. It decided to only check out that "certain of the grounds on which the substantive application is made appear, on first examination, not to be manifestly without foundation".[53] Notwithstanding a fluctuant terminology,[54] it is possible to say that in order for this condition to be met it suffices that the applicant shows that he has a reasonable chance of succeeding on the merits of the case. It is rather a low threshold.[55] This assessment nevertheless may change depending on, for instance, the nature of the litigation involved[56] or the particular circumstances of the cases.[57]

Thereafter, this requirement has been progressively incorporated in the case law of other international courts and tribunals.[58]

In the *Questions relating to the Obligation to Prosecute or Extradite* case, the ICJ added, through a back door, a new requirement for the issuance of provisional measures. Henceforth, the indication of provisional measures presupposes that the Court it satisfied "that the rights asserted by a party are at least plausible".[59] The integration of the *fumus boni juris* as a requirement had been a thorny question at the ICJ.[60] It was discussed for the first time in the *Great Belt* case. Denmark pretended

[49] In the words of Advocate Slynn: CJEU, Case C-228 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesselschaft v. Commission*, Opinion of Advocate General Sir Gordon Slynn, p. 1164.

[50] CJEU, Case 43/59, 44/59 and 45/59, *Von Lachmüller and others v. Commission of the EEC*, Order of 20 October 1959, p. 492.

[51] CJEU, Case 68/63 R, *Luhleich v. Commission of the EAEC*, Order of 17 July 1963, p. 621.

[52] Rideau and Picod 1995, p. 125.

[53] CJEU, Case 3/75 R, *Johnson & Firth Brown v. Commission*, Order of 16 January 1975, p. 1.

[54] This was confirmed by the President of the Court: "it must be noted that a number of different forms of wording have been used in the case-law to define the condition relating to the establishment of a *prima facie* case, depending on the individual circumstances": CJEU, Case C-149/95 P(R), *Commission v. Atlantic Container Line and others*, Order of 19 July 1995, para 26.

[55] Mehdi 2003, p. 80. Some are even questioning whether the requirement of *fumus boni juris* would not have turned into *fumus non mali juris*. See Antunes 1993, p. 97; Lenaerts et al. 2014, pp. 595–596.

[56] See Jaeger 2009–2010, p. 382.

[57] For example, in the "Mad cow disease" case, the Court decided to devote no fewer than thirty-two paragraphs to the assessment of the *fumus boni juris* requirement: CJEU, Case C-180/96 R, *United Kingdom v. Commission*, Order of 12 July 1996, paras 49–81.

[58] In many municipal systems, the likelihood of success on the merits of the main application is required for provisional measures to be granted.

[59] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para 57.

[60] Already in 1932, Edward Dumbauld thought that "a *prima facie* showing of probable right and probable injury is all that is required. In view of the need for rapidity and the provisional nature of

that for provisional measures to be granted, it was essential "that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success in the main case exists, and that not even a *prima facie* case exists in favour of the Finnish contention".[61] If the Court did not really deal with this issue,[62] in his separate opinion, Judge Shahabuddeen, on the contrary, militated in favour of the incorporation of this condition.[63] Many years later, the same view was adopted by Judges Abraham and Bennouna in their separate opinion in the *Pulp Mills on the River Uruguay* case.[64] The former president of the ICJ presented this requirement as a matter of necessary consequence of the *LaGrand* case and the determination of the binding nature of provisional measures. According to Judge Abraham, the Court "cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated—and irreparably so—in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case".[65] Plausibility is now a requirement that must be met for provisional measures to be granted by the ICJ. With few exceptions,[66] it has not been subject of criticism per se. However, some members of the Court have criticized its excessive vagueness.[67] It is true that the ICJ has not yet fully adopted a clear definition. The assessment of the plausibility standard by the Court is nonetheless the subject of controversy between academics. One the one hand, some consider that the Court is actually relaxing the requirement of plausibility

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the order, absolutely convincing proof, such as would be necessary in forming the Court's opinion on final judgment, is not necessary": Dumbauld 1932, p. 161.

[61] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, para 21.

[62] The Court addressed the parties' arguments as follows: "Whereas it is the purpose of provisional measures to preserve 'rights which are the subject of dispute in judicial proceedings'; whereas the Court notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over the nature and extent of that right, including its applicability to certain drill ships and oil rigs; whereas such a disputed right may be protected by the indication of provisional measures under Article 41 of the Statute if the Court 'considers that circumstances so require'": *ibid.*, para 22.

[63] *Ibid.*, Separate Opinion Shahabuddeen, pp. 28–36.

[64] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, Separate Opinion Abraham, pp. 137–141 and Separate Opinion Benouna, pp. 142–146.

[65] *Ibid.*, Separate Opinion Abraham, p. 140, para 8.

[66] According to Judge Cançado Trindade, "[t]he test of so-called 'plausibility' of rights is (…) an unfortunate invention—a recent one—of the majority of the ICJ": ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order of 23 July 2018, Separate Opinion Cançado Trindade, para 57. See also ICJ, *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, supra* note 16, Separate Opinion Cançado Trindade, paras 72–77.

[67] See for example: ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, Separate Opinion Koroma, p. 31, para 7.

through its latest orders[68] while, on the other hand, others believe, in contrast, that the Court is strengthening this requirement.[69] But, in any event, the consequence of the incorporation of the plausibility standard should not be exaggerated. Firstly, rejection of a request for provisional measures because this requirement is not fulfilled is rare.[70] Secondly, as some voices of authorities observed,[71] before it was officially consecrated, the ICJ had implicitly paid attention to this requirement. In other words, it confined itself to bring to the surface this unofficial requirement. In reality, the rise of the plausibility test is clearly designed to reassure states. This means that the Court will refrain from granting provisional measures unless the party seeking those measures has at least a plausible case on the merits.[72]

Following the lead of the ICJ, ITLOS has also enshrined the plausibility standard as a requirement for the grant of provisional measures. In the *Delimitation of the Maritime Boundary in the Atlantic Ocean*, the Special Chamber stated that before prescribing provisional measures, it needs to "satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible".[73] This condition has become recurring since this order.[74] Some arbitral tribunals also

[68] Somos and Sparks 2018. See also Chap. 5 by these authors in the present book.

[69] According to Massimo Lando, "plausibility, originally adopted by the Court as a test only aimed at establishing whether applicant states might hold the rights they assert under international law, has evolved into a higher standard also aimed at establishing whether the conduct of respondent states might breach the applicant states' asserted rights": Lando 2018, p. 643. Karin Oellers-Frahm and Andreas Zimmermann considered that the ICJ "seems to have clarified that the plausibility test does not amount solely to such a test of conclusiveness (…) but it also encompasses evidentiary issues. Thus in the [*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*] case the Court denied the existence of a plausible case with regard to the ICFST for lack of sufficient evidence. (…) It thus seems that, in order for a claim to be plausible and thus satisfied this recently reinterpreted requirement for provisional measures to be indicated, the party requesting such measures must also provide some level of evidence supporting its allegation rather than its allegation merely being conclusive": Oellers-Frahm and Zimmermann 2019, pp. 1157–1158. See also: Miles 2018a, b.

[70] In the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* case, the ICJ hold that "Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present": ICJ, Provisional Measures, Order of 19 April 2017, pp. 131–132, para 75.

[71] *Pulp Mills on the River Uruguay, supra* note 64, Separate opinion Benouna, para 14; Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixth Committee of the General Assembly, p. 4; ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 70, Separate Opinion of Judge Owada, p. 145, para 11.

[72] Quintana 2015, p. 668.

[73] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, ITLOS No. 23, Provisional Measures, Order of 25 April 2015, para 58. One has to note that Judge Abraham was appointed as an *ad hoc* judge in this case.

[74] See *The "Enrica Lexie" Incident*, ITLOS Case, *supra* note 21, para 84; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019, para 91; *The M/T "San Padre Pio" Case, supra* note 16, para 77.

have encompassed this requirement. That is the case in some ICSID cases[75] or PCA cases.[76] Under the UNCITRAL Arbitration Rules, the party requesting provisional measures must satisfy the arbitral tribunal that, *inter alia*, "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim".[77] In the same vein, Philip Leach stated that, in considering requests for provisional measures, the ECHR must be satisfied that there is "an arguable (*prima facie*) case".[78]

In any event, as regards the different issues of *prima facie* evaluation, international courts and tribunals deciding on requests for provisional measures are required to show great restraint. They must take care not to prejudice the substance of the case. The assessment must be provisional. That concern explains why many provisional orders make use of cautious wording in the form of expression.[79]

The assessment made in the proceedings on the application for provisional measures is a *prima facie* assessment. It cannot prevent the judges on a later stage from making a different assessment. This is what happened for example in *Georgia v. Russia.* In 2008, the ICJ prescribed provisional measures considering notably that it had *prima facie* jurisdiction under Article 22 of the International convention of the elimination of all forms of racial discriminations.[80] Three years later, the Court dismissed the case, considering that it had no jurisdiction to entertain the application.[81] *Mutatis mutandis*, that is what also happened, as it is well known, in the *Southern Bluefin tuna* case. At the provisional measures stage, ITLOS found that

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However, according to Cameron Miles, "ITLOS clearly considered the plausible existence of rights claimed to be relevant to the grant of provisional measures since at least 2010. In *M/V Louisa*, it noted that it did not need to 'establish definitively the existence of rights claimed' [para 69]; with the insertion of the adjective 'definitively' perhaps implying that *some* form of review was nonetheless required": Miles 2017a, p. 202.

[75] See for examples: *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on claimant's request for provisional measures of 17 May 2006, para 32; *Tethyan Copper Company Pty Ltd v. Pakistan*, ICSID Case No. ARB/12/1, Decision on provisional measures of 13 December 2012, para 117.32.

[76] In the *Indus Waters Kishenganga*, the Court of arbitration stated that "[c]onsistent with the general practice of international and national courts and tribunals, the Court must be satisfied that, without prejudice to its decision on the merits, the claims set forth by the Party seeking interim measures appear to be at least 'plausible'": *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Order of 6 June 2011, para 135. However, in the *Enrica Lexie* case, the annex VII arbitral tribunal called to prescribe provisional measures under Article 290 para 1 of UNCLOS—did not refer to "plausibility of claims": *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Provisional measures, Order of 29 April 2016.

[77] Article 17 A of the UNCITRAL Arbitration Rule (as revised in 2010).

[78] Leach 2011, p. 31.

[79] See for example: "whereas it cannot at this stage make definitive findings of fact, nor finding of attribution" (ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, p. 396, para 141).

[80] *Ibid.*, p. 388, para 117.

[81] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, p. 141.

the arbitral tribunal would *prima facie* have jurisdiction over the disputes.[82] Ruling on the merits, the arbitral tribunal decided that it did not have jurisdiction.[83] There are no contradictions between these different decisions. The judgment in the main proceedings must not be seen as an appeal against the order of provisional measures. There are two levels of review which are separate and autonomous.[84] Therefore, these two examples should not be interpreted as a divergence of jurisprudence. It is the core of the *prima facie* requirement that the findings in this proceeding does not bind the judges in their future assessment in the main case. However, in terms of judicial policy, it should not happen too often. states, in particular, do not appreciate to be told a specific pattern of behaviour while the court or the tribunal does not have jurisdiction *in fine* to entertain the main application. This is probably why, in fact, this rarely happens.[85]

3.2.2 The Link Between the Measures Required and the Substantive Rights of the Parties

The object of the provisional measures, basically, is to preserve the rights claimed by the parties and the integrity of the final decision in case the main action succeeds. As a result, according to the ICJ, "a link must exist between the rights whose protection is sought and the provisional measures being requested".[86] In other words, the rights concerned must correspond to the ones claimed on the merits. That imperative is fully justified insofar as no one can "seek the protection of rights other than those that are to be the subject of the final judgment".[87]

The link requirement was first formulated by the PCIJ in the *Polish Agrarian Reform*. According to it, "the essential condition which must necessarily be fulfilled

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[82] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Cases No. 3 and 4, Provisional Measures, Order of 27 August 1999, para 62.

[83] *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, UNCLOS Annex VII Arbitration, Decision of 4 August 2000, para 72.1.

[84] See also *The M/V "Louisa" Case* where ITLOS found it had *prima facie* jurisdiction while when dealing with the merits it found that it had no jurisdiction: *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Provisional Measures, Order of 23 December 2010, para 70; Judgment of 28 May 2013, para 160.1.

[85] See for the ICJ: *Anglo-Iranian Oil Co.*, *supra* note 19; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America*, Judgment of 19 January 2009; and, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment of 1 April 2011.

[86] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, supra* note 16, para 54. It should also be noted that under Article 27(3) of the Rules of procedure of the IACtHR, "[i]n contentious cases before the Court, victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject matter of the case".

[87] Kolb 2013, p. 625.

in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court".[88] This question was subsequently raised on a couple of occasions before the PCIJ and the ICJ as in the *Arbitral award of 31 July 1989* case. In this case, Guinea-Bissau requested the Court, first, to declare null and void an arbitral award determining the rights to certain maritime areas between the parties and, second, to indicate provisional measures in order that Senegal abstain from any act in the disputed area while the proceedings were pending. The ICJ dismissed the request for provisional measures because the link requirement was not set. Indeed: "[w]hereas the Application instituting proceedings asks the Court to declare the 1989 award to be "inexistent" or, subsidiarily, "null and void", and to declare "that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989"; whereas the Application thus asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; whereas accordingly the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case".[89] To assess this requirement, the key question is whether the rights protected by the provisional measures are those that will fall to be determined in the final judgment. In its second order for provisional measures in the *Pulp Mills* case, the ICJ defined the threshold of the link requirement as one of "sufficient connection with the merits of the case for the purposes of the current proceedings".[90] In other words, in order for this requirement to be met, it seems enough that there is a relationship between the rights to be protected and the merits of the proceedings.[91] Since the *Certain Activities*

[88] PCIJ, *Polish Agrarian Reform and German Minority*, Order of 29 July 1933, p. 177. On this topic: Sztucki 1983, pp. 89–93.

[89] ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Provisional Measures, Order of 2 March 1990, para 26.

[90] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, para 30.

[91] As Inna Uchkunova observed, "[a] very slight deviation from the strict applicability of the direct link requirement may be notices in territorial disputes when the requesting State is provisionally seeking withdrawal of the troops of the others party. In the *Land and Maritime Boundary between Cameroun and Nigeria* case, the Court granted the request for such measures reasoning that 'the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and these rights also concern persons [*ICJ Reports*, p. 22, para 39]'. But this may well be explained by the fact that sovereignty over territory comprises also the population which inhabits it and moreover the Court cannot have been indifferent to the loss of human life": "Provisional measures before the International Court of Justice", Uchkunova 2013, p. 407. This deviation is also perceptible in other cases. For instance, in the *Breard*, *LaGrand*, *Avena* and *Jadhav* cases, the subject of the main claim related to the violation of the 1963 Convention on Consular relations and not to the carrying out of death sentences. See Kolb 2013, p. 627. As Judge Higgins observed, "[t]he requirements for the indication of provisional measures have evolved over the years. Although these are now well established, their scope and application in particular circumstances continue to evolve. At the same time, the evolving jurisprudence on provisional measures shows a growing tendency to recognize the human realities behind disputes of states": Higgins 1998, p. 108.

Carried Out by Nicaragua in the Border Area case, the link requirement is related with the condition of the plausibility of the rights claimed.[92]

Similarly, ICSID tribunals ensure that provisional measures relate to the preservation of the requesting party's rights. But, unlike the ICJ, ICSID tribunals consider that the rights to be preserved should not be limited to the rights in dispute. It "must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus, the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date".[93] As a result, ICSID tribunals have slightly departed from the ICJ practice.

In a more informal way, the Court of Justice and the General Court take into consideration the link requirement especially in the suspension of operation. One has to recall that in Luxembourg, an application to suspend the operation of any measure of an institution is to be admissible only if the applicant is challenging that measure in an action before the Court or the Tribunal.[94] As a result, a plaintiff that has not challenged the contested measures is not entitled to make an application to suspend it under Article 278 TFEU. Its application will be dismissed as inadmissible.[95] However, in some circumstances, an application to suspend the operation of a measure other than the one contested might be declared admissible. Indeed, according to the Court, "it would be excessively formalistic in an application for the adoption of an interim measure to compel the parties to enter multiple pleadings when the facts of the case show that the subject-matter of the main application and of the application for the adoption of the interim measure are so linked as cause and effect that the second appears as the inevitable consequence of the first".[96] However, it must

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[92] *Certain Activities Carried Out by Nicaragua in the Border Area supra* note 67, p. 18, paras 53–54. As noted by Cameron Miles, "in *Pulp Mills*, the Court identified the link test as an independent requirement in the provisional measures calculus, in opposition to the Court's previous position whereby the relationship between provisional measures and the merits was considered implicitly when assessing irreparable prejudice to rights in issue": Miles 2017a, p. 182. See also: Lee-Iwamoto 2012, pp. 240–242.

[93] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of 6 September 2005, para 40. See also: *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on provisional measures of 26 February 2010, para 118. However, one has to note that originally, ICSID Tribunals had adopted a strict standard: *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on request for provisional measures of 9 December 1983, para 3.

[94] See Article 160(1) of the Rules of procedure of the Court of Justice; Article 104(1) of the Rules of procedure of the General Court.

[95] CJEU, Case T-310/03 R, *Kreuzer Medien v. Parliament and Council*, Order of 21 September 2004, paras 19–21.

[96] CJEU, Case C-18/65 R, *Max Gutmann v. Commission de la CEEA*, Order of 8 April 1965, p. 197. Despite its apparent clarity, this definition lead in the past to contradiction in the jurisprudence of the

be noted that such jurisdiction may not be exercised unless both measures emanate from one and the same institution and that institution is a party to the proceedings.[97]

Other international courts and tribunals do not so far seem to have developed the link requirement in their case law. For instance, ITLOS has not really referred to this condition. In the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, the Special Chamber simply observed that there was "a link between the rights Côte d'Ivoire claims and the provisional measures it seeks".[98] It was the first time that the Tribunal mentioned this requirement.[99] However, it has not done so since that order.[100]

3.3 Requirements Arising from the Autonomous Character of Provisional Measures: The Substantive Conditions

Notwithstanding the diversity of international courts and tribunals, there are two substantive requirements which are systematically considered for the issuance of provisional measures (Sect. 3.3.1). However, some other conditions are specific to particular courts or tribunals (Sect. 3.3.2).

3.3.1 The Recurring Substantive Requirements

The idea behind provisional measures of conserving the rights of the parties pending the decision of the court or the tribunal presupposes that there is an imminent danger to those rights. As a consequence, urgency (Sect. 3.3.1.1) and irreparable prejudice (Sect. 3.3.1.2) are two requirements that need to be fulfilled in order to obtain the granting of provisional measures by any international court or tribunal.

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court for suspension of action. Jurisprudence of the European Court of Justice was sometimes very strict. See for example: CJEU, Case C-35-62 and 16-63, *Leroy v. ECSC High Authority*, Order of 16 July 1963, p. 215. See on this topic: Gray 1979, p. 86; Borchardt 1985, p. 208. In other times, the jurisprudence was quite liberal. See for instance: CJEU, Case C-18/65 R, *Gutmann v. Commission of the EAEC*, Order of 8 April 1965, pp. 136–137; CJEU, Case C-88/76 R, *Exportation des Sucres v. Commission*, Order of 19 October 1976, paras 7–9.

[97] CJEU, Case 133/87 R, *Nashua Corporation v. Commission*, Order of 25 June 1987, para 7; CJEU, Case C-277/07 P(R), *Makhteshim-Agan Holding and others v. Commission*, Order of 17 July 2008, para 28.

[98] *Delimitation of the Maritime Boundary in the Atlantic Ocean, supra* note 73, para 63.

[99] One has to recall that Judge Abraham sat on the bench as an *ad hoc* judge in this case. This may explain the frequent references to the ICJ's jurisprudence.

[100] In any event, one has to observe that "provisional measures for the protection of the marine environment, being the subject of express mention in UNCLOS Article 290, need not fulfil the link requirement—they remain available in all proceedings under Part XV, irrespective of the subject-matter of the dispute": Miles 2017a, p. 186.

3.3.1.1 Urgency

In the *Enrica Lexie* case, the annex VII arbitral tribunal stated that it was "mindful of the international jurisprudence developed by courts and tribunals (…) which supports the view that urgency is an important element in considering a request for provisional measures".[101] Indeed, urgency can be considered as the essence of provisional measures.[102] That is why this requirement is expressly mentioned in some constitutive instruments of international courts and tribunals.[103] In such cases, international courts and tribunals, systematically refer to these provisions and so to urgency. For example, when a request for provisional measures is received under Article 290, para 5 of UNCLOS, ITLOS recalls that pursuant to this provision it "may prescribe provisional measures if the urgency of the situation so requires".[104] Similarly, the Court of Justice, relying expressly on Article 160, para 3 of its Rules of procedure, declares that it "may order interim relief only if it is established that such an order is (…) urgent".[105] However, the same holds for international courts and tribunals whose constitutive instrument do not explicitly refer to urgency. For instance, the ICJ systematically recalls that its power "to indicate provisional measures will be exercised only if there is urgency".[106] ITLOS, for its part, when a request is filed before it under Article 290, para 1 of UNCLOS, consistently states that "urgency is required in order to exercise the power to prescribe provisional measures".[107] As a result, there is no doubt that urgency is one of the requirements—if not the most important[108]—for the granting of provisional measures.[109]

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[101] *The "Enrica Lexie" Incident*, PCA Case, *supra* note 76, Provisional measures, Order of 29 April 2016, para 85.

[102] According to Judge Treves, urgency is inherent in the very nature of provisional measures: *Southern Bluefin Tuna Cases supra* note 82, Separate Opinion of Judge Treves, para 3. See also *The M/V "Louisa" Case*, Order of 23 December 2010, *supra* note 84, Dissenting Opinion of Judge Treves, para 17. *Contra The M/V "SAIGA" (No. 2) Case, supra* note 21, Separate Opinion of Judge Laing, para 26.

[103] See in particular: Article 290 of UNCLOS; Article 63(2) of the American Convention on Human Rights; Article 27(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[104] *The M/T "San Padre Pio" Case, supra* note 16, para 111.

[105] CJEU, Case C-441/17 R, *European Commission v. Republic of Poland*, Order of the Court (Grand Chamber) of 20 November 2017, para 29. See also for more examples: IACtHR, *Case of Arrom Suhurt* et al. *v. Paraguay*, Request of Provisional Measures, Order of 13 May 2019, paras 2–3; ACtHPR, *Léon Mugesera v. Republic of Rwanda*, Provisional Measures, Order of 28 September 2017, para 28.

[106] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, supra* note 16, para 78.

[107] *Delimitation of the Maritime Boundary in the Atlantic Ocean, supra* note 73, para 42.

[108] According to Shabtai Rosenne, urgency is probably the most important requirement among the circumstances justifying provisional measures: Rosenne 2005, p. 136. See also: Slusny 1967, p. 143.

[109] This is also emphasised in a procedural sense by the fact that the rules of procedure of many international courts and tribunals provide that a request for provisional measures shall have priority over all other case (See for instance: Article 74(1) of the ICJ Rules, Article 90(1) of the ITLOS

Urgency is a malleable concept related to the factor of time. Nonetheless, several international courts and tribunals have defined it. According to the ICJ, there is urgency when "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".[110] In a similar way, ITLOS considers that there is urgency, when there is "a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute".[111] In the same vein, according to the IACHR, "[t]he "urgent" nature implies that the risk or threat involved be imminent, which requires that the response be immediate"[112] while the Court of Justice considers that "[t]he urgency of an application for the adoption of interim measures must therefore be assessed in the light of the extent to which an interlocutory order is necessary in order to avoid serious and irreparable damage to the party seeking the adoption of the interim measures".[113] ICSID tribunals are consistent in finding that this requirement is satisfied where "action prejudicial to the rights of either party is likely to be taken before such final decision is taken".[114] These definitions are broadly similar. An urgent situation implies the impossibility of waiting for the final decision because of the risk of a real and imminent irreparable prejudice. It calls for immediate action. When assessing urgency of the matter, international courts and tribunals take into account, on the one hand, the state of the proceedings when the request is made and, on the other hand, the estimated period likely to elapse before the final decision on the main claim.[115] This requirement is

Rules, Article 85(3) of the ECJ Rules). Moreover, in case of request of provisional measures, the court or the tribunal shall be convened as a matter of urgency (See for instance: Article 74(2) of the ICJ Rules, Article 90(2) of the ITLOS Rules). Finally, urgency justifies the exceptional nature of the procedure [See particularly Resolution on the Internal Judicial Practice of the Tribunal (ITLOS/10), Article 11(2)]. See on this topic: Le Floch 2008, pp. 132–142.

[110] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 66, para 61.

[111] *The M/T "San Padre Pio" Case, supra* note 16, para 111.

[112] IACtHR, *Matter regarding two girls of the indigenous people of taromenane in voluntary isolation*, Provisional measures, 31 March 2014, para 7. See also *Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement Center regarding Venezuela*, Provisional Measures, Order of 8 February 2008 where the Court stated that "urgency refers to special and exceptional situations that deserve an immediate measure and response aimed at averting the threat. These are circumstances that because of their own nature imply an imminent risk. The nature of the response to repair the situation derives from the urgency of the threat. This should imply, above all, an immediate and, in principle, of short duration measure in order to face with such situation, since a lack of response would mean a danger per se" (para 18).

[113] CJEU, Case C-329/99 P(R), *Pfizer Animal Health v. Council*, Order of 18 November 1999, para 94.

[114] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order n°3 of 18 January 2005, para 8. In the *Biwater Gauff v. Tanzania*, the Arbitral Tribunal stated that "the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award": ICSID Case No. ARB/05/22, Procedural Order No. 1 of 31 March 2006, para 76.

[115] "Urgency is not determined by the speed with which a measure is to be applied for and taken but by the extent to which a person may need to obtain the adoption of a measure which is necessary at

intimately linked to the circumstances of the case. Consequently, it must be assessed on a case-by-case basis, depending on the facts of the case and on the rights to be protected.

Although urgency is a contingent concept, it might have an objective character in some occasions. In the *LaGrand* case, for instance, the request for provisional measures had been filed with the ICJ by Germany less than 24 h before the execution of Walter LaGrand. However, this is not always the case. To assess the urgency of the situation, international courts and tribunals can take into account different factors.

First of all, an undertaking by the defendant or by a third party to behave in a certain way is likely to deprive the urgency character of the request.[116] For example, in the *Questions relating to the Obligation to Prosecute or Extradite* case, Senegal "gave a formal assurance on several occasions during the hearings that it will not allow Mr. Habré to leave its territory before the Court has given its final decision". In this light, the ICJ, "taking note of the assurances given by Senegal, finds that, the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order".[117] In the same way, in the *M/V "Louisa"* case, ITLOS placed on record the assurances given by Spain and dismissed the request for provisional measures filed by Saint Vincent and the Grenadines.[118] In the *Société des aciéries de Montereau v. Commission*, the European Court rejected the request for provisional measures as the Commission had stated that it was willing not to proceed to enforcement of the challenged decision as long as the main action was pending.[119] However, any undertaking does not have automatically the effect of depriving the urgent character of the request. In the *Certain documents and data* case, for instance, the ICJ considered that the undertaking of the Attorney-General of Australia was insufficient to remove the risk of an imminent irreparable prejudice.[120]

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the present time to avoid certain damage": CJEU, Case C-23/87 R, *Aldinger v. Parliament*, Order of 22 June 1987, para 13.

[116] On this topic: Worster 2016, pp. 445–471.

[117] *Questions relating to the Obligation to Prosecute or Extradite, supra* note 59, para 72. See also: PCIJ, *Case concerning the Administration of the Prince von Pless*, Application for the Indication of Interim Measures of Protection, Order of 11 May 1933, pp. 152–152; ICJ, *Interhandel Case (Switzerland v. United States of America) (interim measures of protection)*, Order of 24 October 1957, pp. 108–109, p. 112; *Passage through the Great Belt, supra* note 61, p. 18, para 27.

[118] *The M/V "Louisa" Case*, Order of 23 December 2010, *supra* note 84, para 78.

[119] CJEU, Case C-31/79 R, *Société des Aciéries de Montereau v. Commission*, Order of 27 March 1979, para 2.

[120] "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 (…) [I]n spite of the written undertaking dated 21 January 2014, there is still an imminent risk of irreparable prejudice": ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor–Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, p. 159, paras 47–48. In the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 66, the Court did not take account of an official statement of the UAE Ministry of Foreign

In the second place, the applicant's attitude is also taken into account. As a result, he should not take its time in introducing a request for provisional measures. As the President of the General Court underlined, "[u]rgency in ordering an interim measure must result from the effects produced by the contested measure and not from a lack of diligence on the part of the applicant".[121] In other words, there is an obligation of diligence. For example, the European Court dismissed a request for provisional measures since the application was made more than eight months after the main action was brought before the Court.[122]

Lastly, certain requests are likely to lose their urgent nature of a situation. That is for example the case, where the plaintiff asks the court or the tribunal to postpone further consideration of its request for the indication of provisional measures. According to the ICJ, it "signifies that the Court no longer has before it a request for interim measures which is to be treated as a matter of urgency".[123]

To sum up, the urgency requirement is met as soon as the decision over the provisional measures cannot wait until the final decision.

3.3.1.2 Irreparable Prejudice

Irreparable prejudice is the other condition systematically required for provisional measures to be granted by international courts and tribunals. As the ICJ states, "[t]he Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings".[124] ITLOS, for its part, recalls that the

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affairs made after the closure of the oral proceedings. See Dissenting opinion Crawford, paras 12–16; Dissenting opinion Bandhari, paras 3–10. See: Geslin and Le Floch 2018, pp. 1369–1370.

[121]CJEU, Case T-350/00 R, *Free Trade Foods v. Commission*, Order of 1 February 2001, para 59.

[122]CJEU, Case 28/65 R, *Fonzi v. Commission of the EAEC*, Order of 7 July 1965, p. 510. See also IACtHR, *Matter of children deprived of liberty in the "Complexo do Tatuapé" of FEBEM regarding Brazil*, Provisional Measures, Order of 4 July 2006 where the Court hold that "according to the documentation submitted by the representatives, some alleged threats against Mrs. Paganele took place before February, 2005, which gave rise to police investigation IP No. 070/2005 of February 28, 2005. That is to say, more than a year before the request of extension of the provisional measures (…), situation which questions the "urgency" nature necessary for the adoption of the measures" (para 21).

[123]ICJ, *Trial of Pakistani Prisoners of War*, Interim Protection, Order of 13 July 1973, p. 330, para 14. This was also a constant practice of the PCIJ. "[A] party who has asked that a given matter should be dealt with urgently, and who afterwards files a request for the prolongation of the time-limits in that case, is considered as precluded from maintaining its request for urgency": *Series D*, third addendum to Nº. 2, 1936, p. 815.

[124]See, for instance: ICJ, *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, p. 243, para 49. In the *Tokios Tokelés v. Ukraine*, the ICSID Tribunal, relying on the Separate Opinion of President Jiménez de Aréchaga in the order for provisional measures in the *Aegean Sea Continental Shelf* case, observed that "[t]he international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked'": ICSID Case No. ARB/02/18, Procedural Order n° 3 of 18 January 2005, para 8. Some others ICSID Tribunals, however, had used a

"Tribunal therefore has to determine whether there is a risk of irreparable prejudice to the rights of the Parties".[125] In the same way, the ECHR will issue a provisional measure only if there is an imminent risk of irreparable damage[126] while the Court of Justice will do the same "in order to avoid serious and irreparable damage to the party seeking the interim relief".[127]

It is not necessarily easy to decide what constitutes "irreparable prejudice".[128] This term is indeed not without ambiguity. It is well-known that in the *Sino-Belgium Treaty* case, the Permanent Court of International Justice stated that provisional measures could be granted when the threatened prejudice "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material

lower threshold as "a sufficient risk of harm or prejudice": ICSID Case No. ARB/05/22, Procedural Order No. 3 of 29 September 2006, para 146. According to Dan Sarooshi, this is a more appropriate interpretation. In contrast, there are at least three reasons why the approach emphasizing irreparable prejudice as a precondition for a finding of necessity should be rejected by ICSID Tribunals. "First, there is no such thing as an 'international jurisprudence' on provisional measures such that various interpretations given by international courts or tribunals of their own very different statutes or rules of procedure should be considered as binding or even as persuasive authority to be followed by ICSID Tribunals. Second, the construction given to the concept of necessity in the context of ICSID should be different to that of the ICJ because of the different nature of the types of cases in which the ICJ may be involved as compared to the nature of investor-State claims before ICSID Tribunals. Third, there is significant support provided by decisions of ICSID Tribunals that the ICJ's irreparable prejudice standard is too high and inappropriate in the context of ICSID arbitration": Sarooshi 2013, pp. 369–370.

[125] *Detention of three Ukrainian naval vessels, supra* note 74, para 100.

[126] *Mamatkulov and Askarov v. Turkey*, *supra* note 24, para 104. See also Practice directions on requests for interim measures issued by the President of the Court in accordance with Rules 32 of the Rules of Court on 5 March 2003 and later amended on 7 July 2011, p. 55 according to which the Court indicates provisional measures only if "it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied".

[127] CJEU, Case C-7/04 P(R), *Commission v. Akzo and Akcros*, Order of 27 September 2004, para 36. One has nevertheless to wonder if serious and irreparable harm have to be considered as synonymous or as two distinct requirements. According to Koen Lenaerts, Ignace Maselis and Kathleen Gutman, "the case-law does not provide any conclusive definitions of the two terms. Moreover, the seriousness and the irreparable nature of the alleged damage are not always considered separately. Although the damage must be both serious and irreparable, where one of the two criterions is found lacking, the Judge hearing the application for interim measures may consider that is not necessary to examine the other": Lenaerts et al. 2014, p. 599. "The requirement for the damage to be serious prevents interim measures being imposed in order to avert irreparable but negligible damage": *ibid.*, p. 604. See for example: CJEU, Joined Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T-93/08 R, *Cyprus v. Commission*, Order of 8 April 2008, para 76.

[128] On this topic: Rieter 2010.

form".[129] This a very harsh standard to meet.[130] Nowadays this standard has been abandoned by the ICJ.[131] Indeed, in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the ICJ stated that: "[w]hereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue; Whereas the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and *affect the possibility of their full restoration in the event of a judgment in its favour*".[132] The World Court, like any other court or tribunal, is more inclined to interpret irreparability as the impossibility of full execution of the final judgment. For example, according to the General Court, the interim relief judge has to check "whether the operation of the disputed acts, before a decision on the substance of the case, is capable of causing the party seeking interim measures irreversible damage which could not be remedied even if the contested decision were annulled or which, despite its provisional nature, would be out of proportion to the defendant's interest in having those acts implemented, even where proceedings have been brought against them".[133]

The irreparable nature of prejudice of prejudice does not give rise to any specific difficulty when human lives are at stake. That is for instance the case when the

[129]PCIJ, *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, Order of 8 January 1927, p. 7.

[130]According to Jerzy Sztucki, "to say that provisional measures should not be indicated when the prejudice in question might be capable of reparation by some appropriate means would amount to the proposition that such measures should not be indicated at all, except when it is shown with substantial credibility that the magnitude of the prejudice in a given case would exceed the respondent's resources available for reparation or would cause a total collapse and disappearance of the actual beneficiary of the prospective reparation. Such a criterion of granting interim protection would be clearly at variance with the principle of sovereign equality of States and of their equality before the law": Sztucki 1983, pp. 109–110.

[131]Except for the *Aegean Sea Continental Shelf* case where the Court stated that: "Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation": *Aegean Sea Continental Shelf, supra* note 19, p. 11, para 33.

[132]*Fisheries Jurisdiction (United Kingdom v. Iceland), supra* note 27, p. 16, paras 21–22 (emphasis added). See also *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), supra* note 27, p. 34, paras 22–23.

[133]CJEU, Case T-108/94 R, *Candiotte v. Council*, Order of 2 May 1994, para 25.

request of provisional measures involves armed activities,[134] genocide,[135] imminent execution of a convicted person to death penalty,[136] threat to life[137] or danger to health.[138] More exceptionally, irreparability of the prejudice, for instance, can be recognised regarding damage to environment,[139] to property,[140] to political rights[141]

[134]For example: ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, para 43.

[135]For example: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April1993.

[136]For examples: IACtHR, *Case of Raxcacó Reyes* et al. *v. Guatemala*, Provisional Measures, Order of 30 August 2004, para 9; ACtHPR, *Armand Guehi v. The United Republic of Tanzania*, Application 001/2015, 18 March 2016; *Ally Rajabu and 4 Others v. The United Republic of Tanzania*, Application 007/2015, 18 March 2016; *John Lazaro v. The United Republic of Tanzania*, Application 003/2016, 18 March 2016; ECtHR, *Öcalan v. Turkey* [GC], Application No. 46221/99, Judgment of 12 May 2005, para 5; ICJ, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, p. 257, para 37; *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, p. 15, para 24; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, p. 55, para 91; *Request for Interpretation of the Judgment of 31 March 2004 in the* Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America)*, Provisional Measures, Order of 16 July 2008, p. 330, para 73; *Jadhav, supra* note 124, p. 244, para 53.

[137]For examples: IACtHR, *The Miguel Agustin Pro Juárez Human Rights Center* et al. *case*, Order of 30 November 2001, para 7; ECtHR, *M.E. v. Sweden* [GC], Application No. 71398/12, Judgment of 8 April 2015, para 4.

[138]For examples: *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, supra* note 16, para 91. ECtHR, *Paladi v. Moldova* [GC], Application No. 39806/05, Judgment of 10 March 2009, para 4; ECtHR, *Paposhvili v. Belgium* [GC], Application No. 41738/10, Judgment of 13 December 2016, para 3. Most of the cases in Strasbourg relate to deportation or extradition proceedings.

[139]For examples: *Certain Activities Carried Out by Nicaragua in the Border Area, supra* note 67, pp. 25–26, para 80; CJEU, Case C-445/00 R, *Austria v. Council*, Order of 23 February 2001, paras 103–106.

[140]For examples: ICJ, *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, p. 551, para 55; IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Order of 6 September 2002, paras 8–9.

[141]For examples: *Application of the International Convention on the Elimination of all Forms of Racial Discrimination, supra* note 79, p. 396, para 142; *Application of the International Convention*

or to the rights to psychological integrity, identity, and protection of a family.[142] Because it may be compensated in principle, financial prejudice is deemed generally not to be irreparable,[143] except in extraordinary circumstances.[144]

In any event, in each case, the specific characteristics of the situation must be taken into account to determine whether the prejudice that provisional measures seek to avoid is irreparable or not. Like the urgency requirement, it is a case-to-case assessment. For example, the Inter-American Court of Human rights recognised that "[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations".[145] As a consequence, as Clara Burbano observed, "if the rights to the communities' property is infringed, it would cause much more than economic damage because, according to their view of the cosmos, the land is fundamental part of their life and damage to it under those conditions would affect the very survival of the collectively".[146] That is why, in this case, the IACHR prescribed provisional measures with regard to the right of property.[147]

It is worth noting nevertheless that international courts and tribunals have a margin of appreciation in assessing the seriousness of prejudice. For instance, the president of the General Court stated that "the judge hearing an application for interim measures must not apply mechanically and rigidly the condition relating to the irreparable

for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, supra note 70, p. 138, para 96; *Application of the International Convention on the Elimination of All Forms of Racial, supra* note 66, para 67.

[142]IACtHR, *Matter of L.M. regarding Paraguay*, Provisional Measures, Order of 1 July 2011, para 19.

[143]See for example: CJEU, Case C-213/91 R, *Abertal v. Commission*, Order of 18 October 1991, para 24; IACtHR, *Matter of Belfort Istúriz* et al. *regarding Venezuela*, Provisional Measures, Order of 15 April 2010, paras 18–20 (risk of job loss and financial interests).

[144]According to the Court of Justice, "harm of a financial nature is considered to be serious and irreparable if it cannot be wholly recovered, which may in particular be the case if the harm, even when it occurs, cannot be quantified": CJEU, Case C-551/12 P(R), *EDF v. Commission*, Order of 7 March 2013, para 60.

[145]IACtHR, *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, para 149.

[146]Burbano Herrera 2010, p. 99.

[147]*Mayagna (Sumo)*, Order *supra* note 140, paras 8–9.

nature of the financial damage".[148] The ICJ's case law, for its part, as Karin Oellers-Frahm and Andreas Zimmermann underlined, "does not show detailed or consistent examination of the question of irreparability, but rather reveals that provisional measures are granted when an obvious and flagrant violation of the rights claimed on the merits cannot be tolerated until the delivery of the final judgment".[149] This observation may apply to other international courts and tribunals.

In principle, it is only the prejudice affecting the applicant that can be considered as relevant. As stated by the Court of Justice, provisional measures cannot "have any object other than to safeguard the interests of one of the parties to the proceedings in order to prevent the judgment in the main proceedings from being rendered illusory by being deprived of any practical effect".[150] In other words, the applicant has to furnish proofs that he cannot wait for the final judgment of the main claim without personally suffering irreparable prejudice.[151]

However, the prejudice does not always have to be established with absolute certainty.[152] This requirement varies from one jurisdiction to another. It is enough mostly to prove that there is a reasonable chance that harm may occur.[153] However, this requirement is not fulfilled if the prejudice is purely hypothetical and based on uncertain future events.[154]

Before rounding off this point, one has to recall that under Article 290 of UNCLOS, ITLOS (or another court or tribunal) can prescribe any provisional measures not only to preserve the respective rights of the parties but also to prevent serious harm to the marine environment. The standard of irreparable prejudice does not apply to provisional measures' requests seeking the prevention of prejudice to the marine environment. This is reflected for example in the operative part of the order in the *Land Reclamation* case where a distinction was made by the Tribunal. Indeed, ITLOS directed "Singapore not to conduct its land reclamation in ways that might cause *irreparable prejudice to the rights of Malaysia* or *serious harm to the marine*

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[148]CJEU, Case T-235/15 R, *Pari Pharma v. EMA*, Order of 1 September 2015, para 110.

[149]Oellers-Frahm and Zimmermann 2019, pp. 1162–1163.

[150]CJEU, Case C-313/90 R, *CIRFS and others v. Commission*, Order of 17 May 1991, para 24.

[151]However, the proposed beneficiaries of provisional measures do not have systematically to be identified individually. The IACHR has indeed issued "provisional measures in favor of people who have not been already individualized but can be determined and identified and are in danger of suffering an irreparable damage due to the fact that they belong to a group or community": *Matter of Capital El Rodeo I and El Rodeo II supra* note 112, para 21.

[152]See for example: *Nuclear Tests (Australia v. France)*, *supra* note 43, para 29; *Nuclear Tests (New Zealand v. France)*, *supra* note 43, para 30.

[153]According to the IACtHR, "[r]egarding damages, there must be reasonable probability that the damages will occur": *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama*, Provisional Measures, Order of 28 May 2010, para 10. See also for example: CJEU, Case C-149/95 P(R), *Commission v. Atlantic Container Line and others*, Order of 19 July 1995, para 38; CJEU, Case T-422/03 R, *Enviro Tech Europe and Enviro Tech International v. Commission*, Order of 3 February 2004, para 64.

[154]See for example: CJEU, Case C-352/88 R, *Commission v. Italy*, Order of 3 February 1989, para 26.

environment".[155] As a result, the threshold is slightly lower in this case, and proving a serious harm to the marine environment is sufficient.[156] However, the Tribunal has never granted such measures solely on that basis.[157]

Urgency and irreparable prejudice are two requirements intimately related that all international courts and tribunals take into account when assessing a request for the indication of provisional measures.[158] Depending on the court or the tribunal involved, these two conditions are treated—at least formally—either separately (like the ICJ) or together (like the Court of Justice). Nevertheless, even when they are considered separately, urgency is so dependent on prejudice "that they are almost always addressed together, or, in some accounts, conflated to form a unified requirement of 'necessity'".[159] It lies on the applicant to prove the facts which are alleged to show the urgency and the probability of irreparable damage.

As a whole, international courts and tribunals are rather rigorous in their assessment of urgency and irreparable prejudice.[160] This is justified by the fact that the

[155] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003, p. 28, para 2 (emphasis added).

[156] Proelss 2017, p. 1872. See also: Yiallourides 2017, pp. 11–17; Miles 2017a, pp. 243–245.

[157] This provision was invoked by Côte d'Ivoire but the Special Chamber found that it did not adduce "sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment": *Delimitation of the Maritime Boundary in the Atlantic Ocean, supra* note 73, para 67.

[158] In the *Kishenganga* arbitration, the Court denied the applicability of the concept of prejudice and urgency as developed by the ICJ because of the difference in the respective wording of Article 41 of the ICJ Statute and para 28 of Annexure G of the Indus Waters Treaty. "Paragraph 28 sets out three distinct, specific grounds on the basis of which the meaning of "necessary" can be ascertained. It thus functions as a kind of *lex specialis* prescribed by the framers of that provision that makes unnecessary the imposition of further requirements": *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Order on Interim Measures of 23 September 2011, para 130. Nonetheless, as Yoshufumi Tanaka observed, "a close reading of the Order seems to suggest that the Court of Arbitration did not completely ignore urgency": Tanaka 2012, pp. 570–571.

[159] Miles 2017a, b, p. 225. In comparison, it must be remembered that Article 63(2) of the Inter-American Convention lays down three requirements: extreme gravity, urgency, and necessity of avoiding irreparable. As Clara Burbano Herrera noted, "the urgency to adopt the measures, given the imminence of a possible prejudice to human rights, is the direct result of the gravity of the situation presented": Burbano Herrera 2010, p. 85. Nevertheless, "[t]he idea of gravity, (…), is related in three aspects: with the hierarchy of the right, the violation of which is sought to be avoided; with the relevance of the actions or the omissions that may be attributed to the State presumably responsible and with the presence of a real and note merely hypothetical danger": *ibid.*, p. 86.

[160] Except maybe ITLOS (see for example the *Enrica Lexis* case where the Tribunal "did not convincingly prove the existence of the urgency of the situation": Tanaka 2017, p. 284 and, at a lesser degree, the IACtHR. See: Le Floch 2008, pp. 374–398.

power to order provisional measures is an exceptional one which should not be used lightly.[161] Indeed, provisional measures can infringe on states' sovereignty.[162]

3.3.2 Substantive Requirements Specific to Certain International Courts and Tribunals

There are two more requirements that one can find in the case law of certain international courts and tribunals. The first one is the balance of interest (Sect. 3.3.2.1) while the other is the prevention of the aggravation or extension of a dispute (Sect. 3.3.2.2).

3.3.2.1 Balance of Interests

In its case law, the Court of Justice of the European Union added another condition that must be fulfilled for an application for provisional measures to be granted: "the balance of interests".[163] Under this requirement,[164] the Court is called to assess, where appropriate, if the interest of the applicant for provisional measures outweighs the interest of the defendant,[165] of third parties[166] or of public interest[167] in case

[161]For example, in the ECtHR's case-law as it currently stands, provisional measures are not indicated in the following cases: "to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings; to ensure the holding of a referendum; or to prevent the dissolution of a political party": Factsheet—Interim measures, prepared by the Press Unit of the European Court of Human Rights, January 2019, p. 2.

[162]As Robert Kolb stated concerning the ICJ, "[t]he Court is exercising a power which can be described as in a sense inordinate, in that it consists of indicating, in advance, certain obligations, which may well be onerous ones, to be complied with by a sovereign State, moreover doing this at a time when the Court is not yet certain either that it has jurisdiction, or that the claim is well founded. For these reasons, a restrictive interpretation is required": Kolb 2013, p. 630. On the infringement of the provisional measures to State's sovereignty in general: Le Floch 2008, pp. 170–203.

[163]CJEU, Case C-15/63 R, *Lasalle v. Parliament*, Order of 13 March 1963, p. 57. It is noteworthy that, long time ago, the Belgo-Bulgarian mixed arbitral tribunal had adopted a similar approach: "le préjudice causé par la mesure conservatoire ne doit pas être hors de proportion avec le profit que peut en retirer le requérant": 6 January-26 February 1923, *Electric Tramway Company of Sofia v. Bulgaria and Municipality of Sofia*, TAM, vol. II, pp. 926–927.

[164]On this requirement: Jacobs 1994, pp. 56–59.

[165]CJEU, Case T-146/95 R, *Bernardi v. Parliament*, Order of 18 August 1995, para 22.

[166]CJEU, Case 4/78 R, *Salerno and others v. Commission*, Order of 13 January 1978, para 14. As the Court observed in *Simmenthal v. Commission*, third parties are not parties to the proceedings and therefore cannot express their views: CJEU, Case 92/78 R, *Simmenthal v. Commission*, Order of 22 May 1978, para 9.

[167]CJEU, Case T-96/92 R, *CCE de la Société générale des grandes sources and others v. Commission*, Order of 15 December 1992, para 39.

provisional measures are allowed.[168] This assessment will lead the judge to balance between conflicting interests.[169]

It is difficult however to see from the case law whether or not the balance of interest is an autonomous condition for granting provisional measures.[170] In some cases, the balance of interest appears as a distinct requirement[171] whereas in others there is no clear line between this question and that of urgency.[172] In fact, as President Da Cruz Vilaça observed, "[t]he balance of interests is, as a rule, closely linked to the condition of urgency and more specifically to the requirement for serious and irreparable damage. Indeed, quite often, the balancing of interests leads to the refusal of an interim measures which would otherwise be justified were it not for the serious consequences that its adoption would entail for the other party or for the public interest in the particular circumstances of the case, thus precluding any possibility for an acceptable and proportionate balance between the burden borne by that party or interest and the potential advantages flowing from the measure's adoption for the applicant. (…) [A]ssessing the balance of interests actually amounts to little more than applying the principle of proportionality to interim relief proceedings".[173]

More generally, this question arises in all legal systems: domestic and international.[174] Indeed, the rights of the applicant, who may, if provisional measures are not granted, lose the effective exercise of its rights, must be balanced against those of the defendant, whose position may eventually be vindicated. That is why ICSID tribunals also take into account this requirement. In the *Eskosol v. Italy* case, for instance, the Tribunal stated that it: "should ensure that the particular measures requested are proportionate, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them".[175] This means that the requested measures must be proportionate to the prejudice to be avoided. More generally, there is a need to weigh the interests at stake.

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[168]CJEU, Case T-44/98 RII, *Emesa Sugar v. Commission*, Order of 30 April 1999.

[169]See for example CJEU, Case T-31/07 R, *Du Pont de Nemours (France) and others v. Commission*, Order of 19 July 2007, para 207 where the President of the Tribunal recalled that "there can be no question but that the requirements of the protection of public health must take precedence over economic considerations".

[170]See on this topic: Joliet et al. 1992, p. 280.

[171]See for example: CJEU, Case T-308/94 R, *Cascades v. Commission*, Order of 17 February 1995, paras 51–56; CJEU, Case C-619/18 R, *Commission v. Poland*, Order of 17 December 2018, paras 91–117.

[172]See for example: CJEU, Case C-208/03 P-R, *Le Pen v. Parliament*, Order of 31 July 2003, paras 101–109 where the Court examined jointly the requirement of urgency and the requirement of the balance of interests.

[173]Da Cruz Vilaça 2014, pp. 148–149.

[174]See Collins, Report on Provisional Measures, Yearbook of Institute of International Law 2017, vol. 78, p. 106.

[175]*Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Request for Provisional Measures of 12 April 2017, para 36. See also: *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 on Provisional Measures Concerning Security for Costs of 3 May 2012, para 35.

Other international courts and tribunals ignore this requirement, at least formally. Indeed, they certainly take it into consideration more or less implicitly. For example, in the *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, the Special Chamber observed that "the suspension of ongoing activities conducted by Ghana in respect of which drilling has already taken place would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment resulting, in particular, from the deterioration of equipment".[176] It thus took into account the prejudice that the grant of provisional measures requested by Côte d'Ivoire would cause to Ghana. This is probably not an isolated example.[177] In some ways, the requirement of balance of interests seems to be inherent in the power to prescribe provisional measures.[178]

3.3.2.2 Prevention of the Aggravation or Extension of a Dispute

At the ICJ, there has been a debate as to whether the Court can indicate provisional measures for the sole purpose of preventing the aggravation or extension of a dispute independently of its power to indicate measures preserving the rights of either party against irreparable prejudice.

In the *Legal Status of the South-Eastern Territory of Greenland*, the PCIJ stated that "it has been argued that under Article 41 of the Statute, the Court is also competent to indicate interim measures of protection for the sole purpose of preventing regrettable events and unfortunate incidents".[179] Nevertheless, it did not consider it necessary to take a final stand upon this controversy in this case. In the *Aegean Sea Continental Shelf* case, Greece requested the Court to indicate provisional measures in order to prevent the aggravation or extension of the dispute.[180] However, the ICJ dodged the question considering that it was not necessary to decide on it.[181] In the *Frontier Dispute* case, the Chamber stated that "independently of the requests

[176] *Delimitation of the Maritime Boundary in the Atlantic Ocean, supra* note 73, para 99.

[177] For example, in his dissenting opinion in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, Judge Rezek implicitly alluded to the balance of interests stating that: "is not a matter of ascertaining whether the continuation in force of the arrest warrant against the Congolese Minister causes irreversible prejudice—death aside, little is irreversible—but rather determining whether the indication of a provisional measure would also be liable to cause prejudice no less serious than that sought to be remedied on a provisional basis": *Arrest Warrant, supra* note 45, para 6. On this topic: Elkind 1981, pp. 235–237.

[178] De Schutter 2003, pp. 117–118. In its final resolution on provisional measures, the Institute of International Law has adopted this requirement: "Provisional measures are available if the applicant for such measures can show that: (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) *the risk of injury to the applicant outweighs the risk of injury to the respondent*; and (d) the measures are proportionate to the risks" (emphasis added): Yearbook of Institute of International Law 2017, vol. 78, p. 129, para 2.

[179] PCIJ, *Legal Status of the South-Eastern Territory of Greenland*, Order of 3 August 1932, p. 184.

[180] *Aegean Sea Continental Shelf, supra* note 19, para 36.

[181] *Ibid.*, p. 13, para 42.

submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require".[182] Once more, this assertion did not resolve the question. However, in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court stated "that independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require".[183] This assertion was taken over in the *Armed Activities on the Territory of the Congo*[184] and in the *Certain Criminal Proceedings in France.*[185] In the light of this statement one has to conclude that the ICJ can indicate provisional measures to prevent the aggravation of a dispute independently of its power to indicate measures preserving the rights of either party against irreparable prejudice. However, in the *Pulp Mills* case, the Court clearly retreated from this position. It stated that it "has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay […]; whereas the Court therefore considers that the blockades themselves do not justify the indication of the second provisional measure requested by Uruguay [*id est* to prevent the aggravation or the extension of the dispute], in the absence of the conditions for the Court to indicate the first provisional measure". As a result, measures for the non-escalation of a dispute could not be awarded independently of measures for the protection of a right or interest; the former is dependent or/and supplements the existence of the latter.[186] In its second provisional order in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, the Court clearly states that "[s]uch measures can only be indicated as an addition to specific measures to protect rights of the parties".[187] The debate is now closed.[188]

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[182]ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Provisional Measures, Order of 10 January 1986, para 18.

[183]*Land and Maritime Boundary between Cameroon and Nigeria, supra* note 39, para 41.

[184]*Armed Activities on the Territory of the Congo, supra* note 134, para 44.

[185]ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, para 39.

[186]This reversal of jurisprudence is presumably a consequence of the express recognition of the binding character of provisional measures in the *LaGrand* case. See Palchetti 2008, p. 641; Miles 2017b, p. 534.

[187]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 17, para 28.

[188]This assertion had been thought to be too strong by some. For example, vice-president Xue considered that "[a]dding such a restrictive qualification may unduly restrain the power of the Court under Article 41 of the Statute and Article 75 of the Rules of Court to indicate provisional measures": *Ibid.*, Declaration Xue, para 3.

3.4 Conclusions

International courts and tribunals have a wide discretion in determining the requirements for provisional measures to be granted. While the conditions applied are not totally uniform, there are a number of constants. Those requirements correspond to the logic of provisional measures and contribute to the sound of justice.[189]

All requirements are cumulative. As a consequence, the applicant seeking provisional measures shall prove the fulfilment of each condition. A request for provisional measures must be dismissed if any one of them is lacking.[190] International courts and tribunals are free to determine the manner in which the various requirements are to be examined.[191] However, most of them assess the requirements in a particular order. For example, the ICJ has always considered questions of *prima facie* jurisdiction before substantive requirements.[192] In addition, international courts and tribunals enjoy a considerable margin of appreciation to assess the case and to take the decision that it is most suitable.[193] The power of the judges to decide on provisional measures is really a discretionary and exceptional one.

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[189] Le Floch 2009, p. 150.

[190] Similarly, international courts and tribunals will lift provisional measures when the requirements no longer exist.

[191] CJEU, Case C-459/06 P(R), *Vischim v. Commission*, Order of 3 April 2007, para 25.

[192] Nowadays, the ICJ assesses first *prima facie* jurisdiction, second the rights whose protection is sought and the measures requested (plausibility and link) and finally risk of irreparable prejudice and urgency.

[193] Le Floch 2008, pp. 108–117.

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Chapter 4
Autonomy of Provisional Measures

Eva Rieter

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Abstract Provisional measures are an essential tool of international adjudication, especially in the field of human rights. It has been argued that an autonomous legal regime is developing. Indeed, the essential function of provisional measures confers upon them a special status, that, nevertheless, cannot lead to the establishment of an autonomous legal regime. This chapter argues that the use of provisional measures cannot be fully detached from the pending case on the merits. At the same time, while the tool of provisional measures is not free-standing, for its use one should not replicate the criteria for the decision-making on the merits. After the analysis of requirements for provisional measures, the chapter also highlights international non-judicial tools, which are indeed autonomous and can be used to deal with urgent human rights situations.

Keywords prejudgment of the merits · urgent human rights situations · free-standing tools · autonomous legal regime

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4.1 Introduction

Provisional measures have become increasingly important in international judicial practice, especially in cases involving human rights. It has even been argued that the possibility to order them is developing into an "autonomous legal regime".[1] Indeed, they generate state responsibility autonomously and separate legal consequences are attached to non-compliance with provisional measures. Yet does that mean that they have acquired a life of their own, independent of the main case? At the other end of the discussion are the developments in the case law of the International Court of Justice (ICJ), which since 2017 expects the parties requesting provisional measures to show evidence of likelihood of success on the merits.

This contribution argues that neither that approach, nor the use of provisional measures divorced from a pending case, properly treats provisional measures as a judicial tool for the international administration of justice specifically aimed at the prevention of irreparable harm to persons.

The focus of this contribution is on the criteria for the use of provisional measures in the first place and it argues that in this respect the tool of provisional measures is not free-standing. At the same time, it is inappropriate to replicate the criteria for the decision-making on the merits. Doing the latter means that a court will prejudge the merits when deciding on requests for provisional measures.

After a brief discussion of provisional measures as a specific judicial tool for the prevention of irreparable harm to persons (Sect. 4.2), this chapter discusses the relation with a pending case (Sect. 4.3). It then discusses prejudgment (Sect. 4.4). Finally, this contribution draws attention to the fact that there are international *non-judicial* tools available to deal autonomously with urgent human rights situations (Sect. 4.5). Several adjudicators refer to interim measures rather than provisional measures and both expressions are used in this chapter.

4.2 Provisional Measures as a Specific Judicial Tool for the Prevention of Irreparable Harm to Persons

4.2.1 Provisional Measures as a Judicial Tool Used by Diverse Tribunals

Provisional measures are a judicial tool used by courts, both of general and specialized jurisdiction, and by quasi-judicial bodies supervising specific treaties and dealing with individual complaints. Provisional measures are always modelled to a specific

[1] See e.g. Cançado Trindade 2010 and ICJ, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Order of 3 October 2018, Separate opinion of Judge Cançado Trindade, para 28 and references therein.

judicial context, but the authority to order them is inherent in the judicial function. They apply in contentious proceedings, in the face of an urgent situation that may cause irreparable harm. They are provisional and their purpose is to ensure the meaningful outcome of a case or the proper administration of justice.

The ICJ has the function to adjudicate cases between states,[2] with the overall purpose of peaceful settlement of disputes. While doing so, it must preserve its own judicial function.[3]

The substantive law focused on in this contribution is human rights law, as dealt with by the ICJ and specific human rights adjudicators. The adjudicators with a mandate under a specific human rights treaty monitor the states' obligation to respect and ensure the rights in that treaty. The latter deal with complaints by individuals or groups against states, some as a court, some as a quasi-judicial body and they all use the tool of provisional measures.

Sometimes the competence to order provisional, or interim measures, is based on a separate treaty provision dealing with remedies in general, which explicitly provides a separate jurisdictional basis for the use of provisional measures. This is the case for the ICJ as a court of general jurisdiction, in Article 41 of the ICJ Statute. It is also the case for the Inter-American Court of Human Rights (IACtHR), in Article 63(2) of the ACHR and the African Court of Human and Peoples' Rights (ACtHPR), in Article 27 of the Protocol establishing the Court, but not for the European Court of Human Rights (ECtHR). For the latter, the competence to order interim measures is based on the right of individual petition in the treaty and it is only in the rules of court and in the case law that it is explicitly laid down. Similarly, the Inter-American Commission and the African Commission on Human and Peoples' Rights have developed a practice of using precautionary measures and provisional measures, respectively, and have inserted rules on this in their rules of procedure.

Similar to the ECtHR and the regional Commissions, the older UN complaint mechanisms have developed the tool in their practices and have inserted it in their rules of procedure, considering the use of such tool as inherent in their function. The UN Human Rights Committee (HRCtee), for instance, uses provisional measures as part of the individual complaint procedure established with the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[4] Its current Rule 94 stipulates that it may request such measures "[a]t any time *after the registration* of a communication and *before a determination on the merits* has been reached". It concerns such measures as the Committee "considers necessary to avoid possible

[2]Providing advisory opinions also belongs to its functions. There have been theoretical discussions on whether it could order provisional measures while it is examining a request for an advisory opinion. See e.g. Kolb 2013, pp. 651–652 and Miles 2017, pp. 400–405. There is no practice in this respect, but I would argue that in any case such order should not be in the interest of the requesting organization. Instead it should just be to ensure a meaningful outcome of the request before the Court.

[3]See e.g. Hernández 2014.

[4]Currently Rule 94, HRCtee Rules of Procedure, UN Doc. CCPR/C/3/Rev.11, January 2019. The current version of the rules was adopted at the Committee's 3567th meeting during its 124th session. In older cases, it was Rule 92 and in even older cases Rule 86.

actions which could have irreparable consequences *for the rights invoked* by the author" (emphasis added). It will "indicate that the request does not imply a determination on the admissibility or the merits of the communication, but that failure to implement such measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol". In other words, it warns the state in its interim measures that respect for its interim measures is a crucial element of the state's obligations under the Optional Protocol on individual complaint.[5]

In addition to these interim measures under Rule 94, the HRCtee has now created a separate Rule for approaching the state for urgent protection in situations where authors of communications, or others involved, might suffer intimidation or reprisals (Rule 95).[6] Obviously, a state's association with threats and harassment against those involved in the proceedings, as well as a lack of due diligence in protection against such action by third parties, could in itself trigger a claim under the right to life, the prohibition of inhuman and degrading treatment and the right to personal security. Moreover, it would mean a hindrance of the right of individual complaint. This incidence of harassment is a problem in the context of contentious proceedings in the regional systems as well. In response, the Inter-American Court has ordered provisional measures in such cases from the first moment it was able to exercise its judicial function in a contentious case.[7]

The Committee against Torture (CAT), established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ICAT), is the other older treaty body that has developed a practice of using interim measures

[5]The Rule also stipulates that "[a]t any stage of the proceedings the Committee will examine any arguments presented by the State concerned on the request to take interim measures, including reasons that would justify the lifting of the measures" and that it "may withdraw a request for interim measures on the basis of information submitted by the State party and the author(s) of the communication".

[6]Rule 95, HRCtee Rules of Procedure, UN Doc. CCPR/C/3/Rev.11, January 2019: Upon receiving information from the author of the communication, the Committee may also request the State party to take protection measures in favour of individuals, including the author(s), his/her counsel and family members, who might suffer acts of intimidation or reprisals as a result of the submission of the communication or cooperation with the Committee. The Committee may seek from the State party written explanations or statements clarifying the matter and describing any action taken in that regard. In 2014 the Committee explained that it had "developed the practice of requesting States parties to adopt measures of protection vis-à-vis the author(s) of a communication or close family members, when there are well-founded indications that the submission of the communication to the Committee has resulted or will result in acts of intimidation against these persons." The mandate of the Special Rapporteur on New Communications and Interim Measures, UN Doc. CCPR/C/110/3, 6 May 2014, para 12. "Protection measures are to be distinguished from interim measures in that their purpose is not to prevent irreparable damage affecting the object of the communication itself, but simply to protect those who might suffer adverse consequences for having submitted the communication, or to call the State party's attention to their aggravating situation linked to the alleged violations of their rights." *Ibid*. See also Sect. 4.4 referring to the Committees' concern about intimidation and reprisals in general (e.g. also in the context of involvement in the public hearings discussing state reports, or with the submission of shadow reports).

[7]This concerns the Honduran cases, 1987. For a discussion of these cases and other provisional measures to protect against death threats and harassment, see Rieter 2010, pp. 405–449.

pending the proceedings.[8] Moreover, it has appointed a rapporteur to follow-up on allegations of reprisals against persons who cooperate with it: in the context of state reports and shadow reports (Article 19 ICAT), in the context of the inquiry procedure (Article 20) and in the context of individual complaint (Article 22).[9]

Next to the HRCtee and CAT, the other quasi-judicial bodies also make use of interim measures and the more recent UN individual complaint mechanisms do include a specific reference to interim measures in the treaty provisions themselves.[10]

4.2.2 Preventing Irreparable Harm to Persons

The strength of the provisional measures in the human rights systems is derived from their purpose of preventing irreparable harm to persons pending the proceedings. The rights involved are distinguished through their elevated status in the treaties and in

[8]Rule 114 CAT Rules of Procedure, UN Doc. CAT/C/3/Rev.6, 1 September 2014: Interim measures: "(1) At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations. (2) Where the Committee, the Working Group, or Rapporteur(s) request(s) interim measures under this rule, the request shall not imply a determination of the admissibility or the merits of the complaint. The State party shall be so informed upon transmittal. (3) The decision to grant interim measures may be adopted on the basis of information contained in the complainant's submission. It may be reviewed, at the initiative of the State party, in the light of timely information received from that State party to the effect that the submission is not justified and the complainant does not face any prospect of irreparable harm, together with any subsequent comments from the complainant. (4) Where a request for interim measures is made by the Working Group or Rapporteur(s) under the present rule, the Working Group or Rapporteur(s) should inform the Committee members of the nature of the request and the complaint to which the request relates at the next regular session of the Committee. (5) The Secretary-General shall maintain a list of such requests for interim measures. (6) The Rapporteur on new complaints and interim measures shall also monitor compliance with the Committee's requests for interim measures. (7) The State party may inform the Committee that the reasons for the interim measures have lapsed or present arguments why the request for interim measures should be lifted. (8) The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures.".

[9]The Committee stresses Article 13 ICAT: "States parties shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given". See http://www.ohchr.org/EN/HRBodies/CAT/Pages/ReprisalLetters.aspx. See also Sect. 4.4.

[10]See Article 31(4) Convention for the Protection of All Persons from Enforced Disappearance (2006) and Article 4 Convention on the Rights of Persons with Disabilities (2006); earlier already the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999); and subsequently also Article 5 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008); and Article 6 Optional Protocol to the Convention on the Rights of the Child (2011).

case law.[11] These rights are applicable either directly, because these are the rights claimed in the contentious proceedings, or indirectly, because of threats to life and limb of witnesses, the applicants, or their lawyers, undermining the international administration of justice.[12]

At minimum, provisional measures in all systems aim to prevent *irreversible* harm to the claim (because the harm would make impossible the return to the *status quo ante*), or to the procedure (to ensure the proper administration of justice and the integrity of the system of contentious proceedings). Without this element of irreversibility provisional measures are beyond the outer limits of the concept. On occasion, the human rights bodies have used provisional measures that appear to be beyond the outer limits. An example is the order to halt the judicial seizure of assets or other financial measures.[13]

The strongest provisional measures are those that aim to prevent not just irreversible, but *irreparable* harm to persons, such as the execution of a death sentence. In addition, there may be orders aiming to prevent irreparable harm to another public interest, such as harm to the environment.[14] In 1981, Elkind noted that the notion of irreparable harm did not adequately cover experiences such as those of the hostages in the *Hostages* case (*US v. Iran*).[15] He noted that in fact their situation could be better qualified as unendurable.[16] The use of the notion irreparable, however, has become even more widespread by now. The word irreparable is stronger than the word irreversible and in the context of human rights irreparable harm has come to connote harm that would be so devastating and unendurable that allowing it to occur pending the proceedings and ordering financial compensation afterwards would be manifestly inadequate.

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[11] Rieter 2010; Saccucci 2006.

[12] Rieter 2010.

[13] For instances where adjudicators ordered provisional measures in situations that are beyond the outer limits of the concept, such as in order to halt the seizure of assets, see Rieter 2010, pp. 584–587. The ACtHPR has now added instances as well. See ACtHPR, *Alfred Agbesi Woyome v. Ghana*, Order of 24 November 2017.

[14] Article 290(1) UNCLOS refers not to irreparable but to serious harm, and this provision does specifically refer to the 'marine environment.' For a general discussion of the protection of community interests in international law, see e.g. Tanaka 2011. There have been orders by the ICJ that did express concern both for the environment and for people. For an early discussion of the ICJ order in the *Nuclear Test* cases, see Elkind 1981, p. 223. More recently see ICJ, *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*), Order for new provisional measures of 22 November 2013 (and separate opinions in earlier orders, e.g. ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order of 8 March 2011, Declaration of Judge Greenwood, paras 13 and 15; separate opinion of Judge Sepúlveda-Amor, paras 4, 14–38; see also the Declaration by Judge Xue expressing concern about prejudgment, but indicating that she would have been in favour of a different type of provisional measure ordering both states to cooperate to prevent irreparable harm to the environment. Similarly, the Declaration by Judge ad hoc Guillaume. See further the practices developed by human rights adjudicators in the context of indigenous rights, Rieter 2010, 451–465.

[15] ICJ, *US Diplomatic and Consular Staff in Tehran* (*US v. Iran*) (*Hostages* case), Order of 15 December 1979.

[16] Elkind 1981, pp. 224, 258.

There is some measure of convergence between the various human rights adjudicators, namely in how they deal with rights identified for their elevated status within the applicable human rights treaty.[17] Next to the serious nature of the rights at stake as such, this convergence in the approach on the merits taken by these adjudicators, and a convergence in the actual use of provisional measures by the various adjudicators, adds to the persuasiveness of these measures. Interestingly, Cameron Miles has more recently drawn similar conclusions on the commonality of approaches between the ICJ and arbitral tribunals.[18]

4.2.3 Follow-up and Legal Consequences of Non-compliance

The question is whether the importance attached to preventing irreparable harm to persons, in relation to the claim, or to the integrity of the proceedings, is reflected in the way the adjudicators follow up on non-compliance. Such follow up could encompass: including reporting obligations already in the orders for provisional measures themselves; following up (*proprio motu*) in the main part (or the reasoning) of subsequent orders; adding specifications in subsequent orders involving a different case, which de facto follow up on an earlier situation of non-compliance.[19] Such follow-up illustrates a distinct attention for the tool of provisional measures.

The same applies to the issue of state responsibility. To some extent it is possible to distinguish the legal consequences of disrespect for provisional measures from the legal consequences of findings based on the specific initial claims. States can be held responsible for non-compliance separately from any other findings on the merits

[17] See Rieter 2010 discussing the commonalities and differences in approaches to provisional measures by various human rights adjudicators and the ICJ, as well as their common core and outer limits, indicating in the practice until 2008, a convergence of approaches by the adjudicators. See also Saccucci 2006. More closely on convergence, see Rieter 2012, pp. 174–180. There have been important political developments in the European and Inter-American systems since 2008. Moreover, there is now practice by the ACtHPR as well. In this light there still appears to be a convergence between the approaches of the human rights adjudication in terms of the common underlying rationale for their use (prevent irreparable harm to life and limb) and the actual use of provisional measures in a specific context in more than one system. This also applies to cultural survival of indigenous peoples, the third situation that I consider to belong to the common core, see Rieter 2010, pp. 451–500. The ACtHPR has since added its voice by ordering provisional measures in the case of the Ogiek Community of the Greater Mau Forest: ACtHPR, *African Commission on Human and Peoples' Rights v.* the *Republic of Kenya*, Order for provisional measures of 15 March 2013 (Ogiek community). With its Order in *Ogiek* it confirmed the approach taken by the Inter-American Commission, the Inter-American Court, the African Commission on Human and Peoples' Rights and the UN HRCtee in using provisional measures also in this context. Also noteworthy here is a different aspect: like the ICJ and the IACtHR, the ACtHPR publishes its Orders for provisional measures. Moreover, the Inter-American Commission on Human Rights now also publishes concrete information about its precautionary measures.

[18] Miles 2017, pp. 475–476.

[19] More closely discussed in Rieter 2019, pp. 158–167.

and separately from jurisdiction on the merits. Indeed, the ICJ now mentions non-compliance as a separate finding in its Operative Clauses. The Court also concluded on non-compliance with the provisional measures in *Avena II*, after having found that it had no jurisdiction on the merits.[20] This is an indication of a separate legal existence for provisional measures, because of their separate legal basis and their importance for the functioning of the Court.[21]

At the same time, a specific discussion of remedies, or of the question how the non-compliance plays a role in establishing a breach, or even an aggravated breach, must still be developed. An ICJ Order itself often does not even call on the states to report on how they will comply with the Order[22] and, different from the Inter-American Court, the ICJ does not have a formalized mechanism to monitor compliance with its provisional measures. To the extent that it has sufficient information, it may at most issue a new Order that is more specific (as it eventually did in *Costa Rica v. Nicaragua*),[23] or it can observe in the Operative Part of the judgment on the merits that its provisional measures have not been respected.[24]

In its *Jadhav* judgment (2019) the ICJ found in the Operative Part, that the appropriate reparation in this case meant that Pakistan had to provide, "by the means of its own choosing, effective review and reconsideration of the conviction and sentence" of Mr. Jadhav "so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Convention." In its reasoning it referred to specific paragraphs of the judgment. In addition, it declared in the Operative Part "that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence" of Mr. Jadhav.[25] This specification in the *Jadhav* judgment about continued stay of execution as an indispensable condition for the effective review required, should be seen against the

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[20] ICJ, *Avena II, Request for interpretation of the Judgment of 31 March 2004 (Mexico v. US)*, Judgment of 19 January 2009, para 61 under (2).

[21] See e.g. Palchetti 2017.

[22] But see, more recently, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*the Gambia v. Myanmar*), Order of 23 January 2020: "submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court". This Order may be followed by similar formulations in new cases. For older orders including an obligation to report (without a mechanism to follow this up), see Rieter 2010, pp. 90–91.

[23] See the development in ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Orders of 8 March 2011, 16 July 2013 and 22 November 2013.

[24] See e.g. ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), Judgment of 16 December 2015, para 126, where the ICJ noted that it had already ascertained certain facts in its provisional measures Order and then explained that "that statement was only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings. The judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures. Thus, contrary to what was argued by Nicaragua, a statement of the existence of a breach to be included in the present Judgment cannot be viewed as 'redundant'. Nor can it be said that any responsibility for the breach has ceased: what may have ceased is the breach, not the responsibility arising from the breach.".

[25] ICJ, *Jadhav* case (*India v. Pakistan*), Judgment of 17 July 2019.

background of the Court's previous experience, involving the United States, in the *Breard*, *LaGrand*, *Avena I* and *II* line of cases.[26]

In the human rights systems, non-compliance generally results in the separate finding that the provisional measures have been disrespected, rather than 'only' a finding that any violation found on the merits is aggravated.[27] In other words, it constitutes autonomous wrongful conduct. While the follow up to non-compliance requires further development, it could be qualified as creating a somewhat separate legal regime on provisional measures. Yet none of this makes autonomous the decision-making on their use in the first place.

In other words, the regime for responding to non-compliance may have acquired a level of autonomy, but the tool itself of provisional measures has not. This is because of the importance of the link with the pending case.

4.3 Relation to a Pending Case

Adjudicators do have a *separate* competence to order provisional measures. Formally their incidental jurisdiction is independent. Substantively, however, the criteria for their use presume a relation with the main claim, either directly, or indirectly, through non-aggravation of the conflict and by ensuring the integrity of the proceedings.

The ICJ has never accepted a provisional measures request without also having received an application on the merits. The same applies to the ECtHR. At the UN level, provisional measures are always ordered in the context of the right of individual petition, while other urgent matters are addressed through different mechanisms such as those involving reprisals.[28] In the Inter-American system the situation is more fluid. This applies particularly to the Inter-American Commission, which has a practice to also issue precautionary measures without an actual case,[29] although it remains doubtful whether the latter approach is appropriate.

It is clear already from the text of Article 63(2) of the American Convention that the Inter-American Court (IACtHR) has been given a special role. It has stressed that it may order provisional measures *proprio motu* at any stage of the proceedings.[30]

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[26] See also Rieter 2019, p. 151.

[27] But see Haeck et al. 2008.

[28] See further Sect. 4.4.

[29] The Commission itself has explicitly and extensively recognized that its precautionary measures are autonomous. They can operate independently of a case pending before it. See Article 65 of its rules.

[30] In its Rules of Court (2009) it added that it may order provisional measures "at any stage of the proceedings" and it repeats this in its Annual Reports. This appears to relate mainly to (1) its practice of ordering provisional measures in cases not yet before it, but upon request by the Commission (see further in the main text); (2) its practice of ordering provisional measures after a judgment on the merits, but while the proceedings on reparations are still pending; and (3) its practice of ordering provisional measures while the case is already at the stage of monitoring compliance. Since its development of a system for monitoring supervision, where a case is not closed until the

Like the other adjudicators it has the authority to order provisional measures *pending a case*. But unlike the other adjudicators, in the Inter-American system, the protection offered by Orders for provisional measures has two foundations.[31] The IACtHR can also order provisional measures in *matters* that are not yet pending before it, but which the Inter-American Commission brings before it just to deal with urgent situations of extreme gravity where there is a risk of irreparable harm.[32] Because this concerns cases that are not yet pending before the Court, these provisional measures could to some extent indeed be seen as a "jurisdictional guarantee of a preventive nature".[33]

In any case, the Inter-American Court distinguishes between its 'traditional' preventive provisional measures, and the second type of provisional measures involving situations that are not pending before it, based on the specific mandate mentioned in Article 63. It does so by referring to the latter specific mandate as 'protective' provisional measures. But prevention and protection are themselves fluid notions. The labels preventive and protective are therefore somewhat artificial. All provisional measures could be labelled both. The one question is what they aim to *prevent* and who or what they aim to *protect*. The other question is what their jurisdictional basis is. It is significant though that Article 63(1) concerns the substantive remedies *after* the Court finds a breach. One would assume, then, that Article 63(2) concerns provisional remedies while the case is pending.

Court has determined that the state has satisfactorily implemented the judgment, it has lifted certain provisional measures. When they mainly concerned compliance with its judgment it transferred further monitoring to its monitoring mechanism. When it concerns death threats against victims, witnesses or others involved in the case, it still maintains its provisional measures during the stage of monitoring compliance. The Court has refused expansion of the group of beneficiaries of existing Orders involving matters still pending before the Commission if this expansion was not requested by the Commission. See e.g. IACtHR, *Matter of the communities of Jiguamiandó and Curbaradó* (Colombia), Order of 30 August 2010, considering clauses 17 and 21. See also considering clause 71: the Commission must keep the Court informed of the procedural state of the petition before the Commission.

[31] Yet the Inter-American system is not the only one that has a special possibility in this context. The ITLOS, for instance, also has a formal role examining requests for provisional measures in cases that are not pending before it.

[32] In its rules it distinguishes not only the contentious cases before the Court and the matters not yet submitted to it, but also its *proprio motu* use. But in practice I would say that most Orders are either part of the contentious proceedings or requested by the Commission. There the question of course is whether the matter brought before the Court is already a case pending before the Commission, or whether the Commission has opened its discussion of this case *proprio motu*, without there being a formal merits case. An example where the Inter-American Court explicitly referred to the fact that there was no case pending before the Commission was its July 2009 Order in the *Matter of Liliana Ortega* et al. *(Venezuela)*, paras 3 and 4.

[33] See, among others, IACtHR, *Matter of Danilo Rueda*, Order of 28 May 2014, considering clause 3, referring to *Case of Herrera Ulloa v. Costa Rica (Newspaper "La Nación"). Provisional Measures regarding Costa Rica*, Order of 7 September 2001, considering clause 4, and *Case of Wong Ho Wing. Provisional Measures regarding Perú*, Order of 31 March 2014, considering clause 10.

Similarly, in Article 27 of the Protocol of the African Court of Human and Peoples' Rights,[34] the first clause discusses that if the Court finds that there has been a violation, it shall make appropriate orders to remedy the violation. The second clause then provides that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary." This joint discussion in one treaty provision, under the heading 'Findings', illustrates the relationship between the remedies following a judgment in a case, and the remedies to be provided while the case is pending.

Thus, one significant aspect of Article 63 ACHR and Article 27 Protocol of the ACtHPR is that they unite the authority to order provisional measures with the authority to order substantive remedies following the finding of a violation. This is for a good reason. What the Courts order pending a case and what they order after a finding of a violation is indeed closely related. Provisional measures and substantive remedies depend on each other and this would mean that provisional measures cannot be seen as a fully independent tool, even in the Inter-American system.

In human rights cases, provisional measures often are pending throughout the entirety of the case, simply because the situations remain urgent and the risk of irreparable harm continues. But there is something to the word 'provisional.'[35] The provisional nature calls for measures that are at least related to a case. Then they have autonomy to a certain extent, during the proceedings, but not outside of them. If new threats arise, a new case should be opened.

The special mandate in the Inter-American system does not, in and of itself, change the nature of the concept of provisional measures in other contexts, without such mandate. If we look at the rationale of the concept of provisional measures as used by international courts, they are ordered in the context of international litigation. Provisional measures traditionally have been subsidiary to the main claim. Of course, the fact that something has traditionally been so is not necessarily an argument in itself to keep it that way. But calling something traditional is not a reason to dismiss it either. The point is here: what is the reason for expecting a main claim and a relation with it? This is, in my view, because provisional measures are measures provisionally

[34] Not to be confused with another Statute, that of an African Court of Justice and Human Rights. This Court does not exist (yet), but it features prominently in textbooks and documents books, while the existing Court is the African Court on Human and Peoples' Rights.

[35] At the same time caution is warranted here. Irreparable harm has sometimes followed a decision to lift provisional measures. Provisional measures on behalf of Digna Ochoa remained in place for almost two years. In August 2001 they were lifted at the request of Mexico and without the opposition of the Commission. The state had argued that it was 'an abuse of provisional measures to use them as a de facto substitute for prosecuting a case that should have sufficient merit to be heard before the Inter-American Court of Human Rights'. It was reported that Digna Ochoa and her colleagues considered that violence against them "could not happen in present day Mexico". Tragically, two months later Digna Ochoa was found dead. Immediately the President of the Court ordered new provisional measures on behalf of her colleagues and family. A hearing took place discussing the circumstances, including the earlier decision to lift the provisional measures, after which the Court confirmed the President's measures, 8th and 10th. IACtHR *Miguel Agustín Pro Juárez Human Rights Center et al.* (Mexico), Order of 30 November 2001, 8th and 10th 'having seen' clause.

taken, by an international *court or a quasi-judicial body*, if circumstances so require. Risk of irreparable harm to persons is a circumstance that requires urgent action. Yet provisional measures are a tool in international adjudication, and they should be ordered in the context of contentious proceedings.

At the same time, this link to a pending case, and to claims on the merits, should have enough flexibility. The link with the merits should not be a chokehold. Considering the aim of preventing irreparable harm to persons, a degree of flexibility is necessary, both to ensure legitimacy and to be sufficiently responsive to serious situations of risk.

Firstly, a strictly formal requirement to submit a full complaint on the merits before, or at the same time as, a request for provisional measures is not feasible. By the time all these conditions are fulfilled, the irreparable may have already occurred. Such a strict approach would not correspond to the protective mandates given to the supervisory bodies. Thus, the UN treaty bodies and the ECtHR can also decide on the use of provisional measures before the complete case is submitted. The idea is, though, that the full application on the merits will be brought soon thereafter and that continuation and expansion of provisional measures depends on this existence of a case pending on the merits.

Secondly, a sufficiently flexible approach to establishing the link is also warranted. There are measures that have a clear link to the claims on the merits and there are those that aim to protect the administration of justice.

In inter-state cases as well, there have been situations as already described by Higgins,[36] where the ICJ issued orders for provisional measures to ensure evidence, and to protect persons caught up in inter-state conflicts. Here, the rationale for the provisional measures was not to ensure the rights of the party as claimed, but to ensure the proper administration of justice[37] and non-aggravation of the conflict.[38] This means that in the past the ICJ, too, ordered provisional measures that related more to non-aggravation of the dispute in general, than strictly to the main claim, or took a broader approach to the main claim, assuming that protection of certain interests (protection of lives, cultural heritage, the environment) is subsumed in a state's general sovereignty rights, even if the state itself did not mention this in its

[36] Higgins 1997.

[37] For a recent example see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*the Gambia v. Myanmar*), Order of 23 January 2020.

[38] For non-aggravation as such: ICJ, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Order of 10 January 1986; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Order of 15 March 1996; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 1 July 2000. For preserving the integrity of the judicial process and preserving the evidence: *Frontier Dispute (Burkina Faso/Republic of Mali)*, Order of 10 January 1986; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Order of 15 March 1996. See also *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)*, Order of 18 July 2011; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Orders of 8 March 2011 and 16 July 2013. See further Rieter 2010, pp. 19–20.

claim. In both situations, the aim of the provisional measures is to ensure a meaningful outcome of a case.

Thus, the ICJ has also ordered provisional measures mainly for the non-aggravation of the dispute.[39] More recently, it has taken the attitude that this purpose cannot stand alone and that it serves only by way of an add-on.[40] Yet the earlier practice can be seen as more appropriate as this type of provisional measure can be necessary for the peaceful settlement of the dispute and the preservation of the judicial function.[41]

Whether there is a clear link to the claim, or a loose link, there must be some bearing on existing rights, even if the party does not explicitly claim them, but if the Court refers to them *proprio motu.* Because one could not order something pending a case which one could not possibly order on the merits. This requires a flexible link, but still a link.

There can be a direct relation to the merits, or the relation can be indirect and aim at protection of the proper administration of justice. Moreover, persuasiveness of provisional measures orders does not just relate to how they could persuade states, but also to how they are perceived by those who might invoke their protection. How do provisional measures meet their protective aim? Thus, persuasiveness depends on the extent to which these measures anticipate the merits *and* on how responsive they are to situations of risk of irreparable harm to persons. An overly restrictive list of preconditions for their use is therefore problematic and certain requirements may even prejudge the merits and undermine the proper administration of justice.

In human right cases, there are situations where the alleged victim and the person(s) who are protected under a provisional measures order are not the same. Again, this may make provisional measures more autonomous. For instance, when they are witnesses who are receiving threats or when the alleged victim has no access to counsel.[42]

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[39] See for further references Thirlway 2013, pp. 1802–1803; Kolb 2013, pp. 616–619, and Rieter 2010, pp. 7, 16–39, 47–48 and 98. See also Zyberi 2015, pp. 342–365. For other general works on provisional measures in the practice, among others of the ICJ, see e.g. Elkind 1981, Sztucki 1983, Bernhardt 1994, Rosenne 2005, Cohen-Jonathan and Flauss 2005, Saccucci 2006, Le Floch 2008, He 2010, Oellers-Frahm 2012 and Miles 2017.

[40] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, paras 49–50. This approach was continued in subsequent orders, see e.g. ICJ. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, para 43.

[41] See also ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, Separate Opinion of Judge Buergenthal, para 8 supporting a continued stand-alone option by referring to the inherent power of courts to "ensure that the orderly adjudication of cases pending before it is not aggravated or undermined by extrajudicial coercive measures resorted to by one party to the dispute against the other". See Palchetti 2008, p. 636.

[42] On death threats and harassment, see Rieter 2010, pp. 405–449. On preserving evidence: Rieter 2010, pp. 556–564, and Leach 2016. On access to counsel, see further Rieter 2010, pp. 385–396 including provisional measures to ensure procedural rights such as habeas corpus. For a more recent instance, see Registrar of the ECtHR, ECHR grants an interim measure in case concerning the Sea Watch 3 vessel, Press Release of 29 January 2019, ECHR 043 (2019).

All the same, the provisional measures aim to ensure a meaningful outcome of the case. Here too, an apparent right must be at stake, even if it is not claimed by the parties, and it must be shown that its violation could result in irreparable harm. In other words, also when provisional measures aim to ensure the proper administration of justice and non-aggravation of the conflict, there must be a close link with the existing case law of the court in question, analogous to the 'relation with the merits.'

4.4 Prejudging the Merits

In time-sensitive cases the decision to order provisional measures could result in an anticipation of the merits. Yet the same applies to the decision *not* to order them. The regional human rights courts require a link with the merits, and at the same time they take pains not to anticipate their own judgment. In 2013, for instance, in its Order in *Konaté* the ACtHPR denied a request for immediate release because that would adversely affect consideration on the merits.[43]

The Inter-American Court has pointed out that "in a request for provisional measures it is not possible to consider arguments pertaining to issues other than those which relate strictly to the extreme gravity and urgency, and the necessity to avoid irreparable damage to persons".[44] It explained that it would study the implications of other facts reported to it "if appropriate, at the stage, still pending, of oversight of compliance" with its judgment in the case in question.[45]

Also, the Inter-American Court has explicitly decided not to monitor one important element of its provisional measures, namely, to *investigate* threats, when it monitors compliance with its provisional measures Orders pending the case. After all, that would anticipate too much on its judgment on the merits. Instead it focuses at this stage on the implementation of other elements in its Orders for the protection of persons against threats and harassment. Otherwise the provisional measures would conflict with the principle of non-anticipation.

[43] ACtHPR, *Konaté v. Burkina Faso*, Order of 4 October 2014, para 19 (with two dissents).

[44] IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Order denying provisional measures of 29 January 2008, considering clause 10. See also IACtHR, *Matter of James* et al. *(Trinidad and Tobago)*, Order of 20 August 1998, considering clause 6; *Matter of "Globovisión" Television Station (Venezuela)*, Order of 29 January 2008, considering clause 10 and *Matter of Luisiana Ríos* et al. *(Venezuela)*, Order of 3 July 2007, considering clause 9.

[45] IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Order denying provisional measures of 29 January 2008, considering clauses 11 and 12. See also *Case of the Miguel Castro-Castro Prison v. Peru*, Order of 30 January 2007 (denying a request for provisional measures) and the *Miguel Castro-Castro Prison*, Judgment of 25 November 2006.

By contrast, in its *Ukraine v. Russia* Order of 19 April 2017,[46] the ICJ turned the criteria for the appropriate use of provisional measures into strict conditions for their use. In addition, the plausibility requirement became such that it undermined the credibility as well as the effectiveness of the tool as this new requirement prejudged the merits to an unacceptable level.[47]

In its order in *Qatar v. United Arab Emirates* (UAE), the ICJ appeared less strict. The application by Qatar had been quite detailed, likely because of the steep requirements in *Ukraine v. Russia.* In response, UAE argued that the rights claimed in ICERD were not plausible because discrimination based on nationality was not covered by the prohibition in Article 1 ICERD.[48] It also argued that "the lack of evidence supporting Qatar's claims calls into question the plausibility of the rights asserted by Qatar."[49] Yet the ICJ recalled "its conclusion that it need not decide at this stage of the proceedings between the divergent views of the Parties on whether the expression 'national … origin' in Article 1, para 1, of CERD encompasses discrimination based on 'present nationality'".[50]

Subsequently, in its provisional measures order in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, of 3 October 2018, the ICJ appeared to stick to a very strict plausibility approach.

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[46] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation*), Provisional Measures, Order of 19 April 2017. The so-called plausibility criterion was introduced by the Court in ICJ, *Questions relating to the obligation to prosecute or extradite* (*Belgium v. Senegal*), Order of 28 May 2009, para 57.

[47] See more closely Rieter 2019, pp. 151–157.

[48] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order for provisional measures of 23 July 2018, para 48.

[49] *Ibid*., para 49.

[50] *Ibid*., para 53. It found "that the measures adopted by the UAE (…) appear to have targeted only Qataris and not other non-citizens residing in the UAE. Furthermore, the measures were directed to all Qataris residing in the UAE, regardless of individual circumstances. Therefore, it appears that some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention. Consequently, the Court finds that at least some of the rights asserted by Qatar under Article 5 of CERD are plausible. This is the case, for example, with respect to the alleged racial discrimination in the enjoyment of rights such as the right to marriage and the choice of spouse, the right to education, as well as freedom of movement, and access to justice." *Ibid*., para 54. In his separate opinion Judge Cançado Trindade again drew attention to the problems of the plausibility 'requirement', see paras 57–61. The dissenters focused on prima facie jurisdiction and/or on urgency and risk of irreparable harm, not on the issue of plausibility, although Judge Crawford did note that there is a question "whether the UAE's statement of 5 June 2017 plausibly implicates rights under the CERD as invoked by Qatar, which equated national origin with present nationality".

Substantively the order did appear sensible.[51] It was the reasoning that was problematic, as the ICJ required evidence for the subjective elements, thereby ignoring the serious risk of prejudgment. From this order, it seemed that if a *respondent* state argues that rights are not plausible, and the ICJ then considers this argument by the respondent to be plausible, it will not order the provisional measures requested, finding that the claimant state has not shown sufficient evidence of plausibility.

If this is the case, it only accepts a right claimed as plausible, for purposes of provisional measures, when it finds the objection by the respondent state implausible. Even Cameron Miles, who sees the plausibility approach in *Ukraine v. Russia* more favourably because of its high threshold for the use of provisional measures, has considered that this "cannot be right".[52]

Meanwhile it would seem that requiring prima facie jurisdiction, prima facie evidence of irreparable harm, and showing the prima facie existence of the rights are enough to counter frivolous claims.

This chapter was already completed when the ICJ ordered provisional measures in *Gambia v. Myanmar*,[53] but I will briefly refer to it, since in this order the Court does not appear to apply the strict plausibility requirement of *Ukraine v. Russia*. In the order, which was unanimous in all four decisional clauses, the ICJ considered: "In view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In the Court's view, all the facts and circumstances mentioned

[51] ICJ, *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v. United States of America*), Order for provisional measures of 3 October 2018. In this Order the ICJ found that the rights whose preservation Iran sought "appear to be based on a possible interpretation of the 1955 Treaty of Amity and on the prima facie evidence of the relevant facts." The measures complained of "appear to be capable of affecting some of the rights invoked by Iran under certain provisions of the 1955 Treaty" (para 67). But, the ICJ noted, it should also consider the invocation by the US of Article XX 1(b) (d) of the treaty. It did note that at this stage there was no need to fully assess the respective rights of the parties. But it did consider that the application of this treaty provision "might affect at least some of the rights invoked by Iran under the treaty of Amity" (para 68) and in light of the US argument it did not order the provisional measures requested by Iran. Other rights claimed by Iran, however, were not affected by Article XX, see para 69 of the Order: "In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, para 1, subparagraphs (b) or (d)." In effect, the decision to order provisional measures with regard to certain measures, but not to others, seems reasonable. In other words, the sanctions regarding nuclear materials and by-products could be necessary to protect essential security interests of the US and therefore postponing these sanctions is not part of the provisional measures order. But this relates to the substance of the provisional measures. And the Court's ordering of provisional measures in the context of access to food, humanitarian needs and safety seems entirely in line with the its provisional measures in the general interest. What remains problematic is the reasoning of the Court.

[52] Miles 2018.

[53] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*the Gambia v. Myanmar*), Order of 23 January 2020.

above (see paras 53–55) are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection—namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention—are plausible."[54]

While under the Convention against Genocide genocidal intent is a necessary element for finding the state responsible (Article II), here the Court, appropriately, did not stick to the position that Gambia had to bring elaborate evidence of this already at the stage of provisional measures.[55] The question whether the genocidal intent is sufficiently established will now be dealt with in the eventual judgment, many years down the line, when discussing Myanmar's responsibility for genocide. As judge ad hoc Kress noted in his Declaration, the Court rejected a stringent standard of plausibility "with respect to the mental elements of crime".[56] He agreed and added that "rather than saying, as Myanmar has done, that a strict standard to be applied at the merits stage in case of exceptionally grave allegations, must apply 'a fortiori' 'at the provisional measures phase' (*ibid.*), one might wonder whether the distinct—that is, the protective—function of provisional measures does not point in the opposite direction, precisely because fundamental values are at stake."[57]

The notion plausibility may mean very different things. Plausibility could mean probability, or likelihood of having an existence in law. It is not so uncommon to expect that the claim that the right could be violated is not manifestly ill-founded, but there are two reasons why the *Ukraine v. Russia* approach by the ICJ was problematic.

The first is that its relatively new plausibility approach at times crosses the boundaries from 'relation to the merits' to anticipation of these merits. This undermines the legitimacy of the Court's decision.

The second is that the practice appears to be fenced in so much that it is no longer possible to order provisional measures independently aiming at non-aggravation. This means that the ICJ has, for the time being, disabled the tool it had introduced to consider risk to human life, or other general interest risks, such as to the environment, or to cultural heritage, in conflicts about borders and property.

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[54] *Ibid.*, para 56. In paras 53–55 it referred to the 2019 report of the Independent International Fact-Finding Mission on Myanmar.

[55] See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*the Gambia v. Myanmar*), Order of 23 January 2020, Separate Opinion of Vice-president Xue, who voted along but put on the record "serious reservations" regarding the plausibility in terms of the subject matter.

[56] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*the Gambia v. Myanmar*), Order of 23 January 2020, Declaration of Judge ad hoc Kress, paras 3 and 4.

[57] *Ibid.*, para 4.

4.5 International Non-judicial Tools to Deal Autonomously with Urgent Human Rights Situations

The availability of tools to call for protection in urgent human rights cases is crucial to civil society, especially to human rights defenders. There are several tools to deal with urgent situations that could be referred to as autonomous in the sense that they are unrelated to existing contentious proceedings.

Sometimes these are tools available to international adjudicators who also have non-adjudicatory roles and are in fact not courts but quasi-judicial bodies when they do deal with individual complaints. Most human rights protection systems have a range of methods available. The Inter-American and African Commissions, for instance, do not just deal with individual complaints. They visit states outside the context of a contentious case pending before it, prepare country and thematic reports and issue press statements.

Indeed, these Commissions also deal with complaints against states and, when performing their role of adjudicator in a contentious procedure their function is quasi-judicial. In order to ensure a meaningful outcome of the case before them they then use provisional, interim or precautionary measures.

Yet as part of their overall task of monitoring respect for the treaty, it is only one of their roles to deal with individual complaints, and urgent situations in the context of such complaints. Apart from the (quasi-)judicial methods they may also use 'softer', more informal forms of interaction with states, which exist autonomously from the individual complaint procedure. The UN Committees have established mechanisms for dealing with reprisals against persons who cooperated with them, as part of the state reporting, or in the context of individual complaints. While the latter also aim to protect the integrity of the individual complaint procedure, the Committees refer to them together in the context of activities against reprisals.[58]

The awareness by the member states to the UN Human Rights Council of the need for autonomous mechanisms for urgent intervention to protect persons against irreparable harm can be seen in the mandates they have given to many of the special

[58] See e.g. CAT guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee under Articles 13, 19, 20 and 22 of the Convention, UN Doc. CAT/C/55/22, see https://www.ohchr.org/EN/HRBodies/CAT/Pages/ReprisalLetters.aspx; Committee on the Elimination of Racial Discrimination (CERD), Guidelines to address allegations of reprisals and acts of intimidation against individuals and organizations cooperating with the Committee, 9 January 2020. All treaty bodies have now appointed rapporteurs, or so-called focal points to deal with these situations, see https://www.ohchr.org/EN/HRBodies/Pages/Reprisal.aspx. This general page also includes e-mail addresses per treaty body, to be contacted in case of intimidation and reprisals. For the common policy agreed upon by the Committees, see: Twenty-seventh meeting of Chairpersons of the human rights treaty bodies, Guidelines against Intimidation or Reprisals ("San José Guidelines"), 30 July 2015, UN Doc. HRI/MC/2015/6. Beyond the treaty bodies, the UN thematic rapporteurs also deal with situations of reprisal. Moreover, the UN Secretary General has assigned the Assistant Secretary-General for human rights with the task to monitor situations of reprisal against those who cooperate with the UN: https://www.ohchr.org/EN/Issues/Reprisals/Pages/ReprisalsIndex.aspx.

thematic mechanisms, established under the UN Charter, such as the Special Rapporteur against Torture and the Special Rapporteur against Summary and Arbitrary Executions.

The two regional Commissions also have appointed, among their members, special rapporteurs dealing with specific themes. What they do as Rapporteurs comes close to the activities of the UN Special Rapporteurs mandated by the UN Human Rights Council. Many of those Rapporteurs are also tasked to intervene in urgent situations. In response to well-founded information provided by lawyers and civil society organizations, the Rapporteurs may send urgent appeals. Sometimes Rapporteurs issue joint urgent appeals, which provides an even stronger message to the government, often supported by a press release. This is clearly an autonomous tool that can be applied *vis-à-vis* all states, independent of their ratification of human rights treaties.

It is posited that the Inter-American Commission's development of its own very elaborate and autonomous tool of precautionary measures can partly be seen in light of this Commission's broad role in monitoring compliance with the Inter-American human rights norms.

The awareness by UN member states of the need for autonomous independent mechanisms to deal with urgent situations, can also be seen in the text of a relatively recent treaty against enforced disappearances. The Convention against Enforced Disappearances (CED) introduces a new treaty-based urgency procedure in Article 30. The supervisory body to this treaty may apply this procedure *vis-à-vis* all states parties to that convention, also if they have not recognized the right of individual petition. In that sense, it now has a free-standing urgency tool at its disposal. This is explicitly separate from the interim measures that it can call for while a complaint is pending before it. *Those* are only granted *vis-à-vis* states that have recognized the right of individual petition under this treaty (Article 31(4) CED). Such a special tool for dealing with recent disappearances, explicitly included in the treaty itself (Article 30), but unrelated to any complaint brought before the Committee under the individual complaint procedure, clearly is an autonomous tool.

4.6 Conclusion

Provisional measures are not a judicial tool to prevent any harm indefinitely and independent of a main case. They are measures provisionally taken by an international court or a quasi-judicial body if circumstances so require. Given the protective function of these tribunals, the risk of irreparable harm to persons is a clear circumstance that requires urgent action. At the same time, if provisional measures are used as a tool in international adjudication, they should be ordered in the context of contentious proceedings.

This requires a use of the tool that has a sufficient level of flexibility, but also makes clear what is the role of the measures in the proceedings. This means that the tool may show some level of autonomy in the sense that it may also be used to protect the integrity of the proceedings and prevent aggravation of the conflict brought before

the tribunal. Moreover, in very serious circumstances of enduring risk, where individuals or communities involved in the case are facing irreparable harm, provisional measures have been known to last for very extensive periods stretching the notion of provisional. This, too, could be indicative of a more autonomous nature of provisional measures, at least in the Inter-American system. When the aim of preventing irreparable harm to persons pending the proceedings cannot be met otherwise, I consider this stretch justifiable, as long as the provisional measures form part of the proceedings.

Indeed, there are separate criteria for deciding on, maintaining, and attaching consequences to, provisional measures. The basis for jurisdiction on provisional measures also differs from that of jurisdiction on the merits. Yet the basis for ordering provisional measures, ordered in the exercise of the judicial function, cannot be divorced from any consideration regarding the case pending on the merits. In that sense they do not, and should not, have an autonomous nature.

In order to be persuasive as a judicial tool, there must be a relation with the ongoing case. If there is a need to take urgent measures without opening a case on the merits, a separate tool should be created that does not depend on the right of individual petition. There are such tools, as discussed in Sect. 4.5, and they clearly serve a need.

If they maintain their normative legitimacy, provisional measures are more likely to help prevent irreparable harm. Adjudicators need to apply relevant criteria for when their use is appropriate, and they need to apply these in a clear and consistent manner. This also means that there should be a link to the merits and to the existing case law. If that is the case, normative legitimacy may persuade third states and international authorities to follow up on compliance. This need for good follow-up is exactly why it is so important to maintain persuasive provisional measures.

In inter-state cases, just like it is crucial not to forget about the human beings who may get stuck in the conflicts between their states, as discussed already by Judge Higgins,[59] it is also crucial to keep faithful to maintaining a relation with the merits or, at minimum, with the international administration of justice. In practice, this means avoiding anticipation of the merits. But it also means avoiding aggravation of the dispute and ensuring proper proceedings, where equality of arms is maintained, not just formal equality of arms, but material.

Even when they aim at non-aggravation of the dispute, provisional measures should somehow relate to the legal *dispute*. So even in that context they are not a free-standing tool.

What provisional measures do have is a special status, warranting a separate regime for follow-up, to be expressed in *proprio motu* follow up provisional measures, as well as separately in the judgment.[60]

In order to persuade third parties to follow-up on non-compliance by certain states, the appropriate use of the tool is very important, whether it is in systems that do not have an explicit mandate in the text of the treaty, or in systems that do, but

[59] Higgins 1997.

[60] See more closely Rieter 2019.

where there is a fear of how states will respond. Of course, if courts and tribunals let themselves be ruled by their fear of how states would respond, they would no longer perform their judicial function. Sometimes they must be bold and not being so would undermine their credibility and standing more than the fact that states withdraw their acceptance of the court's jurisdiction. At the same time, some measure of prudence is wise as well. After all, it is the judicial function they are expounding.

The main reason for not insisting on provisional measures being a free-standing tool, or forming an entirely autonomous legal regime, is that the tool is too important for risking a diminution of its persuasiveness. It is imperative to maintain a link with the claim on the merits and, at the same time, not to anticipate an eventual judgment on the merits. There must indeed be a possibility of the claimed rights being substantiated as having an existence in law,[61] just not with a steep plausibility requirement that unacceptably prejudges the merits judgment and thereby does a disservice to the international administration of justice.

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[61] As Goldie 1974, p. 502, already pointed out in 1974, using provisional measures would be a "pointless exercise in empty authority" if there were "no possibility of the claimed rights being substantiated as having an existence in law".

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Chapter 5
The Humanisation of Provisional Measures?—Plausibility and the Interim Protection of Rights Before the ICJ

Tom Sparks and Mark Somos

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Abstract In order for an international Court to grant interim protection (provisional measures), it should first satisfy itself that the party seeking protection has at least a plausible claim to the rights in question. So says, at least, the doctrine of plausibility, a relatively modern development in the criteria for the granting of provisional measures, but nonetheless one that now appears to be well-entrenched. But what standard does plausibility denote? This chapter will trace the introduction and development of plausibility as a key criterion in provisional measures cases, and will discuss its various interpretations. Although plausibility was first introduced as a low standard intended only to exclude weak or speculative requests for interim protection, it evolved to require a meaningful—albeit provisional—analysis of the applicant party's claim. Recent developments, however, have seen a retreat from the higher standard, and in some recent cases the plausibility assessment could better be characterised as a possibility assessment. This chapter will consider the rationale of plausibility, and its changing use over time. In particular, it will ask whether plausibility is bifurcating, creating a situation in which one—strict—version of the plausibility assessment is applied where most categories of states' rights are concerned (plausibility as a reasonable prospect of success and substantive link to the merits), and another—refocussed—standard is applied to situations where individual and group rights are at risk (plausibility as human vulnerability). The chapter will focus

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on the case-law of the ICJ, where plausibility has been extensively discussed in orders and separate/dissenting opinions, and where some of the most exciting recent developments have taken place.

Keywords plausibility requirement · humanisation of provisional measures · recent ICJ practice · possibility assessment

5.1 Introduction

In the slow-moving world of international adjudication, provisional measures[1] are a bellwether. In this unique arena, the timescale of international judgment accelerates from years to weeks, or even days. Judges are recalled; other business is put aside; statements of claim, memorials, and counter-claims are hastily assembled. This is international law in the fast lane, and though that carries with it a risk of misdirection and false starts, developments in the provisional jurisdiction can shine a light on trends in international law writ-large in a way no other (judicial) mechanism can.

Nowhere are these trends and movements more important than before the International Court of Justice (ICJ). As the principal judicial organ of the United Nations (UN) and foremost of the courts of general jurisdiction, the ICJ has from its inception occupied a privileged position within the international legal system,[2] and now unquestionably sits at its pinnacle. Its pronouncements matter. Its understanding of the nature of international law is influential not only as a result of its own high authority, but also because it is consciously or unconsciously modelled by many other judicial and quasi-judicial bodies within the constellation of international dispute settlement.[3] For these reasons, the ICJ's provisional measures orders offer a fascinating insight into the development of international law both as prophesy and as precedent.

This chapter will contend that the most recent interim protection orders issued by the ICJ offer insights into a new shift in the framework of international law. We will argue that a changing conception of *plausibility* as a criterion for the indication of provisional measures evinces a development from state-centrism to a focus on the needs and interests of human individuals and communities as the ultimate rationale of international law. This shift towards a human-centred international law—towards international law's *humanisation*—has been a theme of international legal scholarship since at least the last years of the twentieth century. In his 1999 Hague lecture, Christian Tomuschat argued that the international legal system could no longer be

[1] In this chapter, the terms *provisional measures* and *interim measures of protection* are used interchangeably.

[2] Hernández 2014, pp. 4–5, 40.

[3] Oellers-Frahm and Zimmermann 2019, p. 1197 (references omitted), note that the ICJ's approach to provisional measures "ha[s] been successfully transposed to almost all other international courts, tribunals and dispute settlement organs, so that interim protection may now be considered as an example of the uniformity of international law which otherwise is often criticized—rightly or wrongly—as suffering from fragmentation". See also Miles 2017, pp. 12–17.

claimed to be "based exclusively on state sovereignty."[4] Rather, certain basic values of the system had attained a protected status "derived from the notion that states are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights."[5] These themes were foreshadowed in 1994 in Bruno Simma's lectures for the Hague Academy, in which he argued that the shift from bilateralism to community interests—including the interests of human beings—is producing significant changes in international law.[6] The years that followed saw further Hague Courses dedicated to the notion of human-centred international law, with Theodor Meron (in 2003) arguing that the international acceptance of human rights is producing a shift from state- to individual-centralism,[7] and—particularly significantly in the context of this discussion—a 2005 Hague Course by Antônio Augusto Cançado Trindade, then President of the Inter-American Court of Human Rights, and now (as of 2009) sitting as a Judge of the International Court of Justice.[8]

The humanisation of international law, it is argued by its proponents, is driven by changes in the ways in which the legal system at large reacts to the individual. For Tomuschat these changes are attributable to "a crawling process […] through which human rights have steadily increased their weight, gaining momentum in comparison with state sovereignty".[9] Ruti Teitel casts a slightly wider net, arguing that in the post-Cold War period a triptych of factors—humanitarian, human rights, and international criminal law—has resulted in a deep structural change.[10] Important contributions to this discussion have been made, too, by Antonio Cassese,[11] Kate Parlett,[12] and Astrid Kjeldgaard-Pedersen,[13] among others.

The idea of the humanisation of international law has found perhaps its widest reaching and, in the present authors' opinion, a highly convincing expression in the work of Anne Peters. Peters' scholarship on this subject is in two main parts. The first part considers the impact of the idea of humanity on sovereignty, with the notion of 'humanity' drawn more broadly than Tomuschat's or Meron's focus on human rights, but retaining human rights as a vital orientating concept.[14] The second part of Peters' approach looks beyond both sovereignty and human rights in order to cast light on the many other areas of international law which show an increasing regard for

[4] Tomuschat 1999, p. 161.

[5] *Ibid*., p. 162.

[6] Simma 1994.

[7] Meron 2003.

[8] Cançado Trindade 2005a, b.

[9] Tomuschat 1999, p. 162; Meron also attributes the ongoing humanisation of international law primarily to the influence of human rights: Meron 2003, p. 22 et seq.

[10] Teitel 2011, p. 4 (footnotes omitted).

[11] See, *inter alia*, Cassese 2008.

[12] Parlett 2011.

[13] Kjeldgaard-Pedersen 2018.

[14] Peters 2009.

individuals.[15] Peters describes an international legal system in which the individual is acknowledged as the 'original' or 'true' international legal subject,[16] and conducts an extensive examination of international law practice and doctrine in order to support the contention that the role individuals play in international law is dramatically expanding. Her argument finds support in the ability of individuals to bear primary (substantive) obligations,[17] their ability to bear secondary (procedural) obligations,[18] and that international norms generate correlative rights for individuals;[19] as well as from a number of substantive areas of law: humanitarian law, investment law, consular law, diplomatic protection, in the legal status of victims of crime, and in the protection of the individual from disasters. We argue that the emerging trend we identify suggests that it is increasingly plausible to include inter-state adjudication in Peters' list.

We will proceed as follows. Section 5.2 will introduce plausibility as a criterion in the ICJ's provisional jurisdiction, and will discuss its inclusion and evolution in ICJ practice, before Sect. 5.3 examines the standard the assessment of plausibility implies. Section 5.4 will then discuss the most recent interim protection orders issued by the Court,[20] in the cases concerning the *Application of CERD (Qatar v. UAE)*,[21] *Violations of the Treaty of Amity (Iran v. USA)*,[22] and *Application of the Genocide Convention (Gambia v. Myanmar)*,[23] and will note the radically lowered standard of review the Court appears to employ. Finally, Sect. 5.5 will offer an alternative view, and will argue that the treatment of those cases is better understood as a reorientation of the provisional measures jurisdiction to focus on human need and vulnerability. We will conclude that such a reorientation would be an important and welcome development, and would advance the wider humanisation of international law.

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[15] Peters 2016.

[16] Peters 2016, pp. 23–25, 408–435.

[17] *Ibid*., p. 60 et seq.

[18] *Ibid*., p. 115 et seq.

[19] *Ibid*., p. 167 et seq.

[20] At time of writing: August 2020.

[21] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018 (hereinafter: *Qatar v. UAE I*); and ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019 (hereinafter: *Qatar v. UAE II*).

[22] ICJ, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018 (hereinafter: *Treaty of Amity*).

[23] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020 (hereinafter: *Gambia v. Myanmar*).

5.2 Plausibility in Provisional Measures

Like its predecessor, the Permanent Court of International Justice (PCIJ), the ICJ is granted under its Statute the power to order "provisional measures […] to preserve the respective rights of either party", where "it considers that circumstances so require".[24] With the exception of a change from the objective to "reserve the respective rights of either party" (under the PCIJ Statute) to that of "preserv[ing]" them (under the ICJ's),[25] the clauses are all but identical, and the practice of granting interim measures of protection has generally been treated, both by scholarship and in the ICJ's jurisprudence, as being continuous with that of its predecessor. Both Courts, though expressly granted the power to do so, were given no more explicit guidance on the exercise of their provisional jurisdictions than that they should issue such orders "if [they] consider[] that circumstances so require", and the modalities have been left to the discretion of those bodies, both through their rules of practice and through the case-law built by the orders themselves.[26] In the course of those orders, the Courts have articulated a doctrine of provisional measures that, though not immovable, is at least reasonably well-settled.

In its contemporary practice, the ICJ will follow a set procedure in determining whether a particular case merits the indication of provisional measures. First it will examine whether it has sufficient jurisdiction to entertain the request. Although its authoritative determination of its jurisdiction will, in cases where this is in dispute, normally not be made until after the provisional measures stage,[27] it is the settled practice of the Court that it will indicate provisional measures only if it is satisfied that "the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded".[28] Having established that it has *prima facie* jurisdiction—that is to say, not that its jurisdiction has been established "in a definitive manner", but that it has been shown that the authorities cited "could" found its jurisdiction—it proceeds to consider the rights for which protection is claimed. Here its test is in four parts: it must be satisfied that the rights claimed by the applicant state are linked sufficiently closely to those it claims in the merits case; that they are at

[24] Statute of the International Court of Justice [ICJ Statute], Article 41.

[25] Statute of the Permanent Court of International Justice [PCIJ Statute], Article 41; ICJ Statute, Article 41.

[26] Shaw 2016, p. 1428. Its most notable decision, perhaps, was that these orders are binding: see ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, para 109; and discussion in Oellers-Frahm 2006, pp. 953–959; Oellers-Frahm and Zimmermann 2019, pp. 1182–1192.

[27] Though note that provisional measures can be requested (and granted) at any stage in the proceedings, and so may post-date the Court's determination of its jurisdiction. See, e.g. Cambodia's request for provisional measures in ICJ, *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. Here the Court's initial determination of its jurisdiction over the dispute was made some fifty years previously, in ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961.

[28] See, for example, *Treaty of Amity*, *supra* note 22, para 24.

risk of "irreparable" prejudice;[29] and that this risk is an "urgent" one.[30] First however, and of greatest importance for the present discussion, it must satisfy itself that the rights claimed are *plausible*.

The plausibility standard, though clearly central to the Court's process, has sometimes seemed to defy formalisation. Although the Court has often asserted that it is not required 'definitively' to determine whether the applicant state's claim of right is well founded, it is necessary to substantiate them to at least some extent, and to show that there exists "a link […] between the rights whose protection is sought and the provisional measures being requested".[31] This section will briefly review the history and development of the plausibility requirement, to shed light on this shifting standard.

5.2.1 Emergence of Plausibility: The Great Belt

It has become conventional to date the requirement of plausibility from the ICJ's order in *Obligation to Prosecute or Extradite* in 2009, where the Court first articulated the test in those terms.[32] Though scholars acknowledge the roots of the test in the Court's practice (and in influential separate opinions) prior to this date, it is common to conclude as Miles does that in 2009 the plausibility requirement "first appeared in the ICJ's jurisprudence".[33] We prefer the view that though the Court first applied the label of 'plausibility' in 2009, it had with growing regularity conducted an assessment with a comparable object in prior years, dating back at least to the *Great Belt* case of 1991.[34] What is not in dispute, is that this move towards an assessment of the rights claimed was a change in the practice of the Court. Up to a certain point—we suggest 1991—the Court sought to remain so emphatically neutral on the merits of the case that any form of plausibility assessment was excluded. Certainly such a position is at least implied by the joint declaration of Vice President Ammoun and Judges Foster and Jiménez de Aréchega in the 1972 *Fisheries Jurisdiction* cases, in which they noted that the Order could not "have the slightest implication as to

[29] Oellers-Frahm and Zimmermann 2019, p. 1145 point out that the term "right" here is ill-chosen, because "the 'right' remains in existence even if it is infringed. Thus what is to be preserved is the subject-matter of the right".

[30] See, for example, *Treaty of Amity*, *supra* note 22, para 78.

[31] *Ibid*., para 54.

[32] ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para 57: "[T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible". See further Miles 2017, p. 197 et seq; Lando 2018, p. 642.

[33] Miles 2018a; see also Miles 2017, p. 197 et seq.; Lando 2018, p. 642; Uchkunova 2013, p. 407; though c.f. Lee-Iwamoto 2012, pp. 247–250. We have had a—brief and good-natured—disagreement with Cameron Miles on this subject on the *Völkerrechtsblog*, and venture to reprise and further substantiate our view here: Somos and Sparks 2018; Miles 2018b.

[34] For a similar view, see Oellers-Frahm and Zimmermann 2019, pp. 1156, 1159.

the validity or otherwise of the rights protected by [it]".[35] In his declaration in the *Nuclear Tests* cases, Judge Jiménez de Aréchega re-iterated that opinion, arguing that all that needed to be shown at the preliminary stage is that the two parties "are in conflict as to their respective rights".[36] Moreover, that position was regarded by commentators as appropriate. For example, prior to the formalisation of plausibility in 2009, Rosenne commented that:

> It is arguable that this [the assessment of urgency and irreparability] also can imply some assessment by the Court of the nature of the decision on the merits and the chances of each party on the merits. But speculation of that nature is hardly compatible with the international judicial function.[37]

Nevertheless, as early as 1979 the Court can be seen to—albeit briefly, and in no great detail—substantiate the rights claimed by the United States of America against Iran in the *Diplomatic and Consular Staff* case.[38] There the Court referred to the "fundamental" nature of the rule on "the inviolability of diplomatic envoys and embassies", and noted that the "obligations thus assumed […] are essential, unqualified, and inherent".[39] In the years (and cases) that followed, that point was not taken up to any great extent,[40] until the 1991 order on provisional measures in *Passage through the Great Belt*, in which Denmark submitted that Finland must show at least a *prima facie* case on the merits before its request for interim protection could be granted:

> Denmark contends that for provisional measures to be granted it is essential that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success

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[35] ICJ, *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Interim Protection, Order of 17 August 1972, p. 18. An identical joint declaration was appended to the linked case *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Order of 17 August 1972, p. 36.

[36] ICJ, *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, p. 108; *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 June 1971, p. 144.

[37] Rosenne 2005, p. 72.

[38] ICJ, *United States Diplomatic and Consular Staff in Tehran (United State of America v. Iran)*, Provisional Measures, Order of 15 December 1979, paras 38–44.

[39] *Ibid*., para 38.

[40] The specific circumstances of the cases concerned suggest that the absence of a comparable assessment of rights does not speak against the requirement already taking shape. Three provisional proceedings took place during that period. In ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Order of 10 May 1984, para 32, Nicaragua relied primarily on rights under the UN Charter—and in particular its Article 2(4)—and it could be argued therefore that the rights were self-evidently plausible. In ICJ, *Frontier Dispute (Burkina Faso/Mali)*, Order of 10 January 1986, paras 15–21, both Parties sought to rely on the same international rights (of sovereignty and to territory), which consequently were agreed between the Parties and not in need of substantiation. Finally, in ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Order of 2 March 1990, para 26, the Court rejected the application on the grounds that the rights for which interim protection was sought were not at issue in the main case. A fourth request, filed by Nicaragua in ICJ, *Border and Transborder Armed Activities (Nicaragua v. Honduras)*, Order of 31 March 1988, was withdrawn prior to a decision.

> in the main case exists, and that not even a prima facie case exists in favour of the Finnish contention[.][41]

The Court appeared at least partially to accept that submission, replying that "the existence of a right of Finland through the Great Belt is not challenged, the dispute between the Parties being over the nature and extent of that right".[42] That point was examined in much greater detail in the separate opinion of Judge Shahabuddeen—the first of a number of extraordinary separate opinions which have shaped the Court's practice in relation to the plausibility requirement.[43] Shahabuddeen rephrased the question thus:

> [I]s it open to the Court by provisional measures to restrain a state from doing what it claims it has a legal right to do without having heard it in defence of that right, or without having required the requesting state to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought?[44]

This was, he remarked, a question to which the Court had not given a definitive answer in any previous case. Though he noted the need to avoid (even an appearance of) prejudgment of the merits,[45] he also denied that the Court could be "bound by a mere assertion of rights".[46] He concluded by stating his position, that:

> It is not suggested that the requesting state should anticipate and meet each and every issue which could arise at the merits. How far it should do so in any particular case will depend on the nature and circumstances of the case. What is important is that enough material should be presented to demonstrate the possibility of existence of the right sought to be protected.[47]

He then proceeded to demonstrate that, in his view, the Court's prior practice indicated that an assessment along these lines, even if not conceived in these terms, was already an occasional and perhaps usual part of its procedure on provisional measures.[48]

In the years that followed there are few, if any, counterexamples to the Court's taking up Denmark's and Shahabuddeen's point. Although the need to do so was not articulated as a formal part of its provisional measures test and the standard of proof the applicant was required to meet was not discussed, in virtually every case in

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[41] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, para 21.

[42] *Ibid*., para 22. The Court ultimately dismissed the claim without conducting an assessment of the extent of the right, holding that Finland had not shown that any right it claimed was at "urgent" risk of prejudice: para 27.

[43] *Great Belt*, *supra* note 41, Separate Opinion of Judge Shahabuddeen. Similarly influential separate opinions include that of Judge Abraham in *Pulp Mills* (see *infra* note 53 *et seq*), Judge Owada in *Ukraine v. Russia* (see *infra* note 96), and possibly also Judge Cançado Trindade in *Ukraine v. Russia* (see *infra* Sect. 5.5). Miles compiles a more extensive list: Miles 2018a, p. 37.

[44] *Great Belt*, *supra* note 41, Separate Opinion of Judge Shahabuddeen, p. 28.

[45] *Ibid*., p. 29.

[46] *Ibid*., p. 30.

[47] *Ibid*., p. 31.

[48] *Ibid*., pp. 31–35.

which the Court found that it had *prima facie* jurisdiction, it substantiated (or denied) the existence and applicability of the rights claimed at some level.[49] This practice set the stage for the next interpretive move—a development in three parts—in the articulation of plausibility.

5.2.2 *Plausibility after* LaGrand

The stage was set by the 2001 Judgment on the merits phase of the *LaGrand* case. Here the Court was at long last faced with the question of whether its provisional measures orders are binding on the states to which they are addressed—a question

[49]The cases concerned were: ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996; ICJ, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998; ICJ, *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999; ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures, Order of 8 December 2000; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006 (hereinafter: *Pulp Mills I*); ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007 (hereinafter: *Pulp Mills II*); ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals (Mexico v. United States of America), *(Mexico v. United States of America)*, Provisional Measures, Order of 16 July 2008; ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008. In the same period requests for provisional measures in the *Use of Force* cases *(Yugoslavia v. Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, the UK and the USA)* were all dismissed for lack of *prima facie* jurisdiction. See (1996) ICJ Reports, pp. 124–926, and further Oellers-Frahm and Zimmermann 2019, p. 1156, who argue that these cases are better understood as a denial of a *prima facie* case.

The exceptions are the *LaGrand* case, in which the fact that the case was submitted and decided within twenty-four hours could account for (though not, perhaps, justify) much more significant procedural irregularities; *Arrest Warrant*, in which a change of circumstances post the filing of the request for provisional measures meant that the risk of harm was no longer either urgent or irreparable (see para 72), and the case was thus decided on these headings; and *Avena*, in which the rights concerned had already been established by the Court in its previous judgment between the Parties. The only significant counterexamples to the contention that a plausibility requirement in some form was imposed by the Court during this period were *Pulp Mills I* and *II*, in both of which

which had already been the subject of some academic debate[50]—and it concluded that they are. The 1999 Order it had delivered in that case, it said, "was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States."[51] Naturally, that confirmation (or innovation, as it was seen by some) changed the complexion of the provisional jurisdiction.[52] Although it would surely never have been acceptable for the Court's orders to be made in a slip-shod way, that they were confirmed to be binding re-focussed attention on the Court's procedure, and the propriety or impropriety of holdings under this heading. One particularly important reflection on the subject was given by Judge Abraham in his separate opinion on the 2006 first provisional measures order in *Pulp Mills*.[53] Although Judge Abraham acknowledged that the circumstances of the case were such that the Court had not been required to address plausibility, he regretted that it had not taken the opportunity to do so, and so took that opportunity himself.[54] He first referred with high approval to the separate opinion of Judge Shahabuddeen in *Passage Through the Great Belt*,[55] before confirming Shahabuddeen's conclusions through a different line of reasoning. He observed that in any provisional measures application the Court is faced always with two rights (or sets of rights). The first are those which are claimed by the applicant as being in need of protection; the second is, even if no more, "the fundamental right of each and every sovereign entity to act as it chooses provided that its actions are not in breach of international law."[56] Although it is of course, he noted, fully within the ambit of the Court to curtail those rights if necessary—that is unavoidably implied by the Court's power to grant binding provisional measures—but when it does so

> [T]he obligation thus imposed must rest on sufficiently solid legal ground, especially when the party in question is a sovereign state. In other words, I find it unthinkable that the Court should require particular action by a state unless there is reason to believe that the prescribed conduct corresponds to a legal obligation (and one predating the Court's decision) of that state, or that it should order a state to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.[57]

Though it is necessary at the same time to avoid pre-judging the merits of the dispute, the Court cannot make such a demand of a state unless it has first "carried out some

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the Court assessed (and rejected) the claim to urgency and irreparability without first substantiating the rights claimed.

[50] Sztucki 1983, pp. 260–302; Thirlway 1994a, pp. 28–33; Bernhardt 1994, see in particular the remarks by Oellers-Frahm 1994, pp. 146–147 and Thirlway 1994b, pp. 150–151; Oellers-Frahm and Zimmermann 2019, pp. 953–959. Sources post–*LaGrand* acknowledge that the question was settled in that case: see, e.g., Rosenne 2005, pp. 34–40; Thirlway 2013, pp. 1649–1651.

[51] *LaGrand*, *supra* note 26, para 110.

[52] Thirlway 2013, p. 1649.

[53] *Pulp Mills I*, *supra* note 49, Separate Opinion of Judge Abraham.

[54] *Ibid*., paras 1–2.

[55] *Ibid*., para 3; *Great Belt*, *supra* note 44, Separate Opinion of Judge Shahabuddeen.

[56] *Pulp Mills I*, *supra* note 49, Separate Opinion of Judge Abraham, para 6.

[57] *Ibid*., para 6.

minimum review to determine whether the rights thus claimed actually exist".[58] Judge Abraham then meditated briefly on the standard to be obtained, characterising it variously by reference to the principle *fumus boni juris*, as *prima facie* validity, "that the claimed right is not patently non-existent", and "that there is a plausible case for the existence of the right".[59]

In its 2009 provisional measures order in *Obligation to Prosecute or Extradite*, the Court took up Abraham's formulation, and explicitly recognised that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible".[60] From whichever case one chooses to date the requirement,[61] it is common ground that plausibility of rights has been a constant and explicit criterion of the Court's provisional measures test following *Obligation to Prosecute or Extradite*. The test has continued to provoke some uncertainty, however, although in the years since 2009 this has concerned not the test's existence, but the standard it implies.

5.3 Plausibility in Practice: An Uncertain Standard

Judge Koroma has complained that "[i]n my view, the most problematic aspect of the plausibility standard is its vagueness".[62] Plausibility has, since it was acknowledged in 2009 to be a part of the criteria for the granting of provisional measures, always seemed to be suffering from something of an identity crisis; unsure of its role in the process or how it is supposed to behave.[63] Its formative outings were, it has to

[58] *Ibid*., para 8.

[59] *Ibid*., paras 10–11. Though Judge Bennouna's Separate Opinion in the same case was a more concrete and less detailed discussion, he reached highly consonant conclusions. See, in particular, paras 11–13.

[60] *Obligation to Prosecute or Extradite*, *supra* note 32, para 57. In ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge Owada, para 11, Judge Owada noted his "understanding that this formal introduction did nothing more than making explicit what had long been implicit in the jurisprudence of the Court".

[61] The availability of interpretive space between our contention and that of Miles and Lando is captured in the beautiful irony that Judge Koroma's separate opinion in *Certain Activities* could serve equally well as a buttress to either of our points of view. Though he complains of the plausibility standard as having 'appeared out of nowhere' in *Obligation to Prosecute or Extradite*, his principle objection is that it risks *lowering* the standard of review conducted by the Court in provisional measures cases: ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, Separate Opinion of Judge Koroma, paras 6–7.

[62] *Ibid*., para 7.

[63] Recent treatments by scholars have not only recommended the formalisation of a standard, but have suggested its formalisation at quite different levels. Miles argues that the standard should be equivalent to that of *prima facie* jurisdiction, while Lando says it is 'conceivably higher'; Lee-Iwamoto suggests that of *fumus no mali juris*, and Uchkunova that the interpretation suggested

be said, not auspicious: there is a world of difference between *prima facie* validity and "not patently non-existent", two of the standards mooted by Judge Abraham in his (otherwise excellent) separate opinion in *Pulp Mills*. Nor did the full Court seem to have a more definite conception of the place plausibility was supposed to occupy. Even in *Obligation to Prosecute or Extradite*, the idea of 'plausibility' of rights is immediately paired with another word which appears to denote a much lower standard, that of their 'possibility'. The Court noted that as "the rights asserted by Belgium [are] grounded in a *possible interpretation* of the Convention Against Torture, [they] therefore appear to be *plausible*".[64] Lando argues that since this time the standard implied by plausibility has risen,[65] and we, with the caveat that the standard has never been fully clear and nor has it achieved a position of stability, agree that in the period leading up to the publication of Lando's study (the most recent Order addressed by Lando is *Jadhav* in May of 2017) a standard significantly beyond mere possibility was articulated. This section will consider that standard, before Sect. 5.4 considers the Orders that post-date Lando's assessment.

In its 2011 Order in *Certain Activities in the Border Area*, the ICJ was required to apply its newly-declared standard of plausibility for the first time. The experience seemed to bring it up short: that considerable attention was paid to the term and to the standard of review that it demands in its internal discussions is attested by the fact that four separate opinions gave detailed consideration to that question.[66] The outcome of these discussions was somewhat inconclusive,[67] and the Court did not take up the task of articulating a standard in the Order itself. The text of that Order similarly gives no indication of the rigour (or lack of it) of the Court's assessment of the respective rights of the Parties, confining itself to a rather bland profession of its having conducted "a careful examination of the evidence and arguments".[68] Nevertheless, in both *Certain Activities* and *Request for Interpretation*, the next provisional measures application to come before the Court, the Court's conclusions on plausibility were based on a (brief, at least insofar as the text of the orders reveals) assessment of the legal authorities at issue. In *Certain Activities* it noted that the rights claimed by both parties were founded in sovereignty, and that although both relied on a factual finding of sovereignty over a territory which was in dispute (and dominion over which would be determined at the merits stage), that sovereignty

not 'appear to be absurd': Miles 2018a, p. 45; Lando 2018, p. 667; Lee-Iwamoto 2012, p. 250; Uchkunova 2013, p. 409.

[64] *Obligation to Prosecute or Extradite*, *supra* note 32, para 60 (emphasis added).

[65] Lando 2018, p. 643 et seq; for different reasons Miles, too, argues that the standard has become more exacting since its inception Miles 2018a, p. 3 et seq.

[66] Separate opinions were issued in that case by Judges Koroma, Sepúlveda-Amor and Greenwood, and Judge ad hoc Dugard.

[67] Of these, only Judge Greenwood recommended a specific standard, arguing that plausibility should be equated to 'reasonable possibility', which he in turn defined as indicating that the "right *might* be adjudged to belong to" the applicant State (see *Certain Activities*, *supra* note 61, Separate Opinion of Judge Greenwood, para 5). One might reasonably contend that these suggested terms expand the definition of plausibility without particularly clarifying it.

[68] *Certain Activities*, *supra* note 61, para 58.

over the territory *would* give rise to the claimed rights *if* substantiated. Here, then, it seemed to accept the *legal* plausibility of the rights, while considering that it was unnecessary to give more detailed consideration to their *factual* basis.[69] Its task was, perhaps, a touch easier in *Request for Interpretation*, as it could ground its reasoning in its own previous Judgment between the Parties.[70] The legal rights claimed by Cambodia were, thus, indisputable, *if* its interpretation of the 1962 Judgment was correct. The Court seemed to accept this alone as a sufficient basis for plausibility, and did not enquire into the credibility of Cambodia's reading of that Judgment.

In these cases alone, varying standards can already be seen. Though *Request for Interpretation* seems closer to the *Obligation to Prosecute or Extradite* equation of plausibility with a "possible interpretation" of a legal text than does the slightly more extensive consideration given to the legal basis of the rights in *Certain Activities*, the three cases seem to be best understood as offering three different standards.

A fourth contender can be derived from the Court's 2013 Order in *Construction of a Road*.[71] Here, whether designedly or not, a much higher standard of substantiation is evinced. The Court begins by observing that Nicaragua's factual claim (not in dispute between the Parties) to dominion over the waters of the San Juan River is established by a bilateral treaty, which had previously been interpreted by the Court itself.[72] It then noted that Nicaragua's right to be free from transboundary harm "is derived from the right of a state to sovereignty and territorial integrity", and that it had previously asserted the existence of such a right to be free from transboundary harm in its Advisory Opinion in *Threat or Use of Nuclear Weapons*.[73] It somewhat blandly concludes from these findings that "a correlative right to be free from transboundary harm is plausible".[74] It conducted a similar enquiry, with the same result, in relation to the obligation to conduct an environmental impact assessment (EIA).[75]

Though apparently simple, the process in *Construction of a Road* offers an important insight into the standard of review. The basic rights were shown to be all but indisputable, but a number of issues addressed at the merits stage indicate the parameters of the Court's process. First, the Court's assessment in the Order assessed both the existence and applicability of the rights at issue. Thus, in relation to the obligation to conduct an EIA, it first established that the territory in question (the waters of the San Juan) pertained to Nicaragua, and secondarily that an obligation to conduct an EIA has been found to exist under customary law. In the merits stage it considered

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[69] *Ibid*., paras 55–58.

[70] ICJ, *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, paras 38–40.

[71] ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 13 December 2013.

[72] *Ibid*., para 19.

[73] *Ibid*., para 19; citing ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para 29.

[74] *Construction of a Road*, *supra* note 71, para 19.

[75] *Ibid*., para 19; citing ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Judgment of 20 April 2010, para 204.

additional, factual circumstances (for example, whether the threshold to trigger the right had been reached); possible exceptions; and whether the studies Costa Rica had conducted satisfied the requirements of the obligation.[76] It also considered alternative sources of that obligation in conventional law.[77] Though the Court satisfied itself that Nicaragua held the right in question and that the relevant norm applied between the Parties then, the Court did not ask Nicaragua to show, as a matter of fact, that the norm applied to this specific case, and did not consider possible Costa Rican defences.

The Court's process in *Construction of a Road* is indicative but not enlightening. Although it shows clearly the outer limits of the Court's assessment (it seems clear on this evidence that questions of fact and possible defences are not matters which need to be established for plausibility) and that the analysis is thus limited to the existence and application of the right claimed, it does not give any indication of the level at which the Court would need to be convinced. The rights concerned were too firmly established for it to be useful in this regard. The Court's orders in *Immunities and Criminal Proceedings* and *Jadhav* are closely analogous in this respect, and follow the same pattern.[78] By contrast, the rights claimed by Timor-Leste in *Certain Documents and Data* were somewhat novel (though derived from well-established norms), and their plausibility was concertedly challenged by Australia.[79] As in *Construction of a Road*, the Court's focus was to establish a credible legal basis for the rights which Timor-Leste claimed, and it relied on a chain of reasoning to do so which was grounded in "the sovereign equality of states, which is one of the fundamental principles of the international legal order". Though it begins (somewhat ambiguously) by noting that the "claimed right *might* be derived" from that principle,[80] it thereafter uses much stronger terms. The "equality of the parties

[76] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Merits, Judgment of 16 December 2015, paras 146–162.

[77] *Ibid*., paras 164–165.

[78] In *Immunities and Criminal Proceedings* Equatorial Guinea claimed that its building at 42 Avenue Foch, Paris was inviolable under the Vienna Convention on Diplomatic Relations, as the premises of a diplomatic mission. The Court found that the right was plausible relying on the indisputable truth of the legal contention that diplomatic premises are inviolable under the Convention, without assessing whether the building was in truth the premises of a mission (a fact disputed by France): ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, paras 73–79. In *Jadhav*, the Court relied on the right of states to have access to nationals accused of crimes abroad under the Vienna Convention on Consular Relations, without considering it necessary to assess at this stage of the procedure Pakistan's contention that the VCCR does not apply to nationals charged with certain categories of offences (espionage and terrorism), or that India's right of access was precluded by an earlier agreement between the Parties: ICJ, *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, paras 40–44.

[79] ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014. See further Miles 2017, pp. 199–201; Miles 2018a, pp. 9–10; Lando 2018, pp. 647–648.

[80] Miles 2017, pp. 200–201 notes that Timor-Leste's pleadings do not adequately substantiate the right, and 'might' could therefore indicate that the Court is seeking a legal basis on its own conjecture, rather than assessing the argument of the Applicant.

must be preserved" in international dispute settlement, it observes, before noting that states involved in a dispute settlement process "would expect" the opposing Party not to interfere with the preparation of its case. It therefore "would follow that in such a situation, a state has a plausible right" to be free of such interference, including with respect to its communications with counsel.[81] Here, although the test is confirmed to be narrow—as with previous cases, the Court did not enquire into proof of facts or any possible defences—nonetheless it implies quite a high threshold. Although the Court did not (and could not, without trespassing on the Merits stage) decide that the right in question governed the situation between the Parties or that Timor-Leste's arguments would be accepted in the Court's final judgment, it did establish to its satisfaction that the right claimed by Timor-Leste existed, and that it *would* lead to the conclusion proposed by the applicant *if* the applicant's argument were to be accepted.[82] In his dissenting opinion (though he agreed with the Court on the question of plausibility), Judge Greenwood reformulated the conclusion as a finding "that there is a realistic prospect that when the Court rules upon the merits of the case [the rights] will be adjudged to exist and be applicable".[83]

As Miles notes, however, a different approach appears to have been adopted in the Court's Order of 19 April 2017 in *Ukraine v. Russia*.[84] Here, for the first time, the Court declared a right claimed by a Party to be 'implausible',[85] and appeared to do so primarily on the grounds that the factual conditions for the application of the provision—Article 2(1)(b) of the Convention for the Suppression of the Financing of Terrorism (FTC)—had not been met. That provision applies to the provision of funds *in the knowledge that* they will be used to cause death or serious injury to civilians *with the intention to* intimidate a population or to coerce a body to act in a particular way.[86] In particular, it was this combined element of knowledge and intentionality that was not satisfied by Ukraine in the opinion of the Court, largely because Ukraine did not adduce any specific evidence on this point.[87] In so doing the Court followed closely the argument of Russia that Ukraine was not only required to substantiate the rights in question, but must also show—in the words of Samuel Wordsworth, counsel for Russia—that "the arguments that Ukraine makes are sufficiently serious on the merits".[88] The Court accepted that line of reasoning, refusing Ukraine's argument that the rights it claimed under the FTC were plausible with the statement that "Ukraine has not put before the Court evidence which affords

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[81] *Certain Documents and Data*, *supra* note 79, para 27.

[82] This is, as Oellers-Frahm and Zimmermann note, highly consonant with the German legal idea of *Schlüssigkeit*, which they translate as 'conclusiveness': Oellers-Frahm and Zimmermann 2019, pp. 1157–1158.

[83] *Certain Documents and Data*, *supra* note 79, Dissenting Opinion of Judge Greenwood, para 4.

[84] *Ukraine v. Russia*, *supra* note 60; see further Miles 2018a, pp. 18–32; Lando 2018, pp. 648–650.

[85] Miles 2018a, pp. 43–44.

[86] International Convention for the Suppression of the Financing of Terrorism, signed 9 December 1999, in force 10 April 2002, 2178 UNTS 197, Article 2(1)(b).

[87] Miles 2018a, p. 24.

[88] Verbatim Record of the sitting held on 9 March 2017, CR 2017/04, 12.

a sufficient basis to find it plausible that these elements [knowledge and purpose] are present."[89] The Court conducted a similarly detailed review in relation to Ukraine's submissions on the International Convention for the Elimination of All Forms of Racial Discrimination (CERD),[90] but here reached the opposite conclusion. It found that two specific factual circumstances—the banning of the *Mejlis* and restrictions on educational rights—plausibly fell within the ambit of that convention.[91]

Miles notes that the test the ICJ employed in *Ukraine v. Russia* went beyond that used in its previous practice. He identifies four elements which *could* form part of an assessment of a right, arguing that the Court's test in *Ukraine v. Russia* extended to the first three, where previously only the first two elements had been the subject of consideration:

> [O]f the four elements that a provisional review of the merits might require—the existence of rights in law, their possession by the applicant in the circumstances, their breach by the respondent and the availability of any defences or alternative claims—the plausibility test post-*Ukraine v. Russia* examines the first three, whilst not outright excluding the possibility of the fourth.[92]

In other words, the test in *Ukraine v. Russia* considered the existence, applicability (as between the Parties), and what Miles later terms 'engagement'[93] of the rights concerned (i.e., applicability to the factual circumstances of the case, and possibly extending to the indication a breach). Miles seems to accept that this is "the 'new' plausibility" doctrine, arguing that the approach "was consolidated" in the *Jadhav* case.[94] On *Jadhav*, we respectfully disagree. As argued above,[95] we see *Jadhav* as a continuation of the Court's previous approach, as expressed in *Construction of a Road* and *Immunities and Criminal Proceedings*. It is, however, not necessary for the purpose of this discussion to resolve that point. It suffices to note that whether one characterises the test as existence and application only or as existence, application and engagement of rights, the standard involved is more than *de minimis*. The Court will establish to its own satisfaction that the necessary elements are present, and will not merely accept the applicant's contention on that point. Though this remains somewhat short of requiring it to establish any element conclusively—as Judge Owada's separate opinion in *Ukraine v. Russia* persuasively reminded the Court, it must avoid prejudgment of the merits—it remains a finding of plausibility by the Court, and

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[89] *Ukraine v. Russia*, *supra* note 60, para 75. As Miles 2018a, pp. 38, 44 notes, the Court did not offer Ukraine any indication of in what respects its proofs were deficient, or what standard it should have achieved.

[90] International Convention for the Elimination of All Forms of Racial Discrimination, signed 7 March 1966, in force 4 January 1969, 660 UNTS 195.

[91] *Ukraine v. Russia*, *supra* note 60, paras 78–83.

[92] Miles 2018a, p. 32 (references omitted). See also Oellers-Frahm and Zimmermann 2019, p. 1158.

[93] Miles 2018a, p. 34.

[94] *Ibid*., p. 31.

[95] See *supra* note 78 and accompanying text.

not a contention of plausibility by a Party.[96] In the most recent orders of the Court, however, the standard seems to have lost all stability and sense of centre.

5.4 Recent Developments: Oscillat[ing] Wildly?

In 2018 the Court issued two provisional measures orders, on the request by Qatar for provisional measures in the *Qatar v. UAE* case concerning the application of CERD, and on Iran's request in its *Treaty of Amity* case against the USA.[97] A further order in the *Qatar v. UAE* case—on a request for provisional measures by the UAE—was issued in 2019,[98] and early 2020 saw the release of the hotly-anticipated order for provisional measures in the Gambia's case against Myanmar in *Application of the Genocide Convention*.[99] On the face of it, in these orders the standard of plausibility seems to have lost all equilibrium, and now seems to be changing from case to case. The treatment of plausibility in these orders will briefly be described, before we turn to an alternative explanation for this apparent variability in the form of the humanisation of international law.

The background to the *Qatar v. UAE* case is complex and fraught, and extends far more widely than the narrow confines of the case itself. The disagreement between the states over the meaning and application of CERD is a small part of the wider breakdown of relations between Qatar and four of its neighbours—Saudi Arabia, Bahrain, Egypt and the UAE ('the Quartet')—that has seen an extensive sanctions regime applied against Qatar in condemnation of Qatar's support for terrorism.[100] The case is therefore circumscribed not by the dispute, but by the availability of a jurisdictional basis under which it could be brought before the ICJ, and carries with it this wider and deeper context. On 11 June 2018 Qatar initiated ICJ proceedings against the UAE under Articles 2 and 4–7 of CERD. Under Article 41 of the ICJ Statute, Qatar requested provisional measures claiming that the sanctions imposed by the UAE (as a part of the Quartet) violate Qataris' rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education

[96] *Ukraine v. Russia*, *supra* note 60, Separate Opinion of Judge Owada. At para 10 of his opinion, Judge Owada argues that the standard cannot be equated with that of a *prima facie* case, and at paras 18–20 argues that it should equate to "a certainty of fifty per cent or less".

[97] *Qatar v. UAE I*, *supra* note 21; *Treaty of Amity*, *supra* note 22.

[98] *Qatar v. UAE II*, *supra* note 21. The *Qatar v. UAE II* request was dismissed on the grounds that the provisional measures requested were responses to those granted to Qatar in *Qatar v. UAE I*, and did not directly relate to the rights of the UAE under CERD. It is not, therefore, directly relevant to the present discussion.

[99] *Gambia v. Myanmar*, *supra* note 23.

[100] See e.g. Worth RF, Kidnapped Royalty Become Pawns in Iran's Deadly Plot. New York Times, 14 March 2018, available at: https://www.nytimes.com/2018/03/14/magazine/how-a-ransom-for-royal-falconers-reshaped-the-middle-east.html; The $1bn Hostage Deal that Enraged Qatar's Gulf Rivals. Financial Times, 5 June 2017, available at: https://www.ft.com/content/dd033082-49e9-11e7-a3f4-c742b9791d43; and discussion in Somos and Sparks 2018.

and training, property, work, participation in cultural activities, and equal treatment before tribunals.[101] In its 23 July Order the ICJ ruled that there are plausible human rights violations causing irreparable harm, and imposed provisional measures. Of Qatar's nine requests they granted three: concerning mixed families, students, and access to UAE courts.[102] This was a knife-edge decision. The judges voted 8:7 in favour of the Order, and eight of the fifteen judges registered some level of disagreement: the stage produced four Dissenting Opinions (by Judges Bhandari, Crawford, Salam, and Judge ad hoc Cot), a Joint Declaration by Judges Tomka, Gaja, and Gevorgian, and a critical Separate Opinion by Judge Cançado Trindade who, though he accepted the Court's conclusion, disagreed with important elements of its reasoning. It may therefore be speculated that any irregularities in the Court's treatment of the plausibility question could be the result of a need to find some common denominator—no matter how low—in order to resolve the questions placed before it. Certainly the paucity of reasoning offered by the Court would seem to lend support to that conclusion, but it is not fully satisfying: the Court appeared also to change the contours of the enquiry, requiring a higher level of factual plausibility and reducing the threshold of legal plausibility considerably.

This element is clearest in relation to CERD's scope. Qatar argued, and the UAE denied, that CERD could apply to discrimination against individuals on the basis of present nationality, as an analogy to the Convention's stated application to discrimination on the basis of "race, colour, descent, or national or ethnic origin".[103] This question received no analysis by the Court, which restricted itself to observing that it was not necessary to "decide at this stage of the proceedings between the divergent views of the Parties on" the proper interpretation of this clause.[104] Following extensive verbatim citation of the Convention presented without analysis, the Court's conclusion was limited to factual elements. Qatar had satisfactorily shown that certain measures adopted by the UAE targeted Qataris as opposed to other nationalities, and thus that *if* CERD applies then "*some* of the acts of which Qatar complains *may* constitute acts of racial discrimination".[105] It therefore found that the rights were plausible, seeming to rely on Qatar's satisfaction of the factual standard, and their grounding—to cite the Qatari contention—"in a possible interpretation" of CERD.[106]

If the *Qatar v. UAE* case is controversial, the *Treaty of Amity* dispute is no less explosive. Like *Qatar v. UAE*, the question before the Court is shaped by a desire to bring a dispute before the Court that would not otherwise be within its jurisdiction: that of the American decision to reintroduce sanctions against Iran following its decision no longer to apply the so-called 'nuclear deal' (Joint Communication and Programme of Action—JCPOA). Iran contended that the re-imposition of sanctions following the American disavowal of the JCPOA violates the two countries' 1955

[101] *Qatar v. UAE I*, *supra* note 21, para 11.

[102] *Ibid*., para 79.

[103] Article 1(1) CERD; *Qatar v. UAE I*, *supra* note 21, paras 46–48.

[104] *Qatar v. UAE I*, *supra* note 21, para 53. See also para 27.

[105] *Ibid*., para 54 (emphasis added).

[106] *Ibid*., para 46.

Treaty of Amity, and sought five provisional measures.[107] In a victory that is likely to be of greater symbolic than practical relevance, the ICJ granted a number of Iran's requests. It ruled that it had *prima facie* jurisdiction to hear the case,[108] that Iran had a plausible claim to (certain) rights under the 1955 Treaty,[109] and that there was an urgent risk of irreparable prejudice to those rights.[110] In stark contrast to *Qatar v. UAE*, here the Court's decisions were unanimous.

In assessing plausibility, *Treaty of Amity* seemed partially to confirm the approach in *Qatar v. UAE I*, that the standard for assessing legal plausibility is that the interpretation given to an instrument by the applicant is 'possible'. It noted that "the rights whose preservation is sought by Iran appear to be based on a possible interpretation of the 1955 Treaty".[111] As in *Qatar v. UAE I*, the Court also considered factual plausibility, here confined by the circumstances of the case to an observation that the revocation of the relevant import licenses did "appear to be capable of affecting some of the rights" under that treaty.[112] Here, though, it made another significant innovation in the plausibility test, and one for which it offered no commentary or explanation. Contrary to its long-established practice (see the discussion of *Construction of a Road* and *Certain Documents and Data*, above),[113] the Court then proceeded to consider the US argument that its actions were permitted under the exception included in Article XX of the Treaty of Amity, which creates exceptions allowing the US to restrict trade in any items related to "fissionable materials" or "necessary to protect … essential security interests".[114] Here the Court seemed for the first time to set two plausibilities against each other: the US invocation of Article XX, it said, "might affect at least some of the rights invoked by Iran".[115] Although certain items did not plausibly fall within the scope of the Article XX exemption—the Court mentioned "goods required for humanitarian needs, and [for] the safety of civil aviation"—it implied that the balancing of these two claims would in other respects need to wait for the merits.[116]

It is unclear why the Court elected in this case to consider the countervailing principle invoked by the USA, where it has previously chosen not to do so. Two explanations could be offered. The first would to be suggest that the Court treated the question not as a 'defence' or exculpatory principle, but rather one of the scope

[107] The JCPOA was a part of the context to the dispute, not a subject of it: Iran did not rely on the JCPOA in its pleadings.

[108] *Treaty of Amity*, *supra* note 22, paras 24–52.

[109] *Ibid*., paras 53–76.

[110] *Ibid*., paras 77–94.

[111] *Ibid*., para 67.

[112] *Ibid*.

[113] See above, notes 71–78 and accompanying text.

[114] *Treaty of Amity*, *supra* note 22, para 68, quoting the Treaty of Amity 1955. In so doing it has followed Miles' advice that "the Court should expressly extend the contemplated review to cover the respondent's defences": Miles 2018a, p. 45.

[115] *Treaty of Amity*, *supra* note 22, para 68.

[116] *Ibid*., paras 69–70.

of application of the 1955 Treaty. That seems doubtful, however, given the Court's two-stage process. It appeared first to establish the general principle (that Iran's contention was passed in a possible interpretation of the Treaty), and then considered Article XX. Moreover, it characterised this second-stage consideration as being prompted by the USA's "invocation" of that provision, which would appear to be more appropriate for a treatment of the question as one of norm conflict than one of scope.[117] A second possible explanation would be to refer to the character of the norm concerned as being primarily for the protection of national security interests. This, too, is not fully convincing. Admittedly, given its centrality to the post-1945 legal order and its strong statement in Article 51 of the Charter of the UN, it is doubtful whether the Court would have the power to prevent a state from exercising its right to self-defence, but 'self-defence' is far narrower than 'national security', and the former has a very specific legal meaning (i.e., necessary response to repel an armed attack). 'National security' is not an international legal term of art, and its ambit is determined individually by each state. A finding that the Court could not order actions which a state considered to fall within the ambit of its 'national security' (even only at the interim protection stage) would severely limit the potential of the Court to contribute to the maintenance of international law and international peace and security. Moreover, the Court has previously considered itself competent to order states to take actions which might be considered far more immediately prejudicial to 'national security' considerations broadly defined; including, in *Request for Interpretation*, the creation of a "provisional demilitarized zone" and a requirement that the Parties permit international observers to access that area.[118]

In its (at the time of writing, August 2020) most recent provisional measures order, in *Gambia v. Myanmar*,[119] the Court was asked to indicate provisional measures under the Genocide Convention. Though a high-profile and politically sensitive case, the request was significantly more straightforward in legal terms than *Treaty of Amity*, and again produced a unanimous decision. Gambia filed a case against Myanmar alleging that it had failed to fulfil its obligations under the Genocide Convention[120] with respect to the Muslim population of Myanmar's Rakhine State, the Rohingya. Gambia requested provisional measures, including an order that Myanmar "take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide", that it ensure that irregular armed forces affiliated to it do not commit acts amounting to genocide, and that it safeguard all evidence.[121] In those proceedings the argument between the states focussed on the scope of the plausibility

[117] *Ibid*., para 68. See also para 42, where the Court appears to characterise the provision as a treaty-specific circumstance precluding wrongfulness, rather than as a limit on the treaty's scope of application.

[118] *Request for Interpretation*, *supra* note 70, para 69. Oellers-Frahm and Zimmermann 2019, pp. 1196–1197 note that it is far from unusual for the Court to be asked to issue interim orders in circumstances relating to the maintenance of international peace.

[119] *Gambia v. Myanmar*, *supra* note 23.

[120] Convention on the Prevention and Punishment of the Crime of Genocide, signed 9 December 1948, in force 12 January 1951, 78 UNTS 277 [Genocide Convention].

[121] *Gambia v. Myanmar*, *supra* note 23, para 12.

assessment. Gambia asserted that the plausibility assessment was satisfied by a thin legal test: given that the Genocide Convention applies between the two states and that the rights it sought to protect derive directly from that convention, it was plausible that it could claim a violation of that convention vis-à-vis the Rohingya on an *erga omnes* and *erga omnes partes* basis.[122] Moreover, it was reasonable to believe, on the basis of the conclusions of the General Assembly and the United Nations Fact-Finding Mission, that an urgent risk of irreparable prejudice existed.[123] Myanmar disagreed, arguing that an additional factual consideration had to be added to the legal enquiry: the application of the rights under the Genocide Convention would be plausible only if the specific intention to commit genocide were established.[124]

Though a parallel could perhaps be drawn here to the Court's treatment of the USA's purported defence in *Treaty of Amity*, in *Gambia v. Myanmar* the Court did not accept that the existence of genocidal intent formed a necessary part of the plausibility assessment. Rather, it cast the assessment of the actual application of the norm as quintessentially a matter for the merits stage, and rejected Myanmar's argument that the 'exceptional gravity' of the allegations required that specific intent be assessed at this preliminary stage.[125] All that was necessary was for Gambia to show that the norms contained in the Convention plausibly applied to the treatment by Myanmar of its Rohingya population, and that it could assert those rights *erga omnes*. Though the circumstances of the cases are different—in particular, specific intent is an aspect of the application of the norm rather than a defence of the kind asserted in *Treaty of Amity*—it is nevertheless striking that the Court in these two cases decided by much the same bench[126] and in (in the Court's terms) a very short space of time, adopted respectively a strict and an expanded interpretation of the matters which are appropriate to a plausibility assessment.

5.5 The Humanisation of Provisional Measures?

There is, however, an alternative explanation for the Court's practice in the line of Orders following *Ukraine v. Russia*. That case was notable for the strong statement by Judge Cançado Trindade of an alternative vision of provisional measures, in which he argued that *human vulnerability* has replaced plausibility (and perhaps also other steps in the assessment) as the key factor.[127] We argue that the cases which followed

[122] *Ibid*., para 45.

[123] *Ibid*., paras 53–55, 67.

[124] *Ibid*., paras 47–48.

[125] *Ibid*., para 56.

[126] Judges Donoghue and Sebutinde, though members of the Court, were present and sitting in *Gambia v. Myanmar* but absent for the provisional measures stage in *Treaty of Amity*. The Judges ad hoc sitting in the two cases were, naturally, also different.

[127] *Ukraine v. Russia*, *supra* note 60, Separate Opinion of Judge Cançado Trindade, para 44 and *passim*.

are amenable to an interpretation which would indicate the emergence of a doctrine of provisional measures similar to that proposed by Judge Cançado Trindade.[128] We refer to this as the doctrine of *humanitarian stasis*. Although it will be necessary to see the effect of future orders of the Court on this nascent idea before its emergence as a parallel doctrine of provisional measures can be confirmed, we argue that the first shoots are already showing.

Provisional measures, Judge Cançado Trindade has argued, have now been established as an "autonomous legal regime". "This being so", he argues, "human vulnerability is a test even more compelling than 'plausibility' of rights for the indication or ordering of provisional measures of protection."[129] In coming to that conclusion, Judge Cançado Trindade relies on what he describes as a growing "recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere",[130] and argues that in any situation of the grant of interim protection, the ultimate beneficiaries are the individuals within states, and not only the metaphysical entity of The State itself.[131] In *Treaty of Amity* he summarised the argument thus:

> [Provisional measures] have a juridical nature of their own: directly related to the realization of justice itself, provisional measures of protection, being anticipatory in nature, in evolving from precautionary to tutelary, have been contributing to the progressive development of international law. [… They] have been extending protection to growing numbers of individuals (potential victims) in situations of vulnerability; they have thus been transformed into a true jurisdictional guarantee with a preventive character.[132]

We argue that this logic can be best understood as the creation of a *doctrine of humanitarian stasis*. Self-evidently, not every case of provisional measures will have at its core direct and immediate harms to human individuals. It would be difficult, for example, to characterise the rights at issue in the *Great Belt* case in those terms, nor yet those in *Certain Documents and Data*; and though the link is closer (there is no question that human individuals will ultimately be affected), it is still perhaps too much of a stretch to include in this category cases of environmental harm (such as in *Pulp Mills* or *Construction of a Road*) unless a certain threshold of severity is breached. It is undeniable, however, that a significant number of the provisional measures applications made before the Court has concerned situations of direct human vulnerability and harm. This is the case, for example, with questions of consular access (such as in *LaGrand* or *Jadhav*), in cases concerning conflicted borders (such as in *Request for Interpretation*), and is especially the case in situations

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[128] If borne out, this development would follow the well-established pattern, noted *supra* at note 43, that developments in the character and law of provisional measures have been articulated first in extraordinary separate opinions before being translated into the practice of the Court. For a list of such development see Miles 2018a, p. 37.

[129] *Ukraine v. Russia, supra* note 60, Separate Opinion of Judge Cançado Trindade, para 44.

[130] *Ibid*., para 53 (emphasis omitted).

[131] *Ibid*., para 68. Judge Cançado Trindade has repeated many of these arguments in his Separate Opinions in *Qatar v. UAE I*, *supra* note 21 and *Treaty of Amity*, *supra* note 22.

[132] *Treaty of Amity*, *supra* note 22, Separate Opinion of Judge Cançado Trindade, paras 99–100.

where massive and sustained humanitarian or human rights abuses are alleged (such as in *Application of the Genocide Convention*, and in the cases relating to the application of CERD). There is no essential reason why these different contexts must be treated in the same way, and we argue that the Court is increasingly recognising the significantly different contexts. Although in the former category the primary concern is to establish whether it is necessary for reasons of the fair administration of justice to take action to prevent prejudice to the rights of the state prior to a decision on the Merits; in the latter, the Court increasingly seeks to hold the situation in humanitarian stasis in order to protect the lives and interests of individuals until a decision can be reached. In so doing it implicitly recognises that in comparison to the loss of lives and livelihoods, very few harms to states are truly irreparable.

Viewed in this way, the Court's recent judgments begin to fall into a more comprehensible order. In *Jadhav* the Court ordered that Mr Jadhav not be executed prior to the merits stage; in *Qatar v. UAE I* the Court required the UAE to facilitate the reunification of families kept apart by the sanctions regime, to enable Qatari students studying in the UAE to continue their education, and to ensure access for Qataris to UAE courts and tribunals. In *Treaty of Amity* the link is more apparent still. The Court justified its choice to order that the US suspend sanctions related to medicines and medical devices, foodstuffs and agricultural commodities, and goods necessary for the safety of civil aviation as being those elements of the sanctions regime to which the exemption "necessary to protect its [the USA's] essential security interests" could not apply.[133] It is notable that in so doing, though, it directly juxtaposed "essential security interests" with "humanitarian needs", finding that the goods involved "cannot plausibly" fall within the Article XX exception. Moreover, it returned to the standard of humanitarian need in assessing irreparability, noting that "the Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to a danger of health and life."[134] Though it seemed to accept the US argument that economic damage can never be irreparable, it decided that in the three areas abovementioned—safety of aircraft, provision of food and agricultural necessities, and medicines and medical supplies—there was the potential for "a serious, detrimental impact on the health and lives of individuals on the territory of Iran."[135] Finally, it is both clear and, perhaps, unavoidable that the focus of the Court's decision in *Gambia v. Myanmar* should lie on the protection of human interests—in this case those of the persecuted Rohingya minority in Myanmar. By the very nature of the Genocide Convention and the interests which it codifies, the *erga omnes* right to protect minority groups and their members from the worst forms of abuse was the subject of Gambia's request to the Court. Though that essential connection to human interests means that the *Gambia v. Myanmar* order

[133] See *Treaty of Amity*, *supra* note 22, para 21: It is intriguing to wonder exactly what threat arose from "the importation of Iranian-origin carpets".

[134] *Ibid*., para 91.

[135] *Ibid*. In his Separate Opinion to that Order, Judge Cançado Trindade argued that the ICJ "has duly taken into account the humanitarian needs of the affected population", and in so doing has "ended up discarding arguments grounded on 'national interests'". See *Treaty of Amity*, *supra* note 22, Separate Opinion of Judge Cançado Trindade, paras 90–91, 105.

can offer no very clear support to the line of argument advanced here, certainly the Court was ready to accept that a halt to acts amounting or potentially amounting to genocide was a plausible right of Gambia, and one at urgent risk or irreparable prejudice. That conclusion may, perhaps, be considered to have significance in light of the *erga omnes* nature of the norm: here Gambia sought to protect not its own interests—except tangentially—but the rights of a vulnerable human group and its members.

It is worth recalling, as discussed above,[136] that the purpose established for provisional measures by the Court's Statute is "to preserve the respective rights of either party".[137] In general, that phrase has been taken to refer to two main categories of states' rights. It refers, first, to the right of the states parties to a dispute to a fair adjudication of their rights and obligations. Parties are therefore under an implied obligation to preserve evidence associated with the case, and to conduct themselves in such a way that the judicial proceedings can take place without hindrance. Where necessary, that implied obligation can be supported by an interim order, as it was in *Frontier Dispute*,[138] *Land and Maritime Boundary between Cameroon and Nigeria*,[139] and most significantly in *Certain Documents and Data*.[140] It was a measure of this kind that was ordered by the Court in its third provisional measure in *Gambia v. Myanmar*, in which it required Myanmar to "take effective measures to prevent the destruction and ensure the preservation of evidence related to the allegations".[141] A second category of rights which may fall under the interim protection procedure relate to securing the object of the claims. The procedure has as its target rights which can be rendered defunct or impossible to enforce as a result of actions taken during the period in which the case is pending before the Court. The *LaGrand* case provided the paradigm example: Germany sought an interim order to prevent the execution of Walter LaGrand by the United States, an individual in relation to whom it had claimed a violation of the Vienna Convention on Consular Relations.[142] LaGrand's execution by the United States would have rendered Germany's case without object and, crucially, irreversibly so. As the Court and its predecessor have indicated on multiple occasions, a prejudice to the rights of either party which can be reversed will not qualify for interim protection, and nor will a right which could be made good by the payment of compensation *post facto*.[143]

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[136] See above, Sect. 5.2.

[137] ICJ Statute, *supra* note 24, Article 41.

[138] *Frontier Dispute*, *supra* note 40.

[139] *Land and Maritime Boundary*, *supra* note 49.

[140] ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014.

[141] *Gambia v. Myanmar*, *supra* note 23, para 86(3).

[142] *LaGrand*, *supra* note 26.

[143] See, for example, PCIJ, *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, Provisional Measures, Order of 8 January 1927, p. 7 [*Sino-Belgium Treaty*]; ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Provisional Measures, Order of 11 September 1976, para 18.

Gambia v. Myanmar departs to some extent from this typical case. Rather than seeking to enforce a right in which it has a direct interest, Gambia seeks to enforce a right held *erga omnes* and *erga omnes partes*. Myanmar is obliged, under the 1948 Convention, to "prevent and punish" genocide,[144] as well as to criminalise the commission of genocide under its domestic law.[145] In asking the Court to issue an interim order requiring Myanmar not itself to commit acts prohibited by the 1948 Convention and to prevent forces over which it has control from committing such acts, Gambia in effect makes the assertion that the 1948 Convention was concluded not for the benefit of states—whose interests in its enforcement can in principle be compensated *post facto*—but for the benefit of the human groups which are the objects of its protections. The Court agreed that it is their—vulnerable human groups'—rights and interests which were the appropriate subject for the interim protection procedure.

The conclusion that the Court actively seeks to protect human lives and health through its provisional measures is far from radical. Many commentators have noted both the potential and actuality of the Court's use of provisional measures to protect life in international disputes.[146] As early as 1997 Rosalyn Higgins—a jurist whose well-earned reputation for careful and precise analyses of positive law precludes any accusation of starry-eyed utopianism—argued that an "evolving jurisprudence on provisional measures shows a growing tendency to recognize the human realities behind the disputes of states".[147] Higgins referred to a line of cases that were not centred on human concerns (she referred in particular to *Frontier Dispute* and *Land and Maritime Boundary*),[148] and argued that these

> [W]ould seem effectively to overrule the determination by the Permanent Court of International Justice in the Eastern Greenland case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.[149]

It is on a similar theme that Hugh Thirlway noted of the *Armed Activities (New Application)* Order that Judge Buergenthal was conspicuously alone in objecting to the inclusion of humanitarian considerations in the Court's Order, and that

> [T]he overwhelming majority of the Court saw the humanitarian concerns involved as trumping the arguably more academic issues of jurisdiction and judicial propriety. An observer is bound to feel that if the jurisdictional bases invoked could have been 'stretched' to cover the matters raised in the request for measures, the Court would readily have lent itself to such an exercise.[150]

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[144]Genocide Convention, *supra* note 120, Article 1.

[145]*Ibid*., Article 5.

[146]Higgins 1998; Lee-Iwamoto 2002; Rosenne 2005, pp. 201–209; Zyberi 2010; Thirlway 2013, pp. 1791–1794; Miles 2017, pp. 346–364.

[147]Higgins 1998, p. 108.

[148]See *Frontier Dispute*, *supra* note 40; *Land and Maritime Boundary*, *supra* note 49.

[149]Higgins 1998, pp. 107–108.

[150]Thirlway 2013, p. 1793; citing ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002.

As Miles concludes, "where a norm of human rights or humanitarian law is directly the subject of adjudication, the award of provisional measures for the protection of human rights is uncontroversial. Furthermore […] it is arguably possible to obtain effective interim relief in this respect from an apparently narrower jurisdictional base."[151] It is, therefore, a change of perspective and of the forms of argumentation and justification that are employed that is primarily proposed by Judge Cançado Trindade, rather than a radical shift in practice. Thus it is perhaps surprising that Miles has recently argued that

> The risks of Judge Cançado Trindade's approach are, with respect, considerable. In ordering provisional measures on the basis of human vulnerability, the ICJ may well be seen as having exceeded the limited form of competence that the parties, by their consent, have afforded it in the provisional measures phase. This may lead to recalcitrance by states and increased non-compliance with provisional measures.[152]

Miles is undoubtedly correct to note the vital role that the expectations of states play in the legitimation and realisation of provisional measures (and thus in the ability of provisional measures orders to achieve their aims, howsoever conceived). Certainly, the interests of individuals and communities would not be served by a reaction by states against recourse to the Court or by an increasing disregard for its interim orders. Nevertheless, we respectfully disagree with the conclusion that for this reason it would be unwise to focus more explicitly on human harm and vulnerability. It is, to begin with, widely acknowledged in the scholarship that human vulnerability is already a part of the Court's calculus. Thirlway and Higgins have observed that the Court seeks to include this element where it is able to bring it within the boundaries of its jurisdiction, and the Court's recent practice could indicate an increasing willingness to place this aspect at the centre of its appraisal of requests for interim relief. Miles himself acknowledges that "the Court has routinely demonstrated its capacity to find ways to protect human life and health, even where the strict boundaries of the provisional measures test would appear to preclude it."[153] The potential for an adverse reaction therefore seems to be overstated. On the contrary, we would argue that the potential for an adverse reaction is actually raised by the Court's current approach of seeking to shoehorn humanitarian considerations into its existing tests, formulae, and structures. Such an approach not only has the potential to make the Court and its processes appear capricious,[154] but it precludes the formulation of principled arguments which explicitly refer to the reasons which in fact motivate the Court's decisions. Many of the principles to which it could refer in that pursuit, if it gives itself the latitude to do so, are well-established principles of international law which are recognised and accepted by the vast majority of states members of the international community, and will most likely be recognised by (or even will exist

[151] Miles 2017, pp. 352–353.

[152] Miles 2018a, p. 30.

[153] *Ibid*.

[154] See *supra*, Sects. 5.3–5.5.

as applicable norms between) the Parties to any given dispute.[155] Finally, openly to acknowledge a parallel doctrine of provisional measures centred around human vulnerability would attest to the new reality of the international legal order as being more than purely state-centric. If it can be argued that the Court implicitly maintains the state-centricity of the international legal order—in part unavoidably through its jurisdictional scope; in part by choice through its reasoning—then it does so in wilful ignorance of the reality of the contemporary international legal system;[156] what Cançado Trindade calls the perpetuation of "an outdated and impertinent attachment to state voluntarism".[157] In so doing it would refuse and frustrate the emancipatory potential of international law. The suggestion that its authority is best won and maintained by this kind of conscious conservatism or disguised progressive thinking is, at best, doubtful.

Although the short run of cases under consideration here do not permit the drawing of a firm conclusion—the suggestion we make here will need to be confirmed or disproven in the orders made by the Court in the coming years—we submit that the Court has come close to articulating a bifurcated and parallel doctrine of provisional measures for the protection of human vulnerability, the goal of which would be to impose a form of humanitarian stasis on a dispute until such a time as a decision is rendered. If future cases continue that development, it may be that increasingly an assessment of human needs and human vulnerabilities replace plausibility as a key test to be satisfied in this sphere; with other tests, namely link to the merits, urgency and irreparability restricted in their scope to non-human-centred rights of states or redirected toward the preservation of the fair administration of international justice. That would be in line with the developments discerned in other parts of international law by scholars in the so-called 'humanisation' school. It would also be highly significant in its own right, implying that international law recognizes a minimum standard of protection of individuals independent of the rights of the states involved: that during the lull between application and judgment, when the rights of states lie in the scales, it is the human factor that can tip the balance one way or the other. In this way the rights of the states involved subtly take a back seat to human needs and harms. If the Court is moving towards a full and open recognition of such a human-centred doctrine of provisional measures, we are only in the protogenic stages of that shift. Future cases will either cement or draw back from that position. It is too early firmly to say whether the provisional measures doctrine has been definitively humanised, but if so it would be a very welcome development.

[155] See e.g. Chap. 7 by Marotti in this volume on ITLOS's use of community interest and UNCLOS invocations of considerations of humanity.

[156] See above, notes 4–19 and accompanying text, and in particular Peters 2016.

[157] *Treaty of Amity*, *supra* note 22, Separate Opinion of Judge Cançado Trindade, para 106.

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Part II
Provisional Measures Issued by Universal Courts and Inter-State Arbitral Tribunals

Chapter 6
Opposites Attract? Provisional Measures in the International Court of Justice Oscillating Between the Judicial Function and Party Autonomy

Stephan Wittich

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Abstract Provisional measures in the International Court of Justice can be viewed from the perspective of the tribunal as well as that of the parties, thus oscillating between the tribunal's function to maintain judicial integrity and party autonomy. This chapter will answer three questions that arise in this context. First, it will enquire whether the Court possesses the power to indicate *proprio motu* provisional measures and whether this power even has a mandatory nature. Second, the chapter will ascertain the degree over which the parties may arguably control provisional measures. Finally, it will dwell upon the Court's power of issuing provisional measures in the exercise of its advisory function.

Keywords party autonomy · judicial discretion · Article 41 ICJ Statute · positive derogations · negative derogations · advisory opinions

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6.1 The Problem Stated

According to Article 41 of the Statute of the International Court of Justice, 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". Like any other procedural concept, provisional measures can be viewed from the perspective of the tribunal or from that of the parties. Each of these perspectives may have a distinct focus that oscillates between the autonomy of the parties to adapt the proceedings according to their own ideas, needs, and interests on the one hand, and the task of the tribunal to protect its judicial integrity in the course of discharging its judicial function on the other hand. There are two interrelated questions with regard to this power that need to be addressed from the viewpoint of party autonomy and the judicial function of the International Court of Justice.[1] First, does the Court possess the power to indicate provisional measures of protection *proprio motu* and, further, does this power assume an obligatory or mandatory nature upon the Court itself? In other words, may there be instances where the Court might even be obliged to indicate provisional measures? And second, what is the extent of the autonomy of the parties in controlling provisional measures? May they even deviate from the terms of Article 41, for instance by agreeing to confer more powers to the Court or, conversely, by limiting the Court's power or even exclude it altogether? These two sets of questions will be addressed in turn in the present chapter. A third question to be examined is whether provisional measures have a place in advisory proceedings which, after all, are also an important aspect of the Court's discharge of its judicial function.

6.2 The Power to Indicate Provisional Measures *Proprio Motu*

The first question concerns situations in which the circumstances would in principle warrant the indication of provisional measures, but in which there is no corresponding request by either of the parties. In other words, does the Statute authorize the Court to indicate interim protection on its own initiative? Article 41 of the Statute does not contain an express authorization to this effect, nor does it explicitly limit interim protection to situations where one or both parties make a request. Article 41 explicitly states that its objective is "to preserve the respective rights of either party" and since each party may be considered the best guardian of its own rights and interests, a teleological interpretation might rule out the possibility of *proprio motu* powers, or at least confine them to exceptional cases where not only the rights of the parties to the dispute are at stake but also those of other entities or actors provided that the Court enjoys at least *prima facie* jurisdiction and the general conditions for interim

[1] The issue of the binding effect of provisional measures, which also has a bearing on this relationship, is left aside here as this matter has been authoritatively decided by the Court in the *LaGrand* case.

protection are fulfilled.[2] On the other hand, Article 41 speaks of the Court's power to indicate provisional measures "if it considers that circumstances so require" and, moreover, of measures "which *ought* to be taken", leaving it to the Court whether or not to act. Viewed from that perspective, Article 41 is phrased in sufficiently broad terms so as to include *proprio motu* powers. If interim protection is considered as an inherent power that the Court may resort to whenever the maintenance of its judicial integrity and the proper exercise of its judicial function or the administration of justice so require, there will be no doubt that the Court possesses the power to indicate *proprio motu* provisional measures.[3]

This is also confirmed by the Court's case law. Already the Permanent Court of International Justice was "satisfied that it may proceed to indicate interim measures of protection both at the request of the Parties (or of one of them) and *proprio motu*"[4] and took the view that in the case at hand it had to consider "whether or not there is ground for proceeding, *proprio motu*, to indicate interim measures of protection […], independently of the Norwegian request to that effect".[5] In the *Anglo-Iranian Oil Co.* case the current Court held that this power followed "from the general terms of Article 41 of the Statute".[6] In line with this aspect of Article 41, Article 75(1) of the Rules of Court entitles the Court to examine *proprio motu* whether provisional measures are required by the circumstances of the case.[7] This was later confirmed by the Chamber in *Frontier Dispute (Burkina Faso/Mali)* in which case both parties, in view of the grave incidents between the armed forces of the two states, filed parallel requests for interim protection. While thus there was no need to resort to *proprio motu* powers, the Chamber nevertheless stated in an *obiter dictum* that, "independently of the requests submitted by the Parties for the indication of provisional measures, […] the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so

[2]It could for example be argued that where the lives of individuals or other fundamental human rights are at stake the Court must be deemed to have the power to indicate provisional measures even in the absence of a request of the parties. See also below text at notes 67–69.

[3]This view is widely held in the doctrine, see Oellers-Frahm 1975, p. 122; Sztucki 1983, p. 61; Collins 1992, pp. 23 and 214; Tzanakopoulos 2004 *passim*; Shaw 2016, p. 1410.

[4]ICJ, *Legal Status of the South-Eastern Territory of Greenland (Norway v. Denmark)*, Order of 3 August 1932, p. 284.

[5]*Ibid*., pp. 287–288. See also PCIJ, Ninth Annual Report of the PCIJ, Ser E No. 9, 1932–1933, p. 121, and PCIJ, *Polish Agrarian Reform and the German Minority (Germany v. Poland)*, Order of 29 July 1933, pp. 178–179 where it spoke of "its power to act *proprio motu*".

[6]ICJ, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Provisional Measures, Order of 5 July 1951, p. 93.

[7]Article 75(1) of the Rules reads: "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties." See ICJ, *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, para 21. See generally Oellers-Frahm and Zimmermann 2019, paras 67–68; Kolb 2013, pp. 633–638.

require".[8] In explaining the foundation for this power, the Chamber added that the Court, as the principal judicial organ of the United Nations, no doubt had the "power and *duty* to indicate, if need be, such provisional measures as may conduce to the due administration of justice", especially in cases involving a resort to armed force by the disputing parties which is irreconcilable with the principle of the peaceful settlement of international disputes.[9] In *LaGrand*, the Court stated that it may make use of its power to indicate provisional measures "irrespective of whether or not it has been seised by the parties of a request" and that although it had never "made use of the power conferred upon it by [Article 75(1)], the latter appears nonetheless to be clearly established".[10]

All of this clearly shows that the Court has a 'right' to prescribe measures also on its own initiative, and it lies within its discretion whether or not it exercises such power. It is an enabling clause that permits the Court to act accordingly. At the same time, however, this discretion differs from a faculty in that it is not up to the Court, for instance purely for reasons of opportunity, convenience, pragmatism, or judicial economy, to exercise it or not—like invoking, waiving or renouncing a right—but that it is a part of the Court's judicial function and hence limited by the latter. That carries with it a duty of vigilance of the Court[11] to evaluate the particular situation and the circumstances of the case whether these are so urgent as to require the indication of provisional measures.[12] In line with the Court's invocation of a duty to indicate provisional measures in *Frontier Dispute (Burkina Faso/Mali)*, it would certainly be incompatible with its judicial function to refrain from making use of its power under Article 41 if, after objective assessment of the situation, the circumstances indeed required to indicate provisional measures (provided of course that all the other conditions are met). This would mean that the Court may exceptionally not only be empowered, but even required or obliged, to indicate provisional measures of protection on its own initiative.[13]

Practice is scarce concerning the power of the Court to indicate provisional measures *proprio motu.* In fact, there is to date no case in which the Court has

[8] ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Provisional Measures, Order of 10 January 1986, para 18. The extension of the purpose of provisional measures ("with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require") made by the Chamber in *Frontier Dispute* was subsequently endorsed by the Court in a number of cases, see ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996, para 41; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, para 44.

[9] *Frontier Dispute, supra* note 8, para 19 (emphasis added).

[10] *LaGrand, supra* note 7, para 21.

[11] As described in the context of advisory proceedings by George Abi-Saab in his observations in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Public Sitting, 1 November 1995, CR95/23, at 25–26.

[12] This situation is comparable to the Court's 'discretion' to give an advisory opinion, but it may only refuse to do so if there are 'compelling reasons'. See Oellers-Frahm and Zimmermann 2019, para 18 invoking the "good administration of justice" to the same effect.

[13] Notably see Miles 2017, p. 1.

made use of this power and indicated measures in the absence of any party request at all.[14] The reason for this restraint is quite obvious: since any recourse to *proprio motu* or *ex officio* powers is at variance with the elementary principle of *non ultra petita*, the Court is willing to make use of them only restrictively and in very exceptional cases. But as the *LaGrand* case has illustrated, there may indeed be compelling circumstances where the power of the Court to indicate provisional measures *proprio motu* may become imperative.[15] The fact that the loss of human life is irreversible and hence involves an irreparable prejudice relevant for the indication of interim protection was obviously a reason for the Court to indicate certain measures *proprio motu* "independently of requests for the indication of provisional measures submitted by the parties to preserve specific rights".[16]

Furthermore, the *non ultra petita* rule does generally not apply where a request for provisional measures was made.[17] This also follows from Article 75(2) of the Rules[18] and implies that the Court, in prescribing provisional measures, is not confined to the particulars of the request, such as the type of measure(s) sought. In this regard, the Court has developed a practice of introducing some element of reciprocity or mutuality in the behaviour which the parties ought to follow on the basis of the provisional measures indicated.[19] This means that the Court usually addresses provisional measures to both parties, in principle under the same conditions. This is particularly the case when the measures are aimed at preventing any aggravation of the dispute because "it would obviously make no sense to address measures of this kind to one party only".[20] Under its *proprio motu* powers the Court can even require the party that has requested provisional measures to comply with those indicated. For example, in the *Temple (Interpretation)* case, Cambodia requested interim protection directed against Thailand. The Court found that

> when it is indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties' requests, also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require[.][21]

The inapplicability of the *non ultra petita* rule may also be considered to be an aspect of the inherent power of the International Court as a judicial organ, and hence

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[14] Thirlway 2013, p. 1805. But see Ghantous 2012, p. 38.

[15] It must however be noted that in *LaGrand* the Court did not really make use of its *proprio motu* powers in indicating provisional measures as Germany in fact had made a request. Yet the extreme urgency of the case did proceed to indicating the measures without holding oral hearings. *LaGrand, supra* note 7, para 21.

[16] *Land and Maritime Boundary, supra* note 8, para 41.

[17] Shaw 2016, p. 1411.

[18] Article 75(2) of the Rules reads: "When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.".

[19] Shaw 2016, p. 1411; Rosenne 2005, p. 177.

[20] Thirlway 2013, p. 953.

[21] ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, para 59.

a logical corollary of its judicial function.[22] A note of caution is however warranted here. It is for instance argued that while *non ultra petita* restricts international courts to considering only issues put forward by the disputing parties, it would not restrict the manner in which international courts resolve these issues in dispute.[23] In support of this argument, reference is made to the *Guardianship of Infants* case, where the Court famously said that it had "the freedom to select the ground upon which it will base its judgment".[24] These two statements are certainly accurate, but the second does not follow from the first. Essentially, the 'freedom to select'-argument involves the Court's discretion to choose between different arguments or motives for a decision that have in fact been raised or invoked by the parties, but certainly not for justifying a power to act *ultra petita.* Moreover, in its case law the Court's invocation of, and reference to, its freedom to select the ground upon which it will base its judgment is very inconsistent.[25]

Secondly, the principle of *iura novit curia*, too, is invoked to justify the Court in its disregard of the principle of *non ultra petita.*[26] However, *iura novit curia* concerns the applicable, notably substantive, law but cannot serve the purpose of justifying the Court's ignoring or replacing the submissions of the parties. In other words, while the Court is always free to select the ground(s) on which it will base its judgment, it is not free to award judicial remedies—even if only interim remedies such as provisional measures—that have not been requested by the parties (unless, of course, such a power is expressly conferred upon it in the relevant constituent instrument or follows from the concept of inherent judicial powers). Furthermore, it is doubtful whether *iura novit curia* has a place at all in the present context as the question whether the conditions for provisional measures are met is not so much concerned with the applicable law (or the application of the law) than with an assessment and appreciation of the underlying facts.

Whether the Court can *proprio motu* modify or revoke provisional measures or whether this requires a corresponding request from a party which need not necessarily be the one who has initially requested interim protection, has been less clear and open to debate until the recent amendment of the Rules of Court.[27] On the one hand, previous Article 76(1) of the Rules—unlike Article 75(1)—did not provide for *proprio motu* powers of the Court but presupposed a corresponding request from a party.[28] A literal interpretation would therefore have militated in favour of excluding any *proprio motu* power, whatever the reason for its invocation.

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[22] Brown 2007, p. 150.

[23] *Ibid*.

[24] ICJ, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, p. 61.

[25] See on that Orakhelashvili 2007, p. 171.

[26] Brown 2007, p. 150.

[27] Amendment entered into force on 21 October 2019.

[28] Previous Article 76(1) read: "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." See also Lamus 2013, p. 473; Forlati 2014, p. 92.

On the other hand, it is not easy to see why there should be a difference, in terms of *proprio motu* powers, between indicating and revoking or modifying provisional measures. Initial indication is certainly more far-reaching than subsequent revocation or modification, hence applying an *argumentum a maiore ad minus* it would only be logical that the Court's powers are the same in both cases.[29] Furthermore, it is doubtful whether the Rules can deprive the Court of powers it has inherently under the Statute (Article 41). The least that could be said is, first, that the Court has the power to revoke or modify measures *proprio motu* that it has indicated on its own initiative under Article 75(1) of the Rules; and second, that it does not seem unreasonable to invoke the principle of the proper administration of justice to justify a *proprio motu* termination of measures that have proven ineffective or otherwise unsuccessful.[30] Accordingly, it might be warranted as an act of judicial propriety to revoke provisional measures that have become entirely and irreparably useless. Finally, the Court does not have the power to *proprio motu* indicate provisional measures aimed at protecting rights of the parties that are not in dispute in the pending case as this would amount to action by the Court *ultra petita.*[31]

Against this logic, it is therefore not surprising that the Court has clarified in a highly welcome recent amendment of Article 76(1) of the Rules that it has the power to revoke or modify provisional measures on its own initiative.[32]

6.3 Deviation from Article 41

6.3.1 Deviation Through Inter Se Agreements

A different, and certainly more complex, question is whether the parties may, in a given case, deviate from the terms of Article 41. The Statute and the Rules are silent in this respect and practice is virtually non-existent. But it may happen that the parties, either in a special agreement or in a general treaty providing for the Court's

[29] See Gaja 2015, pp. 2–3. See also Oellers-Frahm and Zimmermann 2019, para 85. It is interesting to note here that in commercial arbitration, tribunals may, depending on the pertinent arbitration rules, be empowered to modify or terminate interim measures. See e.g. Article 17 D of the UNCITRAL Model Law on International Commercial Arbitration providing that "[t]he arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative".

[30] Kolb 2013, p. 635.

[31] Palchetti 2008, pp. 632–633. But see Greig 1991, p. 127. It may perhaps be argued that where a party invokes rights on behalf of individuals, as especially is the case in human rights protection, the protection of the separate rights of the individuals may well be the purpose of *proprio motu* indication by the Court. See also below the text at notes 67–69.

[32] Article 76(1) now reads: "At the request of a party or *proprio motu*, 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.".

jurisdiction (or even ad hoc during the proceedings) deviate from the terms of Article 41 of the Statute. This situation may have two different, in fact opposing, aspects. On the one hand, the parties may attempt to endow the Court with broader powers than those to which it is entitled under the Statute. On the other hand, they may intend to limit the Court's powers under Article 41, or even exclude them entirely. The question now is whether such a deviation is permissible and, further, how that has to be assessed legally.

On its face, either agreement would certainly be a deviation from the terms of the Court's Statute; in fact, it would amount to an *inter se* modification of Article 41 of the Statute in the relations between the parties, that could be considered to fall within the scope of Article 41(1) of the Vienna Convention on the Law of Treaties (VCLT).[33] Under that provision, *inter se* agreements to a multilateral treaty that does not provide for such a possibility are only permitted if they do not affect the rights and obligations of the other parties to that treaty, or if they do not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. The first alternative will generally not apply: an agreement between the parties to a case concerning provisional measures will not affect in any way the rights and obligations of the other parties to the Statute, if only because the Statute does not contain rights and obligations of States at any rate.

More difficult is the second alternative which raises the question whether a deviation from Article 41 of the Statute "relates to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole". A preliminary, but crucial, point here is the meaning of derogation. In international law, the term derogation assumes a plethora of different meanings.[34] This is not surprising given the fact that in domestic law the meaning differs from country to country and may, depending on the context, vary even within a given legal system.[35]

In the first place, derogation may mean (partial) abrogation or non-application of a law in an unqualified manner. Thus Kelsen describes derogation as "the repeal of the validity of a valid norm by another norm".[36] In this sense, derogation is a neutral term that denotes a legal technique by which one norm is replaced by another and covers any form of deviation from the existing norm. Understood in this sense as a mere formal device, derogation does not indicate the material, substantive, or

[33] Article 41(1) of the Vienna Convention reads as follows: "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

[34] See, e.g., Salmon 2001, pp. 325–326, listing no less than five different meanings. For a very narrow concept of derogation, see Jennings and Watts 1996, p. 1241 in note 2 *in fine*; Aust 2000, p. 105.

[35] Karl 1983, p. 5 at footnote 264.

[36] Kelsen 1962, p. 1429. Similarly Bydlinski 1991, p. 572; Salmon 2001, p. 325.

hierarchical relation between the two norms. It does not take into account the content of, or the values contained in, the derogated nor the derogating norm. In particular, derogation in this sense does not prejudge the question whether the new norm is more or less favourable or beneficial in relation to the interest it protects than the previous one.

However, the term derogation may also assume a more specific, evaluative meaning signifying that the deviation entails a prejudicial effect on the interest legally protected by the derogated norm. Thus derogation is also defined as "[t]he partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force".[37] This etymological meaning also conforms to the ordinary (common or non-legal) understanding of the word 'derogate' denoting 'to take away a part so as to impair'.[38]

From this follows that what is relevant in determining the permissibility of an *inter se* agreement is the direction at which 'derogation' is aimed; in other words, what is the aim pursued by resorting to derogation? As long as the *inter se* agreement produces a result more favourable to the beneficiaries of the norm—for instance by ameliorating the standard, by extending the scope of the protective norm, by granting more rights to the beneficiaries, or, more generally, by making the norm more effective—it would clearly not be incompatible with the effective execution of the object and purpose of the treaty.[39] Such a 'positive' derogation is not covered by Article 41 VCLT and hence in principle permissible. Unless the treaty provides otherwise, it may be assumed that these considerations apply to any type of treaty, irrespective of its content and the structure of the obligations contained therein.[40]

Finally, there is a difference between modification and derogation, and this is also emphasized in the doctrine. Kolb, for instance, seems to suggest that a modification differs from derogation in that the latter is an agreement among individual parties to the original treaty whereas the former is an act by the totality of the parties to the treaty or at least by a qualified majority in the context of customary law.[41] However, such an understanding of modification does not conform to an *inter se* modification pursuant to Article 41 VCLT, which expressly denotes a derogation among only certain of the parties as a form of modification. Therefore, the notion of 'modification' as used in the context of Article 41 VCLT is broader than the term 'derogation'.[42] While any derogation from a treaty no doubt is a modification of it, the reverse is not necessarily true. Thus, a treaty may be modified by various methods, ranging from revision by unanimity to modification by established practice or derogation *inter se*.

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[37] Garner 2005, p. 375.

[38] Derogate, The Merriam-Webster online dictionary at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=derogation (accessed 1 August 2019).

[39] Cf. also Sztucki 1974, p. 175.

[40] This is also the general thrust of the VCLT. It is only in a few provisions that the VCLT distinguishes in its scope between different types of treaties, e.g. Article 60(1), (2)(c) and (5), or Article 62(2)(a).

[41] Kolb 2005, p. 322.

[42] Sztucki 1974, p. 174.

For all these reasons, we may therefore validly conclude that a reasonable interpretation of the ordinary meaning of the term 'derogation' in its context and in light of the object and purpose leads to the result that under Article 41(1)(b)(ii) VCLT, derogation does not include, and thus does not prohibit, 'positive derogation', that is, a modification of a treaty—or a treaty provision—which is intended to be taken in furtherance of the execution of that treaty's object and purpose. It would simply be unreasonable to read the term 'derogation' in Article 41(1)(b)(ii) VCLT so as to mean any deviation from the terms of a treaty irrespective of the fact that such deviation ultimately conforms to the overall general aim of the regime established by the treaty.

6.3.2 'Positive' Derogations from Article 41 of the Statute

As mentioned, the first scenario contemplates a situation where the parties consensually deviate from Article 41 of the Statute by granting the Court more powers and thus go beyond the terms of the Statute. For instance, under the Statute and the Rules as well as according to the Court's case law, there are a number of (cumulative) conditions that must be met in order for the Court to grant interim protection,[43] and the parties might agree to desist from some of these conditions.

But this does not mean automatically or a priori that such an agreement would amount to a derogation from the Statute in a strictly technical meaning. Rather such a deviation would amount to a case of 'positive' derogation denoting a departure from the Statute resulting in a broadening of the scope of application of interim measures and thus in an increase of their effect. Such a situation would imply that the function and purpose of provisional measures would, in the given case, be strengthened by the parties' agreement to deviate from the Statute, so that interim measures would apply to a much larger set of cases than compared to the 'regular' situation under Article 41.

Let us suppose, for the sake of argument, that the parties agree to less strict conditions for the indication of measures which would for instance entitle the Court to award interim protection even in the absence of urgency, that is, in cases where there is no danger of irreparable harm to a party's substantive rights. Such an agreement would certainly be in principle compatible with the Statute, yet it is doubtful whether the Court would be willing, let alone be obliged, to heed such an agreement. Rather it would most likely decline a corresponding request and invoke considerations of the proper administration of justice and procedural economy. After all, an agreement of the parties going beyond the terms of the Statute may bestow upon the Court additional powers and competences, but the Court cannot be considered

[43] Among these conditions are *prima facie* jurisdiction of the Court, plausibility of the case, urgency of the situation, irreparable prejudice, or an adequate link between the measures sought and the substantive rights of the parties in dispute. See in detail Oellers-Frahm and Zimmermann 2019, paras 18–61; Kolb 2013, pp. 621–633.

to be obliged to use them without reviewing their necessity in the particular case. Any such supplemental competences and powers provide a 'permissive basis for the action of the Court'[44] and it lies within the discretion of the Court whether or not it conforms to the request of the parties. In such a situation, the discretion is limited by the Court's judicial function as much as it is in cases of 'normal' requests for provisional measures according to the strict terms of Article 41 of the Statute.[45]

However, much will of course depend on the particulars of the case and the terms of the agreement between the parties, and other situations may readily be envisaged in which the Court might accept such an agreement. Thus where the parties for instance deviate from the requirement of *prima facie* jurisdiction there would be nothing to prevent the Court from granting interim protection without establishing that this requirement is fulfilled. For as long as provisional measures are aimed at avoiding an escalation of the dispute and an aggravation of the situation and thus to protect the rights of the parties (or at least of one party), the essential function and purpose of provisional measures will be satisfied and, ideally, achieved. In other words, lowering the threshold for the imposition of provisional measures of protection through agreement of the parties may even increase the effectiveness of interim protection by the Court and thus facilitate the attainment of the purpose interim protection generally serves. Still the Court would of course not be compelled to 'honour' such a request (and to grant interim protection), given that it may, under its Statute, refuse to grant interim protection if and to the extent the 'objective' criteria or conditions of protection are not met, and may well decline to grant provisional measures that would go beyond the limits of the Statute and break up the strict conditions established by the Court in its case law.[46]

However, from the viewpoint of judicial integrity, there is nothing to consider such an agreement of the parties as incompatible either with the Court's Statute or its judicial function. Consequently, the autonomy of the parties would clearly prevail over any considerations of judicial propriety not to respect such an agreement modifying the conditions for the indication of provisional measures.

[44] Kolb 2013, p. 657.

[45] See the above text at notes 7–12.

[46] To the same effect, Kolb 2013, p. 657, who however argues that the Court's refusal is warranted by the fact that while the "parties can bind themselves to each other by agreement", "such agreements are not binding on third parties". This is no doubt correct, but the Court can in any event not be a 'party' (neither a party to an agreement nor a non-party, that is) as it is not a legal personality enjoying distinct subjecthood under international law.

6.3.3 'Negative' Derogations from Article 41 of the Statute

6.3.3.1 Non-opposability Towards the Court of Agreements to Deviate from the Statute

The situation will be quite different in the opposite case. Here the question is whether the parties may agree to (substantially) restrict the Court's power to indicate provisional measures. Situations are envisageable where the parties limit the effects of an order indicating provisional measures, for example by denying their legally binding effect and reducing them to mere recommendations. Another example would be that the parties require the Court to first establish its jurisdiction in which case *prima facie* jurisdiction would not be sufficient for the indication of provisional measures. An extreme example would be that the parties agree to deprive the Court of its power to indicate provisional measures of protection altogether.[47]

That this situation is not entirely academic or theoretical is illustrated by the *Gabčíkovo-Nagymaros* case. In the Special Agreement to that case, the parties included a provision according to which they agreed, pending the final judgment of the Court, to establish a temporary water management regime for the Danube and, further, that in case of peril of their rights, 'protection shall not be sought through a request to the Court under Article 41 of the Statute'; rather they agreed to request consultation or reference to the European Commission.[48] This agreement between Hungary and Slovakia is a rare, yet clear example of reducing the Court's power under Article 41, virtually to the point of excluding interim protection altogether.

The question then is whether such an agreement is to be considered effective. In answering that question, a distinction must be made according to the addressee of the intended effects of such an agreement: shall the exclusion of interim protection only operate as between the parties *inter se* or shall it also apply towards the Court? Concerning the latter case, it is highly doubtful whether the parties can effectively deprive the Court of its power to indicate provisional measures *proprio motu.* This power is an integral part of the Court's judicial function and part of its inherent jurisdiction and as such not subject to the autonomy of the parties.

Both the International Court and its predecessor have on occasion emphasized that any such 'procedural' or 'jurisdictional agreement' by the parties is limited

[47] Kolb 2013, p. 657.

[48] Special Agreement of 7 April 1993 between the Republic of Hungary and the Slovak Republic for submission to the International Court of Justice of the differences between them concerning the Gabčíkovo-Nagymaros project, jointly notified to the Court on 2 July 1993. Article 4 reads: "(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management regime for the Danube. (2) They further agree that, in the period before such a regime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute. (3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement."

by its judicial integrity, and that the Statute provides the contours of this limit. These considerations are supported by the finding of the Permanent Court in the *Free Zones* case. In that case, the parties indeed proposed to the Court to modify, with effect *inter se*, provisions of the Statute. They suggested to the Court that it communicate 'unofficially' to them 'the results of [the Court's] deliberation' on a particular disputed question, and thereby to circumvent Articles 54(3) and 58 of the Statute.[49] The Court openly rejected this request by stating:

> Whereas the spirit and letter of its Statute, in particular Articles 54, paragraph 3, and 58, do not allow the Court 'unofficially' to communicate to the representatives of two Parties to a case 'the result of the deliberation' upon a question submitted to it for decision; as, in contradistinction to that which is permitted by the Rules (Article 32), the Court cannot, on the proposal of the Parties, depart from the terms of the Statute[.][50]

Similarly, in the *Northern Cameroons* case both parties requested the Court to determine whether it had jurisdiction. The Court, however, refused to do so and held that the 'proper limits of its judicial function' did not permit it to entertain the merits of the case, an issue raised by neither party. It stated:

> There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[51]

In the *Nuclear Tests* cases, the Court invoked the necessity to safeguard its 'basic judicial functions' as the reason for rendering a decision that was not requested by the parties.[52] While it must of course be noted that neither *Northern Cameroons* nor *Nuclear Tests* concerned the problem of mutual agreement of the parties to deviate from the express terms of the Statute,[53] the statements by the Court nevertheless strongly indicate the Court's attitude to handle such agreements.

The view that the Court's judicial function and the maintenance of its judicial integrity prohibit any modification of the Statute by the parties is also shared in doctrine. Shihata, for instance, says that the Statute provides for an institution that can hardly function if it were up to the parties to modify its structure by their unilateral or bilateral instruments. Therefore, he concludes, the Statute is "composed of higher norms with which other instruments must agree".[54] Schwarzenberger also speaks of 'safeguards of judicial integrity' and, with regard to the position of the Court towards the Statute, observes:

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[49] Article 54(3) provides that "[t]he deliberations of the Court shall take place in private and remain secret". Article 58 reads: "The judgment shall be signed by the President and the Registrar. It shall be read in open court, due notice having been given to the agents."

[50] PCIJ, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order of 19 August 1929, at 12.

[51] ICJ, *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment of 2 December 1963, p. 29.

[52] ICJ, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, para 23.

[53] The more so as in the *Nuclear Tests* cases France decided not to plead at all.

[54] Shihata 1965, pp. 105 and also 206–208.

> The Court has no choice. Its Statute is its supreme law. If it treats it with less than becoming respect, it does so at its peril: it puts its own judicial status and credibility in jeopardy.[55]

Professor Abi-Saab, alluding to the statement in *Corfu Channel* where the Court considered itself as the organ of international law,[56] states that the International Court

> is the organ of the legal order of [the international] community and not of the parties to the dispute before it; it is an instrument put by the international legal order at the disposal of the litigants, without however depending on them in its structural and functional properties or in its judicial policy.[57]

Other authors take a similar view on the judicial function as limiting party autonomy and also the sphere of the Court's action,[58] even though at times this functional approach is combined with other reasons justifying the limitation of party autonomy, such as 'constitutional limitations', *ordre public*,[59] *jus cogens*,[60] or 'objective or statutory limitations upon the Court's exercise of its jurisdiction'.[61] Consequently, any attempt by the parties to deprive the Court of its power to indicate provisional measures will not be effective or opposable vis-à-vis the Court.

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[55] Schwarzenberger 1986, p. 723.

[56] ICJ, *Corfu Channel (United Kingdom v. Albania)* (Merits), Judgment of 9 April 1949, pp. 35 (paragraph break suppressed) and 36. Similarly already the Permanent Court in *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment of 25 August 1925, p. 19. See also PCIJ, *Brazilian Loans (France v. Brazil)*, Judgment of 12 July 1929, p. 124 (stressing that it is a tribunal of international law).

[57] Abi-Saab 1996, p. 7.

[58] Münch 1971, p. 713; ICJ, *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, p. 145, para 5 (diss. op. Judge Gros, stating that if the parties in the special agreement agreed to ignore the binding effect of the Court's judgment the Court would be prevented to exercise its judicial function).

[59] In his dissenting opinion in *Legality of Use of Force*, Judge Kreća stated: "The disposition of the parties, although the dominant principle in the proceedings before the Court, suffers limitations. These limitations derive from the objective rules of the Statute and the Rules of Court defining the nature and limits of the Court's judicial action. As constitutional norms […] or as *règles préceptives* […], these rules transcend the disposition of the parties and pertain to the international public order." ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, ICJ Reports 2004, p. 401 (diss. op. Judge Kreća).

[60] Münch 1971, p. 724; Schwarzenberger 1976, p. 125 (footnotes omitted): "Every legal system rests on a de facto order or quasi-order sustaining it. If this order or quasi-order is incorporated into the law, it embodies the fundamental political decisions on which the legal system concerned is based. Whether these rules are termed constitutional law, public policy or *ordre public* matters little. What does matter is that these rules are public law in the strict sense, that is, they cannot be modified by *inter se* agreements between individual parties. So long as the order or quasi-order behind the legal system lasts, they are *jus cogens*." Such an approach is briefly indicated by Abi-Saab 1987, p. 259, who combines arguments of *ius cogens* and the judicial function. See also Schwarzenberger 1986, p. 439, who refers to the Court's constitutional limitations under its own *jus cogens* as well as considerations of public law and public policy.

[61] Wegen 2012, p. 1453.

6.3.3.2 Effect on the *Inter Se* Relations Between the Parties

But the question remains whether the parties can, in their relations *inter se*, exclude the possibility of seeking interim protection. This was apparently the intention of Hungary and Slovakia in the *Gabčíkovo-Nagymaros* case. From a general point of view, it must be recalled that the main purpose of interim protection is to preserve the respective rights of either party. As a matter of principle, it is up to each party to decide whether it wishes to protect its rights and how or whether it refrains from requesting protection by the Court. After all, the rights at issue are essentially individual rights of the parties over which they possess a right of disposal, and there is nothing to prevent them from waiving such a protective entitlement even at the risk of irreparable damage or harm. Such a decision would eventually amount to a kind of relinquishment of the specific right affected (which is not necessarily identical with the substantive right forming the essence of the dispute), and the underlying agreement between the parties has in principle to be considered valid and effective as between the parties.

This is even more so where the parties provide for a sort of 'alternative' or 'equivalent protection' that should operate as a substitute for provisional measures under Article 41 of the Statute. In their Special Agreement in *Gabčíkovo-Nagymaros*, Hungary and Slovakia provided for the possibility of either party to request "immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities", with a view to protecting its rights if it believes that these are endangered by the other party.[62] Of course, from a strictly legal point of view, this kind of 'protection' is not an equivalent substitute for provisional measures in that unlike the Court's orders, neither the result of consultations between the parties, nor the views of experts or of the European Commission are legally binding, nor would such result be necessarily based on the law, or even follow from legally regulated proceedings. Thus it may well be doubted whether such an alternative protection is both sufficient and effective for the protection of the rights of either party.

In *Gabčíkovo-Nagymaros*, the Court neither was requested by the parties to indicate provisional measures nor did it consider it necessary to order interim protection *proprio motu.* It cannot reasonably be said whether this factual non-application of Article 41 was indeed due to the agreement in the *compromis* or whether the circumstances of the case simply did not warrant provisional measures either in the opinion of the Court or in the eyes of the parties. At the same time, it must be noted that the Court did not deem it necessary to pronounce on this agreement in which Hungary and Slovakia clearly departed from the terms of the Statute which is without prejudice to its validity. Most likely, the Court did not address the issue as it had not been asked to do so, and this is in line with the Court's general reluctance to adjudge highly controversial issues on the extent of party autonomy that could be at variance with the Statute.[63]

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[62] Article 4(2) of the Special Agreement, *supra* note 48.

[63] A comparable situation existed when the Court was faced with an allegedly invalid 'automatic' reservation to a declaration under Article 36(2) of the Statute in *Norwegian Loans.* Although there

However, it is also worth noting that Hungary and Slovakia considered the non-applicability of Article 41 and the alternative means of protection in case the rights of either party are endangered "as fundamental to the conclusion and continuing validity of the Special Agreement".[64] Thus it could well be argued that had the Court allowed a party to make a request for provisional measures, the opponent could have probably argued that this would have been a material breach of the Special Agreement which therefore would have no longer been effective and that the Court accordingly lacked jurisdiction.

From all these considerations it may be concluded that the parties not only may 'positively derogate' from Article 41, that is, allowing them to consensually extend the possibility of requesting provisional measures, but that they also may restrict the scope of Article 41 or even exclude the possibility of requesting interim protection. This seems to be covered by the autonomy of the parties concerning their particular, individual rights at issue even though this might imply an "à la carte functioning of the Provisional Measures jurisdiction".[65]

Any such agreement is however not necessarily, or not in every case, effective or opposable towards the Court which enjoys the power to indicate provisional measures *proprio motu* as part of its judicial function. This 'exception' is particularly important where provisional measures are warranted because the dispute not only concerns the individual rights of the parties but also rights protecting collective interests. Such broader interests are for instance involved whenever the Court considers it necessary to indicate interim protection for the purpose of "preventing the aggravation or extension of the dispute", particularly in cases involving a resort to armed force by the disputing parties.[66] Another example would be if a party invokes legally protected interests pertaining also to individuals. In *LaGrand* for instance, the Court recognized that Article 36(1) "creates individual rights for the detained person in addition to the rights accorded to the sending State"[67] and that Germany accordingly not only invoked its own right but at the same time that of the individual detained.

These considerations apply *a fortiori* to cases where a party invokes rights under treaties for the protection of human rights. In its Order on Provisional Measures in the case concerning the *Racial Discrimination Convention* between Georgia and Russia, the Court recognized that "there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek

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were strong and convincing voices from within the Court that the French reservation was incompatible with the Statute and hence invalid, the Court concluded: "The Court, without prejudging the question, gives effect to the reservation as it stands *and as the Parties recognize it*." ICJ, *Certain Norwegian Loans (France v. Norway)*, Judgment of 6 July 1957, p. 27 (emphasis added).

[64] Article 4(3) of the Special Agreement, *supra* note 48.

[65] Kolb 2013, p. 658, who is quite categorical in this respect: "Thus, a derogation from the rules applicable to Provisional Measures under the Statute, the Rules and the jurisprudence of the Court is incompatible with the law of the Statute. Not only is the Court not obliged to apply such special rules; it is under a positive obligation to refuse to do so.".

[66] As was emphasized by the Chamber in *Frontier Dispute, supra* note 8, para 19.

[67] ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, paras 77 and 89.

compliance therewith"[68] and that, therefore, the indication of provisional measures was required for the protection of rights under the Convention which formed the subject-matter of the dispute.[69] Thus, where genuine rights of individuals under international law are the subject of the dispute and threatened by irreparable harm, any *ex ante* exclusion of interim protection by the parties will certainly not be effective as towards the Court.

6.4 Provisional Measures in Advisory Proceedings?

The final question to be addressed concerns the transferability, as it were, of the concept of provisional measures to advisory proceedings. Article 41 is located in chapter III of the Statute dealing with the procedure in contentious proceedings between states. Chapter IV, devoted to advisory opinions, is silent on the power of the Court to indicate provisional measures in the exercise of its advisory function. Chapter IV is generally very terse and contains only provisions specifically designed for advisory proceedings. However, Article 68 provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable". The Rules not only duplicate this 'instruction' but provide further regulation of the Court's conduct of advisory proceedings.[70]

Of particular interest for present purposes is Article 103 of the Rules which requires the Court to resort to accelerated advisory proceedings, either because the requesting body informs the Court that the request necessitates an urgent answer—a characterization of the request which may be viewed differently by the Court[71]—or because the Court assumes urgency *ex officio*. In such case, the Court shall convene as early as possible for the purpose of proceeding to a hearing and the deliberation on the request. The terms of Article 103 of the Rules may well be interpreted as to mean that the Court might dispense with the phase of the written proceedings altogether. In several requests for an opinion, the respective body insinuated that the request would warrant accelerated proceedings, even though the various requests differed in their language.[72] But it was only in one case that the Court indeed made use of

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[68] ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, para 126. On the question of provisional measures to protect human rights, see Higgins 1998.

[69] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination, supra* note 68, para 145.

[70] Articles 102–109 of the Rules. See particularly Article 102(2): "The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. […]".

[71] Reisman 1974, p. 660.

[72] *Legal Consequences for States of the Continiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para 1: "request for an advisory opinion which shall be transmitted to the Security Council at an

this possibility of accelerated proceedings. In the preamble to its request for an advisory opinion in *Applicability of the Obligation to Arbitrate*, the General Assembly itself directly referred to Articles 41 and 68 of the Statute.[73] This raises the question whether Article 41 on provisional measures on protection may be applied in advisory proceedings pursuant to Article 68.

Several arguments may be advanced against the possibility of such a transfer of Article 41.[74] Firstly, it seems inappropriate to apply a concept that has developed exclusively in the context of contentious proceedings where opponents seek to enforce or vindicate their rights in an adversarial procedure. Secondly, provisional measures by their very nature require the existence of a dispute. This is also supported by the clear wording of Article 41 which refers to the "respective rights of either party" (para 1) and to the duty of the Court to give notice of the measure suggested "to the parties" (para 2). Thirdly, it seems illogical that provisional measures with legally binding force should be rendered in advisory proceedings resulting in legally non-binding opinions.

On the other hand, there are arguments clearly militating in favour of extending the scope of Article 41. In that regard, advisory proceedings are designed to address not only legal questions in general, but also a "legal question pending between two States" (Article 102(3) of the Rules). Thus, there may be situations in which a particular dispute forms the very subject-matter of the question(s) put to the Court. Indeed, there is practice according to which advisory opinions essentially addressed legal disputes between states.[75] Also, the possibility of requesting advisory opinions concerning disputes between international organizations and states or opinions

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early date" (SC Res 284); *Western Sahara*, Advisory Opinion of 16 October 1975, pp. 12, 14 (para 1): decides to "request the International Court of Justice … to give an advisory opinion at an early date (GA resolution 3292 [XXIX])"; *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, ICJ Pleadings, p. 3: "I would like to inform the Court, in accordance with Article 103 of the Rules of Court, that this request necessitates an urgent answer" (letter by the Director-General of the WHO transmitting the request); *Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the UN*, Advisory Opinion of 15 December 1989, pp. 177, 178 (para 1): "on a priority basis" (ECOSOC Resolution 1989/75); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, pp. 62, 63 (para 1): "on a priority basis" (ECOSOC decision 1998/297); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, p. 141: decides the Court to "urgently render an advisory opinion" (GA resolution ES-10/14).

[73] ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory opinion of 26 April 1988, pp. 12, 13 (para 1).

[74] See also Oellers-Frahm and Zimmermann 2019, para 79 (with further references); Thirlway 2013, pp. 862–863.

[75] ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950; *Western Sahara, supra* note 72, p. 12; *Legal Consequences of the Construction of a Wall, supra* note 72, p. 136. See also D'Argent 2019, paras 33–49; Kolb 2013, pp. 1100–1102. It is noteworthy that at one point, the Permanent Court envisaged including the possibility to indicate provisional measures also in advisory proceedings, see draft Article 57 para 1 of the draft rules of 1936, PCIJ Ser. D, no. 2, Add. 3, p. 875.

relating to employment disputes that may result in opinions having legally binding effect[76] testifies to the flexible assimilation of advisory to contentious proceedings, which might also entail the possibility of the Court ordering provisional measures. The fact that in advisory proceedings there is no "party" that could make a request for provisional measures does not support the argument against their availability; for either the body requesting the opinion may request provisional measures or the Court itself may indicate them *proprio motu*, invoking by analogy Article 41 and its inherent jurisdiction.[77]

Finally, the fact that the language of Article 41 uses terms unique to contentious cases is no hindrance in itself to its application by analogy in advisory proceedings. When transferring rules from contentious to advisory proceedings, these must necessarily be adapted to the exigencies of the latter. In other words, such an application by way of analogy cannot fail merely because the 'original' provisions are coined in terms of contentious proceedings *(falsa demonstratio non nocet)*. By their very nature, the procedural rules for contentious proceedings use terms such as 'case', 'parties', 'dispute', or 'judgment'. That use of terms should be no obstacle in itself in applying the underlying provisions to advisory proceedings, and the provisions must be applied *mutatis mutandis* according to Article 68 of the Statute[78] to the needs and demands of the advisory procedure.[79]

The Court, for its part, has left the matter open in the only request in which provisional measures were at issue. As mentioned, in the *Applicability of the Obligation to Arbitrate* advisory opinion, the General Assembly in its request referred to Article 41 and stated that its decision was made "taking into account the time constraint". However, in its first Order on procedural matters, the Court stated that the Assembly's resolution did not "constitute a formal request for the indication of provisional measures", and further that it was "not appropriate, in the circumstances of the case, for the Court to consider whether or not provisional measures may be indicated in proceedings on a request for advisory opinion".[80]

All things considered, it would therefore seem that, in principle, the Court may well indicate provisional measures in advisory proceedings pursuant to Article 68, and by analogy of Article 41 of the Statute. To be sure, in such an exceptional case a carefully balanced approach is called for. In assessing the need to indicate measures, the Court would have to take into account whether the request concerns a legal question pending between two (or more) states similar to a (legal) dispute between 'parties' and whether the factual circumstances indeed warrant an indication because their respective rights are in jeopardy in the first place. Furthermore, the legal effect of such an indication would vary depending on whether the opinion is a 'regular' one, in which case the indication would not be legally binding; or whether the entities involved have, by way of exception, agreed beforehand that they would accept and

[76] D'Argent 2019, para 47; Ago 1991, pp. 439–514; Thirlway 2013, pp. 860–861.

[77] Kolb 2013, p. 651.

[78] Wittich 2019, 1850 para 18.

[79] *Ibid*., who calls this a "critical analogy".

[80] *Applicability of the Obligation to Arbitrate, supra* note 73, p. 4.

recognize the opinion as legally binding in their mutual relations, in which case the indication might be considered legally binding as well.

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Chapter 7
A "Game of Give and Take": The ITLOS, the ICJ and Provisional Measures

Loris Marotti

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Abstract Besides testing the enduring influence of the ICJ law and practice on provisional measures on those of ITLOS, this chapter aims to assess whether the recent practice of ITLOS could suggest new developments in the ICJ (and other courts and tribunals) approach to provisional measures. Accordingly, the analysis carried out in this chapter is twofold. First, it is showed that, with respect to certain aspects of provisional measures, the practice of "borrowing" from the ICJ is still particularly evident in ITLOS case law. It is stressed at the same time that this practice should often be followed by a practice of adapting the Court's suggestions to the Tribunal's peculiarities. Secondly, this chapter claims that while the evolution of the law governing provisional measures in the ICJ continues to have a significant impact for the ITLOS, this latter has also the potential to "lend" something to the Court, rather than only to borrow from it, and more generally to contribute to the development of the international law on provisional measures.

Keywords ITLOS · ICJ · provisional measures · plausibility requirement · urgency · community interests · protection of environment · humanitarian considerations · effects of provisional measures · judicial dialogue

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7.1 Introduction

It is commonplace that in the field of provisional measures the law and practice of the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) have to be considered through the lens of the law and practice of the International Court of Justice (ICJ or the Court). Both the texts governing the indication of provisional measures and the relevant case law of the Tribunal—and of other tribunals operating under the law of the sea Convention (UNCLOS)—have indeed been shaped along the lines of Article 41 of the ICJ Statute and the relevant practice thereof.[1] In the *MOX Plant* case, an Annex VII Tribunal significantly emphasized this intimate relationship between the two systems by noting that "[a]lthough the language of Article 290 [of the Convention] is not in all respects identical to that of Article 41 of the Statute of the International Court of Justice, the Tribunal considers that it should have regard to the law and practice of that Court, as well as to the law and practice of ITLOS, in considering provisional measures".[2]

Quite understandably, the imitation of the Court's approach to provisional measures by UNCLOS tribunals has prompted scholars—especially in the first years of operation of the UNCLOS dispute settlement system—to focus mostly on the influence the ICJ had, and continues to have, on ITLOS law and practice on provisional measures, rather than enquiring on the possible impact that the latter could have on the ICJ. This tendency does not overlook the original features of UNCLOS provisional measures regime and the ensuing need to adapt the ICJ suggestions to its "special needs" as well as to the "special interests of the parties of international law of the sea disputes".[3] However, it places less attention on the potential contribution to the law on provisional measures that the Tribunal may provide and which the ICJ and other international courts and tribunals could look at.

Besides testing the enduring influence of the ICJ law and practice on provisional measures on those of ITLOS, this chapter aims to assess whether the recent practice of ITLOS could suggest new developments in the ICJ (and other courts and tribunals) approach to provisional measures.

Accordingly, the analysis carried out in this chapter is twofold. First, it is showed that, with respect to certain aspects of provisional measures, the practice of "borrowing" from the ICJ is still particularly evident in ITLOS case law. It is stressed at the same time that this practice should often be followed by a practice of adapting the Court's suggestions to the Tribunal's peculiarities. Secondly, this chapter claims that while the evolution of the law governing provisional measures in the ICJ continues to have a significant impact for the ITLOS, this latter has also the potential to "lend" something to the Court, rather than only to borrow from it, and more generally to contribute to the development of the international law on provisional measures.

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[1] Rosenne 2005; Treves 2009, p. 341.

[2] *The MOX Plant* case *(Ireland v. United Kingdom)*, PCA Case No. 2002-01, Order No. 3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures (the *MOX Plant* Order No. 3) of 24 June 2003, para 41.

[3] Aloupi 2019, p. 21.

In order to illustrate how this "game of give and take" between the two systems takes place in light of the most recent developments of provisional measures under UNCLOS, this chapter focuses on three general aspects, namely the requirements for the prescription of provisional measures (Sect. 7.2), their content (Sect. 7.3) and their effects (Sect. 7.4). Section 7.5 concludes.

7.2 Adjusting the ICJ Case Law on the Requirements for the Prescription of Provisional Measures in ITLOS Jurisprudence

The first area of the present enquiry relates to the requirements for the prescription of provisional measures. This is an area where the practice of "borrowing" from the ICJ is particularly evident. Both Article 290 UNCLOS and Article 89 of the Rules of the Tribunal set out some of these requirements, such as the *prima facie* jurisdiction or the existence of a situation of urgency. The Tribunal has contributed to the interpretation of such requirements. In doing so it has greatly borrowed from the ICJ jurisprudence. As mentioned, however, ICJ case law needs to be adjusted to the specificities of the law governing provisional measures under UNCLOS. This need places the Tribunal in a position to further elaborate on such requirements, thus providing for a more general contribution to their interpretation and development in a variety of situations. More generally this process of adjustment has in turn the potential to further contribute to the law governing provisional measures in international adjudication.

The latest developments concerning this practice pertain to the introduction of the "plausibility" requirement. The ICJ made this requirement explicit after the judgment in the *LaGrand* case—where the Court held the binding nature of provisional measures[4]—in order to counterbalance such binding nature by providing for a deeper, yet still provisional, appraisal of the rights whose protection is sought.[5] In essence the rationale of this new requirement lies in the consideration that "it would be unjust to subject a respondent State to a legally binding order […] if the applicant State had merely asserted a right, without showing on a prima facie basis that it had some prospect of succeeding on the merits".[6]

The ITLOS has followed the same path starting from 2015, on the occasion of the issuance of the Order on provisional measures in the *Gulf of Guinea* case, where the Special Chamber held that "before prescribing provisional measures […] it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks

[4]ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, para 109.

[5]ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para 57.

[6]ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, Separate opinion of Judge ad hoc Dugard, para 4.

to protect are at least plausible".[7] This requirement—which so far has been assessed under the heading of urgency—has been further confirmed by the Tribunal in the orders handed down in the three subsequent cases.[8]

Plausibility directly touches upon one of the most controversial aspects of provisional measures in international adjudication, that is the degree of intensity of a review into the merits at the provisional measures stage. Caution is warranted in this respect as both the Court and the Tribunal should not prejudge the merits of the case at this stage.[9] But the ITLOS and the ICJ have never clarified in a definite manner the standard or threshold of plausibility for a claimed right. This lack of clarity has been criticized several times by individual judges. In *Ukraine v. Russia* the criticisms have been much more intense,[10] perhaps because in that case the Court found for the first time that part of the rights claimed by the requesting party was not plausible.[11]

The lack of clarity of the plausibility standard might raise a number of issues which both the ITLOS and the Court are likely to face. One may wonder at this point whether the differences between the two dispute settlement systems suggest different answers for similar questions concerning plausibility.

For example, it is often submitted that plausibility, for the ICJ, entails a two-fold test aiming at ascertaining (1) the plausibility of rights, that is to say "whether the rights asserted by the applicant state might have a legal basis under international law", and (2) the plausibility of claims, namely "whether the conduct of the respondent state might breach the rights plausibly asserted by the applicant state".[12] With respect to the ITLOS, it might be argued that, given that the rights whose protection is sought must be located in the Convention due to the limited jurisdiction of UNCLOS Tribunals, the assessment of the plausibility of rights in the context of UNCLOS disputes overlaps with the assessment of *prima facie* jurisdiction which is aimed at establishing whether there exists a dispute on the interpretation and application of the Convention.[13] The fact that the Special Chamber referred for the first time to plausibility as a separate requirement for the prescription of provisional measures

[7] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, ITLOS Case No. 23, Provisional Measures, Order of 25 April 2015 ("*Gulf of Guinea*"), para 58. For a first account of the Order, see Tanaka 2015, p. 315.

[8] *The "Enrica Lexie" Incident (Italy v. India)*, ITLOS No. 24, Provisional Measures, Order of 24 August 2015, para 85; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019, para 91; *The M/T "San Padre Pio" Case (Switzerland v. Nigeria)*, ITLOS Case No. 27, Provisional Measures, Order of 6 July 2019, para 77.

[9] See e.g. *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Provisional Measures, Order of 23 December 2010, para 80. For further references, see Marotti 2014, pp. 763–764.

[10] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017. See the Separate opinions of Judge Owada, Judge Cançado Trindade, Judge Bhandari and Judge ad hoc Pocar.

[11] Marotti 2017.

[12] Lando 2018, p. 667. See also Miles 2018.

[13] Miles 2017, pp. 201–202.

may be linked to the circumstance that in that case the jurisdiction was based on a special agreement between the parties.[14] Be that as it may, in all its subsequent cases the Tribunal followed the same approach as in the *Gulf of Guinea* Order by making reference to plausibility as an autonomous requirement.

Regarding the plausibility of claims, while there seems to be a trend within the ICJ to endorse this kind of assessment, which means to make a deeper enquiry into the merits of the case,[15] one may wonder whether the ITLOS should follow the same trend or adapt the ICJ approach to its characteristics. So far it seems that the Tribunal has adopted a rather "light" approach to plausibility, being cautious not to engage in an examination of legal and factual issues naturally devoted to merits stage.[16] In *Gulf of Guinea* the Special Chamber stressed that it did not need "concern itself with the competing claims of the Parties",[17] thereby "expressing excluding consideration of breach of rights as part of the plausibility analysis".[18]

It is further submitted that the Tribunal should calibrate its approach towards plausibility also according to the type of proceedings it is seised of, by distinguishing provisional measures prescribed under Article 290(1) and those under Article 290(5) UNCLOS. In this latter case, it is an Annex VII tribunal that has jurisdiction over the merits of the dispute, the Tribunal being entitled only to prescribe provisional measures pending the constitution of the Annex VII tribunal. The characteristics of the procedure under Article 290(5) may thus suggest the need for a less intrusive scrutiny into the merits. As recently noted by judge Kateka "the need for restraint in prescribing provisional measures is greater under para 5 than under para 1".[19]

Be that as it may, as with the ICJ, the debate on the standard of plausibility is still open in the Tribunal. Future cases will tell whether it will find ways to adapt this requirement to its special needs and contribute in turn to a further development of this new requirement.

Also with regard to the requirement of urgency, ITLOS law and practice has been very much inspired by the ICJ and, as with the plausibility requirements, the Tribunal is facing the need to adapt it to its specificities. There have been some

[14] Tomka 2017, p. 184.

[15] Lando 2018, Miles 2018.

[16] See for instance *The M/T "San Padre Pio" Case, supra* note 8, para 110 where the Tribunal did not assess the plausibility of the third right claimed by Switzerland (concerning Nigeria's obligation to have due regard to rights and duties of Switzerland in the exclusive economic zone of Nigeria under Article 56, para 2, of the Convention) since such an assessment "would have required the examination of legal and factual issues which were not fully addressed by the Parties in the proceedings before it. Having established that the first and second rights asserted by Switzerland are plausible, the Tribunal, therefore, does not find it necessary to make a determination of the plausible character of the third right at this stage of the proceedings".

[17] *Gulf of Guinea, supra* note 7, para 58.

[18] Miles 2018, p. 17.

[19] See *The M/T "San Padre Pio" Case, supra* note 8, Dissenting opinion of Judge Kateka, para 3. See also Tomka 2017, p. 184 at footnote 31, noting that in Article 290(5) cases, "the question of prejudging the merits is of heightened importance" since the Tribunal itself does not have jurisdiction over the merits of the case". See *contra Detention of three Ukrainian naval vessels, supra* note 8, Declaration of Judge Kittichaisaree, para 17.

inconsistencies in a first line of cases as to the linkage between urgency and the existence of an imminent risk that an irremediable prejudice may be caused to the rights at issue before the final decision is delivered.[20] The risk of irreparable prejudice is constantly present in ICJ case law, whereas in ITLOS jurisprudence the reference has been critically missed in some cases.[21] However, recent cases confirm such linkage and the Tribunal is apparently moving towards a definite endorsement of such requirement, in line with the ICJ case law.[22]

At the same time, there are still some aspects which, if compared with the ICJ, apparently call for more flexibility in the assessment of the requirement of urgency in ITLOS law and practice on provisional measures. Here again, the distinction between the two different procedures under Article 290 UNCLOS has a bearing also on the requirement of urgency. First of all, it should be recalled that the requirement of urgency is explicitly set out only under para 5 of Article 290.[23] It is not mentioned in para 1. This may not be determinative as to the existence of the need to ascertain the urgency of the situation also in cases of requests under para 1. As the Annex VII tribunal in the *Enrica Lexie* case held "[a]lthough urgency is not expressly mentioned in Article 290, para 1, of the Convention, as it is in para 5, the Arbitral Tribunal is mindful of the international jurisprudence developed by courts and tribunals on this question, which supports the view that urgency is an important element in considering a request for provisional measures […] a showing of urgency in some form is inherent in provisional measures proceedings".[24] It is also undisputed that the assessment of a situation of urgency, and particularly of an imminent risk of irreparable prejudice "can only be taken on a case by case basis in light of all relevant factors".[25]

The differences between the two procedures might, however, have an impact on the "temporal" and "qualitative" scope of the requirement of urgency, as different degrees of urgency may be envisaged.[26] The question is whether provisional measures under Article 290, para 5, require a stricter assessment of the urgency of the situation,

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[20] Tanaka 2019.

[21] Miles 2015, p. 250; Klein 2005, pp. 71 *et seq.*

[22] See *The M/T "San Padre Pio" Case, supra* note 8, para 111; *"Enrica Lexie", supra* note 8, para 87; *Detention of three Ukrainian naval vessels, supra* note 8, para 100; *Gulf of Guinea, supra* note 7, para 42.

[23] See also Article 89, para 5 of the Rules of the Tribunal.

[24] PCA, The *'Enrica Lexie' Incident* case, Case No. 2015-28, Request for the Prescription of Provisional Measures, Order of 29 April 2016, paras 85 and 89. See also Virzo 2018a, pp. 149–150; Wolfrum 2019, para 27, "the inherent presumption that the issuance of provisional measures under Article 290 (1) Convention requires urgency is well established".

[25] *Gulf of Guinea, supra* note 7, para 43.

[26] For references to the impact of the differences between the two procedures on the "qualitative" dimension of urgency, relating to the real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute, see *"Enrica Lexie", supra* note 8, Dissenting opinion of Judge Heidar, para 9, according to whom "the qualitative dimension of the requirement of urgency is even more stringent under para 5 of Article 290 than under para 1 thereof". The same point was expressed by Judge Treves in his Separate opinion in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS No. 3 and 4, Provisional Measures, Order of 27 August 1999, p. 316, paras 3 *et seq.*

given that, contrary to measures under para 1, the relevant timeframe is "the short period involved before the Annex VII arbitral tribunal is constituted"[27] and not the possibly longer period before the Tribunal itself decides the dispute. The Tribunal took a stance on the issue in the *Land Reclamation* case, where it stated that the period before the constitution of the Annex VII tribunal "is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable […] the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures".[28] This stance notwithstanding, which apparently differ from a previous approach,[29] there remains the general perception of different degrees of urgency on account of the two different procedures. This perception is reinforced by the assumption that "there would have been no necessity to [set out explicitly the requirement of urgency in para 5 of Article 290] had the intention of the drafters been that this "urgency" be the same as the one inherent in the concept of provisional measures and reflected in para 1".[30] It is telling that even in most recent cases, respondent states continue to insist on the differences between the two procedures as regards the question of urgency.[31]

In sum, in the field of requirements for the prescription of provisional measures, recent practice confirms that the ITLOS is constantly looking at the ICJ. At the same time, the Tribunal needs to adapt the imported case law to its exigencies, taking into account the differences between measures under paras 1 and 5 of Article 290 UNCLOS. These differences might call for dissimilar standards of plausibility and urgency. Given that in Article 290(5) cases the Tribunal does not even have a potential jurisdiction over the merits of the dispute, it is suggested that the plausibility should be assessed with more caution if compared with Article 290(1) cases. A lighter approach to plausibility might in turn be balanced with a stricter approach as to the assessment of urgency in Article 290(5) cases.

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[27] *"Enrica Lexie", supra* note 8, Dissenting opinion of Judge Chandrasekhara Rao, *Enrica Lexie*, para 6.

[28] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003, para 68.

[29] See *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, para 81, where the Tribunal considered that it did not find that the urgency of the situation required the prescription of the provisional measures requested by Ireland "in the short period before the constitution of the Annex VII arbitral tribunal". See Virzo 2005, pp. 393–394.

[30] Separate opinion of Judge Treves in the *Southern Bluefin Tuna* case*, supra* note 26, para 3. See also Ishii 2019. More generally Klein 2005, pp. 69–71.

[31] See e.g. the submission of Nigeria in *The M/T "San Padre Pio" Case*, summarized in para 120 of the Order (*supra* note 8), claiming that "[p]rovisional measures under Article 290, para 5, are even more exceptional than ordinary provisional measures under Article 290, para 1"; and Russia's claim summarized in para 107 of the Order in *Detention of three Ukrainian naval vessels, supra* note 8.

7.3 The Content of Provisional Measures and ITLOS Greater Openness Towards the Protection of Community Interests

With regard to the content of provisional measures the general impression is that the Tribunal has recently shown a more pronounced inclination, if compared with the ICJ, to the protection of community interests, such as the protection of the environment or humanitarian considerations. It is well known that, in light of the traditional function to preserve the respective rights of the parties to the dispute, the prescription of provisional measures requires a link with the rights whose protection is sought. However, the Tribunal has shown to be also aware of a different and more general function of provisional measures of protection, aimed at protecting objective interests which go beyond the protection of the rights of the parties. This is due not only to the fact that UNCLOS provides for a textual basis of such a general function in relation to the protection of the environment but also because of the peculiarities of UNCLOS disputes, which, by their very nature, may regularly involve such community interests.

Two aspects can be illustrated to show how the ITLOS could contribute in this respect to the development of the law of provisional measures and suggest new and original solutions also to the ICJ.

First, it is known that Article 290 provides that provisional measures may also be prescribed "to prevent serious harm to the marine environment". This is a specific prerogative of the ITLOS which has been referred to several times and can be linked to the Tribunal's role in protecting a community interest which goes beyond the specific rights of the disputing parties.[32] The power to order provisional measures is not limited to the preservation of respective rights of the disputing parties but may be extended to the protection of the marine environment.

It has been argued that these measures mark "an important difference with 'usual' provisional measures", since they have been ordered to protect "general procedural obligations", such as the duty to cooperate to prevent pollution of the marine environment, which arguably do not meet the requirement of "urgency".[33] Indeed, this kind of measures stretch the "conventional parameters of interim relief"[34] and until very recently the Tribunal has adopted a rather cautious approach with them. Environmental measures have in fact been prescribed always in connection with and in the interest of the rights of the parties. Moreover, the Tribunal has never elaborated much on the contours of such power.

A more proactive approach has apparently been taken in *Gulf of Guinea*. In this case, the Special Chamber rejected the Côte d'Ivoire request as it had not adduced "sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area [were] such as to create an imminent risk of serious harm to the

[32] Bendel 2019, pp. 498–499.

[33] Oellers-Frahm 2011, pp. 1696–1697.

[34] Miles 2017, p. 392.

marine environment".[35] However, the Special Chamber finally ordered that Ghana "shall carry out strict and continuous monitoring of all activities […] in the disputed area with a view to ensuring the prevention of serious harm to the marine environment", and that both parties "shall take all necessary steps to prevent serious harm to the marine environment".[36] Aside from the specific claims made by the parties, the case is interesting as the Special Chamber of the Tribunal hinted at the protection of the marine environment "as a standalone ground for ordering provisional measures"[37] and expressed its own concerns for the protection of the environment, independently from the need to protect the rights of the parties to the dispute.[38] In particular, while the Special Chamber stated that an order prescribing the suspension of Ghana's exploration or exploitation activities in the disputed area "would […] cause prejudice to the rights claimed by Ghana and create an undue burden on it", it added that "such an order could also cause harm to the marine environment".[39] It is therefore not only in the interest of Ghana's rights that Côte d'Ivoire's request was rejected but also in the general interests of the preservation of the marine environment.

Writing in 2012, Tomka and Hernández noted that "[i]t remains an open question whether the Tribunal will, when faced with a request for provisional measures by a party which does not invoke a general interest, go beyond such a request in ordering such provisional measures as to preserve the general interest".[40] The Order rendered in *Gulf of Guinea* does not provide a conclusive answer to the question, as in the end in this case "the common environmental interest implicitly overlapped with the interests of Ghana".[41] There remains however the impression that the Tribunal might be ready to accept that the general interest is even susceptible to go beyond the parties' requests since such an interest is considered in the Order at hand independently from the parties' rights. After all, this stands in line with the text of Article 290, referring to measures "to preserve the respective rights of the parties to the dispute *or* to prevent serious harm to the marine environment". In other words, the case shows a potential willingness of the Tribunal to prescribe autonomous provisional measures—which are not necessarily complementary or ancillary to measures aimed at protecting the rights of the parties—with a view to protect this community interest.

Now, if one compares this practice with that of the ICJ, one may wonder—as Torres Bernárdez did some years ago—whether the Court could do the same "with a view to protect a general interest as ITLOS may do with respect to the prevention of serious harm to the marine environment".[42] The Court undoubtedly has considerable discretion in this field and has empowered itself to order measures aimed at preventing

[35] *Gulf of Guinea, supra* note 7, para 67.

[36] *Ibid*., paras 108(c) and 108(d).

[37] Bendel 2019, p. 499, commenting on *Gulf of Guinea, supra* note 7, para 73.

[38] *Gulf of Guinea, supra* note 7, para 68.

[39] *Ibid*., para 101.

[40] Tomka and Hernández 2011, p. 1784. See also Wolfrum 2019, para 24.

[41] Tomka 2017, p. 135 at footnote 37.

[42] Torres Bernárdez 2006, p. 43.

the extension or the aggravation of the dispute between the parties.[43] This kind of measures—which have always been prescribed by the Tribunal as well[44]—differ from those traditional measures aimed at preserving the rights of the parties. Non-aggravation measures are broader in scope than the former and usually consist in a general request to the parties to refrain from taking actions that might aggravate or extend the dispute.[45] The Court made use of this power many times, especially where there was a risk of military escalation between the parties. This practice has also led some judges and authors to detect a public function of the Court that goes beyond its judicial function and would even resemble a "peace-keeping" function.[46]

Whether environmental concerns can fall within this practice is still a matter of speculation, but one cannot exclude that a serious harm to the environment might risk to aggravate the dispute between the parties and prompt the Court to order measures of this kind upon the inspiration of the ITLOS practice.

What can be said is that the ITLOS so far has shown more flexibility than the ICJ in prescribing measures with a view to protect general interests. Indeed, contrary to the impression that one can draw from the most recent ITLOS jurisprudence, the ICJ has clearly refrained from indicating non-aggravation measures without associating them with measures aimed at protecting specific rights of the parties.[47] In essence, according to the Court's approach, non-aggravation measures "would merely be ancillary to measures directed at preserving specific rights".[48]

The second point worth mentioning as far as the content of provisional measures is concerned pertains to the so-called "considerations of humanity", which are now well-established in the jurisprudence of law of the sea tribunals and are also well-known in the ICJ practice.[49] The growing tendency to recognize what Rosalyn Higgins called "human realities behind disputes of states"[50] even at the provisional measures stage appears far more intense in the case law of ITLOS and other UNCLOS tribunals. These tribunals have shown a very strong inclination to engage, expressly or implicitly, in "humanitarian" considerations when seised of disputes.[51] Suffice it to recall here that in the most recent provisional measures prescribed by the Annex

[43] Palchetti 2008.

[44] See Virzo 2018b, 526–527, according to whom the fact that the Tribunal has always deemed it appropriate to prescribe non-aggravation measures marks a difference with the approach taken by the ICJ towards such measures. In the author's view: "While the ICJ orders provisional measures aimed at preventing the aggravation or extension of the dispute only when it considers that the circumstances of the case so require, the ITLOS constantly reiterates this additional purpose" (internal references omitted). See also Virzo 2018a, pp. 156–157.

[45] Palchetti 2008.

[46] For further discussion, see Lee-Iwamoto 2013; Thirlway 2014.

[47] ICJ: *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, paras 49–50; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, para 83.

[48] Palchetti 2008, p. 626. See also Lee-Iwamoto 2013, p. 78.

[49] Papanicolopulu 2015.

[50] Higgins 1998, p. 91.

[51] See Petrig and Bo 2019, p. 353.

VII tribunal in the *Enrica Lexie* case "considerations of humanity" were included both in the reasoning *and* in the operative part of the order.[52] One should admit that the ITLOS has not gone that far when prescribing its measures in the same case as well as in other cases.[53] Be that as it may, there is no doubt that the ever-increasing trend to refer to considerations of humanity in provisional measures prescribed under the Convention testifies that UNCLOS disputes very often offer occasions to deal with issues which call to reconcile pure interstate rules with humanitarian values. However, UNCLOS Tribunals—and ITLOS in particular—still have to develop and further clarify the actual scope and impact of "considerations of humanity" in their case law.

The still-uncertain "normative status" of considerations of humanity could surely prompt these tribunals to further elaborate on the concept and contribute more generally to the development of the law on provisional measures, also providing some guidance for the ICJ. In doing so, however, caution is warranted so as to avoid (or not to give the impression) that human rights aspects of an interstate dispute completely trample the rationale of provisional measures and, in particular, the need to preserve the rights of the parties pending a dispute without prejudging its final outcome. In this respect one cannot but share the view that considerations of humanity cannot "replace" the requirements to prescribe provisional measures, but should be rather regarded as an element of the interpretation or application of the requirements for the prescription of provisional measures.[54] Following this path, the Tribunal's (and also arbitral tribunals') willingness to engage in considerations of humanity in provisional measures cases could also add to the conceptual framework for a "humanization" of the requirements for the prescription of such measures in the ICJ context, as Sparks and Somos suggest with specific regard to the plausibility requirement.[55]

7.4 Effects of Provisional Measures and the ITLOS Contribution to the Development of ICJ Practice

The third and last area of the present survey concerns the question of the effects of provisional measures. In this field, the law and practice of provisional measures under UNCLOS have provided, and still can provide, a significant contribution to the development of the law on provisional measures for the ICJ and other international courts and tribunals.

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[52] *The 'Enrica Lexie' Incident*, PCA Case, *supra* note 24, paras 104, 106, 124, 132(a). As it has been critically noted, contrary to the more prudent practice of the ICJ, in this case the arbitral tribunal "seemed to regard the concept of considerations of humanity as an independent element that is distinct from the preservation of the respective rights of the parties". See Chap. 9 by Tanaka in this volume and Tanaka 2017.

[53] *The 'Enrica Lexie' Incident*, ITLOS Case, *supra* note 8, paras 133–135. Virzo 2018b, pp. 529–531.

[54] Tanaka 2017, pp. 283–284.

[55] See Chap. 5 by Sparks and Somos in this volume.

The most well-known contribution pertains to the binding nature of provisional measures. It now seems to be accepted that the inclusion in the Convention, as well as in the Statute of the Tribunal,[56] of express provisions referring to the bindingness of such measures has prompted the ICJ to say a definitive word on the same issue on the occasion of the *LaGrand* judgment.[57]

The binding nature of provisional measures entails that the breaches of such measures give rise to international responsibility. As the Annex VII tribunal in the merit phase of the *Arctic Sunrise* arbitration recently stated, "[t]he failure of a State to comply with provisional measures prescribed by ITLOS is an internationally wrongful act".[58] Interestingly, in that specific case, the Annex VII tribunal found for the first time that Russia failed to comply with the ITLOS order and breached its obligation under Articles 290(6) and 296(1) of the Convention.[59] Just like the ICJ, the recent case law of UNCLOS tribunals shows a willingness to address requests concerning the alleged failure to comply with provisional measures, as well as to include in the operative part of a judgment findings of non-compliance with provisional measures.[60]

But in the context of UNCLOS dispute settlement further steps have been taken. In the recent award on compensation in the *Arctic Sunrise* case the Annex VII tribunal held that the violation of the ITLOS Order, consisting in the impairment of the Arctic 30's ability to promptly leave Russian territory, would be considered as "an aggravating factor in determining Russia's liability for non-material damages".[61] Russia's non-compliance with the ITLOS order was therefore considered as an "aggravating factor" having an impact in the determination of the amount of compensation for non-material losses owed to The Netherlands. This approach confirms what has already been suggested by scholars but so far never endorsed by the ICJ, namely that "[a] breach of provisional measures may reveal wilful intent or gross negligence, which the Court may take into account when assessing the extent of the reparation to be due for the breach of the substantive obligations".[62] The approach followed by the Annex VII tribunal in the compensation phase of the *Arctic Sunrise* case may provide the Court a first (external) precedent to rely on should it ever consider the impact

[56] See Article 290(1) (where it is used the word "prescribe"), Article 290(6) ("The parties to the dispute shall comply promptly with any provisional measures prescribed under this article") and Article 25(1) of the Statute ("[i]n accordance with Article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures"); Orrego Vicuña 2007, pp. 452–453; Tomka and Hernández 2011, pp. 1766–1767; Mensah 2002, pp. 44–45.

[57] *LaGrand* supra note 4. See Brown 2007, pp. 147–148; and Simma and Hoppe 2007, p. 383.

[58] *The Arctic Sunrise Arbitration*, PCA Case No. 2014-02, Award on the Merits of 14 August 2015, para 337.

[59] *Ibid*., para 401(D).

[60] See for instance ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 2016, para 229. Palchetti 2017; Marotti 2014, p. 776.

[61] *The Arctic Sunrise Arbitration*, PCA Case No. 2014-02, Award on compensation of 10 July 2017, para 78. See also para 85.

[62] Palchetti 2017, p. 16.

of non-compliance with provisional measures in the determination of the amount of compensation due.

Apart from the questions relating to the consequences stemming from the binding character of provisional measures ordered by international courts and tribunals, the question of ensuring compliance with such measures is also interesting for an analysis aimed to assess the potential contribution that the ITLOS practice may provide to the development of other regimes of provisional measures, and particularly that of the ICJ.

It may be easily noted that law of sea tribunals are more well-equipped than the ICJ when it comes to the supervision and the monitoring of compliance with orders prescribing provisional measures.[63] Article 95 of the ITLOS Rules requires the parties to inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed by means of a written report. The same article further provides that the Tribunal "may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed". While one may question whether it is appropriate to provide an obligation of this kind in the Rules, there is little doubt that it has been accepted by states so far and the practice of reporting the steps towards the implementation of provisional measures has become "a matter of routine".[64] It is interesting to note that in the already mentioned *Arctic Sunrise* award on the merits, the Annex VII tribunal, among other things, found that Russia failed to comply with the obligation of submitting a report on its compliance with the measures previously ordered.[65] As to the ICJ's practice, it should be noted that Article 78 of the ICJ Rules provides that "[t]he Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated". Such a discretionary power has been rarely used by the Court and reporting remains a non-compulsory means to monitor compliance with provisional measures by parties to a dispute before the Court. As it has been suggested, the ICJ could look at the ITLOS reporting scheme in order to strengthen the requirement of reporting by amending Article 78 of its Rules.[66]

When it comes to the effects of provisional measures, as well as to those aspects stemming from their binding character such as the determination of consequences of non-compliance or the needs of monitoring compliance, the UNCLOS regime—including the practice of UNCLOS tribunals—ultimately proves to be well-suited to contribute to the development of the ICJ law and practice on provisional measures.

[63] Lando 2017.

[64] Tomka and Hernández 2011, p. 1769.

[65] *The Arctic Sunrise Arbitration, supra* note 58, paras 359–360 and 401 (D).

[66] Lando 2017, p. 50.

7.5 Conclusion

Despite the relative paucity of orders on provisional measures prescribed by the ITLOS against the practice of the ICJ it remains important to keep alive the discussion about the contribution that the Tribunal has given and still can give to the development of international law on provisional measures.

By looking at the most recent practice of the Tribunal, this chapter has shown that the ICJ not only can "teach" the ITLOS how to approach provisional measures but can also "learn" from the ITLOS innovative—and at times more advanced—ways to deal with them, in a spirit of mutual cross-fertilization. As Aloupi has put it in general terms, "if ITLOS has been influenced by other international courts and tribunals, and especially by the ICJ, its case law can in turn become an influence for them".[67]

It seems safe then to argue that the Tribunal is in good shape to elaborate new ways for balancing the tension between the urgent need to protect parties rights *pendente lite* and the need to preserve states' sovereignty, that is in the end a tension that constantly characterizes provisional measures in international adjudication.

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[67] Aloupi 2019, p. 23.

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Chapter 8
Interim Measures in the Practice of the International Court of Justice and the International Criminal Court

Péter Kovács

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Abstract Comparative international jurisprudence is a precious tool in the hands of international lawyers to examine the increasing, and increasingly important, phenomenon of cross-fertilization among international courts and tribunals. From this perspective, this chapter reviews the practice of the International Court of Justice and the International Criminal Court with regard to the issuance of provisional measures by considering their nature, form, modalities and efficacy. In light of the comparative exercise carried out herein, this chapter contends that interim measures granted by the ICJ and the ICC—despite the existing differences due to the framework of their statutory norms—share some remarkable common features.

Keywords comparative international jurisprudence · ICC · ICJ · cross-fertilization

8.1 Introduction

Comparative international jurisprudence is a theme often analysed by international lawyers because it makes possible to check the fertilizing capacity of an international court with regard to other tribunals of the international community. The contribution of the European Court of Human Rights to the renewal of the jurisprudence of the

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Court of Justice of the EU (and vice versa), the judicial dialogue among different regional human rights courts, the emergence of the legacy of the International Military Tribunal of Nuremberg in the jurisprudence of the ICTY[1] and ICTR,[2] as well as the comparison of the jurisprudence of the ICTY and ICTR with that of the ICC or the hybrid tribunals (SCSL,[3] ECCC,[4] STL[5] etc.) are the best known examples for this profile of researches. Similarly, the impact of the jurisprudence of the PCIJ and the ICJ on other permanent tribunals or arbitral tribunals has also been deeply analysed.

This does not, however, render it superfluous to review the practice of the International Court of Justice (ICJ) and the International Criminal Court (ICC) with only one aspect in the centre of interest, i.e. the *interim measures*—which have been called *magma* by Jean-Marc Sorel[6] and *element of drama* by Shabtai Rosenne.[7] Indeed, such comparative exercise may provide some useful insights as to whether and how the jurisprudence of the ICJ has influenced the issuance of provisional measures in the context of the ICC.

It is to be noted, however, that this analysis has also its limits because interim measures do not have the same content in the practice of the ICJ and in that of the ICC. As far as the ICJ, measures of conservation and interim measures/provisional measures cover more or less the same entities. Instead, with respect to the ICC and according to the terms of the Rome Statute, the notion of measures of conservation is used to call some precise forms of a greater amount of what is called interim measures by scholars, a notion unused in the Rome Statute. Moreover, as usual, a slight difference may be felt between the French and the English versions of the Rome Statute.

Article 41 of the Statute of the ICJ gives a rather large and discretionary mandate to the judges to impose "*provisional measures*" ("mesures conservatoires" in the French text)[8] and the procedural details are regulated in Articles 73–74 of the Rules of the Court. Contrariwise, no mention of "interim measures" or "provisional measures"

[1] International Criminal Tribunal for the former Yugoslavia.

[2] International Criminal Tribunal for Rwanda.

[3] Special Court for Sierra Leone.

[4] Chambers in the Courts of Cambodia.

[5] Special Tribunal for Lebanon.

[6] Sorel 2003, p. 52: "un magma peu identifiable où urgence, provisoire et conservatoire jouent des rôles complémentaires et confondus.".

[7] Rosenne 2005, p. 1416: "The inherent nature of provisional measures proceedings and the factor of urgency supply an element of drama which fits in well with modern practices of diplomacy by television and the Internet.".

[8] Statute of the ICJ, Article 41(1): "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. (2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." See the French version: "La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire. (2) En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.".

can be found in the English text of the Rome Statute, and even the French version contains the expression "mesures conservatoires" *verbatim* only once.[9]

The Rome Statute often uses the word "measures" and it depends on the context whether they should be understood as interim measures. There are, however, a range of other expressions, such as *unique investigative opportunity* contained in Article 18(6),[10] and appropriate measures to ensure the protection for/of witnesses and victims [in Article 43(6), Article 68(1), Article 87(4)] or pieces of evidences [in Article 54(3)(f), Article 56(3)(a)]. We can also refer to the arrest warrants (Article 58) or the request for provisional arrest (Article 92). A similar array of expressions can also be found in the Rules of Procedure and Evidence: e.g. Rule 57 on provisional measures under Article 16(6), Rule 87 on protective measures, and Rule 88 on special measures.

Inasmuch as the wording "interim measures" is absent from the Rome Statute, the expressions "interim measures *lato* sensu" and "interim measures *stricto* sensu" will be used in the following pages to describe the practice of the ICC in order to carry out the comparative analysis. While admitting that "interim measures *stricto* sensu" and "interim measures *lato* sensu" do not appear at all in the Rome Statute, I will use the expression "interim measures *stricto* sensu" as being very close[11] to what the ICJ understands under interim measure. "Interim measures *lato* sensu" will be used when this logical similarity is still recognizable despite the fact that the two approaches are not that close to each other.

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[9]Rome Statute, Article 57(3) "In addition to its other functions under this State, the Pre-Trial Chamber may (….) (e) Where a warrant of arrest or a summons has been issued under Article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to Article 93, para 1(k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims." See the French version: "Indépendamment des autres fonctions qui lui sont conférées en vertu du présent Statut, la Chambre préliminaire peut: (…) (e) Lorsqu'un mandat d'arrêt ou une citation à comparaître a été délivré en vertu de l'article 58, solliciter la coopération des États en vertu de l'article 93, paragraphe 1, alinéa k), en tenant dûment compte de la force des éléments de preuve et des droits des parties concernées, comme prévu dans le présent Statut et dans le Règlement de procédure et de preuve, pour qu'ils prennent des mesures conservatoires aux fins de confiscation, en particulier dans l'intérêt supérieur des victimes.".

[10]Rome Statute, Article 18(6): "Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available." See the French version: "En attendant la décision de la Chambre préliminaire, ou à tout moment après avoir décidé de surseoir à son enquête comme le prévoit le présent article, le Procureur peut, à titre exceptionnel, demander à la Chambre préliminaire l'autorisation de prendre les mesures d'enquête nécessaires pour préserver des éléments de preuve dans le cas où l'occasion de recueillir des éléments de preuve importants ne se représentera pas ou s'il y a un risque appréciable que ces éléments de preuve ne soient plus disponibles par la suite.".

[11]As I mentioned *supra*, the French version of the Rome Statute is using effectively once "measure conservatoire" to one type of these measures (see the French version of Article 57(3) in the footnote 10, *supra*.).

In order to analyse the judicial dialogue between the ICJ and the ICC (Sect. 8.2), I will compare the interim measures adopted by these two judicial bodies with regard to: (1) their purpose; (2) their preconditions; (3) the parties or actors mandated to submit a claim for their triggering; (4) the most important procedural rules of their adoption; (5) their intended recipient; (6) their legal nature; (7) their characteristics and their most typical forms; and finally, (8) their efficacy. Building on this analysis, Sect. 8.3 will offer some concluding remarks.

8.2 Critical Issues of Interim Measures

8.2.1 The Purpose of Interim Measures Before the ICJ and the ICC

In order to get closer to the purpose of the interim measures of the ICJ—and taking into account the silence of the Statute and of the Rules of the ICJ—it is possible to recall phrases often used by the ICJ, such as "it is the purpose of provisional measures to 'preserve rights which are the subject of dispute in judicial proceedings' […]"[12] and [regarding the reason for using this tool] "ensure, in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment".[13] As expressed by Alain Pellet, the necessity of a speedy action is directly connected to the volume of the danger.[14] In more general terms, the purpose of interim measures encompasses the preservation of evidences, the diminishing of tensions, the creation of basis for negotiations and efforts towards international peace and security.[15]

[12] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, para 22 (When the Court cited the "rights which are the subject of dispute in judicial proceedings", it referred to the case of *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, Order of 15 December 1979, para 36 and the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Provisional Measures, Order of 10 January 1986, para 13).

[13] ICJ, *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, para 61.

[14] Pellet 1989, p. 561: "(…) l'adoption d'une ordonnance en ce sens permet à la Haute Juridiction de réagir avec célérité dans des situations de grand péril.".

[15] Kempen and He 2009, p. 929.

Considerations on purpose go hand in hand with a definition of urgency[16] or necessity. "[P]rovisional measures […] are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given."[17] The vocabulary is very similar in a series of orders[18] and the word "irreparable" is nearly always present with the exception of the judgment in the *LaGrand* case.[19] (But let us keep in mind that the preceding order rendered in the *LaGrand* case used the word "in conformity with the established practice").[20]

As to the ICC, the purpose of interim measures is already expressed by certain dispositions of the Rome Statute. Indeed, in cases of so called "unique investigative opportunity", the Rome Statute empowers the Pre-Trial Chamber to take, upon request of the Prosecutor, such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.[21] By adopting these measures, the harmful effects of either a *ping-pong*[22] between national authorities and the ICC or wartime destructions[23] can be

[16] Jouannet 2003, p. 210: "L'urgence dans le contentieux international est une règle standard à contenu variable qui laisse une grande liberté au juge pour faire face à des situatins qui ne sont pas toujours clairement tranchées ou identifiées, et grâce à laquelle le juge délimite le caractère normal ou non d'un ensemble de faits, puis en induit un certain nombre de conséquences précises. L'urgence comme standard juridique est donc tout à la fois un modèle de comportement et un modèle de situation.".

[17] *Passage through the Great Belt*, *supra* note 12, para 23.

[18] See e.g. the recapitulation in the order in ICJ, *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, para 23: "23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice to rights which are the subject of dispute …" (ICJ, *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, p. 103; *Diplomatic and Consular Staff in Tehran*, *supra* note 12, para 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 8 April 1993, para 34; *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, para 36). See also: *Frontier Dispute*, *supra* note 12, para 13, and also *Preah Vihear*, *supra* note 13, para 46: "Whereas 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 (…)"; text quasi verbatim identical in: *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, paras 82–83.

[19] ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, para 102 "(…) the power in question is based on the necessity, when the circumstances cal1 for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.".

[20] *LaGrand*, *supra* note 19, paras 22 and 24.

[21] Article 56 of the Rome Statute, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity (see in particular para 1(b) of Article 56).

[22] Taylor 2016.

[23] Ntanda Nsereko 2016, p. 847: "(…) steps under this paragraph would include a war that paralyses the national authorities' investigations, uproots or displaces potential witnesses or results in fatalities or in evidence being destroyed.".

avoided and the collected pieces of evidence, e.g. records of exhumations[24] or DNA remnants[25] can be presented during the subsequent phases of the procedure.

It is not surprising that as far as the arrest warrant is concerned, the purpose is the same as in national judicial systems: to assure appearance, to avoid hindrance to the investigation and to prevent that further crimes are committed.[26] Measures for the protection of victims and witnesses have also the same purpose as in national law.[27]

As far as interim measures *stricto* sensu are concerned, e.g. the freeze of assets,[28] the reference of the Rome Statute to the "ultimate benefit of victims" was translated as "nécessaire dans l'intérêt supérieur des victimes pour garantir que […] lesdites victimes puissent […] obtenir réparation des préjudices qui peuvent leur avoir été causés."[29] It is not a precondition that the given items or financial assets have a link with the crime for which the arrest warrant was issued.[30] The connection with another disposition of the Rome Statute—especially in the French version—may suggest such a restrictive interpretation,[31] but the judges—in a majority decision adopted in the

[24] According to Klamberg 2016, "the rationale is that some evidence cannot be fully reproduced at trial, for example mass grave exhumations". See also Guariglia and Hochmayr 2016a, p. 1414.

[25] In Guariglia and Hochmayr 2016a the example of exhumations is completed by reference to DNA analysis or the testimony of a patient in a terminal phase. The commentators evoke the discussion in Rome on the collections of testimonies of victims in danger. The issue was not decided in Rome but Guariglia and Hochmayr answer the question affirmatively. See Guariglia and Hochmayr 2016a, p. 1415.

[26] Article 58 of the Rome Statute: "Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear 1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.".

[27] Article 68 of the Rome Statute: "Protection of the victims and witnesses and their participation in the Proceedings 1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. (…) The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

[28] Article 57 of the Rome Statute, para 3(e).

[29] ICC-01/05-01/08-08-US-Exp (reclassified "Public"), para 7 (The author's remark: the "Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise" had only Portuguese but no English translation).

[30] Guariglia and Hochmayr 2016b, pp. 1435–1436.

[31] Article 93 of the Rome Statute, Other forms of cooperation (…) (1) k: "The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties". See the French version: Autres formes de coopération (…) (1) k: "L'identification, la localisation, le gel ou

Kenyatta case—rejected this possibility relying rather on a teleological approach,[32] which was developed by the Pre-Trial Chamber in the Lubanga case.[33]

In fact, the first fifteen years of the ICC proved Hervé Ascensio's prognosis that the legal possibility of the freeze will certainly be insufficient to restore the victims for the harm suffered.[34] The judgments pronounced before December 2018, i.e. those of Lubanga, Katanga and Al Faqi, concerned indigent persons, with the exception of the only wealthy indictee: Jean-Pierre Bemba Gombo, sentenced by the Trial Chamber to eighteen years for murder and rape due to commandant's responsibility, but acquitted by the Appeals Chamber in 2018.[35] However, as Mr. Bemba Gombo was condemned in two separate cases and the acquittal concerned only one of them, the fine imposed on him in the second case—i.e. witness tampering during his trial—was confirmed.[36]

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la saisie du produit des crimes, des biens, des avoirs et des instruments qui sont liés aux crimes, aux fins de leur confiscation éventuelle, sans préjudice des droits des tiers de bonne foi".

[32] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC Case No. ICC-01/09-02/11, Decision on the implementation of the request to freeze assets of 08 July 2014, "11.The Chamber notes the submission of the Kenyan Government that the implementation of a cooperation request under Article 93(1)(k) of the Statute relating to identifying, tracing and/or freezing assets or property of an accused person requires an express finding that such assets or property were instrumentalities of a crime or that they came into the possession of the person upon execution of the crime." and "12. The Majority considers that the statutory framework does not require any such nexus to be established when ordering protective measures under Article 57(3)(e). (…)".

[33] *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 32, referring to Lubanga Decision, ICC-Ol/04-01l06-8-Corr, para 135: 13. "(…) The Majority shares the view of Pre-Trial Chamber I that: [t]he teleological interpretation of Article 57(3)(e) of the Statute reinforces the conclusion arising from a contextual interpretation. Indeed, since forfeiture is a residual penalty pursuant to Article 77(2) [b1 of the Statute, it will be contrary to the "ultimate benefit of victims" to limit to guaranteeing the future enforcement of such a residual penalty the possibility of seeking the cooperation of the States Parties to take protective measures under Article 57(3)(e) of the Statute".

[34] Ascensio 2003, p. 79: "compte tenu de l'ampleur et de la nature des crimes entrant dans la compétence de la Cour, il est néanmoins probable que les confiscations opérées seront largement insuffisantes pour permettre l'indemnisation et que d'autres ressources seront nécessaires pour alimenter le Fonds d'indemnisation en faveur des victimes prévu à l'article 79 du Statut.".

[35] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC Case No. ICC-01/05-01/08, Judgment on the appeal of 8 June 2018.

[36] The Trial Chamber convicted M. Bemba Gombo also (again) to one year of imprisonment but it declared it as served, taking into consideration the time effectively spent in custody. *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC Case No. ICC-01/05-01/13, Decision Re-sentencing Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba and Mr. Jean-Jacques Mangenda Kabongo of 17 September 2018, para 127: "127. In addition, the Chamber again finds that a fine is a suitable part of the sentence. The Chamber recalls that there is a need to discourage this type of behaviour and to ensure that the repetition of such conduct on the part of Mr. Bemba or any other person is dissuaded. Recognising Mr. Bemba's enhanced culpability, and considering his solvency, the Chamber is of the view that he must be fined the same amount as before: EUR 300,000.".

8.2.2 *Preconditions for Interim Measures Before the ICJ and the ICC*

Before the ICJ, the most important precondition for interim measures is the existence of the jurisdiction of the Court over the case or, more precisely, that its competence is not manifestly excluded. As pronounced in the case of *Nicaragua v. US*:

> 24. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded […][37]

Moreover, it is mandatorily required that both the requesting party and the Court are convinced of the urgency and the necessity of taking such a measure (The ICJ may also take it *ex officio*,[38] but up to now this possibility seems to have been left aside.). The onus of the proof is on the party requesting interim measures and information and guarantees received from the interested parties play a decisive role in the assessment. It has happened that the Court, having examined the information offered and the assurances promised, concluded that there was no such necessity at a given phase of the litigation. This occurred in the *Passage through Great Belt* case[39] and in the case of *Obligation to Prosecute or Extradite*,[40] but *a contrario*, the Court did not find the proposed national measures satisfactory in the *case of the San Juan river*.[41]

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[37] Boisson de Chazournes 1993, p. 517.

[38] Article 75 of the Rules of the ICJ: (1) "The Court may at any time decide to examine proprio motu whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties." See however Laurence Boisson de Chazournes's warning, i.e. "l'indication d'office de mesures conservatoires ne peut pas évincer le jeu du contradictoire": Boisson de Chazournes 1993, p. 528.

[39] *Passage through the Great Belt*, *supra* note 12, para 27: "Whereas however the Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings".

[40] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para 72: "Whereas, as the Court has recalled above, the indication of provisional measures is only justified if there is urgency; whereas the Court, taking note of the assurances given by Senegal, finds that, the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order".

[41] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 22 November 2013, para 50 "(…) The Court further takes note of the assurances of Nicaragua, as formulated by its Agent at the hearings in response to a question put by a Member of the Court, 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.".

It is worth remembering also Shabtai Rosenne's proposal to add a check of the solidity of the legal title to the preconditions,[42] although—in the last edition of his monumental book on the jurisprudence—he used a rather reserved formulation and apparently returned to the classical approach.[43]

Interim measures may be adopted in the preliminary phase as well as in the subsequent *in merito* phase, and they can be re-evaluated by the organ that adopted them, whether full court or ad hoc chamber, when the parties to the litigation agreed to bring their case before the latter.

Before the ICC, the *prima facie* jurisdictional competence has rarely been employed as a technical term[44] even in cases close to this judicial notion[45] and the situation is definitely much more complex than in litigation before the ICJ.

The jurisdictional competence of the ICC is primarily based on the territorial link (*ratione loci*) or personal link (*ratione personae*): when a situation is referred by a state, it should indicate that the events occurred on the territory of a state-party or that the alleged perpetrator is a citizen of a state-party.[46] The referral can be submitted by (i) the state in whose territory a situation occurred (self-referral), or (ii) a different state with regard to a situation that occurred in another state-party. The Prosecutor has the right to refer a situation *proprio motu* to the Court when these territorial or personal connections seem to exist vis-à-vis a state-party.[47] However, if a situation is referred by the Security Council, the existence of a *ratione loci* or *ratione personae* connection with a state-party in not required.[48] The *ratione temporis* principle should be observed, as well as that of the complementarity. Consideration of the eventual

[42] Rosenne 2003, p. 203: "In fact a binding provisional measure requiring the respondent to take action very similar to what was requested in the original claim may have the effect of rendering the continuation of the proceedings redundant. (…) Provisional measures binding on the parties would seem to be more justified if the Court should be provisionally satisfied that the claimant State has a reasonable probability of success (as is required in some domestic legal systems), even though there may been element of hazardous guesswork in making such an assessment.".

[43] Rosenne 2005, p. 1410: "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or a part of the claim formulated in the document instituting proceedings." Rosenne in a footnote refers to the PCIJ's position in the Factory at Chorzow case (PCIJ, *Factory at Chorzów (indemnities) (Germany v. Poland)*, Provisional Measures, Order of 21 November 1927).

[44] See e.g. *Situation in Democratic Republic of the Congo*, ICC Case No. ICC-01/04-19-t, FR 02-05-2005, p. 3: "Considering that Pre-Trial Chamber has *prima facie* jurisdiction (….)" but take into consideration that the French translation did not use it *expressis verbis*: "Attendu que de prime abord, la Chambre préliminaire I a compétence (….)" *Nota bene*: The expression "compétence *prima facie*"/*prima facie* competence (or *prima facie* jurisdiction) is not used either in The Rome Statute or in the Rules of Procedure and Evidence.

[45] It is not mentioned either in the recent *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, ICC Case No. ICC-RoC46(3)-01/18, Decision of 6 September 2018, rendered in the context of the alleged deportation of Rohingyas from Myanmar to the territory of Bangladesh.

[46] See Article 12 of the Rome Statute.

[47] See Article 15 of the Rome Statute.

[48] See Article 13 of the Rome Statute.

home prosecution and observance of the *ne bis in idem* rule may require a rather lengthy analysis.

It is an oversimplification to suggest reversing the formula, saying that the judges may not pronounce on interim measures (*lato* sensu) until the ICC's competence on the matter is evident *prima facie*. However, competence and admissibility are two different notions and the *prima facie* competence over a situation is not enough to warrant an interim measure against an alleged perpetrator.

The adoption of interim measures presupposes some procedural decisions—taken typically by the Pre-Trial Chamber on the Prosecutor's demand—e.g. for the purpose of verifying that jurisdiction is established and the rule of *ne bis in idem* respected. Some other types of interim measures (*lato* sensu[49] or only *stricto* sensu[50]) depend on other preconditions and on the logic of the investigations.

Beside urgency and necessity, the condition of "on an exceptional basis" is also evoked in the Rome Statute (see e.g. the "unique investigative opportunity").[51]

In principle, the adoption of interim measures is sought by the Prosecutor, but there are cases where the accused's defence counsels did not want to cooperate. Laurent Gbagbo's lawyer asked the Pre-Trial Chamber to prevent the other counsel from accessing some pieces of evidence that he had submitted.[52] It is to be noted that, similarly to the logic of the rules of the ICJ (not reflected in the practice), an interim measure of "unique investigative opportunity" may also be taken *ex officio*.[53]

These measures can be challenged before several fora of the ICC. According to their nature, these measures can be contested by reference to the termination of

[49] See e.g. as one of the preconditions of issuing an arrest warrant, in Article 58(1)(a) "There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (…)".

[50] See e.g. Article 57(3)(e) of the Rome Statute: "Where a warrant of arrest or a summons has been issued (…)".

[51] Article 18(6) of the Rome Statute: "Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available." (see also Article 56(1) of the Rome Statute).

[52] *The Prosecutor v. Laurent Gbagbo*, ICC Case No. ICC-02/11-01/11, Version publique expurgée du *corrigendum* de la demande d'autorisation d'interjeter appel de la décision de la Juge unique du 19 juin 2014 sur la "Prosecution's request to disclose material in a related proceeding pursuant to Regulation 42(2)" (ICC-02/11-01/11-659) ICC-02/11-01/11-660-Corr-Red, p. 7, para 28: "[i]l est nécessaire que la Chambre préliminaire prenne des mesures conservatoires afin que le Procureur ne divulgue aucun élément de preuve émanant de la défense à l'équipe de défense de Monsieur Blé Goudé. (…)".

[53] Article 56(3)(a) of the Rome Statute: "Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.".

the urgency or the necessity before the organ which has adopted them, i.e. a Pre-Trial Chamber or a Trial Chamber,[54] but some measures like a "unique investigative opportunity" taken *ex officio*, may be appealed.[55] The onus of the proof is incumbent upon those who claim the interim measures, but as we have already mentioned, judges may also act *ex officio* without the prosecutor's submission.

8.2.3 The Legal Nature of Interim Measures Before the ICJ and the ICC

Due to the change in jurisprudential approach,[56] the mandatory nature of the interim measures adopted by the ICJ can no longer be contested. This change, long expected by scholars,[57] first appeared in the case *Bosnia-Herzégovina v. Serbia-Montenegro*,[58] it was then pronounced in a more explicit form in the *LaGrand* case[59]

[54] However, if a case is already before a Trial Chamber, this chamber might suspend the obligation of execution of an interim measure (*stricto* sensu) ordered still by the Pre-Trial Chamber, as it happened so in *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 32, para 29.

[55] Article 56(3)(b) of the Rome Statute: "A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.".

[56] Henri Rolin recognized the ambiguity of Article 41 but put the emphasis on the interplay with Article 94 of the UN Charter "qui n'attribue d'effets obligatoires qu'aux arrêts rendus par la Cour.": Rolin 1954, p. 485; Arbour 1975, pp. 535, 542, 570. On the basis of the old practice, president Schwebel opined in 1994 that interim measures cannot oblige: Schwebel 1994, p. 9.

[57] Guggenheim 1932, pp. 678–679; Fitzmaurice 1958, pp. 122–123; Lauterpacht 1958, pp. 253–254.

[58] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, para 61: "The Court (…) reaffirms the provisional measure indicated in para 52A(1) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented".

[59] *LaGrand*, *supra* note 20, paras 98 and 102: "98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. (…), the Court is now called upon to rule expressly on this question. (…) 102. (…) It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances cal1 for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.".

and was repeated and confirmed consequently[60] after that. This new jurisprudential approach[61] definitely helped the Court to strengthen its position and its judicial functions in international litigation.[62]

Astonishing as it may seem, the legal nature of interim measures adopted by the ICC depends on several factors like the chamber's will and the purpose of the measure to be taken. Typically, these are orders enjoying *ex lege* legal nature but, as we have seen in the precited text of the Rome Statute on the "unique investigative opportunity", the Pre-Trial Chamber may limit itself to the adoption of a simple recommendation (see namely Article 56(2) *a* and *e*).[63]

As far as the *stricto* sensu interim measures are concerned, the Pre-Trial Chamber—according to Article 93—seeks the cooperation of states in order to issue interim measures (Article 57(3) e[64] calls this "protective measures"). The reference to Article 93 implies the states' legal obligation.[65] The ICC interpreted the wording "seek the cooperation of States/solliciter la coopération des Etats" as an order binding on the states due to the use of the terms "to request the cooperation".[66]

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[60] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para 263; *Preah Vihear*, *supra* note 13, paras 46 and 67; *Certain Activities carried out by Nicaragua*, *supra* note 41, para 57; ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, para 53; *Immunities and Criminal Proceedings*, *supra* note 18, para 97.

[61] As we have seen *supra*, the ICJ denies that a change in its jurisprudence occurred here (see my footnote n. 59).

[62] Ben Hammadi 2001, p. 81: "dépasser une controverse doctrinale et de mettre un terme à une anomalie criante qui a empêché l'organe judiciaire principal des Nations Unies de s'acquitter pleinement de ses fonctions judiciaires".

[63] Article 56 of the Rome Statute: "Role of the Pre-Trial Chamber in relation to a unique investigative opportunity 2. The measures referred to in para 1(b) may include: (a) Making *recommendations* or orders regarding procedures to be followed; (b) Directing that a record be made of the proceedings; (c) Appointing an expert to assist; (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance, or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence; (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make *recommendations* or orders regarding the collection and preservation of evidence and the questioning of persons; (f) Taking such other action as may be necessary to collect or preserve evidence.".

[64] Precited *supra.*

[65] Article 93 of the Rome Statute: "Other forms of cooperation: 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (…)". See the French version: "Autres formes de cooperation: 1. Les États Parties font droit, conformément aux dispositions du présent chapitre et aux procédures prévues par leur législation nationale, aux demandes d'assistance de la Cour liées à une enquête ou à des poursuites et concernant: (…)".

[66] *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 32, para 19: "In sum, Articles 57(3)(e) and 93(1)(k) of the Statute and Rule 99(1) of the Rules confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors, to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to

The arrest warrants are of course to be executed and their legal nature goes without saying: for these types of rulings, Articles 86 and 87 appear to be mandatory for states[67] and, at least within academic discussion, such interpretation cannot be contested. The binding character was emphasized in the *Saif Gaddafi*[68] and *Al Bashir*[69] cases.

The interim measures rendered up to now by the ICJ were always public. At the ICC, these measures may be either public or confidential (even secret), and probably most of them belong to this latter category in order to preserve their efficacy from being undermined by a prompt public disclosure. The execution of protective measures (e.g. the freeze of assets) can become much more difficult if the suspect knows which country is addressed by the ICC. For similar reasons, arrest warrants are generally issued in a "sealed" form and they do not become public ("unsealed") until the arrested person is transferred to The Hague. It is also true that there were some arrest warrants which were public from the beginning such as the one issued against Mr. Al Bashir, the former Sudanese president.

The same can be said about a considerable part of the measures of "unique investigative opportunity" such as a witness statement collected during an ongoing open conflict. It goes without saying that the witnesses' and victims' protection could require the adoption of measures to assure that the identity of the witnesses or of the

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the start of trial, both for the purposes of eventual forfeiture as an applicable penalty under Article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute.".

[67] Rome Statute: "Article 86 General obligation to cooperate: States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." and "Article 87 Requests for cooperation: general provisions: 1. (a) The Court shall have the authority to make requests to States Parties for cooperation. (…) 7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.".

[68] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the "Request for an immediate finding of non-compliance and referral to United Nations Security Council.", 17 September 2013, ICC-01/11-01/11-446, p. 8, para 16.

[69] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC Case No. ICC-02/05-01/09-267, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute of 11 July 2016, paras 9–10: "Uganda is a State Party to the Statute. It has an obligation to cooperate with the Court in accordance with Part 9 of the Statute, including with requests for arrest and surrender to the Court of persons against whom a warrant of arrest has been issued by the Pre-Trial Chamber under Article 58 of the Statute. (…) In the present case, and notwithstanding its obligations to cooperate with the Court, Uganda did not arrest Omar Al-Bashir while he was present on its territory and surrender him to the Court nor did it raise with the Court any problem it might have identified in the execution of such request. In fact, Uganda did not even respond to the note verbale transmitted by the Court on 11 May 2016.".

victims does not become accessible. However, as stated by one of the articles of the Rome Statute, these measures may not discredit the rights of the defence.[70]

The interim measures taken by the ICJ are not necessarily those asked for by a given party. As the ICJ put it in *Préah Vihéar 2* "[w]hereas the Court has considered the terms of the provisional measures requested by Cambodia; whereas it does not find, in the circumstances of the case, that the measures to be indicated must be the same as or limited to those sought by Cambodia".[71] One may also ask whether this statement should be understood as a promise to go forward when a party seems to be too reluctant to take the right or more appropriate step. In the San Juan river litigation, however, the Court was much more reserved.[72] Moreover, even if it ordered—according to Costa Rica's demand—that the new bed excavated should be refilled, it imposed that obligation on Nicaragua, without mandating Costa Rica to do it alone.[73] This is exactly what the latter country wanted to hear.[74] The right to act alone was recognized exclusively to Nicaragua and only in a very limited manner.[75]

At the ICC—as we have seen—the Rome Statute set up a counterbalance to the Prosecutor which enables the Pre-Trial Chamber to freely say that it does not feel all the measures claimed or suggested by the Prosecutor to be necessary. We have also seen above[76] that even in the absence of a request submitted by the Prosecutor, the pre-Trial Chamber is mandated to impose special types of interim measures in the context of a "unique investigative opportunity". However, the practice has so far shown that the Pre-Trial Chambers only approve, partially approve or reject the requested measures. Indeed, there has apparently been no "precedent" for the adoption of interim measures that were not originally mentioned in the Prosecutor's request or which could not be considered as an alternative or an attenuated form of the claimed measure. Such a measure would not per se be incompatible with the text

[70] Article 56(1)(b) of the Rome Statute: "In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.".

[71] *Preah Vihear*, *supra* note 13, para 60 (Similarly: *Questions relating to the Seizure and Detention of Certain Documents and Data*, *supra* note 60, para 49).

[72] *Certain Activities carried out by Nicaragua*, *supra* note 41, para 52: "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. (…)".

[73] *Ibid*., para 59B: "Nicaragua shall fill the trench on the beach north of the eastern caño within two weeks from the date of the present Order".

[74] *Ibid*., para 32: "The third provisional measure sought by Costa Rica is aimed at ensuring that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new caños and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory.".

[75] *Ibid*., para 59E: "Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new caños, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River".

[76] See Article 56(3) of the Rome Statute.

of the Rome Statute[77] but it would probably run against the well-established criminal law philosophy behind the institution of the "juge d'instruction", who controls but does not take part actively in the investigations as such.

As far as interim measures *lato* sensu are concerned, the Pre-Trial Chamber or a Trial Chamber may take measures which are different from those asked: e.g. a summons to appear instead of an arrest warrant[78] if the arrest is not felt necessary or lighter (or on the contrary, stronger) measures in light of the specific circumstances of a given situation regarding a witness or a victim. The Prosecutor may request alternative measures,[79] even if, in principle, he/she should choose the one more suited to the particular circumstances of the case.[80] The practice shows that a summons to appear can be revised even *proprio motu*, if it proves to be inefficient.[81] Apparently, given the Prosecutor's activity, the different chambers do not really need to rely upon their *proprio motu* competence.

Interim measures *stricto* sensu (the freeze and forfeiture of assets) covered in Article 57(3)(e) are not linked in the text *expressis verbis* to the Prosecutor's initiative. Nevertheless, it is plainly evident that in most cases, the Chamber is alerted by the

[77] See Article 56(1)(b) of the Rome Statute, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity "In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and in particular to protect the rights of the defence.". See also Article 56(2)f: "Taking such other action as may be necessary to collect or preserve evidence.".

[78] See Article 57(3) of the Rome Statute pointing out that "In addition to its other functions under this Statute, the Pre-Trial Chamber may: (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation; required for the purposes of an investigation;" and Article 58: "Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear: 1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.".

[79] *The Prosecutor v. Bahr Idriss Abu Garda*, ICC Case No. ICC-02/05-02/09-1, Decision on the Prosecutor's Application under Article 58 of 07 May 2009, p. 3: "1. Noting the "Prosecutor's Application under article 58" (the "Application"), 1 filed on 20 November 2008 pursuant to Article 58 of the Statute of the Court in the investigation of the Situation in Darfur, Sudan, whereby it requested the Chamber to issue warrants of arrest or, alternatively, summonses to appear for Bahr Idriss Abu Garda ("Abu Garda"), [REDACTED], on a confidential and *ex parte* basis".

[80] See Hall and Ryngaert 2016, p. 1455. The authors refer to other examples as well, where the Prosecutor submits requests soliciting—in an alternative manner—certain measures.

[81] *The Prosecutor v. Bahr Idriss Abu Garda, supra* note 79, para 32: "32. The Chamber reserves its right to review this finding either *proprio motu* or at the request of the Prosecutor, however, particularly if the suspect fails to appear on the date specified in the summons or fails to comply with the orders contained in the summons to appear issued by the Chamber.".

Prosecutor and/or the representatives of the victims[82] to the necessity of such a measure. The Chamber may also act *ex officio*[83] and there are concrete examples on that.[84] The requested and rendered measures may be different, and this could be explained *inter alia* when the proposed measure is not appropriate to the accused's personal circumstances[85] or when the Chamber realizes that the required measure is already duly covered by a mandatory resolution passed by the Security Council.[86]

8.2.4 Who Are the Intended Recipients of the Interim Measures?

Before the ICJ, the intended recipients of its provisional measures are only the parties of the case at stake and nobody else.

By proclaiming this *dictum*, the ICJ avoided to pass a decision on the delicate issue of the arms embargo imposed by the UN Security Council during the Balkan conflict, affecting much more heavily the official government of Bosnia-Herzegovina

[82] See e.g. the victims' institutionalized representation via Office of Public Counsel for Victims (OPCV). It is to be noted that Guariglia and Hochmayr 2016b, p. 1436, also contest this capacity in this phase of the procedure.

[83] This is clarified in the rule 99(1) in the Rules of Procedure and evidences: "The Pre-Trial Chamber, pursuant to Article 57, para 3(e), or the Trial Chamber, pursuant to Article 75, para 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.".

[84] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*, ICC Case No. ICC-01/09-02/11, Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali of 5 April 2011, p. 5: "For these reasons, the single judge hereby orders the Registrar to prepare and transmit, in accordance with Article 87(2) of the Statute and rule 176(2) of the Rules and in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya for purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, without prejudice to the rights of bona fide third parties". *Nota bene*: "*in consultation with*" and not "*on the application of*". On page 3, single judge Trendafilova precises that "[o]n 21 March 2011, the Single Judge issued the "Decision Requesting Information and Observations from the Prosecutor" (the "21 March 2011 Decision"), in which she requested the Prosecutor to submit observations and any information in his possession concerning the nature and whereabouts of the financial assets and properties belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali". The use of the "she" proves that the initiative came from the single judge.

[85] *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 32, para 17: "(…) an order for protective measures for the purpose of reparations should be appropriately tailored to the circumstances, including consideration of the claims of victims and the personnel circumstances of the accused, as appropriate.".

[86] Let us think on situations where the Security Council has already ordered the freeze of assets of persons falling under sanctions, pronounced "according to Chapter VII" of the UN Charter.

than the rebels of Karadzic and Mladic—which were already duly armed with heavy weapons coming mostly from the Yugoslav army. When Sarajevo asked the judges to order the unilateral lift of the embargo, thus exempting Bosnia-Herzegovina,[87] the Court replied that it lacked competence to do so in the form of interim measures.[88]

Moving to the ICC, the circle of recipients is much larger, and it depends first and foremost on the given measure. The intended recipients of provisional measures having the vocation to protect witnesses are the given persons themselves and—eventually—their family, as well as the states participating in the operation. In case of an arrest warrant or a summons to appear, this is the suspect—who is not necessarily aware of the existence of the arrest warrant, and he is certainly not if the warrant is issued under seal. Within the institutional framework of the ICC, the state(s) where the arrest may take place, or the suspect is called to appear, must be informed by the Registry.

When a "unique investigative opportunity" is the object of a measure, the addressee can be a state, an attorney at law, an expert or even one of the judges of the ICC.[89] The suspect (if arrested or if complying with the summons) is in principle informed of the fact that such a request has been submitted.[90]

When interim measures *stricto* sensu are concerned, it is again the Registry's duty to transmit the Chamber's order to the given state(s) where the suspect allegedly or presumably has assets or important properties, whether mobile or immobile. This state can be the one according to the suspect's citizenship or to his/her domicile,[91]

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[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 59, para 2 (m) and (o): "Whereas on the basis of the facts alleged in the Application Bosnia-Herzegovina requests the Court to adjudge and declare as follows: (…) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;" (…)"that Security Council resolution 713 (199 1) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24(1) and 51 of the United Nations Charter and in accordance with the customary doctrine of ultra vires".

[88] *Ibid*., para 41: "(…) whereas however it is clear that the intention of the Applicant in requesting these measures is not that the Court indicate that the Respondent ought to take certain steps for the presentation of the Applicant's rights, but rather that the Court make a declaration of what those rights are, which "would clarify the legal situation for the entire international community", in particular the members of the United Nations Security Council; whereas accordingly this request must be regarded as outside the scope of Article 41 of the Statute".

[89] Article 56(2)(e) of the Rome Statute: "Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons".

[90] Article 56(1)(c) of the Rome Statute: "Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter." As commentators put it, a negative decision could be taken only in "extremely exceptional circumstances": Guariglia and Hochmayr 2016a, p. 1416.

[91] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*, *supra* note 84.

but also whatever other country whose banks or financial institutions are taking care of the suspect's deposits, assets or shares.[92] On the basis of the few known examples, such a decision is generally not public—or, at the very least, this status is preserved till its execution—in order to avoid undermining its efficacy.

8.2.5 The End of Interim Measures

At the ICJ, an interim measure is not automatically ceased even in case of a proper execution: quite the opposite, the Court has to pass a formal decision on it. It is very interesting to see that, for the sake of legal certainty, the ICJ paid great attention to this condition even in a case where it later concluded that it was not competent on the subject matter.[93]

When adjudging *in merito* the legal dispute, the Court should check whether the ordered interim measure has such elements which, either in their original or in a modified form, may be transposed into the final decision.

The ICJ has, however, the right to modify[94] an interim measure by enlarging or diminishing its scope.[95]

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[92] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC Case No. ICC-01/05-01/08, Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise of 27 May 2008, p. 4 (No English text was issued.): "(…) Par ces motifs, la Chambre a) demande à la République portugaise de prendre, conformément aux procédures prévues par sa législation nationale, toutes les mesures nécessaires afin d'identifier, localiser, geler ou saisir les biens et avoirs de M. Jean-Pierre Bemba Gombo qui se trouvent sur son territoire, y compris ses biens meubles ou immeubles, ses comptes bancaires ou ses parts sociales, sous réserve des droits des tiers de bonne foi".

[93] ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary objections, Judgment of 1 April 2011, para 186: "The Court in its Order of 15 October 2008 indicated certain provisional measures. This Order ceases to be operative upon the delivery of this Judgment. The parties are under a duty to comply with their obligations under CERD of which they were reminded in that Order.".

[94] Article 76(1) of the Rules of the ICJ: "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.".

[95] *Questions relating to the Seizure and Detention of Certain Documents and Data*, *supra* note 60, paras 14, 18, 19: "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." (…) "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." (…) "The modification resulting from the present Order is without effect on the measures indicated in points 1 and 3 of the operative

At the ICC, the answer mostly depends on the nature of the given interim measures. Some of them cease to exist as soon as they are executed: e.g. in case of an arrest warrant while the arrest and transfer to The Hague are based on the interim measure, the detention depends on other measures to be taken.

A "unique investigative opportunity" is terminated with its execution: e.g. when the witness' testimony is registered, or the autopsy is done. The interim measures *stricto* sensu may have a longer and continuous legal life. This is the case of the freeze or forfeiture, which must be observed until another decision is taken, whether aiming the suspension or a final lifting.[96] Similarly, witness protecting measures also enjoy a permanent, or at least a long term, legal character which is ceased only after an opposite decision has been taken by the Court.

8.2.6 The Efficacy of Interim Measures

Since the beginning of their existence, the real effect of the decisions of the Permanent Court of International Justice and the ICJ has always been considered as depending mostly on the will of the states participating in the litigation. If a case is referred by special agreement to The Hague, the judgments are executed—with the notable and *quasi* single exception of the *Gabčikovo-Nagymaros* case[97]—even if sometimes with a considerable delay or after unsuccessful efforts to "appeal" it, disguising the state's unwillingness as a request for interpretation or for revision.

The joint will of states to have their dispute settled by the judiciary of the Peace Palace normally covers all the procedural stages of the case (Let us note however that the special agreement contracted by Hungary and Slovakia in the Gabčikovo-Nagymaros case qualified the unilateral recourse to interim measures as triggering the termination of the agreement).[98]

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part of the Order of 3 March 2014 (…), which will continue to have effect until the conclusion of the present proceedings, or until further decision of the Court.".

[96] *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 32, para 29: "Nevertheless, given the Prosecution's acknowledgement that it "now has insufficient evidence to secure a conviction at trial', (…) that any information provided 'mayor may not yield evidence relevant to this case" (…), and the directive contained in Article 57(3)(e) of the Statute that the Chamber pay due regard to the strength of the evidence and the rights of the parties concerned, the Chamber considers it would not be appropriate at this stage of the proceedings to seek execution of the Pre-Trial Chamber's Order. Mindful, however, that the current limited period of adjournment in this case may enable necessary evidence to be obtained 'potentially shedding light on matters central to the charges' (…) the Majority suspends the Pre-Trial Chamber's order until further notice.".

[97] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*: the special agreement was signed on the 7th of April 1993, submitted to the Court on the 2nd of July 1993 and the Court delivered its judgment on the 25th of September 1997.

[98] "Article 4 (1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management regime for the Danube. (2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and

If the case is submitted to the ICJ unilaterally, on the basis of a compromissory clause or a declaration recognizing the jurisdiction of the Court as compulsory, and the other party contests the existence of jurisdiction *in concreto*, the consequence if often that the state addressed by the interim measure does not execute it or does so only partially. This happened in various cases such as the *Tehran hostages* case, *Bosnia-Herzegovina v. Serbia-Montenegro* case, *LaGrand* case.

More of a school hypothesis than a true reality, the institution of a *forum prorogatum* can hardly lead to examples on interim measures.[99] Consequently, we may recall the old teaching saying that the more a case is political (*recte* politicized), the more difficult the execution of an international judicial decision will be. This is especially true when interim measures are concerned.[100]

The overall situation has only very slightly—or not at all—improved since the alert voiced by Jean-Maurice Arbour[101] and as Sorel rightly put it, an interim measure is a risky act of judges,[102] which, according to Guillaume Le Floch, is nearly never respected.[103]

As to the ICC, the time elapsed since the opening of the doors in 2002 seems to be long enough to state that the efficacy of the interim measures is also multidimensional. Similar to the practice of the ICJ, easy and technical type of the interim measures are the easiest to implement (see e.g. "unique investigative opportunity").

The number of interim measures *lato* sensu is exceptionally high. 2736 were delivered[104] before June 2010 and they were mostly executed (interim measures *stricto*

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reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute. (3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement." See the text in: ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, p. 12.

[99] In the quasi only relevant litigation, i.e. the *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, neither of the adopted six orders (1947–1949) imposed interim measures.

[100] International court of justice orders US to lift new Iran sanctions—Mike Pompeo indicates US will ignore ruling, after judges in The Hague find unanimously in favour of Iran. The Guardian, 3 October 2018, available at https://www.theguardian.com/world/2018/oct/03/international-court-of-justice-orders-us-to-lift-new-iran-sanctions.

[101] Arbour 1975, p. 534: "L'irrespect, par les Etats, des ordonnances portant indication de mesures conservatoires est, en soi, un phénomène troublant et sérieux que l'on ne saurait passer sous silence, tellement néfastes nous paraissent être les retombées au niveau plus général de la solution pacifique des différends internationaux. C'est là autant de discrédit jeté à l'autorité et à l'efficacité de la juridiction de La Haye.".

[102] Sorel 2003, p. 54: "[t]oute décision dans ce cadre est une forme de "prise de risque" et (…) "[i]l en résultera une légitimité renforcée ou au contraire, amoindrie de la juridiction selon l'adéquation entre le résultat escompté et celui obtenu."".

[103] Le Floch 2008, pp. 222–223: [Les] "mesures conservatoires indiquées par la CIJ ne sont presque jamais respectées.".

[104] Ba 2010, p. 48.

sensu[105] included), with the well-known exception of several arrest warrants.[106] (It is to be noted, however, that no legal problem emerged with the execution of arrest warrants against Dominic Ongwen, Bosco Ntaganda, Jean-Pierre Bemba Gombo, Al Faqi Al Mahdi or Al Hassan; even if one has to recall that Ongwen[107] and Ntaganda[108] were arrested only years after the issue of the warrants.)

The reasons underlying the non-execution of several arrest warrants originate on the one hand in the lack of ability, but sometimes in the manifest lack of willingness and these two factors may also be combined. The execution or non-execution of arrest warrants, indeed, largely depend on several factors and namely the following ones:

Was the ICC seized by a self-referral?

If it was, cooperation by state-authorities is in principle granted, even if in an uncertain political climate and in the presence of strongly armed anti-governmental forces, the full implementation of the obligations can be strongly hindered.

When the ICC is requested to act by the Security Council or by a referral submitted *proprio motu* by the Prosecutor, the experiences show considerable difficulties when interim measures should be implemented by the state whose (often very high-ranking) citizens are targeted or when citizens of other states, and especially of non-states parties seem to be involved.

We shall see in the future whether interim measures delivered in procedures initiated by state-referrals concerning another state-party[109] will meet similar difficulties. In this respect, even if the cooperation of the authorities of this situation-state is mandatory in accordance with the Rome Statute, implementation seems far from being certain.

At the same time, and according to the particularities of the cases, it could easily happen that a part of the interim measures presupposes actions to be implemented in a state other than the so-called "situation state". If the former is a state-party to the Rome Statute, it is bound to cooperate; however, if this state is not a state-party, its cooperation should be secured by a special agreement. Sometimes this is easy, sometimes it is not.

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[105] *Ibid*., p. 52. Ba adds in his footnote 147, p. 179, that "[s]ans que l'on puisse donner un pourcentage sur l'état de l'exécution, notamment des réponses données par les États, puisque celles sont en général confidentielles, mais les avoirs des personnes visées sont bloqués à la demande de la Cour.".

[106] Bitti 2016, pp. 896–897: "La CPI dépend donc totalement de la coopération des Etats et il va sans dire que seuls les Etats Parties ont l'obligation de coopérer avec la Cour. Les conséquences sont bien entendue dramatiques pour la Cour (…) Pour la première décennie d'activité de la CPI, on compte à ce jour 14 mandats d'arrêt décernés contre 13 personnes qui n'ont pas été exécutés.".

[107] It is to be noted that the original arrest warrant was issued against Mr. Ongwen yet in 2005, but he became effectively arrested only in 2015, after his surrender in which some Central-African militias and US services played an important role.

[108] Similarly, the arrest warrant was issued in 2006, and Mr. Ntaganda was arrested in 2013 after his surrender to the US Embassy in Kigali (Rwanda).

[109] On 27 September 2018, the Prosecutor received a referral from Argentina, Canada, Chile, Colombia, Paraguay and Peru (the "referring States"), regarding the situation in Venezuela since 12 February 2014. See https://www.icc-cpi.int/Pages/item.aspx?name=180927-otp-stat-venezuela.

The higher the Prosecutor is targeting with her bow and arrows, the higher the reluctance of a state can be (This is however less pertinent when the given person is already an "ex", such as a former head of state. Sub-regional solidarity apparently might also influence the spirit of cooperation of other states with the ICC).

Finally, there are both the Security Council and the Assembly of States Parties who are mandated to act in case of the lack of implementation of an obligation of the Rome Statute.[110] However, it is well known that, up to now, the efforts of the ICC to prompt the Security Council to impose a genuine sanction against non-cooperation states have not been crowned with success.[111] Needless to say, the specialists of geopolitics are better placed to find a proper answer to that than judges and lawyers.

8.3 Conclusions

Interim measures are partly different before the ICJ and the ICC. However, it is apparent from the analysis carried out above that they share some common features. This holds true with regard to their nature, form, respective modalities and efficacy. While the situation is far from being tragic, it cannot be defined as optimal. As the fox told Saint-Exupéry's Little Prince: "Nothing is perfect…" The similarities both in virtues and weaknesses of the institutional and procedural realms of the ICJ and the ICC are inevitably reflected in their regimes concerning interim measures. Indeed, the rules concerning these measures are more often than not influenced by the actual practice of the Courts.

International lawyers are strongly familiar with the inherent limits of their favourite subject: international law is as efficient as states would like to see it.[112] However, mankind has witnessed numerous historical and contemporary examples for the awakening of states, recognizing the need to grant more and direct influence to the values of international law.

The ICJ and the ICC exercise their respective powers within the framework of their statutory norms. The judges' creative jurisprudence and the *Réalpolitik* of the states result in concrete achievements and contribute to the stabilisation and the improvement of the inherited situation and the enlargement of the "Rule of Law" in international relations.

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[110] Article 87 of the Rome Statute: "(7) Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.".

[111] Blaise 2011, para 54: "Certains s'étonnent d'ailleurs qu'au niveau du Conseil de Sécurité, aucune mesure, même hautement symbolique, n'ait été prise pour rappeler l'existence du mandat d'arrêt.".

[112] Ghantous 2012, p. 91: "'La banalisation' des mesures coercitives, qu'elle soient prises par le Conseil de Sécurité, ou par une juridiction internationale est aujourd'hui un fait.".

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Chapter 9
Reflections on Provisional Measures in Inter-state Arbitration

Yoshifumi Tanaka

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Abstract Even though modern examples on provisional measures in inter-state arbitration remain limited, one can find some cases in which the prescription of provisional measures was requested by one of the disputing parties in arbitral proceedings. Such cases include: the 2003 *MOX Plant* arbitration, the 2016 *"Enrica Lexie" Incident* arbitration, and the 2011 *Indus Waters Kishenganga* arbitration. The arbitration will provide an interesting case-study when comparing the practice of international courts and tribunals concerning provisional measures. Thus this chapter examines provisional measures in inter-state arbitration by analysing the three cases as examples. This chapter first addresses the legal basis for prescribing provisional measures by inter-state arbitral tribunals and the issue of dual provisional measures. Next, this chapter examines the requirements for an arbitral tribunal to prescribe provisional measures. This chapter then moves on to analyse the manner of examination of the requirements by an arbitral tribunal. Finally, the issue of compliance with provisional measures will be discussed.

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9.1 Introduction

Though in rare cases,[1] inter-state arbitral tribunals did prescribe provisional measures in arbitral proceedings. In the *Indus Waters Kishenganga* arbitration, for instance, the Court of Arbitration, in its Order of 2011, ordered provisional (interim) measures in response to the request by Pakistan.[2] In the *MOX Plant* arbitration between Ireland and the United Kingdom, the Arbitral Tribunal set out under Annex VII of the UN Convention on the Law of the Sea (LOSC) (hereafter the Annex VII Arbitral Tribunal)[3] examined the further provisional measures requested by Ireland.[4] More recently, the Annex VII Arbitral Tribunal, in the *"Enrica Lexie" Incident* arbitration, prescribed provisional measures.[5]

The prescription of provisional measures in inter-state arbitration raises several issues that need further consideration:

(i) What is the legal basis for prescribing provision measures by an arbitral tribunal?
(ii) What is the relationship between provisional measures prescribed by a standing tribunal and those prescribed by an arbitral tribunal?
(iii) What are the requirements for an arbitral tribunal to prescribe provisional measures?
(iv) How did an arbitral tribunal examine the requirements to prescribe provisional measures?
(v) How is it possible to secure compliance with provisional measures prescribed by an arbitral tribunal?

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[1] Before World War II, there were some treaties that provided provisional measures in arbitral proceedings. By way of example, Article 18 of the 1921 Treaty of Conciliation, Arbitration, and Compulsory Adjudication, 12 LNTS 271, stipulated that "At the request of one of the Parties, the [Arbitral] Tribunal may order provisional measures to be taken in so far as the Parties are in a position to secure their execution, through administrative channels."; Oellers-Frahm and Zimmermann 2001, p. 294. See also Miles 2017, pp. 45–47.

[2] *Indus Waters Kishenganga* Arbitration *(Pakistan v. India)*, PCA Case No. 2011–01, Order on the Interim Measures Application of Pakistan dated 6 June 2011 of 23 September 2011, p. 49, para 152, available at: https://pcacases.com/web/sendAttach/1682. In this case, the Court of Arbitration used the term "interim" measures. In this article, the terms "provisional measures" and "interim measures" will be used interchangeably. For a commentary on the Order, see Tanaka 2012a, pp. 555–579.

[3] 10 December 1982. Entered into force on 16 November 1994.

[4] The *MOX Plant* case *(Ireland v. United Kingdom)*, PCA Case No. 2002–01, Order No. 3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures (the *MOX Plant* Order No. 3) of 24 June 2003, available at: https://pcacases.com/web/sendAttach/867.

[5] *The "Enrica Lexie" Incident* (*Italy v. India)*, PCA Case No. 2015–28, Request for the Prescription of Provisional Measures—Order of 29 April 2016, p. 33, para 132, available at: https://pcacases.com/web/sendAttach/1707.

This chapter seeks to examine the above issues by analysing the three cases, that is, the *MOX Plant, "Enrica Lexie" Incident*, and *Indus Waters Kishenganga* cases as examples. Following the Introduction, this chapter addresses the issue of jurisdiction of inter-state arbitral tribunals to order provisional measures (Sect. 9.2). Next, the requirements for an arbitral tribunal to prescribe provisional measures will be examined (Sect. 9.3). This chapter then moves on to analyse the manner of examination of the requirements by an arbitral court or tribunal (Sect. 9.4). Finally, this chapter discusses the issue of compliance with provisional measures in Sect. 9.5, before offering conclusions in Sect. 9.6.

9.2 Jurisdiction of Inter-state Arbitral Tribunals with Regard to Provisional Measures

9.2.1 Legal Basis for Provisional Measures

It is argued that an international court or tribunal has an inherent power to order provisional measures.[6] In this regard, the Final Resolution on Provisional Measures, adopted by the *Institut de droit international* on 8 September 2017, stated:

> It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the *status quo* pending determination of disputes or to preserve the ability to grant final effective relief.[7]

In practice, normally the power of an inter-state arbitral tribunal to prescribe provisional measures is explicitly provided for in relevant instruments. By way of example, Article 290(1) of the LOSC provides:

> 1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part [XV] or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

It is beyond question that "a court or tribunal" set out under Part XV includes the Annex VII Arbitral Tribunal. Unlike Article 41(1) of the Statute of the International Court of Justice (ICJ),[8] Article 290(1) of the LOSC refers to the prevention of "serious harm to the marine environment". As demonstrated by the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS), provisional measures

[6] Fitzmaurice 1993, p. 542; García Carcía-Revillo 2015, p. 214; Miles 2017, pp. 139–141.

[7] *Institut de droit international*, Final Resolution, Provisional Measures (Session de Hyderabad), 8 September 2017, (2017) 78 *Annuaire de l'Institut de Droit International, Séssion de Hyderabad*, p. 129, para 1 (footnote omitted).

[8] Entered into force 24 October 1945. The text is available at: https://www.icj-cij.org/en/statute.

prescribed by a court or tribunal under Article 290(1) can perform a crucial role in the protection of the marine environment, including marine living resources.[9]

Even though the Rules of Procedure of the *MOX Plant* arbitration contained no rule concerning provisional measures, it is clear that in this case, the Annex VII Arbitral Tribunal can prescribe these measures by virtue of Article 290(1) of the LOSC. Under Article 1(2) of the Rules of Procedure,

> To the extent that any question of procedure is not expressly governed by these Rules or by Annex VII to the Convention [LOSC] or other provisions of the Convention, and the Parties have not otherwise agreed, the question shall be decided by the Arbitral Tribunal after consultation with the Parties.[10]

In this connection, the Arbitral Tribunal noted that ITLOS is empowered to prescribe provisional measures different in whole or in part from these requested in accordance with Article 89(5) of the Rules of the Tribunal; and that a similar provision is contained in Article 75(2) of the Rules of Court (i.e. ICJ). "[H]aving drawn these provisions to the attention of the Parties without comment from either," the Arbitral Tribunal considered, "it is also competent to prescribe provisional measures other than those sought by any Party."[11]

By contrast, the Rules of Procedure of the *"Enrica Lexie" Incident* arbitration contained explicit provisions relating to provisional measures:

> 1. A Party may submit a request for the prescription of provisional measures under Article 290, paragraph 1, of the Convention [LOSC] at any time during the course of the proceedings. The request shall be in writing and specify the measures requested, the reasons therefor and the possible consequences, if it is not granted, for the preservation of the respective rights of the Parties.[12]

Furthermore, Article 11(3) of the Rules makes clear:

> The Arbitral Tribunal may prescribe measures different in whole or in part from those requested and indicate the Party or the Parties which are to take or to comply with each measure.

Pursuant to the above provision, the Annex VII Arbitral Tribunal, in its Order of 2016, prescribed its own provisional measures.

On the other hand, interim measures in the *Indus Waters Kishenganga* arbitration are governed by para 28 of Annexure G to the 1960 Indus Waters Treaty:[13]

> 28. Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute. The Court shall, thereupon, after having afforded an adequate hearing to each Party, decide by a majority consisting of at least four members

[9] On this issue, see Tanaka 2014, pp. 249–273. For a thorough analysis of the ITLOS jurisprudence concerning provisional measures, see Virzo 2018, pp. 145–161; Chap. 7 by Marotti in this volume.

[10] The Rules of Procedure is available at: https://pcacases.com/web/sendAttach/848.

[11] The *MOX Plant* Order No. 3, *supra* note 4, p. 14, para 43.

[12] Article 11(1) of the Rules of Procedures, available at: https://pcacases.com/web/sendAttach/1558.

[13] The Indus Waters Treaty, 419 UNTS 126. Entered into force 1 April 1960.

> of the Court, whether any interim measures are necessary for the reasons hereinbefore stated and, if so, shall specify such measures: Provided that
>
> a) the Court shall lay down such interim measures only for such specified period as, in its opinion, will be necessary to render the Award: this period may, if necessary, be extended unless the delay in rendering the Award is due to any delay on the part of the Party which requested the interim measures in supplying such information as may be required by the other Party or by the Court in connection with the dispute; and
>
> b) the specification of such interim measures shall not be construed as an indication of any view of the Court on the merits of the dispute.

On 6 June 2011, Pakistan submitted an Application for Provisional Measures.[14] In response, India requested the Court of Arbitration to reject Pakistan's request for these measures.[15] Thus, as will be seen, the Court ascertained whether the requirements to order interim measures set out in para 28 would be fulfilled in this case.[16]

9.2.2 Dual Provisional Measures

A particular issue that may arise in this context concerns the relationship between provisional measures prescribed by two different judicial organs, that is, ITLOS and the Annex VII Arbitral Tribunal. The issue of dual provisional measures was raised in the *MOX Plant* and *"Enrica Lexie" Incident* cases.

In the *MOX Plant* case, Ireland requested provisional measures before ITLOS.[17] ITLOS declined the prescription of provisional measures requested by Ireland because of the lack of the urgency of the situation.[18] Nonetheless, ITLOS, in its Order of 2001, prescribed its own measures.[19] Subsequently, Ireland requested further provisional measures relating to discharges, co-operation, assessment and other relief before the Annex VII Arbitral Tribunal.[20] In this regard, change or continuity between the provisional measures prescribed by two judicial bodies is at issue. When examining the existence of urgency and irreparable harm to the claimed rights, the Arbitral Tribunal noted the fact that ITLOS declined to order that the MOX plant not be approved or commissioned.[21] The Arbitral Tribunal received a much greater volume of written material than ITLOS had at the time of its Order. Nonetheless, the Arbitral Tribunal did not consider that "this material leads it to reach any different conclusion as to the question of discharges from the MOX plant, so far as concerns

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[14] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 13, para 52.

[15] *Ibid*., para 53.

[16] See Sect. 9.3.2 of this chapter.

[17] Request for Provisional Measures and Statement of Case submitted by Ireland, available at: https://www.itlos.org/cases/list-of-cases/case-no-10/.

[18] The *MOX Plant* case *(Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, p. 110, para 81.

[19] *Ibid*., pp. 110–111, para 89.

[20] The *MOX Plant* Order No. 3, *supra* note 4, pp. 10–11, para 33.

[21] *Ibid*., p. 17, para 59.

the period prior to the decision on the merits".[22] It thus declined to prescribe provisional measures relating to discharges from the MOX plant.[23] Instead, it affirmed the provisional measures prescribed by ITLOS.[24] The Annex VII Arbitral Tribunal seemed to give weight to the continuity between the ITLOS provisional measures and its own provisional measures in the *MOX Plant* case.

In the *"Enrica Lexie" Incident* case, however, the Annex VII Arbitral Tribunal took a different approach.[25] In this case, Italy requested that ITLOS prescribe provisional measures to, inter alia, lift restrictions on the liberty of two Italian Marines.[26] The Tribunal, in its Order of 2015, prescribed its own measures,[27] even though it did not prescribe the measures requested by Italy. Subsequently, again Italy requested that the Annex VII Arbitral Tribunal prescribe the provisional measures that require India to "take such measures as are necessary to relax the bail conditions on Sergeant Girone in order to enable him to return to Italy under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal."[28]

A contentious issue in this regard was whether the request by Italy could be admissible in the arbitral proceedings.[29] In considering this issue, the Annex VII Arbitral Tribunal stressed two points.[30] First, by referring to the *MOX Plant* case,[31] the Annex VII Arbitral Tribunal held that it exercises a different form of jurisdiction than ITLOS acting under the first sentence of Article 290(5) of the LOSC.[32] Second, the substance of the requests that Italy had submitted to the Annex VII Arbitral Tribunal differed from that submitted to ITLOS. According to the Tribunal, the effect of the request to ITLOS, if granted, would have been to remove Sergeant

[22] *Ibid*., p. 18, para 61.

[23] *Ibid*., para 62.

[24] *Ibid*., para 2 of the operative part.

[25] For an analysis of provisional measures in the *"Enrica Lexie" Incident* case, see Tanaka 2017a, pp. 265–284; Pratap 2017, pp. 413–436.

[26] Request under article 290, para 5, of the Convention, submitted by Italy on 21 July 2015, together with the notification instituting arbitral proceedings dated 26 June 2015, p. 16, available at: https://www.itlos.org/cases/list-of-cases/case-no-24/.

[27] *The "Enrica Lexie" Incident (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, pp. 205–206, para 141.

[28] *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 7, para 25; Hearing Transcript, Day 2, 31 March 2016, p. 26.

[29] On this issue, opinions of the disputing parties were sharply divided. Italy stressed the difference between its requests to ITLOS and that of the Annex VII Arbitral Tribunal. *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 15, para 60; p. 17, para 67. However, India opposed Italy's argument, saying that the current request had the 'same object' as ITLOS request 'as far as Sergeant Girone is concerned'. *Ibid*., pp. 15–16, paras 61–62.

[30] Further, see Tanaka 2017a, pp. 274–276.

[31] The Arbitral Tribunal, in the *MOX Plant* Order No. 3, *supra* note 4, pp. 12–13, para 39, held that although provisional measures had previously been prescribed by ITLOS, "Ireland's request for additional provisional measures is the first such request to this Tribunal. Hence, the Tribunal's competence to prescribe provisional measures is contained in article 290, para 1, of the Convention [LOSC], and is subject to the provisions of paras 2–4 of that article.".

[32] *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 19, para 74.

Girone entirely from the reach of India's legal system. By contrast, Italy's request to the Arbitral Tribunal suggests that Italy is prepared to accept that, should he be allowed to return to Italy, he will remain under the jurisdiction of the courts of India. According to the Annex VII Arbitral Tribunal, the requested measures seek to change the physical location of Sergeant Girone's bail without prejudice to the authority of India's courts.[33] The Tribunal thus found that Italy's request is admissible.[34] It then ordered, in its Order of 2016, the provisional measure that provides an obligation to cooperate between Italy and India to relax the bail conditions of Sergeant Girone.[35]

The Order of the Arbitral Tribunal contrasted with the Order of ITLOS that declined Italy's request to lift restrictions on the liberty, security and movement of the marines immediately. It may be said that the Annex VII Arbitral Tribunal, in the *"Enrica Lexie" Incident* case, stressed the difference of the jurisdiction of ITLOS and that of the Arbitral Tribunal.[36] Arguably, the constitution of the Annex VII Arbitral Tribunal can be regarded as a change in the circumstances in which ITLOS prescribed its provisional measure.[37] Furthermore, *res judicata* does not apply to provisional measures since they are binding but not final.[38] Accordingly, there may be room for the view that the Annex VII Arbitral Tribunal can *de nouveaux* examine the request by Italy with regard to provisional measures.[39]

In summary, both the *MOX Plant* and *"Enrica Lexie" Incident* cases demonstrated that provisional measures prescribed by ITLOS constituted an important factor when considering the further or new request of provisional measures in the arbitral proceedings. Here one can find the interaction between provisional measures prescribed by the two different judicial organs.

9.3 The Requirements to Prescribe Provisional Measures in Inter-state Arbitration

9.3.1 The Approaches of the Annex VII Arbitral Tribunal

The next issue is the requirements for an arbitral tribunal to prescribe provisional measures. In the ICJ jurisprudence, the five requirements must be met in order to indicate provisional measures: (i) *prima facie* jurisdiction, (ii) plausible character of the alleged rights in the principal request, (iii) the link between the alleged rights and

[33] *Ibid*., p. 19, para 75.

[34] *Ibid*., para 76.

[35] *Ibid*., p. 33, para 132.

[36] Tanaka 2017a, p. 275.

[37] See the *MOX Plant* Order No. 3, *supra* note 4, p. 13, para 40.

[38] India also confirmed this point. Hearing Transcript, Day 1, p. 137; *the "Enrica Lexie" Incident* Order, *supra* note 5, p. 16, para 62.

[39] Tanaka 2017a, p. 276.

the measures requested, (iv) urgency, and (v) risk of irreparable prejudice.[40] An issue that arises is whether the same requirements apply to inter-state arbitration. In this regard, the Annex VII Arbitral Tribunal, in the *MOX Plant* case, made an important statement:

> Although the language of article 290 is not in all respects identical to that of article 41 of the Statute of the International Court of Justice, the Tribunal considers that it should have regard to the law and practice of that Court, as well as to the law and practice of ITLOS, in considering provisional measures.[41]

The above statement may be taken to interpret that the Arbitral Tribunal would follow the procedural rules developed through the ICJ jurisprudence concerning provisional measures. However, the Annex VII Arbitral Tribunal, in the *MOX Plant* case, did not examine each and every requirement of provisional measures specified in the ICJ jurisprudence. As for *prima facie* jurisdiction, the Tribunal considered that "none of the issues raised casts doubt on its *prima facie* jurisdiction."[42] While the Tribunal examined the existence of the urgency of the situation, it did not examine the plausible character of the alleged rights in the principal request, the link between the alleged rights and the measures requested, and risk of irreparable prejudice.

Instead, the Tribunal focused on the prevention of serious harm to the marine environment since the Tribunal regarded it as a special consideration for prescribing provisional measures.[43] Under Article 290(1) of the LOSC, any harm to the marine environment must be serious to prescribe provisional measures. According to the Tribunal, however, Ireland failed to establish that "any harm which may be caused to the marine environment by virtue of the operation of the MOX plant, pending the determination of this case on the merits, meets this threshold test."[44] In this connection, the Tribunal also noted that there would be no additional discharges from THORP arising by reason of the MOX plant. It thus rejected the existence of "an urgent and serious risk of irreparable harm to Ireland's claimed rights".[45] In conclusion, the Tribunal rejected Ireland's request for provisional measures concerning discharges from the MOX plant.[46] It also declined Ireland's request for provisional measures relating to assessment and co-operation.[47] Overall it can be observed that the Arbitral Tribunal, in its Order No. 3, examined relatively a narrow range of the requirements of provisional measures.

In the *"Enrica Lexie" Incident* case, the Annex VII Arbitral Tribunal examined *prima facie* jurisdiction, urgency, and irreparable prejudice, while it did not address

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[40] Tanaka 2018, p. 191 *et seq*. See also Chap. 3 by Le Floch and Chap. 6 by Wittich in this volume.

[41] The *MOX Plant* Order No 3, *supra* note 4, p. 13, para 41.

[42] *Ibid*., p. 5, para 17. Yet the Tribunal suspended further proceedings on jurisdiction and the merits in this arbitration since a question arose with regard to the exclusive jurisdiction of the European Communities. *Ibid*., p. 9, para 29.

[43] *Ibid*., p. 16, para 53.

[44] *Ibid*., p. 16, para 55.

[45] *Ibid*., p. 18, paras 61–62.

[46] *Ibid*., p. 20, para 3 of the operative part.

[47] *Ibid*., paras 3 and 4 of the operative part.

the link between the alleged rights and the measures requested and the plausible character of the alleged rights in the principal request. In this connection, the Tribunal explicitly stated that the requirements of a real and imminent risk of irreparable prejudice to the parties' rights and that of the urgency must be fulfilled to prescribe provisional measures. What is of particular interest in this case is that the Annex VII Arbitral Tribunal provided much weight to the concept of considerations of humanity when prescribing provisional measures. According to the Tribunal, "its decision should seek to give effect to the concept of consideration of humanity, while preserving the respective rights of the parties."[48] In so stating, the Tribunal seemed to regard the concept of considerations of humanity as an independent element that is distinct from the preservation of the respective rights of the parties.[49]

However, an issue arises whether considerations of humanity can provide an adequate legal basis for an international court or tribunal to prescribe provisional measures. As discussed elsewhere,[50] in the jurisprudence of the ICJ, considerations of humanity created particular sensitivity when indicating provisional measures to cease the execution of individuals. The *LaGrand* case is an example.[51] In this case, the Court indicated provisional measures since an execution of Walter LaGrand would cause irreparable harm to the rights claimed by Germany in this particular case;[52] and the circumstances required it to indicate, "as a matter of the greatest urgency", provisional measures.[53] In this regard, it must be stressed that the Court did not indicate provisional measures on the basis of considerations of humanity. The same applied to other cases concerning provisional measures to cease the execution of individuals.[54] In the ICJ jurisprudence, there is no case where the Court relied on the concept of considerations of humanity alone when indicating provisional measures.

Given that provisional measures aim to preserve the respective rights of the parties in dispute pending the final decision of a court,[55] there must be a risk of irreparable

[48] *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 27, para 106.

[49] Tanaka 2017a, p. 282.

[50] Tanaka 2017a, pp. 279–281.

[51] ICJ, *LaGrand* case *(Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 March 1999.

[52] *Ibid*., p. 15, para 24.

[53] *Ibid*., para 26.

[54] See ICJ, *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)*, Request for the Indication of Provisional Measures, Order of 9 April 1998, p. 257, paras 37 and 39; *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Request for the indication of Provisional Measures, Order of 5 February 2003, p. 91, para 55; *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Request for the Indication of Provisional Measures, Order of 16 July 2008, p. 330, paras 73–74; *Jadhav* case *(India v. Pakistan)*, Request for the Indication of Provisional Measures, Order of 18 May 2017, p. 243, para 50; p. 244, paras 53–54.

[55] See, for instance, ICJ, *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)*, Request for the Indication of Provisional Measures, Order of 18 July 2011, p. 545, para 33; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May, p. 182, para 32. See also *Aegean Sea Continental Shelf (Greece*

prejudice to the alleged rights of the parties and urgency in order to indicate provisional measures. It must also be noted that the concept of considerations of humanity remains vague with regard to its content. Hence, it is debatable whether the concept of considerations of humanity provides an independent basis for prescribing provisional measures. In this connection, the ICJ in the 1966 *South West Africa* judgment held:

> Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.[56]

Furthermore,

> Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law.[57]

Following the *dicta*, there may be room for the view that the concept of considerations of humanity should be regarded as an element of the interpretation or application of the requirements to prescribe these measures.[58]

9.3.2 Lex Specialis *Nature of Provisional Measures in Inter-state Arbitration*

A related issue that arises in this context is whether the requirements provided in a treaty constitutes *lex specialis* with regard to provisional measures. The *Indus Waters Kishenganga* arbitration provides an insight into this issue.[59] As noted, interim measures in the *Indus Waters Kishenganga* arbitration are governed by para 28 of Annexure G to the 1960 Indus Waters Treaty. In accordance with para 28, the Court of Arbitration is empowered to specify interim measures if it concludes that those measures are necessary:

(i) to safeguard the interests of the requesting Party with respect to the matter in dispute, or

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v. Turkey), Request for the Indication of Interim Measures of Protection, Order of 11 September 1976, Separate Opinion of President Jiménez de Aréchaga p. 15; Kolb 2013, p. 616.

[56] ICJ, *South West Africa (Ethiopia v. South Africa)*, Second Phase, Judgment of 18 July 1996, p. 34, para 49.

[57] *Ibid*., para 50.

[58] Tanaka 2017a, pp. 283–284.

[59] Tanaka 2012a, p. 567 *et seq*.

(ii) to avoid prejudice to the final solution of the dispute, or
(iii) to avoid aggravation or extension of the dispute.

Given that the framers of the 1960 Indus Waters Treaty use a disjunctive "or", it can be considered that the Court of Arbitration can lay down interim measures when only one of these criteria was met.[60] In fact, focusing on timing and impact on the flow of the river, the Court of Arbitration examined the "necessity" of interim measures in order to avoid prejudice to the final solution of a dispute.[61]

A contentious issue in this regard is "whether, to be 'necessary', interim measures must be required urgently and so as to avoid irreparable injury to the interests of the Party seeking those measures."[62] In this regard, the Court made an important statement:

> In the view of the Court, an interpretation of the term "necessary" in Paragraph 28 that engrafts the requirements of "urgency" and "irreparable injury", as those concepts have been developed by the International Court of Justice in its case-law on provisional measures, is not required. One evident reason not wholly to import the ICJ's provisional measures requirements is, of course, the difference in the respective wording of Article 41 of the ICJ Statute and Paragraph 28 of Annexure G. Paragraph 28 sets out three distinct, specific grounds on the basis of which the meaning of "necessary" can be ascertained. It thus functions as a kind of *lex specialis* prescribed by the framers of that provision that makes unnecessary the imposition of further requirements.[63]

Even if, as the Court of Arbitration stated, para 28 of Annexure G to the Indus Waters Treaty can be considered as a kind of *lex specialis*, there appears to be some scope to reconsider the question whether the *lex specialis* nature of the Paragraph of the Treaty automatically excludes requirements which are not explicitly embodied in the Treaty. In particular, urgency should be a crucial requirement since, if the preservation of rights were not urgent, it would be acceptable to wait until such time as an international court or tribunal would render the judgment. Furthermore, it is the elementary judicial principle that the judgment of a court should be effective and, thus, either party, or both must restrain from disrupting the situation or attempting to present its adversary with a *fait accompli*.[64] Therefore, it could well be said that the temporal element of urgency is inherently enshrined in the concept of provisional measures.[65] As Judge Treves rightly stated in the *Southern Bluefin Tuna* cases, "[t]he requirement of urgency is part of the very nature of provisional measures."[66] Hence there are good reasons to argue that the existence of urgency of the situation needs

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[60] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 40, para 132.

[61] Further, Tanaka 2012a, pp. 564–566.

[62] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 39, para 129.

[63] *Ibid*., para 130.

[64] Merrills 2011, p. 124.

[65] Roucounas 2001, p. 201, p. 216. See also Rosenne 2005, p. 136; Brown 2007, p. 143; Sugihara 1996, p. 279; Merrills 1995, p. 110.

[66] *Southern Bluefin Tuna* cases *(New Zealand v. Japan; Australia v. Japan)*, ITLOS Case Nos. 3 and 4, Order of 27 August 1999, Separate Opinion of Judge Treves, p. 316, para 2. See also Treves 2017, p. 1873.

to be examined, even though there is no explicit reference to this requirement in the Indus Waters Treaty. Indeed, as will be discussed in Sect. 9.4.1, the Court of Arbitration did not completely ignore the requirement of urgency.

On the other hand, by referring to the 2011 *Preah Vihear* Order of the ICJ and the UNCITRAL Model Law (2006 Revisions), the Court regarded the plausibility as a requirement to order interim measures. In the words of the Court,

> Consistent with the general practice of international and national courts and tribunals, the Court must be satisfied that, without prejudice to its decision on the merits, the claims set forth by the Party seeking interim measures appear to be at least "plausible". Regardless of the conditions under which a court is authorised under its rules to indicate interim relief, such relief cannot be said to be "necessary" under any of those conditions if it is apparent to that court at any early stage that it is unlikely to have jurisdiction or that the applicant has failed to present a plausible case on the merits.[67]

The Court accordingly examined the plausibility of the claims by Pakistan,[68] even though this requirement was not explicitly set out in the Indus Waters Treaty. As will be discussed in Sect. 9.4.2, however, until recently the plausibility test has not been regarded as a distinct requirement of provisional measures in the jurisprudence of the ICJ and the test was criticised by members of the Court. Hence some doubts can be expressed whether the plausibility test can be regarded as "the general practice of international courts and tribunals".[69] In any event the Court unanimously ruled that: "Except for the sub-surface foundations of the dam stated in para 151(iv) above, India shall not proceed with the construction of any permanent works on or above the Kishenganga/Neelum riverbed at the Gurez site that may inhibit the restoration of the full flow of that river to its natural channel."[70]

9.4 The Manner of Examination of the Requirements to Prescribe Provisional Measures

The further issue relates to the manner of examination of the requirements to prescribe provisional measures by an arbitral tribunal. In this regard, two requirements merit being highlighted.

9.4.1 Urgency and Risk of Irreparable Prejudice

As noted, the existence of urgency of situation can be regarded as an essential requirement to prescribe provisional measures. An issue at point is the criterion to decide

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[67] *Indus Waters Kishenganga* Arbitration, *supra* note 2, pp. 41–42, para 135.

[68] *Ibid*., p. 43, para 140.

[69] Miles 2018, p. 16, argued that this was a "misreading of the ICJ's jurisprudence".

[70] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 49, para 152.

the existence of urgency of the situation. In the ICJ jurisprudence, there is a clear trend that the Court examines the risk of irreparable prejudice and urgency at the same time.[71] The ICJ's approach seemed to be echoed by the Annex VII Arbitral Tribunal in the *MOX Plant* case. Referring to the *Congo v. France* Order of 17 June 2003 of the ICJ,[72] the Tribunal held:

> International judicial practice confirms that a general requirement for the prescription of provisional measures to protect the rights of the Parties is that there need to be a showing both of urgency and of irreparable harm to the claimed rights.[73]

Given that there was no clear indication that there would be additional discharges from THORP arising by reason of the MOX plant, the Tribunal did not consider that there was "an urgent and serious risk of irreparable harm to Ireland's claimed rights, which would justify it in prescribing provisional measures relating to discharges from the MOX Plant."[74]

As pointed out earlier, the Annex VII Arbitral Tribunal also affirmed the provisional measure prescribed by ITLOS in its Order of 3 December 2001.[75] In this regard, it must be recalled that in the 2001 *MOX Plant* case, ITLOS did not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland in the short period before the constitution of the Annex VII arbitral tribunal,[76] even though it prescribed provisional measures. Accordingly, some doubts can be expressed why ITLOS could prescribe its own measures despite the absence of urgency of the situation.[77] The Annex VII Arbitral Tribunal, in its Order No. 3, did not provide any further detail with regard to the urgency of the situation that required the continuous application of the provisional measures prescribed by ITLOS. An explanation may be that both Parties accepted the binding nature of the ITLOS Order and that Ireland did not seek any modification of the Order.[78]

The inter-linkage between urgency and the risk of irreparable prejudice can also be found in the *"Enrica Lexie" Incident* arbitration. In this case, the Annex VII Arbitral Tribunal stressed that "a showing of urgency in some form is inherent in provisional measures proceedings."[79] It then held:

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[71] Sugihara 1996, p. 28; Oellers-Frahm 2012, p. 1047; Tanaka 2018, p. 196.

[72] ICJ, *Case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 17 June 2003, p. 110, paras 34–35.

[73] The *MOX Plant* Order No. 3, *supra* note 4, 17, para 58.

[74] *Ibid*., p. 18, paras 61–62.

[75] *Ibid*., para 2 of the operative part.

[76] The *MOX Plant* case *(Ireland v. United Kingdom)*, ITLOS Case No. 10, *supra* note 18, p. 110, para 81.

[77] A possible interpretation may be that the Tribunal found the situation sufficiently urgent to prescribe its own provisional measures, even though the requirement of urgency was not fulfilled to order measures requested by Ireland. In any case the Tribunal did not provide any precision in this matter. Brown 2002, p. 282.

[78] The *MOX Plant* Order No. 3, *supra* note 4, p. 19, para 64.

[79] *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 23, para 89.

> Generally, urgency is linked to the criterion of preservation of the respective rights of the parties to the dispute in order to avert a real and imminent risk that irreparable prejudice may be caused to the rights at issue, pending the final decision on the merits pursuant to Article 290, para 1, of the Convention [LOSC].[80]

A contentious issue in this case was whether the deprivation of personal liberty can be regarded as a matter of urgency. On this issue, opinions of the members of ITLOS were sharply divided.[81] Judge ad hoc Francioni considered that "the urgency of the situation is manifest"[82] since, in his view, the Tribunal had always considered situations of deprivation of personal liberty as matters of urgency.[83] The view of Judge ad hoc Francioni was supported by Judge Jesus.[84] By contrast, Judges Kateka, Lucky, Heider, Chandrasekhara Rao, Bouguetaia, and Ndiaye questioned the existence of the urgency of the situation in the *"Enrica Lexie" Incident* case.[85] In the end, ITLOS, in its Order of 2015, remained mute on the existence of urgency of the situation when prescribing its own provisional measures.[86] Likewise the Annex VII Arbitral Tribunal, in the *"Enrica Lexie" Incident* arbitration, did not clarify whether the urgency of the situation exists, even though it ruled that "urgency is an important element in considering a request for provisional measures."[87]

As pointed out earlier, the Court of Arbitration, in the *Indus Waters Kishenganga* case, took the view that the urgency and irreparable prejudice criteria are not dispositive under para 28 of Annexure G of the Indus Waters Treaty. However, a close reading of the Order seems to suggest that the Court of Arbitration did not completely ignore the requirement of urgency.[88] In fact, the Court of Arbitration clearly ruled that India's "activities to prepare the construction of the dam in the riverbed at the Gurez site are set to commence in November 2011" and "such activity is thus *imminent*".[89] In the same paragraph, the Court added:

> [W]hile the present proceedings are underway, works on the dam are likely to advance to a point where the possible restoration of the flow of the Kishenganga/Neelum to its natural

[80] *Ibid*.

[81] Tanaka 2017a, pp. 270–272.

[82] *The "Enrica Lexie" Incident*, ITLOS Case, *supra* note 27, Declaration of Judge ad hoc Francioni, pp. 223–224, para 22.

[83] *Ibid*., p. 224, para 23.

[84] *The "Enrica Lexie" Incident*, ITLOS Case, *supra* note 27, Separate Opinion of Judge Jesus, pp. 228–229, paras 11–12.

[85] *The "Enrica Lexie" Incident*, ITLOS Case, *supra* note 27, Declaration of Judge Kateka, pp. 208–209, paras 4–6; Dissenting Opinion of Judge Lucky p. 283, paras 56 and 58, and 284, para 61; Dissenting Opinion of Judge Heider p. 287, para 2 and pp. 289–290, paras 7–14; Dissenting Opinion of Judge Chandrasekhara Rao, p. 245, para 25; Dissenting Opinion of Judge Bouguetaia, p. 235, para 19; Dissenting Opinion of Judge Ndiaye, pp. 266–267, para 35.

[86] Tanaka 2017a, pp. 272–273.

[87] *The "Enrica Lexie" Incident* Order, *supra* note 5, p. 22, para 85.

[88] Tanaka 2012a, pp. 570–571.

[89] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 47, para 149.

> channel will be rendered significantly more difficult and costly to the potential prejudice of any prescriptions that may be made by the Court in its Award.[90]

The above statement can be interpreted to imply that the Court of Arbitration recognised the situation of urgency in this case. In conclusion, the Court held:

> [T]he construction of this portion of the KHEP is capable of leading to 'prejudice to the final solution…of the dispute,' and that it is necessary to enjoin India from proceeding with the construction of permanent works on or above the Kishenganga/Neelum riverbed that may inhibit the full flow of that river to its natural channel until the Court renders its Award.[91]

According to the Court's approach, it appears that the "prejudice to the final solution of the dispute" provides a criterion to decide the existence of urgency of the situation. In any event the Court of Arbitration could better ensure the consistency with the law of provisional measures appeared in the "general practice of international and national courts and tribunals" by explicitly examining the requirement of urgency in connection to irreparable prejudice.[92]

9.4.2 Plausible Character of the Alleged Rights

Plausible character of the alleged rights or plausibility test constitutes a requirement that needs careful consideration.[93] In the ICJ jurisprudence, traditionally the Court has not explicitly examined the plausibility of the alleged rights in the principal request as a distinct condition for provisional measures.[94] The Court, in its order in the *Belgium v. Senegal* case, referred to the plausibility test by stating:

> [T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible.[95]

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[90] *Ibid*.

[91] *Ibid*., p. 47, para 150.

[92] Tanaka 2012a, p. 571.

[93] For an analysis of the requirement of plausibility, see Miles 2018; Lando 2018; Saab 2017; Chap. 5 by Sparks and Somos in this volume.

[94] Sugihara 1996, p. 282. See also Sztucki 1983, pp. 123 and 259. An exceptional case may be the *Lockerbie* case. After the proceedings had been instituted, the UN Security Council adopted a resolution under Chapter VII of the UN Charter calling upon Libya to surrender two Libyan nationals who had been charged with responsibility for the destruction of the PanAm flight. The Court held that under Article 103 of the UN Charter, the obligations of the parties under the Charter prevail over their obligations under any other international agreement, including the Montreal Convention. Thus, the ICJ declined the Libya's request for the indication of provisional measures on the ground the rights claimed by Libya under the Montreal Convention cannot be regarded as appropriate for protection by the indication of provisional measures. ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK) (Libya v. USA)*, Provisional Measures, Order of 14 April 1992, p. 15, paras 39–40; pp. 126–7, paras 42–3. In addition, Lando argued that the origin of plausibility test can be found in Separate Opinion of Judge Abraham in the *Pulp Mills* case. Lando 2018, p. 642.

[95] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, p. 151, para 57.

In the *Belgium v. Senegal* case, the plausibility test was discussed in connection with the link between the right to be protected and the measures requested. In the 2011 *Costa Rica v. Nicaragua* case, however, the ICJ *explicitly* considered this element as a distinct requirement for indicating provisional measures. In this regard, the Court held:

> [F]or the purposes of considering the request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible.[96]

Subsequently the Court continues to examine the plausibility of the alleged rights in the jurisprudence concerning provisional measures.

The plausibility test was transplanted as a requirement to prescribe provisional measures in the jurisprudence of other international tribunals. In the ITLOS jurisprudence, for instance, the plausibility test was, for the first time, examined in the *Ghana/Côte d'Ivoire* case of 2015. In this case, the ITLOS Special Chamber ruled that the party requesting provisional measures, that is, Côte d'Ivoire, had presented enough material to show that the rights it seeks to protect in the disputed area are plausible.[97] Furthermore, ITLOS, in the 2015 *"Enrica Lexie" Incident* Order, considered that both parties have sufficiently demonstrated that the rights they sought to protect regarding the *Enrica Lexie* incident were plausible.[98] More recently, ITLOS, in the 2019 Order concerning the Three Ukrainian Naval Vessels, held that the rights Ukraine sought to protect in the dispute were plausible.[99]

The plausibility test was not discussed by the Annex VII Arbitral Tribunal in the *MOX Plant* and *"Enrica Lexie" Incident* arbitration. As pointed out earlier, however, the Court of Arbitration in the *Indus Waters Kishenganga* arbitration regarded the plausibility as a requirement to order interim measures. It then ruled that Pakistan has presented a plausible, provisionally tenable argument under the Treaty in support of its case.[100] The plausibility test in the law of provisional measures provides an interesting example of the development of procedural law through "institutional circularity".[101] Yet the plausibility test leaves some room for discussion.[102] In particular, two problems must be noted.

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[96] ICJ, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (the *Costa Rica v. Nicaragua* case), Provisional Measures, Order of 8 March 2011, p. 19, para 57.

[97] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Provisional Measures, p. 159, para 62.

[98] *The "Enrica Lexie" Incident*, ITLOS Case, *supra* note 27, p. 197, para 85. See also Saab 2017, p. 210.

[99] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May, 2019, para 99.

[100] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 43, para 140.

[101] However, institutional circularity may be open to criticism. See Tanaka 2017b, pp. 166–167.

[102] Tanaka 2012b, pp. 222–225; Tanaka 2017b, p. 172; Miles 2018, pp. 35–39.

The first problem relates to the vagueness and uncertainty of the criterion for deciding the plausibility of claims of the disputing party. In the *Indus Waters Kishenganga* arbitration, the Court of Arbitration took the view that "some jurisdictions would require the demonstration of something more than a plausible case, such as a *prima facie* determination that the case is meritorious."[103] This statement seems to imply that a threshold of the plausibility test would be below the *prima facie* standard.[104] Yet the Court of Arbitration, in its Order of 2011, offered no further detail with regard to the standard to of the plausibility test. This is not an isolated instance. In the *"Enrica Lexie" Incident* and *Ghana/Côte d'Ivoire* cases, for instance, ITLOS and its Special Chamber offered scant explanation about the criterion for determining the plausibility of the claim of the party in dispute.[105] Likewise ITLOS, in the 2019 Order concerning the Three Ukrainian Naval Vessels, remained mute on the criterion.[106] The vagueness of the criterion was already criticised by some members of the ICJ. For instance, Judge Koroma, in his Separate Opinion in the *Costa Rica v. Nicaragua* case, expressed his misgivings:

> In my view, the most problematic aspect of the plausibility standard is its vagueness, giving the impression that the threshold for the indication of provisional measures has been lowered.[107]

According to the learned judge:

> [T]he ambiguity or vagueness inherent in the English-language meaning of "plausible" makes it unreliable as a legal standard that parties must meet to obtain relief from this Court in the form of provisional measures, especially since the binding force of orders indicating provisional measures has been confirmed by the Court. The standard may even inadvertently offer parties an opportunity to submit specious claims which, at a superficial glance, may appear credible but could mislead the Court to indicate provisional measures.[108]

The vagueness of the plausibility test may entail the risk of undermining predictability of order of the Court with regard to provisional measures.[109]

The second problem is that the plausibility test may entail the risk of making the distinction between provisional measures and interim judgment blur. Provisional measures must be distinct from interim judgments. The distinction was highlighted by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów*

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[103] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 41, para 135, footnote 210.

[104] Miles 2018, p. 16.

[105] Tanaka 2018, p. 257.

[106] Tanaka 2020, p. 240.

[107] *Costa Rica v. Nicaragua* case, *supra* note 96, Separate Opinion of Judge Koroma, p. 31, para 7.

[108] *Ibid*., para 8.

[109] In the *Ukraine v. Russian Federation* Order of 2017, the ICJ, for the first time in its jurisprudence, held that asserted rights of Ukraine in relation to the International Convention for the Suppression of the Financing of Terrorism did not meet the plausibility test. ICJ, *International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order of 19 April 2017, pp. 131–132, paras 75–76. Yet the ICJ did not specify to what extent the Ukraine should have presented evidence to meet the plausibility test. Miles 2018, p. 38.

case.[110] The distinction was also stressed by members of the ICJ. For instance, Judge Oda, in the *LaGrand* case, clearly stated:

> [T]he request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.[111]

Nonetheless, the examination of the plausibility of the alleged rights at the stage of provisional measures may run the risk of dealing with matters which should be examined on the merits and, consequently, the order of provisional measures may close to the interim judgment. If this is the case, the plausibility test may make the distinction between provisional measures and prejudgment obscure.[112]

In practice, it is not easy to distinguish the examination of the plausibility of the alleged rights at the stage of provisional measures and the in-depth examination of the rights at the merits since, As Judge ad hoc Dugard stated, "[i]nevitably this requires some consideration of the merits of the case."[113] Indeed, once the Court confirmed the plausibility of the alleged rights at the stage of the proceedings of provisional measures, it would be difficult to deny the existence of such rights at the later stage of the proceedings. Accordingly, the danger of prejudgment cannot be overlooked.[114] In this connection, Judge Sepúlveda-Amor expressed his misgivings:

> [T]he imprecision surrounding the "plausibility requirement" and the unwarranted emphasis placed upon that in this Order might ultimately encourage states seeking interim protection to over-address the substance of the dispute at an early stage and, as a result, overburden proceedings under Article 41 of the Statute with matters that should actually be dealt with by the Court when adjudicating on the merits.[115]

If this is the case, the plausibility test may entail the serious risk of encouraging the parties to enter into issues of merits at the stage of provisional measures.[116] In this connection, Judge Owada, in the 2017 *Ukraine v. Russia* case (provisional measures),

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[110] The PCIJ in *Case concerning the Factory at Chorzow (Germany v. Poland)*, Order of 21 November 1927, p. 10 stated that: "Considering that the request of the German Government cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned; That, consequently, the request under consideration is not covered by the terms of the provisions of the Statute and Rules cited therein".

[111] *LaGrand* case *(Germany v. United States of America)*, *supra* note 51, Declaration of Judge Oda, p. 19, para 6. See also *Nuclear Tests* case *(Australia v. France)*, Interim Measures of Protection, Dissenting Opinion of Judge Gros, p. 123; *Nuclear Tests* case *(Australia v. France)*, Interim Measures of Protection, Dissenting Opinion of Judge Foster, p. 113.

[112] Sugihara 1996, p. 285.

[113] *Costa Rica v. Nicaragua* case, *supra* note 96, Separate Opinion of Judge ad hoc Dugard, p. 62, para 3.

[114] ICJ, *Passage Through the Great Belt* case *(Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, Separate Opinion of Judge Shahabuddeen, p. 29.

[115] *Costa Rica v. Nicaragua* case, *supra* note 96, Separate Opinion of Judge Sepúlveda-Amor, p. 38, para 15.

[116] Tanaka 2012b, p. 224; Miles 2018, p. 43.

expressed an insightful view on the standard for the plausibility test. Judge Owada stressed:

> It is important to note that the Court's jurisprudence on the requirement since the Order in *Questions relating to the Obligation to Prosecute or Extradite*, when this terminology was introduced, reveals that the standard applied has always been fairly low.[117]

According to the learned Judge, "[t]he question to be asked should therefore be that of whether an asserted right is 'possible' or 'arguable' that it exists."[118] By applying the lower standard, to a certain extent, it might be possible to prevent the risk of the interim judgment. However, the application of the lower standard seems to make the role of the plausibility test minimum. If this is the case, some doubts might be expressed why this test should be considered as a distinct condition for provisional measures.[119]

9.5 Compliance with Provisional Measures

9.5.1 Judicial Supervision in the Jurisprudence of the ICJ and ITLOS

Finally, the issue of compliance with provisional measures must be examined. Under Article 290(6) of the LOSC, "[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article." Therefore, it is clear that provisional measures prescribed by the Annex VII Arbitral Tribunal are binding upon the parties in dispute. In fact, Tribunal, in the *MOX Plant* case, made clear that: "[b]oth Parties accept that that Order remains in force and is binding upon them."[120] In the *Indus Waters Kishenganga* arbitration, the Order of the Court of Arbitration uses the term 'shall' in its operative part. Hence there is little doubt that the interim

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[117] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge Owada, p. 146, para 16.

[118] *Ibid*., p. 147, para 20. According to Judge Owada, "the Court appeared to consider that 'plausibility' could be a certainty of fifty per cent or less." *Ibid*., para 19.

[119] In this regard, Judge Sepúlveda-Amor considered that "this Order [of 8 March 2011] should not be read as introducing a new requirement under Article 41 of the Statute, or interpreted as signalling a departure from the Court's jurisprudence on provisional measures. Rather, as I see it, it should be understood as an attempt on the part of the Court to 'name' or 'label' a requirement already implicit in the Court's case law." *Costa Rica v. Nicaragua* case, *supra* note 96, Separate Opinion of Judge Sepúlveda-Amor, p. 38, para 16. Judge Greenwood also took a similar view. *Costa Rica v. Nicaragua* case, *supra* note 96, Declaration of Judge Greenwood, pp. 47–48, para 5. See also Sugihara 1996, p. 285.

[120] The *MOX Plant* Order No. 3, *supra* note 4, pp. 18–19, para 64.

measures ordered by the Court of Arbitration is binding upon the disputing parties.[121] However, the question is how it is possible to ensure effective compliance with such measures.

In approaching this issue, judicial supervision merits particular mention. Judicial supervision is a procedure which obliges the parties in dispute to submit a report concerning the implementation of these measures to an international court or tribunal. The judicial supervision over provisional measures can be commonly seen in the jurisprudence of the ICJ and ITLOS. The ICJ is empowered to request the parties in dispute to furnish relevant information concerning the implementation of provisional measures by virtue of Article 78 of the Rules of Court. Thus, in appropriate cases, the ICJ required the disputing parties to inform the Court as to compliance with its provisional measures. By way of illustration, the ICJ, in the 2011 *Preah Vihear* Order, decided that "each Party shall inform the Court as to its compliance with the above provisional measures."[122] Furthermore, the Court, in the 2017 *Jadhav* Order, decided that "Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order."[123]

In the case of ITLOS, the judicial supervision is clearly enshrined in Article 95 of the Rules of the Tribunal.[124] In the *Southern Bluefin Tuna* cases, for instance, it decided that each party shall submit the initial report referred to in Article 95(1) of the Rules not later than 6 October 1999.[125] Following the Order, on 6 October 1999, Australia and New Zealand submitted a joint report. On the same day, Japan also submitted its report.[126] In the *MOX Plant* case, ITLOS unanimously decided that:

> Ireland and the United Kingdom shall each submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 17 December 2001, and *authorizes* the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.[127]

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[121] In this regard, Kolb 2005, p. 129, took the view that "in case of silence of the constitutive instruments, it will be presumed that a power to indicate binding provisional measures is granted to the judicial body at stake."

[122] *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear*, *supra* note 55, para 69(C). However, technicalities concerning reporting procedures are not set out in the Rules of the ICJ or its Practice Directions. Zyberi 2010, pp. 575–576; Tanaka 2012b, p. 212.

[123] *Jadhav* case, *supra* note 54, p. 246, para 61.

[124] Article 95 provides that: '1. Each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party shall submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed. 2. The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed.'.

[125] The *Southern Bluefin Tuna* case, *supra* note 66, p. 300, para 90(2).

[126] (1999) 3 *International Tribunal for the Law of the Sea Yearbook* 51.

[127] The *MOX Plant* case *(Ireland v. United Kingdom)*, ITLOS Case No. 10, *supra* note 18, p. 111, para 89(2).

Likewise ITLOS, in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, unanimously decided that "Malaysia and Singapore shall each submit the initial report referred to in Article 95, para 1, of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise."[128] In the 2012 *"ARA Libertad"* Order, ITLOS unanimously decided that Argentina and Ghana shall each submit the initial report referred to in para 103 not later than 22 December 2012 to the Tribunal.[129] Each party thus submitted an initial report on the measures taken within the prescribed time limits. The *"ARA Libertad"* was released and, on 19 December 2012, left the maritime areas under the jurisdiction of Ghana.[130]

9.5.2 Juridical Supervision in the Inter-state Arbitration

The judicial supervision can also be used in inter-state arbitration to secure compliance with provisional measures. In fact, the Annex VII Arbitral Tribunal, in the *MOX Plant* case, decided:

> (a) that no later than 12 September 2003, Ireland and the United Kingdom shall each submit to the Tribunal and to the other Party an initial report and information on compliance with the provisional measure affirmed, and the recommendations made in paragraph 67 above, by the Tribunal in the present Order;
>
> (b) that subject to any further order of the Tribunal, not later than 17 November 2003, a further report and information on compliance shall be submitted.[131]

Furthermore, the Tribunal, in its Order No. 4, required that "further reports and information to be submitted by the parties pursuant to para 7(b) of the *Dispositif* of the Tribunal's *Order No. 3* of 24 June 2003, shall be submitted not later than 28 November 2003"; and that "the Parties shall each submit, not later than 31 May 2004 and every six months thereafter, a report and information on compliance with the provisional measure affirmed and recommendations made by the Tribunal in *Order No. 3* of 24 June 2003."[132] The reports and information were jointly submitted by the Parties in November 2003, May 2004, November 2004, May 2005, November

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[128] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia/Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003, p. 28, para 106(3). This case was settled in 2005. In this regard, see the 2005 Settlement Agreement in the Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor.

[129] *The "ARA Libertad"* case *(Argentina v. Ghana)*, ITLOS Case No. 20, Order of 15 December 2012, p. 350, para 108.

[130] Annual Report of the International Tribunal for the Law of the Sea for 2012, SPLOS/256, 2 April 2013, p. 16, para 71.

[131] The *MOX Plant* Order No. 3, *supra* note 4, p. 21, para 7 of the operative part.

[132] The *MOX Plant* case *(Ireland v. United Kingdom)*, PCA Case No. 2002–01, Order No. 4 Further Suspension of Proceedings on Jurisdiction and Merits of 14 November 2003, pp. 2–3, paras 1(c) and (d) of the operative part.

2005 and May 2006, pursuant to para 1(d) of the *Dispositif* of Order No. 4 of 14 November 2003.[133]

By the same token, the Annex VII Arbitral Tribunal, in the *"Enrica Lexie" Incident* arbitration, decided:

> Italy and India each shall report to the Arbitral Tribunal on compliance with these provisional measures, and authorizes the President to seek information from the Parties if no such report is submitted within three months from the date of this Order and thereafter as he may consider appropriate.[134]

In the *Indus Waters Kishenganga* arbitration, the Court of Arbitration obliged the disputing parties to arrange for periodic joint inspections of the dam site at Gurez and submit a joint report on this matter.[135] It is notable that practice concerning judicial supervision is commonly developing in the jurisprudence of the ICJ, ITLOS and arbitral tribunals. Given the lack of the mechanism for enforcing provisional measures, judicial supervision can be an alternative well worth considering as a means to secure effective compliance with provisional measures. However, two issues need further consideration: disagreement on the implementation of provisional measures and the breach of these measures.

First, the interpretation of the parties in dispute may differ with regard to the manner of the implementation of provisional measures. This problem was exemplified by the *Indus Waters Kishenganga* arbitration. After the Order on the Interim Measures of 2011, the Parties jointly submitted a report on 19 December 2011 and stated that they disagreed about: "(1) the scope of the Order; (2) the timing and frequency of the joint inspections; (3) the size of the delegations for the first joint inspection; and (4) the duration of that inspection".[136] In response, on 20 December 2011, the Court of Arbitration issued Procedural Order No. 6 providing further detail with regard to the joint inspection.[137] Subsequently, in the absence of agreement on the content of a joint report, the Parties submitted separate reports regarding the joint inspection.[138] Furthermore, the Court of Arbitration issued Procedural Order No. 11 concerning the second joint inspection.[139] Even though a second joint inspection was conducted on 14 October 2012,[140] the Parties submitted separate reports to the Court on 26 and 30 November 2012, respectively, since they could not reach agreement on

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[133] The *MOX Plant* case *(Ireland v. United Kingdom)*, PCA Case No. 2002–01, Order No. 5 Suspension of Periodic Report by the Parties of 22 January 2007, p. 2. The obligation on the Parties to submit periodic reports and information on compliance with the provisional measure was suspended by the Tribunal's Order No. 5. *Ibid*., p. 3.

[134] The *"Enrica Lexie" Incident* Order, *supra* note 5, para 132(c).

[135] *Indus Waters Kishenganga* Arbitration, *supra* note 2, p. 49, para 152(2).

[136] *Indus Waters Kishenganga* Arbitration *(Pakistan v. India)*, PCA Case No. 2011–01, Partial Award 18 February 2013, p. 20, para 66, available at: https://pcacases.com/web/sendAttach/1681.

[137] *Ibid*., p. 21, para 67.

[138] *Ibid*., p. 21, para 70.

[139] *Ibid*., p. 22, para 73.

[140] *Ibid*., p. 23, para 74.

the content of a joint report.[141] In summary, the *Indus Waters Kishenganga* arbitration demonstrated that the Parties may disagree with the manner of implementation provisional measures and the contents of the joint report on this matter.

Second, the judicial supervision is not a panacea. The alleged breach of compliance with provisional measures may be at issue at the stage of the merits.[142] The *"Arctic Sunrise"* case is an example. ITLOS, in its Order of 2013, prescribed provisional measures, including the submission of the initial report on compliance with the provisional measures.[143] At the stage of the merits, the Netherlands submitted that the Russian Federation breached its obligation to the Netherlands by failing to comply with provisional measures prescribed by ITLOS.[144] In this regard, the Annex VII Arbitral Tribunal found that "by failing to comply with paras (1) and (2) of the *dispositif* of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296 (1) of the Convention."[145] The Tribunal considered that its findings regarding the international wrongfulness of the Russian Federation's conduct provides appropriate satisfaction.[146] Here one may find another interaction between the provisional measures prescribed by ITLOS and inter-state arbitration.

9.6 Conclusions

This chapter examined provisional measures prescribed by inter-state arbitral tribunals with specific focus on the *MOX Plant, "Enrica Lexie" Incident*, and *Indus Waters Kishenganga* cases. Due to the limitation of modern examples on this matter, it seems too early to draw any general conclusions on this subject. Even so, the above considerations seem to reveal at least the following points.

First, the practice of inter-state arbitral tribunals is not uniform with regard to the requirements to prescribe provisional measures. An essential issue that arises in this regard is whether the same requirements that have been developed through the ICJ jurisprudence also apply to inter-state arbitration. As pointed out earlier, the

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[141] *Ibid*., p. 23, para 75.

[142] One can find such examples in the jurisprudence of the ICJ. See, for instance, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, p. 236, para 469; p. 238, para 471(7); the *LaGrand* case *(Germany v. USA)*, Judgment of 27 June 2001, p. 508, para 115; p. 516, para 128(5). See also Zyberi 2010, pp. 580–582.

[143] The *"Arctic Sunrise"* case *(Kingdom of the Netherlands v. Russian Federation)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, p. 252, para 105.

[144] The *"Arctic Sunrise"* Arbitration *(Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014–02, Awards on the Merits of 14 August 2015, p. 83, para 334, available at: https://pcacases.com/web/sendAttach/1438.

[145] *Ibid*., p. 98, para 401. Paragraph (2) of the *dispositif* of the ITLOS Order relates to the submission of the initial report on compliance with the provisional measures.

[146] *Ibid*., p. 94, para 380.

Court of Arbitration in the *Indus Waters Kishenganga* case took the view that the requirements of "urgency" and "irreparable injury" are not required when ordering the interim measures in the case. However, it is open to debate whether the *lex specialis* nature of the rules of procedures of inter-state arbitration automatically excludes the essential requirements from the list of requirements for the prescription of provisional measures.

Second, as shown in the *MOX Plant* and *"Enrica Lexie" Incident* cases, a disputing party may request the prescription of provisional measures to ITLOS and the Annex VII Arbitral Tribunal, respectively. In this case, the issue of dual provisional measures arises. The Annex VII Arbitral Tribunal, in its MOX Plant Order No. 3, maintained the continuity between the ITLOS provisional measures and its own provisional measures. By contrast, the Annex VII Arbitral Tribunal, in the *"Enrica Lexie" Incident* case, highlighted the difference of the jurisdiction of ITLOS and that of the Arbitral Tribunal. Despite the difference, the two cases demonstrated that provisional measures prescribed by ITLOS may affect the consideration of the Annex VII Arbitral Tribunal with regard to provisional measures.

Third, the manner of examination of the requirements to prescribe provisional measures by an arbitral tribunal is not free from controversy. As the Annex VII Arbitral Tribunal itself stated in the *"Enrica Lexie" Incident* case, urgency is an important element to prescribe provisional measures. In the same case, however, the Tribunal did not clarify the existence of the urgency of the situation. In the *Indus Waters Kishenganga* arbitration, the Court of Arbitration held that the claim of Pakistan was plausible. Yet it offered no further detail with regard to the standard for testing the plausibility of the claim.

Fourth, in the three cases, arbitral tribunals ordered provisional measures which require the disputing parties to submit the initial report on compliance with the provisional measures to the tribunal. The practice is in line with the jurisprudence of the ICJ and ITLOS. It is argued that judicial supervision is a useful means for ensuring compliance with the provisional measures in the inter-state arbitration.

Even though an inter-state arbitral tribunal is to be established in an ad hoc manner, it is not suggested that rules governing provisional measures prescribed by arbitral tribunals can be completely detached from the development of procedural law of international courts and tribunals. In fact, as the *Institut de droit international* suggested, it may not be impossible to identify common essential requirements to prescribe provisional measures in the jurisprudence of international courts and tribunals.[147] In light of the differences of specific purposes and functions of international courts or tribunals, however, the interpretation of or the manner of the application of the requirements may differ according to a court or tribunal.[148] Hence

[147] In this regard, the Resolution of the *Institut de droit international* stated that: 'Provisional measures are available if the applicant for such measures can show that: (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risks'. *Institut de droit international*, Final Resolution, Provisional Measures (Session de Hyderabad), above n 7, p. 129, para 2.

[148] See also Brown 2007, p. 261.

the unity and diversity of international law governing provisional measures should be a crucial issue that needs further consideration.

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Part III
Provisional Measures Issued by Regional Courts

Chapter 10
The Procedural Features of Interim Relief Before the Court of Justice of the European Union

Massimo Francesco Orzan

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Abstract The interim relief before the Court of Justice (CJ) and the General Court (GC), the two jurisdictions of the Court of Justice of the European Union (CJEU), makes it possible for parties to avoid their positions being irreparably prejudiced pending the main proceedings. Interim relief is subject to the demonstration of the existence of urgency (*periculum in mora*) and the factual and legal arguments that justify *prima facie* acceptance of the application (*fumus boni iuris*). Moreover, other than those two conditions provided for in the Rules of procedures of the two jurisdictions, case-law has added another, that is the balance of interests. This chapter focuses on the procedural features of interim relief.

Keywords Articles 278 and 279 TFEU · Articles 280 and 299 TFEU · Article 39 Statute of the CJEU · CJEU Rules of Procedure · CJEU case-law · *Inaudita Altera Parte* Orders

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10.1 Introduction

The need to ensure interim relief before the Court of Justice (CJ) and the General Court (GC)—the two jurisdictions of the Court of Justice of the European Union (CJEU)—must be found in the fact that the European Union legal order is based on a principle of Administrative Law common to the majority of its Member States (MS), i.e. the principle of the presumption of legality of acts. According to this principle, the lodging of an application before a judge does not suspend the effects of the act challenged. Thus, interim relief makes it possible to avoid the parties' positions being irreparably damaged pending the main proceedings. The granting of interim relief is subject to the demonstration of the existence of urgency (*periculum in mora*) and of the *prima facie* validity of the factual and legal arguments that justify the acceptance of the application (*fumus boni iuris*). Moreover, other than those two conditions, provided for in the Rules of procedures (RP) of the two jurisdictions, case-law has added another requirement, that is the balance of interests. Hence, once the first two conditions are satisfied, the judge hearing an application for interim measures must compare the damage alleged by the applicant with that which could be suffered by the defendant (or by a third party) should the interim relief be granted.

This chapter focuses on the procedural features of interim relief. In particular—after having recalled the grounds of this protection in the Treaty on the Functioning of the European Union (TFEU), the Statute of the Court of Justice of the European Union (the Statute), and the RP of the CJ and GC—it will analyse the role of the judge hearing an application for interim measures before the CJEU in light of the division of jurisdiction between the CJ and the GC. Second, the reason why the interim measures procedure is a summary procedure will be examined. Third, the chapter will consider the procedural relevance of each of the conditions for granting the requested measure and their mutual relationships. Fourth, the work will focus on the peculiar category of *inaudita altera parte* orders. Lastly, the capacity of interim decisions to suspend enforcement of acts adopted under Article 299 TFEU will be examined.

10.2 The Grounds for Interim Measures in the EU Legal Order: Articles 278, 279, 280 and 299 TFEU, Article 39 of the Statute of the Court of Justice of European Union and the CJ and GC RP

The possibility to seek interim relief has its ground in Articles 278, 279 and 299 TFEU and Article 39 of the Statute. Those provisions establish the general framework of interim relief, which is fleshed out in more detail in the RP of the CJ and GC.[1]

[1] On interim relief before the CJEU see Tizzano 1979, p. 362; Sharpston 1993; Da Cruz Vilaça 1998, p. 257; Morviducci 2004; Vesterdorf 2004, p. 431; Barbier de la Serre 2007, p. 237; Castillo de la

Articles 278 and 299 TFEU ensure typical protection. The former deals with the suspension of acts contested before the CJEU while the latter deals with the suspension of extrajudicial enforceable acts.[2] In addition, it must be pointed out that according to Article 280 TFEU, the procedure provided for in Article 299 TFEU also applies to the judgments of the CJEU that are enforceable. Therefore, Article 299 TFEU concerns the suspension of the enforcement of both judicial and extra-judicial enforceable acts. Article 279 TFEU ensures an atypical protection, because it recognizes the CJEU jurisdiction to prescribe any necessary interim measures. It is useful to draw a distinction between interim relief regulated by Articles 278 and 279 TFEU, on one side, and by Article 299 TFEU, on the other side. While for the former a main action is always necessary, this is not equally true for interim relief under by Article 299.[3] Moreover, in the latter form of interim relief, EU judges share their jurisdiction with national authorities. Indeed, Article 299 TFEU establishes a hybrid procedure in which enforcement is governed by the rules of civil procedure in force in the MS in the territory of which it is carried out, but its suspension can only be decided by EU judges, even if national authorities maintain the jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Article 39 of the Statute offers some details on interim relief. It clarifies that: first, in principle, the judge hearing an application for interim measures is a single judge (the President or, subject to the conditions laid down in the CJ's RP, the Vice-President);[4] second, the proceedings for interim measures is a summary one; third, the ruling of the judge hearing an application for interim measures is provisional and cannot prejudice the decision in the main proceedings.

The RPs of the two jurisdictions develop this general framework. Chapter 10, Articles 160–165 of the CJ's RP and Chapter 16, Section 2, Articles 156–161 of the GC's RP deal with suspension of operation or enforcement and other interim measures. Even if there is some difference in the formulation of these provisions, in substance they are identical. The first parts of both RPs concern the application for the suspension or other interim measures according to Articles 278 and 279 TFEU and indicate the formalities that must be respected,[5] the procedure, the nature of the decision issued by the judge hearing an application for interim measures and the relevance of changes in circumstances and the conditions for a new application.

The second parts of both RPs deal with the suspension of enforcement according to Articles 280 and 299 TFEU. Both articles provide that the provisions of the section devoted to the suspension of operation and other interim measures apply to the suspension of enforcement.

Torre 2007, p. 237; Le Floch 2008; Jaeger 2010, p. 197; Boni 2012, p. 2015; Moretti 2012, p. 2123; Jaeger 2013, p. 3; Iannone 2014, p. 2187 ss.; Barone 2014, p. 2326; Terrien 2014, p. 339; Picod 2014, p. 1; Biavati 2015, p. 404; Orzan 2017a and b, p. 189, p. 816, p. 833, p. 1315 and p. 1335; Condinanzi 2018, p. 190; Jaeger 2018, p. 437; Iannuccelli 2019, p. 43.

[2] Condinanzi, p. 192.

[3] As clarified in the following pages, see Sect. 10.7.

[4] Section 10.3.

[5] Section 10.4.

10.3 The Role of the Judge Hearing an Application for Interim Measures Before the CJEU in the Light of the Division of Jurisdiction Between the CJ and the GC

From a procedural point of view, it is interesting to point out, on one side, the different evolution in the two jurisdictions of the function of the judge hearing an application for interim measures and, on the other side, the role of this judge, in particular before the CJ, in the light of the division of jurisdiction between the CJ and the GC.

As regards the judge having jurisdiction to rule on interim measures applications before the CJ, originally this judge was the President, without prejudice to the possibility for him to refer the examination of applications received to a chamber of the CJ. This devolution, discontinued since the early 2000s, has resumed in recent practice.[6] Nevertheless, the Statute has been amended in the sense that the Vice President could act as judge hearing an application for interim measures. On 23 October 2012, on the basis of this amendment, the CJ adopted the Decision on the judicial functions of the Vice-President of the CJEU.[7] In this decision, the CJ transferred the exercise of the function of the judge hearing an application for interim measures entirely to the Vice-President and given the fact that the possibility provided for in Article 161(3) of the RP CJ to refer the application to a CJ chamber was not repealed by Decision 2012/671, it is still in force and, as already mentioned, has been applied several times in recent years.

Also, before the GC, originally, the judge hearing an application for interim measures was the President, without prejudice to the possibility for him to refer the examination of the application to a Chamber of the GC. However, this was abandoned with the entry into force of the Treaty of Nice. Nevertheless, if the President is absent or prevented from acting, in order to ensure that the application is dealt with expeditiously, the Plenary Conference of the GC adopted a decision according to which a judge would automatically replace the President.[8] Because of the above-mentioned amendment of the Statute, in 2013 the GC also established the function of Vice-President, which for reasons of consistency of the institutional balance mostly mirrors that of the CJ.[9] However, unlike the CJ, the Vice-President did not replace the President in the role of judge hearing an application for interim measures. Thus, the President of the GC remains, in principle, the judge in this procedure and, only if he is absent or prevented from acting, the application is transferred to the Vice-President.[10]

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[6] See, for instance, CJEU [CJ], Case C-619/18 R, *Commission v. Poland*, Order of 17 December 2018 and Case C-441/17 R, *Commission v. Poland*, Order of 20 November 2017.

[7] Decision of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court GU, OJEU 2012, L 300/47.

[8] Designation of the Judge replacing the President as the Judge hearing applications for interim measures, OJEU 2013/C 313/10.

[9] Jaeger 2018, p. 444.

[10] See Articles 11, 12 and 157(4) of the General Court's Rules of Procedure.

After having clarified the changes regarding the role of the judge hearing an application for interim measures before the CJ and the GC, it is interesting to focus on some procedural aspects linked to the division of jurisdiction between the two courts. An application for interim measures may be lodged in different actions before the CJ. Indeed, it may be brought in the context of an action in which the CJ is judge of first instance or in the context of an appeal against a decision adopted by the GC.[11] Moreover, the Vice-President of the CJ is the judge of the appeal against the orders adopted by the GC judge hearing an application for interim measures. From a systematic point of view, it is useful to point out the difference between the first two hypotheses, in which the Vice-President of the CJ acts as judge hearing an application for interim measures, and the third hypothesis, in which the latter is, first of all, called upon to review the order made by the GC.

With regard to the first two hypotheses, it is worth examining the second one, where the CJ must guarantee interim relief in the context of an appeal against a decision adopted by the GC. In this respect, the jurisdiction of the CJ as judge hearing an application for interim measures in the context of an appeal must be examined in the light of Article 60 of the Statute. Even if this article states that the appeal does not have suspensory effect, it nonetheless provides that GC decisions annulling a regulation shall take effect after the expiry of the time limit for challenging them before the CJ or, if an appeal has been brought within that time limit, after its dismissal, without prejudice to the rights of the parties, under Articles 278 TFEU and 279 TFEU, to apply for suspension of the effectiveness of the annulled regulation or for the adoption of any other interim measure. This difference between the GC decisions annulling regulations compared with other decisions produces certain peculiarities. Indeed, with regard to the GC decisions annulling a regulation, the case-law made it clear that even if an application for interim measures made by the successful party at first instance must satisfy the classic conditions to be granted interim measures, that is the *fumus boni iuris*, urgency and balance of interests, nevertheless the Vice-President of the CJ cannot ignore the fact that GC, at first instance, ruled in favour of the applicant.[12] This finding has a number of consequences in the assessment of the existence of the conditions for granting the measure and, in particular, for the existence of *fumus boni iuris*. In fact, the successful party at first instance must show that, despite the grounds of appeal put forward by the other party, its arguments are sufficiently credible to be admissible and that, consequently it is not clear that the judgment under appeal must be set aside.[13]

Moreover, the case-law made it clear that the more or less serious nature of the *fumus boni iuris* is not irrelevant for the purposes of the assessment of urgency which must be taken into account by the judge hearing an application for interim measures, particularly if the *fumus boni iuris* of the pleas in law and arguments appear extremely

[11] See, for instance, CJEU [CJ], Case C-517/15 P-R, *AGC Glass Europe v. Commission*, Order of 14 January 2016.

[12] CJEU [CJ], Case C-21/14 P-R, *Commission v. Rusal Armenal*, Order of 12 June 2014, para 21.

[13] *Ibid*., para 25.

serious.[14] However, it has been clarified that the impact of *fumus boni iuris* on the assessment of urgency does not call into question the fact that the requirements relating to the two conditions are distinct and cumulative, with the consequence that the total absence of urgency cannot be compensated for by a very serious *fumus boni iuris*.[15]

Unlike appeals against GC decisions annulling a regulation, in the other cases the appeal does not have suspensory effects. It follows that it is the unsuccessful party before the GC who has an interest in submitting an application for interim relief. For example, in the context of an appeal by the Commission against a judgment of the GC in which a series of decisions relating to the market of certain medicines had been annulled, the Commission requested the suspension, without success.[16] It is useful to point out from a practical point of view that, to the extent that the application for interim measures is made by the unsuccessful party, the judge hearing the application is called upon to assess the merits of the grounds of appeal raised, in order to determine whether the appeal is not unfounded.[17]

Finally, with regard to the third hypothesis mentioned above, i.e. the one in which the decisions adopted by the judge hearing an application for interim measures of the GC are appealed before the CJ, the Vice-President (unless he decides to refer the matter to a section) is called upon to check the correct application of the principles and rules and the absence of distortion of the facts made by the judge at first instance. In this respect, two possible situations should be distinguished. If the Vice-President dismisses the appeal, he only acts as an appeal judge. On the other hand, if the appeal is upheld, there are two possibilities. In fact, under Article 61(1)(c) of the Statute, when the CJ sets aside a decision of the GC, it may itself give a final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the GC for judgment. This provision is also applied to appeals filed against orders adopted by the GC judge hearing an application for interim measures. Therefore, where the state of the proceedings so permits, instead of referring the case back, the Vice-President of the CJ may rule on the application for interim measures. Naturally, in this case, the Vice-President of the CJ decides whether or not to grant the application for interim measures, exercising the function of judge of first instance.

[14] CJEU [CJ], Case C-404/10 P-R, *Commission v. Éditions Odile Jacob*, Order of 31 January 2011, para 27.

[15] CJEU [CJ], *Commission v. Rusal Armenal*, above n 13, para 41. On that point, see Lenaerts and Radley 2016, pp. 13–14.

[16] CJEU [CJ], Case C-39/03 P-R, *Commission v. Artedogan and Others*, Order of 8 May 2003.

[17] CJEU [CJ], Case C-78/14 P-R, *Commission v. ANKO*, Order of 8 April 2014, para 15.

10.4 The Features of Interim Measures Procedure: A Summary Procedure

As already observed, interim relief is guaranteed within the framework of a summary procedure, which is ancillary to the main proceedings.[18] Its aim is to avoid that the parties suffer serious and irreparable harm while waiting for the outcome of the case. From a formal point of view, the application for interim measures must be lodged with a separate act. This means that the application may be lodged at the same time as or after the lodging of the main claim, but not before, on pain of inadmissibility of the application.

It should also be borne in mind the particularity of the lodging of application for interim relief in staff cases. Indeed, in derogation from the principle that the admissibility of an action is subject to the completion of the pre-litigation phase, Article 91(4) of the Staff Regulations establishes that the addressee of a decision of the administration, after having submitted a complaint to the authority that has the power to appoint a complaint under Article 90(2) of the Staff Regulations may lodge a claim immediately, provided that it is accompanied by a request for suspension of operation of the contested act or provisional measures.[19] In such a case, the main proceedings is suspended until the Appointing Authority adopts an explicit or implicit rejection. From this point of view, before the GC, the contextual submission of the application for suspension or the adoption of other provisional measures becomes a condition of admissibility of the main action. In addition, it should also be noted, as far as intellectual property is concerned, that the introduction of an action before the GC automatically suspends the effects of the decision of the European Union Intellectual Property Office, with the consequence that the interim relief is excluded. Such suspension, which constitutes a derogation from the general principle that the introduction of an application does not produce suspensive effects, is directly provided for in Article 72(3) of Regulation 2017/1001.[20]

The application must be 'self-sufficient', i.e. it must contain all the necessary elements for the judge hearing an application to assess if the conditions for granting the requested interim measures are satisfied, without it being necessary to refer to the main action. From this requirement, it follows that the summary procedure, although instrumental to the main application, contains elements of autonomy with respect to it.

The filing of an application for interim relief opens the written phase of this procedure. In this regard, an important difference with the ordinary procedure must be drawn. While in the ordinary procedure, the two RPs of the two jurisdictions fix

[18] However, see Sect. 10.7.

[19] Orzan 2017c, p. 544.

[20] To date only one application for interim relief in the field of IP has been lodged. It was considered inadmissible. CJEU [GC], Case T-410/07 R, *Jurado Hermanos v. OHIM*, Order of 18 February 2008, para 30.

the time limit for the lodging of the defense,[21] in the interim measures proceedings, they leave the judge hearing the application free to fix the time limit for the lodging of the defendant's observations.

The oral phase of an interim relief proceedings is different from that of an ordinary procedure. First of all, from a terminological point of view, it would more correct to qualify it as an audition rather than a hearing. Secondly, while in the ordinary procedure, when parties ask to be heard stating the reasons for the request, the CJEU ensures the hearing, in the interim relief proceedings this is not always true. Indeed, the case-law has made it clear that, in the absence of a precise rules governing the oral proceedings in the context of this procedure, the judge hearing an application for interim measures has a wide discretion in deciding whether or not to hear the parties before issuing the order.[22]

From a procedural point of view, it is also interesting to analyse the provisions governing the intervention in the interim measures proceedings. In this respect, it must be recalled that Article 40(1) and (2) of the Statute establish that MS and EU institutions may intervene in disputes lodged before CJEU, as well as organisms and bodies and any other legal or moral person that is able to prove to have an interest in the resolution of the dispute submitted to the judge. With regard to this second category, the principles established for the main proceedings apply in interim relief proceedings too. As a consequence, the notion of interest in the solution of the dispute is to be understood as a direct and current interest in the granting of the order sought. In particular, it must be verified that the intervener is directly affected by the contested act and that its interest in the result of the case is established.[23] In this regard, the case-law recognizes that representative associations may be admitted to take action to protect the interests of their members in cases which raise questions of principle that could likely prejudice such interest.[24] However, it appears clearly from the case-law that when the application for an intervention is submitted in the context of an interim measures proceedings, the interest in the outcome of the case must be understood as interest in the outcome of said proceedings. Accordingly, in the context of an interim relief proceedings, the interest of those who apply for intervention should be assessed with reference to the consequences of granting or rejecting the requested interim measure on their economic or legal situation.[25] In particular, the interest invoked by the intervener is taken into account, where appropriate, in the balancing

[21] See Article 81 of General Court's Rules of Procedure and Article 124 Court of Justice's Rules of Procedure.

[22] CJEU [CJ], Case C-110/12 P(R), *Akhras v. Council*, Order of 19 July 2012, paras 57–59.

[23] CJEU [GC], Case T-138/98, *ACAV and Others v. Council*, Order, 3 June 1999, para 14 and Case T-54/00 R, *Federación de Cofradías de Pescadores de Guipúzcoa and Others v. Council*, Order of 10 July 2000, para 15.

[24] CJEU [CJ], *Pharos v. Commission*, Case C-151/98 P, Order of 28 September 1998, para 6.

[25] CJEU [GC], Case T-484/10 R, *Gas Natural Fenosa SDG v. Commission*, Order of 17 February 2011, paras 35–49 and Case T-201/04 R, *Microsoft Corp. v. Commission*, Order of 26 July 2004, paras 32–35.

of interests. However, the assessment made by the judge hearing the application for interim measures does not prejudge the assessment in the main proceedings.[26]

Moreover, on account of the ancillary nature of the interim measures proceedings, case-law states that an intervening party in a main action in support of an institution, if the main action aims at the annulment of a decision of that institution, has, in principle, an interest in supporting the conclusions of that institution in the interim measures proceedings provided that those conclusions are aimed at maintaining that decision in force.[27] Thus, even if the fact of being an intervener in the main proceedings does not automatically imply the right to be an intervener in the interim measures proceedings, case-law has considered such a condition a strongly significant indication of the existence of an interest also in the interim measures proceedings. Over the years, case-law has been even more favourable to intervening parties acknowledging automatically the intervener in the main proceedings the status of intervener in the interim measures proceedings if requested by the latter, because of the ancillary nature of this procedure.[28] This evolution of the case-law raises some doubts, because the automaticity of the intervention is at odds with the principle of the specific interest to act identified above. However, the issue is mainly theoretical since such a circumstance rarely occurs in practice. Indeed, due to the timing of the lodging of the application for interim measures, the judge hearing an application for interim measures has already adopted the order, at the time when the chamber in the main proceedings examines the intervention.

Finally, it is important to underline that the absence of publication in the Official Journal of the European Union of the lodging of an application for interim measures does not allow, in principle, the possibility for whoever made an application to intervene in the main proceedings to be aware of the existence of this ancillary procedure. In order to remedy this situation, the Registry of the GC informs those who ask to intervene in the main proceedings of the possibility to do so also in the interim measures proceedings, on the condition that intervention in the latter is still possible at the time the application to intervene is lodged in the main proceedings.

10.5 The Procedural Relevance of the Conditions for the Granting of Interim Relief and Their Relationship

From a procedural point of view, it is necessary to make a distinction between the relevance of urgency, *fumus boni iuris* and balance of interests considered, from one side, individually and, on the other side, in the relationship between them.

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[26]CJEU [CJ], Case C-329/99 P(R), *Pfizer Animal Health v. Council*, Order of 18 November 1999.

[27]CJEU [CJ], Case 71/74 R and RR, *Fruit- en Groentenimporthandel v. Commission*, Order of 15 October 1974, p. 1033.

[28]CJEU [GC], Case T-392/02 R, *Solvay Pharmaceuticals v. Council*, Order of 11 April 2003, para 48.

As regards the conditions individually considered, and starting with the urgency, the President of the GC clarified that the burden of proof of the risk of serious and irreparable damage lies with the applicant, who cannot rely on hypothetical facts, i.e. linked to future and uncertain events, but has to rely on certain facts, or at least facts whose occurrence is sufficiently probable.[29] Moreover, it is the applicant's duty to submit the documents necessary to enable the judge hearing an application for interim measure to have a true and comprehensive picture of its financial situation, on pain of the inadmissibility of the application,[30] and these documents must be drawn up by an independent expert.[31] Finally, an application must be considered inadmissible if the applicant has already suffered the damage. In fact, in such a hypothesis, the urgency no longer exists due to the concretization of the prejudice.[32]

As regards *fumus boni iuris*, it is interesting to note that in actions for damages, case-law has made clear that a reinforced *fumus boni iuris* is necessary. Indeed, in the case of a request for provisional payment of part of the amount requested by way of compensation on the ground of a possible subsequent insolvency of the claimant, the judge in the summary proceedings considered it admissible in a limited number of cases and only in the case where the *fumus boni iuris* seemed particularly well-founded.[33]

With regard to the balance of interests, it is important to recall that the case-law makes a distinction between the situations in which the damage resulting from the granting of the requested interim measure produces its effects on the party and the case in which the damage would occur to a third party. In the latter, judges hearing an application for interim measures did not uphold the requested measure, ruling that a third party cannot be prejudiced by a proceedings in which it does not participate.[34] However, they also pointed out that even a measure affecting the rights and interests of third parties, who are not parties to the dispute, could be justified if it appeared that the applicant would otherwise be exposed to a situation threatening its very existence.[35]

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[29]CJEU [GC], Case T-241/00 R, *Le Canne v. Commission*, Order of 15 January 2001, para 37.

[30]CJEU [GC], Case T—474/15 R, *GGP Italy v. Commission*, Order of 10 December 2015, para 27; Case T—532/14 R, *Alsharghawi v. Council*, Order of 20 August 2014, para 22; Case T—461/13 R, *Spain v. Commission*, Order of 16 October 2013, para 35 and Case T—370/10 R, *Rubinetterie Teorema v. Commission*, Order of 24 January 2011, paras 43–44.

[31]*Le Canne v. Commission*, *supra* note 29, para 35; CJEU [GC], Case T—134/12 R, *Investigación y Desarrollo en Soluciones y Servicios EN v. Commission*, Order of 8 May 2012, para 16 and Case T—115/15 R, *Deza v. ECHA*, Order of 6 May 2015, para 44.

[32]CJEU [GC], Case T-274/15 R, *Alcogroup and Alcoldis v. Commission*, Order of 16 June 2015, para 16; Case T—483/13 R, *Oikonomopoulos v. Commission*, Order of 27 November 2013, para 19 and Case T—246/08 R, *Melli Bank v. Council*, Order of 27 August 2008, para 53.

[33]CJEU [GC], Case T—375/07 R, *Pellegrini v. Commission*, Order of 7 January 2008, para 29 and [CJ] Case C—393/96 P(R), *Antonissen v. Council and Commission*, Order of 29 January 1997, para 41.

[34]CJEU [CJ], Case C-3/75 R, *Johnson & Firth Brown v. Commission*, Order of 16 January 1975, para 4.

[35]CJEU [CJ], Case C-92/78 R, *Simmenthal v. Commission*, Order of 22 May 1978, para 9.

As regards the procedural relationship among urgency, *fumus boni iuris* and balance of interests, first of all it must be highlighted that in the absence of a provision of EU law requiring the judge hearing an application for interim measures to have a predetermined scheme of analysis in assessing the existence of the conditions that must be satisfied for granting the requested interim measures, he is free to decide how and in what order to analyse them.[36] Thus, because of their cumulative nature, having found that one of the conditions is not met, the judge hearing an application for interim measurers can dismiss the application without ruling on the others. In this respect, it must be stressed that in the earlier case-law (albeit in a very limited number of cases) the judge hearing an application for interim measures has granted the application for interim measures without carrying out the cumulative examination referred to above, irrespective of one of the other conditions. For instance, the President of the CJ has granted an application for suspension on the grounds of probable urgency, without examining the *fumus boni iuris*[37] and in the field of state aid, the CJ ruled that the failure to comply with the last sentence of Article 93 TEC (now 88 TFEU) undermined the effectiveness of the control system provided for in that article so seriously that this failure was sufficient to grant the requested interim measure.[38] However, these orders are rare and cannot call into question the principle established in the case-law according to which *fumus boni iuris* and urgency are cumulative.

10.6 The *Inaudita Altera Parte* Orders

It should be noted that in the interim measures proceedings the judge has the power to adopt an order *inaudita altera parte*. Indeed, in the hypothesis in which, following the lodging of an application, the judge considers that the arguments put forward by the applicant do not appear *prima facie* unfounded and it cannot be ruled out that they satisfy the condition of urgency, he may adopt an order immediately without the other party having submitted its own observations. In particular, this type of order is adopted when the judge hearing an application for interim measures considers that there is a risk that the serious and irreparable damage linked to the condition of urgency is going to happen within a very short time from the lodging of the application for interim relief. In that case, according to settled case-law, the purpose of proceedings for interim relief is not to ensure reparation for damage already suffered.[39] Thus, the adoption of this type of order allows the judge to avoid that the application for interim measures becomes manifestly devoid of purpose because of the occurrence of the damage.

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[36]CJEU [CJ], Case C-363/98 P(R), *Emesa Sugar v. Council*, Order of 17 December 1998, para 50.

[37]CJEU [CJ], Cases 209-215/78 R and 218/78 R, *Rvan Landewyck and Others v. Commission*, Orders of 30 October 1978.

[38]CJEU [CJ], Cases 31/77 R and 53/77 R, *Commission v. United Kingdom*, Order of 21 May 1977, paras 20–24.

[39]CJEU [GC], Case T—292/11 R, *Cemex and Others v. Commission*, 29 July 2011, para 42.

However, since such an order strongly weakens the adversarial principle, which is a fundamental principle of the trial before the courts of the EU, it has limited effect in time. In fact, the judge hearing an application for interim measures, once the adversarial procedure has been re-established with the lodging of the observations of the other party, may confirm the order or set it aside if he sees that the conditions are not satisfied. In this regard, it is interesting to note that from a procedural point of view, the judge may revoke or modify an *inaudita altera parte* order of his own motion, unlike the orders to reject or grant applications for suspension or adoption of other measures which may be modified or revoked only at the request of a party.

However, because of the weakening of the adversarial principle, these types of orders are not often adopted, and, in any case, they are adopted only when serious circumstances justify it. For instance, the President of the GC ordered the suspension of a decision of the Commission that would have entailed the adoption of a national act imposing an obligation on the applicant to purchase a specified quantity of coal for energy purposes within three days.[40] More generally, in the field of public tender, when an applicant contests in law the awarding of a contract before the contract between the institution and the subject who won the tender is concluded, the judge hearing an application for interim measures may immediately adopt an *inaudita altera parte* order.[41]

10.7 The Admissibility of Applications to Suspend Enforcement in Accordance with Article 299 TFEU

As pointed out above, from a procedural point of view, the question that arises is whether the admissibility of an application for the suspension of the enforcement depends on the existence of a main action. Indeed, the provisions of the RPs of the two jurisdictions devoted to the suspension of enforcement make an explicit reference to the provisions concerning the suspension of execution or any other interim measures. However, it seems preferable to consider that despite this explicit referral the provisions concerning the suspension of the execution or any other interim measures that submit the admissibility of an application for interim relief may not be applied to the suspension of the enforcement.[42] In this regard, the question must be analysed taking into account the fact that there are two different types of enforceable acts according to the TFEU: the judgments of the CJEU (Article 280) and the acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than states (Article 299 TFEU).

Concerning judicial enforceable acts, it should be excluded that a main proceeding must be pending before the EU judge. Indeed, an application for the suspension of

[40] CJEU [GC], Case T-490/10 R, *Endesa and Endesa Generación v. Commission*, Order of 3 November 2010.

[41] CJEU [GC], Case T-715/18 R, *Phrenos and Others v. Commission*, Order of 6 December 2018.

[42] Biavati 2015, p. 404.

enforcement of a decision rendered by the EU judge must necessarily be made after the decision closing the main proceeding has been rendered.

As regards extra-judicial enforceable acts, the same conclusion is possible. First, if a main action is pending before the EU judge, and even if an application for interim relief on the grounds of Articles 278 and 279 TFEU has been dismissed, the possibility that an institution initiates national enforcement proceedings on the grounds of Article 299 TFEU seems to be purely academic. Moreover, in the event that such application for interim relief has been lodged and accepted by the EU judge, the institution cannot request the enforcement of the title at national level since the suspension of the execution of the title on the grounds of Article 278 TFEU prevents its enforcement at the same time on a provisional basis.[43] Second, in the case in which the enforceable act has not been challenged before the EU judge (or, if it was, the action has been dismissed), taking into account the already mentioned hybrid nature of the enforcement provided for in Article 299 TFEU, an application for the suspension of the enforceable act should be admissible even if there is not a main action. Indeed, the enforcement procedure is initiated at the national level, the only judge that has the jurisdiction to suspend the enforcement of that act remains the EU judge.

This interpretation has been recently upheld by the President of the GC. Indeed, the President of the GC explicitly rejected the plea of inadmissibility raised by the Commission that argued that the application for interim measures was inadmissible on the ground that there was no main action for annulment of the contested decision, in breach of Articles 161 and 156 of the GC's RP.[44] In particular, the President of the GC ruled that the obligation to satisfy such a requirement would deprive an applicant of the right to an effective remedy, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and guaranteed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, given the hybrid nature of the procedure for the enforcement established in Article 299 TFEU, and in particular the fourth paragraph of that article according to which national courts have jurisdiction over complaints that enforcement is being carried out in an irregular manner, in order to grant the national courts the time necessary to exercise that jurisdiction, it must be possible to request that the EU Courts, which alone have the jurisdiction to do so, order the suspension of enforcement, where appropriate.[45]

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[43] CJEU [CJ], Case C-107/82 R, *AEG v. Commission*, Order of 6 May 1982, para 1 and [GC] Case T-9/99 R, *HFB and Others v. Commission*, Order of 9 July 1999, para 18.

[44] CJEU [GC], Case T-762/18 R, *Athanasiadou and Soulantikas v. Commission*, Order of 10 September 2019.

[45] *Ibid*., paras 30–33.

10.8 Concluding Remarks

The analysis carried out in the present chapter gives an overview on the procedural features of interim relief before the CJEU.

Although there are differences between the two jurisdictions concerning the judge hearing an application for interim measures (before the GC it is the president, while before the CJ it is the vice-president who, however, may decide to refer the case to a chamber), those differences pose no problem. They are justified by the evolution of the two jurisdictions and they do not have an impact on interim relief, which is guaranteed by principles established in case-law that are applied in a consistent manner. This is confirmed by the fact that from a statistical point of view most of the orders adopted by the judge hearing an application for interim measures at the GC are upheld by the judge at the CJ.

Moreover, the examination of the rules governing interim relief procedure and the procedural relevance of the conditions for granting, both individually considered and in the relationship among them, show that the approach of the judge hearing an application for interim measures is prompted by considerations of speed. Nevertheless, this speed is guaranteed in the respect of the adversarial principle which is a fundamental principle of the EU legal order and that is the reason why the issuance of *inaudita altera parte* orders is very limited and their efficacy is temporary.

Finally, from a procedural point of view, the importance of the clarifications provided by the judge hearing the application for interim measures of the GC on the conditions of admissibility of an application for the suspension of the enforcement on the grounds of Article 299 TFEU cannot be denied. Despite the fact that Article 161 of the GC's RP on the suspension of the enforcement refers to the provisions concerning the suspension of the execution or the adoption of any other measure, which states that the existence of a main proceeding is a condition for the admissibility of an application for interim relief, the judge ruled that such application is admissible even in absence of a main proceeding, taking into account the right to an effective remedy and the hybrid nature of the procedure of execution provided for in Article 299 TFEU.

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Chapter 11
Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges

Andrea Saccucci

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Abstract While the ECtHR often resorts to interim measures, the ECHR does not encompass any specific provision in this regard. However, Rule 39 of the Rules of the Court grants the ECtHR the power to indicate interim measures to be adopted "in the interests of the parties or of the proper conduct of the proceedings". This chapter sheds some light on the major developments occurred in the last 15 years, by analyzing the practice of the Court in relation to different rights. The drawbacks resulting from the application of Rule 39 call for some improvements in terms of systematic consistency, procedural efficiency and substantive effectiveness; as well as a broader rethinking of the protective function of interim relief in the context of international human rights adjudication. In this respect, it is contended that the Court should promote a more efficient application of the Rule, primarily through the disclosure of the reasoning behind its decisions on interim measures.

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11.1 Introduction

As many other international tribunals,[1] the European Court of Human Rights ("ECtHR") is empowered to adopt interim measures (also referred to as "provisional measures") in situations of urgency for preserving *pendente lite* the rights of the parties from irreparable damage or for safeguarding the proper conduct of the procedure.[2] However, absent any specific provision in the European Convention of Human Rights (ECHR),[3] the source of this power is grounded in the Rules of Court, currently Rule 39 according to which the Court may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted "in the interests of the parties or of the proper conduct of the proceedings".[4]

The Court's practice regarding the adoption of interim measures has significantly developed throughout the years drawing inspiration from other human rights adjudicatory bodies and international tribunals, including the International Court of Justice.[5] In its landmark judgment in *Mamatkulov and Askarov v. Turkey*,[6] the ECtHR found for the first time that the Contracting States are legally bound to comply with

[1] For an overview of the relevant practice of different international jurisdictions regarding the indication of provisional measures, see Oellers-Frahm 1995, p. 69 *et seq.*; Gaeta 2000; Ruiz Fabri and Sorel 2003; Rosenne 2005; and most recently Cameron 2017, and Miles 2017.

[2] On the interim measures adopted by the ECtHR see, among others, Nørgaard and Kruger 1988, p. 109 *et seq.*; Buquicchio-De Boer 1992, p. 229 *et seq.*; Spielmann 1992, p. 1303 *et seq.*; Gaeta 1996, p. 34 *et seq.*; Garry 2001, p. 399 *et seq.*; De Schutter 2003, p. 127 *et seq*. More generally, on provisional measures in international human rights adjudication, see Saccucci 2006; Rieter 2010.

[3] Several proposals to provide a treaty legal basis for the Court's power to indicate interim measures have been considered over the years (notably, at the time of the drafting of Protocol No. 11 of 1994 and of Protocol No. 14 of 2004) but never ultimately adopted.

[4] See Rule 39 of the Rules of Court adopted on 4 November 1998 following the entry into force of Protocol No. 11, as amended on 4 July 2005, 16 January 2012 and 14 January 2013. Previously, the Court's power to indicate provisional measures was envisaged by Rule 34 of the Rules of Court adopted in 1959, which then became Rule 36 of the Rules adopted in 1982.

[5] In particular, the Court has attached great weight to the judgment of the International Court of Justice in the *LaGrand* case where it held for the first time that provisional measures indicated under Article 41 of its Statute were to be regarded as legally binding upon the states parties to the dispute. See International Court of Justice, *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001, spec. paras 92–109.

[6] See ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paras 100–129. For a comment on the Court's *revirement* regarding the binding nature of interim measures, see Cohen-Jonathan 2005, p. 421 *et seq.*; Mowbray 2005, p. 377 *et seq.*; Frumer 2005, p. 799 *et seq.*; Tigroudja 2003, p. 601 et *seq.*; Saccucci 2004, p. 70 *et seq.*

interim measures under Article 34 ECHR, holding that such measures are essential in order to ensure the effective exercise of the right of individual application.[7]

Interim protection has thus become an essential component of the European human rights protection system and a pivotal accessory to the right of individual application under Article 34 ECHR, as signalled by the growing number of requests under Rule 39 and of interim measures granted by the Court over the last 15 years.[8]

While the exercise of such judicial power in the absence of a treaty provision is now regarded as fully legitimate by all the Contracting States,[9] its scope of application, the procedural rules to be followed and the legal consequences of interim measures are still subject to debate and continue to develop in the Court's practice.

The purpose of this article is not to carry out a comprehensive review of this practice and of the underlying legal issues, but rather to sketch the major developments occurred in the last 15 years with a view to shed light on the path ahead and on the future challenges that the Court will be called to address in relation to interim measures. Some improvements are certainly desirable, if not imperative, in terms of systematic consistency, procedural efficiency and substantive effectiveness; some others involve a broader rethinking of the protective function of interim relief in light of the nature of the Court's jurisdiction and, more generally, of international human rights adjudication.

In this latter respect, the major challenge lies in reconciling the intrinsic preventive function of interim measures with the subsidiary character of human rights international supervisory mechanisms, which are in principle devised to afford subsequent redress for human rights violations (and their prejudicial effects) already crystallized at the national level following the exhaustion of domestic remedies. A more expansive approach to interim protection may thus have implications of systemic nature

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[7] *Mamatkulov and Askarov v. Turkey*, *supra* note 6, para 128, where the Court concluded that "by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application" and that "[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34".

[8] See the thematical statistics on interim measures published periodically by the European Court of Human Rights on its web-site (www.echr.coe.int). In 2019, the Court disposed of 689 requests under Rule 39, out of which 145 were granted and 544 refused. However, the number of requests lodged every year with the Court is much higher than it appears in the statistics, considering that many of such requests are refused by the Registry as being "out of the scope" of Rule 39 and are not submitted to a judge for consideration (see *infra* Sect. 11.3.2).

[9] The legal foundation of the Court's interim powers (customary law, implied or inherent powers, Court's treaty competence to adopt its rules of procedure, etc.) remains however unclear. While the issue is largely theoretical and does not have significant practical implications, it is my opinion that the source of such powers can be now firmly grounded in the ECHR itself in light of the long-standing "subsequent practice" of the Contracting States recognizing and accepting the conventional legitimacy of interim measures issued under Rule 39 of the Rules of Court. According to Article 31(3) (b) of the Vienna Convention on the Law of the Treaties (VCLT), this practice established the "agreement of the parties" regarding the interpretation of the ECHR in light of its object and purpose which is to safeguard rights that are "practical and effective", including the effectiveness of the right of individual application embedded in Article 34 ECHR.

impinging on the very essence of human rights law as well as on the elements of the states' responsibility for internationally wrongful acts under the relevant treaties.

11.2 The Current Scope of Application of Interim Measures Under Rule 39 of the Rules of Court

As pointed out above, the wording of Rule 39 of the Rules of Court is very broad and does not contain any limitation as to the material scope of interim measures. It only requires that such measures are considered necessary by the Court "in the interests of the parties or the proper conduct of the proceedings", meaning that they can serve both a substantive and/or a procedural purpose.

However, since its inception, the Court's practice has been rather short-sleeved in making use of its regulatory power to indicate interim measures. Not only did the Court clarified—in adherence with the general principles of procedural law governing provisional relief in international adjudication—that substantive interim measures of protection may only be granted in order to avoid an "imminent risk" of "irreparable damage" to the rights and freedoms allegedly violated,[10] but it also embraced a narrow approach to the concept of "irreparability" that mainly revolves around the potential impairment of the life and physical integrity of the individuals concerned.[11]

Substantive interim relief is therefore granted by the Court only in cases of alleged violations of the right to life under Article 2 ECHR, of the prohibition of torture and inhuman or degrading treatment under Article 3 ECHR, and exceptionally of the right to respect for private and family life under Article 8 ECHR.[12] Conversely, the Court has generally refused to apply Rule 39 in cases of alleged violations of

[10] See, for instance, *Mamatkulov and Askarov v. Turkey*, *supra* note 6, where the Court stated that "[it] applies Rule 39 only in restricted circumstances" (para 103) "if there [is] an imminent risk of irreparable damage" (para 104). In ECtHR, *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005, para 473, the Court reiterated that, "where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the *status quo* pending the Court's determination of the justification for the measure. As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint. (…) Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the 'effective exercise' of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State".

[11] In this respect, see *amplius* Saccucci 2006, spec. pp. 285–328.

[12] As pointed out in *Mamatkulov and Askarov v. Turkey*, *supra* note 6, para 104, "[w]hile there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings".

other Convention rights,[13] such as the right to a fair trial,[14] the right to property[15] or the right to freedom of association,[16] considering the effects of such violations as being "reparable" by pecuniary compensation or measures of restitution following adjudication on the merits.

While the Court's self-restraint may be attributable to the absence of explicit treaty language concerning the power to adopt provisional measures, neither Article 34 ECHR nor Rule 39 of the Rules of Court impose such a nuanced approach to the scope of interim relief. This is all the more true considering the practice followed by other human rights bodies, such as in particular the Inter-American Court and the Inter-American Commission of Human Rights, which have expanded interim protection to irreparable harm resulting from violations of rights and freedoms that do not affect the life and physical integrity of the individuals concerned.[17]

Against this background, however, over the last two decades the Court's practice on interim measures has developed well beyond the traditional field of expulsion and extradition cases, by addressing several other instances in which the life and physical integrity may be put at serious risk by the alleged violation of core Convention rights. Moreover, the Court is now more frequently inclined to order interim measures for the purpose of ensuring the proper conduct of the proceedings (including the effective exercise of the right of individual petition), even in cases where there is no allegation of irreparable harm for the life and physical integrity of the applicant or no violation of the Convention rights is established.

The relevant Court's practice is summarized in the following subsections.

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[13] It should be noted that, in accordance with the current practice, requests of interim measures that clearly fall outside the scope of Rule 39 (as presently defined by the Court's case-law) are not submitted to the President of the Chamber for a decision and are immediately rejected by the special Interim Measures Unit of the Court's Registry (see also *infra* Sect. 11.3.2).

[14] For an isolated precedent in which the Court has granted provisional measures to ensure preventive compliance with the requirements of Article 6 ECHR in domestic criminal proceedings which had been instituted against the applicant and exposed him to the risk of death penalty see ECtHR, *Ocalan v. Turkey* [GC], Application No. 46221/99, Judgment of 12 May 2005, para 5.

[15] For instance, the application of Rule 39 is regularly denied for the purpose of preventing the imminent demolition of property or of avoiding an imminent insolvency.

[16] See, for instance, ECtHR, *Sezer v. Turkey*, Application No. 35119/08, where the Court rejected a request for interim measure to prevent the Turkish Constitutional Court from ordering the dissolution of a political party.

[17] For instance, the American human rights bodies have often granted provisional measures to avoid irreparable harm to the right of freedom of expression (see IACtHR, *"La Nación" Newspaper Case (Costa Rica)*, Order of 7 February 2001, concerning the criminal conviction of a journalist and of the editor in chief of a newspaper, where the Court requested the respondent state to suspend the inclusion of the sentence in the criminal records and the publication on the media of the judgment of conviction). For the relevant practice in the Inter-American system, see Pasqualucci 1993, p. 803 *et seq*., and more recently Ubeda De Torres and Burgogue-Larsen 2011, p. 193 *et seq.*

11.2.1 Expulsion and Extradition Putting at Risk the Life or Physical Integrity

The overwhelming majority of cases in which interim measures are requested and granted by the Court concerns the provisional stay of expulsion or extradition of the applicant to a country where he or she has a well-founded fear to face a real risk of being subject to life-threatening conditions or to torture or inhuman or degrading treatment or punishment in violation of Articles 2 and 3 ECHR.[18]

In this respect, following the judgment in *Mamatkulov and Askarov*, the Court reiterated that the Contracting States are bound to comply with its measures under Rule 39 in order to prevent the forced removal of the applicant before the Court has been able to assess the merits of his or her complaints about whether a real risk existed in the manner it considered appropriate in the circumstances of the case, being "implicit in the notion of the effective exercise of the right of application that for the duration of the proceedings in Strasbourg the Court should remain able to examine the application under its normal procedure".[19]

Interim measures are granted—provided that the required evidentiary threshold is satisfied—in cases of deportation or involuntary removal to third unsafe countries where the applicant would face a risk of persecution or ill-treatment[20] or could not receive adequate medical treatment of serious illness;[21] in cases of deportation, repatriation or transfer of migrants under the Dublin Regulation to a Contracting State where they would be at risk of subsequent deportation to a third unsafe country[22] or of treatment contrary to Article 3 standards;[23] and in cases of extradition to a third

[18] In this respect, it is rather telling that the official statistics of the Court concerning the adoption of interim measures are organized by reference to the state of destination of the contested measure of removal.

[19] See, among others, *Shamayev and others v. Georgia and Russia*, *supra* note 10, para 473.

[20] See, for instance, ECtHR, *Aoulmi v. France*, Application No. 50278/99, Judgment of 17 January 2006, para 5, concerning the applicant's deportation to Algeria; *Al-Sadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Judgment of 2 March 2010, para 4, concerning the applicants' detention by British forces in Iraq and their transfer to the Iraqi authorities; and *F.G. v. Sweden* [GC], Application No. 43611/11, Judgment of 23 March 2016, para 4, concerning the applicant's deportation to Iran.

[21] See, for instance, ECtHR, *NO. v. the United Kingdom* [GC], Application No. 26565/05, Judgment of 27 May 2008, concerning the deportation to Uganda of an applicant who was HIV-positive.

[22] See, for instance, ECtHR, *Sharifi and others v. Italy and Greece*, Application No. 16643/09, Judgment of 21 October 2014, concerning the applicants' removal to Greece, where the Court ultimately found a violation of Article 3 ECHR against Italy on account of the real risk to which the applicants would be exposed in Greece owing to the shortcomings of the asylum procedures in that country; *K.R.S. v. the United Kingdom*, Application No. 32733/08, Decision of 2 December 2008, concerning the applicant's transfer to Greece under the Dublin Regulation. On the contrary, no interim measure was adopted in *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, Judgment of 21 January 2011.

[23] See, for instance, ECtHR, *Tarakhel v. Switzerland* [GC], Application No. 29217/12, Judgment of 4 November 2014, concerning the transfer of the applicant and his family to Italy under the Dublin Regulation, where the Court ultimately found a violation of Article 3 ECHR on account

country—or more rarely to a Contracting State[24]—where there would be a risk of death-penalty or ill-treatment (including life-sentence without parole).[25]

The current application of Rule 39 in extradition and expulsion cases is predominantly consistent with the previous practice of the Court. Four developing trends may however be grasped.

First, the Court is expanding its jurisprudence concerning the indication of provisional measures to stay forcible removal of aliens to a Contracting State in case of an indirect risk of being deported to a third state where they would face treatment contrary to the Convention and in case of a direct risk of such treatment in the receiving Contracting State. Especially after *M.S.S. v. Belgium and Greece* and *Tarakhel v. Italy*, the Court has frequently applied Rule 39 in relation to Dublin transfers of asylum seekers due to the risk of subsequent deportation to their country of origin and/or to the shortcomings of the reception system of asylum seekers.[26] The presumption of compliance with the Convention standards by the Contracting States can therefore be refuted also at the provisional measures stage (especially when a violation has already be found in a leading case) and the availability *in abstracto* of the Court's judicial protection (including through interim measures) in the receiving state is no legal obstacle to an early application of Rule 39 against the sending state

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of the failure by the Swiss authorities to obtain individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together; *Paposhvili v. Belgium* [GC], Application No. 41738/10, Judgment of 13 December 2016, concerning the applicant's deportation to Georgia, where the Court ultimately found a violation of Article 3 ECHR on account of the failure to assess the risk faced by the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, and of Article 8 ECHR on account of the failure to assess the impact of the removal on the applicant's right to respect for family life in view of his state of health.

[24] See, for instance, *Shamayev and others v. Georgia and Russia*, *supra* note 10, para 6, where the Court applied Rule 39 in order to stay the applicants' extradition to Russia.

[25] See, for instance, ECtHR, *Olaechea Cahuas v. Spain*, Application No. 24668/03, Judgment of 10 August 2006, concerning the applicant's extradition to Peru; *Mostafa and others v. Turkey*, Application No. 16348/05, Judgment of 15 January 2008, para 16, concerning the applicant's extradition to Iraq; *Babar Ahmad and others v. the United Kingdom*, Application No. 24027/07 and others, Judgment of 10 April 2012, and *Trabelsi v. Belgium*, Application No. 140/10, Judgment of 4 September 2014, para 39, both concerning the applicants' extradition to the United States where they would face the risk of an irreducible life sentence; *Abdulkhakov v. Russia*, Application No. 14743/11, Judgment of 2 October 2012; and *Mukhitdinov v. Russia*, Application No. 20999/14, Judgment of 21 May 2015, both concerning the applicant's extradition to Uzbekistan.

[26] See, among many examples, ECtHR, *Mohammed Hussein and others v. the Netherlands and Italy*, Application No. 27725/10, Decision of 2 April 2013, para 18, *Halimi v. Austria and Italy*, Application No. 53852/11, Decision of 18 June 2013, para 14, and *Abubeker v. Austria and Italy*, Application No. 73874/11, Decision of 18 June 2013, para 29, all concerning Dublin transfers to Italy, where the Court then declared inadmissible the complaints under Article 3 ECHR as being manifestly ill-founded; *Mohammed v. Austria*, Application No. 2283/12, Judgment of 6 June 2013, para 4, and *Mohammadi v. Austria*, Application No. 71932/12, Judgment of 3 July 2014, para 4, concerning Dublin transfers to Greece and Hungary, respectively, where the Court ultimately found no violation of Article 3 ECHR on the merits.

(at least until assurances are provided by the receiving state).[27] On the contrary, the Court remains very reluctant to order a stay of extradition to a Contracting State even when the existence of a risk of ill-treatment is particularly high, especially if assurances are given by the requesting state.[28]

Second, the Court's case-law clarified that interim measures staying the enforcement of expulsion or extradition must be complied with by states even if the measures complained of are ultimately found to be fully compliant with the Convention rights in the absence of any established risk of ill-treatment in case of removal.[29]

Third, the Court often decides to extend the application of Rule 39 also to the post-merits stage of the proceedings until its judgment has become final (and therefore binding on the state under Article 46 para 1 ECHR) or until further decision by the Court, irrespective of whether or not the expulsion or extradition was found to be in breach of Articles 2 or 3 ECHR.[30] This approach purports to avoid any legal vacuum in the protection against forcible removal pending a final determination and also reinforces the autonomy of the assessment of the requisite *fumus boni juris* for the indication of interim measures *vis-à-vis* the principal adjudication on the merits.[31]

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[27] For instance, in *K.R.S. v. the United Kingdom*, *supra* note 22, the Court applied Rule 39 to a Dublin transfer to Greece pending confirmation from the British authorities that the applicant, if removed to Greece and if he so wished, would have ample opportunity in Greece to apply to the Court for a Rule 39 measure in the event of his onward expulsion to Iran.

[28] Provisional measures were exceptionally adopted to stay an extradition to a Contracting State in *Shamayev and others v. Russia*, *supra* note 10, where the Court first granted a stay under Rule 39 of the applicants' extradition to Russia (para 6), but it later lifted the measure in the light of the undertakings given by the Russian Government (paras 21–22); and in *Gasayev v. Spain*, Application No. 48514/06, Decision of 17 February 2009, concerning the stay of the applicant's extradition to Russia, where the complaints under Articles 2 and 3 ECHR were later found to be manifestly ill-founded.

[29] On this point see also *infra* Sect. 11.3.3.

[30] See, for instance, *Paposhvili v. Belgium*, *supra* note 23, paras 57 and 158, where the Court found no violation of Articles 3 and 8 ECHR, but ruled that the stay of the execution of the applicant's removal under Rule 39 "should continue in force until the present judgment becomes final or until the Court takes a further decision in this connection". The case was later referred to the Grand Chamber, which reversed the Chamber's findings and found a violation of Articles 3 and 8 ECHR. For other examples of post-merits interim measures adopted by a Chamber in a judgment of no violation see *Mohammed v. Austria*, *supra* note 26, para 112, and *Mohammadi v. Austria*, *supra* note 26, para 76, *S.J. v. Belgium*, Application No. 70055/10, Judgment of 27 February 2014, para 149; *R.K. and others v. France*, Application No. 68264/14, Judgment of 12 July 2016, para 127; *N.A. v. Switzerland*, Application No. 50364/14, Judgment of 30 May 2017, para 55; *O.D. v. Bulgaria*, Application No. 34016/18, Judgment of 10 October 2019, para 68; and *A.A. v. Switzerland*, Application No. 32218/17, Judgment of 5 November 2019, para 63.

[31] It is to be noted however that interim measures are lifted immediately if the application is declared inadmissible as manifestly ill-founded (see, for instance, *Mohammed Hussein and others v. the Netherlands and Italy*, *supra* note 26, para 86; *Halimi v. Austria and Italy*, *supra* note 26, para 76; and *Abubeker v. Austria and Italy*, *supra* note 26, para 74). This may be explained considering that inadmissibility decisions are not subject to any appeal, while post-merits interim measures also pursue the "procedural function" of securing the applicant's right to seek a referral to the Grand Chamber under Article 43 ECHR (see also *infra* Sect. 11.2.5).

Fourth, the Court has shown a timid sign of openness to consider a potential flagrant denial of the fair trial guarantees in the receiving state as a sufficient ground to order a provisional stay of the execution of the removal to that country. Notably, in *Abu Qatada v. the United Kingdom* a Chamber of the Court found that the applicant's deportation to Jordan would be in violation of Article 6 ECHR on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons, while it found no violation of Articles 3, 5 and 13 ECHR on account of the alleged risk of ill-treatment or arbitrary detention. Nonetheless, it considered necessary to continue the application of Rule 39 until the judgment had become final or until the panel of the Grand Chamber had accepted any request of referral under Article 43 ECHR.[32]

While this ruling may simply be read as an example of the practice described above to continue in force Rule 39 orders following a non-final and non-binding Chamber's judgment, it seems to signal that the Court is now ready to accept, at least in very exceptional circumstances, that interim measures may be justified even where the life and limb of the applicant are not at risk in case of removal.[33]

11.2.2 Conditions of Detention and Medical Treatment of Detainees with Serious Health Problems

Another field in which the application of Rule 39 by the Court is becoming more frequent than in the past concerns the risk of irreparable harm for the life and physical integrity of persons deprived of their liberty owing to their particular state of health and/or to the conditions of their detention.[34]

Notably, the Court has adopted a variety interim measures for the purpose of protecting the health of detained persons who were in need of urgent hospitalization or medical treatment, such as in particular the transfer of the applicant to specialized

[32]See ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, para 291.

[33]This trend is confirmed by those cases in which interim measure have been exceptionally granted by the Court to stay a forcible return of a person which would allegedly breach his or her rights under Article 8 ECHR (see *infra* Sect. 11.2.4).

[34]In the past, the European Commission of Human Rights (ECoHR) had sometimes indicated provisional measures in order to protect detainees from the risk of irreparable damage in prison. See, for instance, ECoHR, *P. v. Italy*, Application No. 11488/85, Decision of 3 December 1986, where the Commission found that there was a serious risk that the depressive state of the applicant could induce her to commit suicide and invited the Italian Government "à prendre dans les meilleurs délais, les mesures propres à sauvegarder la santé de la requérant, soit par son transfert dans un établissement mieux adapté ò son état psycho-physique, soit par un sursis à l'exécution de la peine". See also *Vakalis v. Greece*, Application No. 19796/92, Decision of 15 January 1993, where the Commission considered that the continuation of the applicant's detention notwithstanding the deterioration of his health conditions posed a serious risk of irreparable damage and invited the Greek Government "à prendre toute mesures nécessaire afin de préserver la santé du requérant".

medical settings capable of dispensing appropriate treatment,[35] the maintenance of the applicant in an out-of-prison medical establishment,[36] the setting up of an independent medical commission to diagnose the applicant's health problems and suggest the appropriate medical treatment,[37] the examination of the applicant's health condition by medical experts independent from the prison system,[38] or the discontinuation of the applicant's hunger strike.[39] Such measures may be adopted either separately or in combination and may also be addressed to the individual applicant.

The Court has also applied Rule 39 in the context of an ongoing situation of armed conflict in order to ensure respect for the right to life and to physical integrity of persons deprived of liberty or persons whose whereabouts were unknown.[40]

The Court's approach in this area is yet not very liberal and requires a particular high probative threshold to determine the existence of an imminent risk of irreparable harm for the rights of the detainees. This is the reasons why interim measures of this kind are generally not adopted by the Court *inaudita altera parte* on the sole basis of the information provided by the applicant (as it is commonly the case for a provisional

[35] See ECtHR, *Kotsaftis v. Greece*, Application No. 39780/06, Judgment of 12 June 2008, para 4; *Makharadze and Sikharulidze v. Georgia*, 35254/07, Judgment of 22 November 2011, paras 34–39; *Sizarev v. Ukraine*, Application No. 17116/04, Judgment of 17 January 2013, paras 57–60; *Salakhov and Islayamova v. Ukraine*, Application No. 28005/08, Judgment of 14 March 2013, para 28; *Tymoshenko v. Ukraine*, Application No. 49872/11, Judgment of 30 April 2013, paras 121–122; *Andrey Lavrov v. Russia*, Application No. 66252/14, Judgment of 1 March 2016, paras 18–23; *Yunusova and Yunusov v. Azerbaijan*, Application No. 59620/14, Judgment of 2 June 2016, para 4; *Temchenko v. Ukraine*, Application No. 30579/10, Judgment of 16 July 2015, paras 40 and 46. Very recently, the Court has adopted a similar measure against Italy in order to secure the immediate transfer of a mentally ill offender to a special institution for the enforcement of security measures (REMS) or to another appropriate setting where he could receive medical treatment (see ECtHR, Application No. 11791/20, *Sy v. Italy*).

[36] See ECtHR, *Paladi v. Moldova* [GC], Application No. 39806/05, Judgment of 10 March 2009, paras 54–59.

[37] See ECtHR, *Aleksanyan v. Russia*, Application No. 46468/06, Judgment of 22 December 2008, paras 75–86.

[38] See ECtHR, *Tehrani and others v. Turkey*, Application No. 32940/08 and others, Judgment of 13 April 2010, para 5; *Jashi v. Georgia*, Application No. 10799/06, Judgment of 8 January 2013, para 20; *Amirov v. Russia*, Application No. 51857/13, Judgment of 27 November 2014, paras 29–37; *Kondrulin v. Russia*, Application No. 12987/15, Judgment of 20 September 2016, paras 20–23; *Maylenskiy v. Russia*, Application No. 12646/15, Judgment of 4 October 2016, paras 15–19.

[39] See ECtHR, *Ilascu and others v. Moldova and Russia* [GC], Application No. 48787/99, Judgment of 8 July 2004, para 11, and *Rodic and others v. Bosnia Herzegovina*, Application No. 22893/05, Judgment of 27 May 2008, para 4. More recently, see also the controversial case *Unsal and Timtik v. Turkey*, Application No. 36331/20.

[40] Notably, such measures were adopted by the Court in over 100 individual applications lodged against both Ukraine and Russia in relation to the conflict in Eastern Ukraine and involving complaints about various forms of ill-treatment, wounding and disappearances, and unlawful deprivation of liberty. In 14 of the cases, individuals were released from detention and the respective interim measures were subsequently lifted (see ECtHR, *Press Release issued by the Registrar, ECHR 345 (2014)*, 26 November 2014).

stay of expulsion or extradition),[41] but only after the respondent Government has been heard and the parties have been able to exchange written submissions on the matter.

A review of the Court's practice concerning the application of Rule 39 in relation to poor health conditions of detainees highlights the following relevant trends.

First, while in expulsion and extradition cases Rule 39 measures impose a negative obligation on the state concerned (being aimed at suspending the execution of the applicant's removal from its territory pending a final determination on the merits of the complaints),[42] in detention cases those measures generally require a positive action by the state as they are intended to safeguard the rights of detainees in life-threatening health conditions by securing access to appropriate medical examination and treatment in order to avoid irreparable damage. This different character of interim measures reflects the different nature of the substantive obligations incumbent on the Contracting States, namely the negative obligation to prevent exposure to a potential risk of ill-treatment in case of removal, on the one hand, and the positive obligation to protect the life and physical integrity of persons deprived of their liberty, on the other hand.

Second, also in this context the state's failure to comply with interim measures of protection gives rise to an autonomous violation of the obligation not to hinder the effective exercise of the right of individual petition under Article 34 ECHR, which is fully independent from any actual impairment of the individual's rights or of the Court's proceedings.[43]

Third, given that the assessment of the actual health conditions of detainees and of the appropriate medical treatment to be administered is a complex matter which requires technical expertise and which the Court is generally not able to make on its own, Rule 39 measures are often applied in this context also for the purpose of ensuring an independent examination of the applicant's state of health and of determining whether they can be adequately treated in the medical unit of the detention institutions or whether they require treatment in outside specialized facilities.[44] Measures of this kind are prominently intended to ensure the discharge of the Court's functions in the establishment of the relevant facts and the proper conduct of the

[41] See also *infra* Sect. 11.3.2.

[42] In this respect, it should be noted that the Court has so far refused to grant interim measures when the removal has already taken place for the purpose of requiring the Contracting State to take steps for ensuring the readmission of the applicant on its own territory. Requests of this kind were, for instance, refused by the Court in *Hirsi Jamaa and others v. Italy* [GC], Application No. 27765/09, Judgment of 23 February 2012, concerning the applicants' pushback to Libya, and in *Al-Shari and others v. Italy*, Application No. 57/03, Decision of 5 July 2005, concerning the applicants' deportation to Syria.

[43] See *infra* Sect. 11.3.3.

[44] As pointed out by the Court in *Kondrulin v. Russia*, *supra* note 38, para 47, the purpose of such kinds of interim measure is "to enable the Court, on the basis of relevant, independent medical opinion, to effectively respond to and, if need be, prevent the possible continued exposure of the applicant to physical and mental suffering in violation of the guarantees of Article 3 of the Convention".

proceedings under the Convention, rather than directly to protect the applicant's substantive rights allegedly at risk of irreparable damage.[45]

Lastly, the relevant practice confirms that the Court can apply Rule 39 *proprio motu* to avoid irreparable harm potentially resulting from the applicant's own conduct (such as the continuation of a hunger strike in prison to protest against poor detention conditions). In such cases, however, the interim measures addressed personally to the applicant are intended to prevent situations which may further aggravate the consequences of the failure by the state concerned to provide adequate treatment in prison and are generally coupled with a request addressed to the latter to ensure ECHR compliant conditions of detention.

11.2.3 Protection of Life-Related Rights

In its most recent practice, the Court has exceptionally applied Rule 39 to other situations of potential life-risks that are not related to extradition or expulsion or to detention conditions.

Notably, interim measures have been ordered by the Court to secure the continuation of nutrition and hydration or of other life sustaining treatment to patients affected by incurable degenerative diseases;[46] to prevent the destruction of embryos;[47] and to guarantee the applicants' personal security following their removal from a witness protection scheme.[48]

While the granting of interim measures to prevent the suspension of life-sustaining treatment to terminally-ill patients is fully consistent with the Court's practice regarding the assessment of the "imminent risk of irreparable damage" requirement, the application of Rule 39 in the other two instances seems to pave the way to important future developments which may ultimately lead to a broader use of interim relief for preventive purposes under the Convention.

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[45] See also *infra* Sect. 11.2.5.

[46] See ECtHR, *Lambert and others v. France* [GC], Application No. 10048/10, Judgment of 5 June 2015, para 4, where the French Government was requested to stay the execution of the decision of the *Conseil d'Etat* authorizing the withdrawal of the applicant's nutrition and hydration; and *Gard and others v. the United Kingdom*, Application No. 39793/17, Decision of 27 June 2017, paras 37–39, where the UK Government was requested to stay the execution of the decision of the Supreme Court authorizing the withdrawal of life-sustaining treatment of a terminally ill child. Similarly, on 21 August 2020, the Court granted a request of interim measures on behalf of Aleksey Navalnyy to ensure access by his family members and medical practitioners to his medical file and his person in order to establish whether he was fit for transfer for further treatment in Germany.

[47] See ECtHR, *Evans v. the United Kingdom* [GC], Application No. 6339/05, Judgment of 10 April 2007, para 5, and *Knecht v. Romania*, Application No. 10048/10, Judgment of 2 October 2012, para 4, where the Court ordered the respondent Governments to take appropriate measures to ensure that the embryos were preserved until the Court had completed its examination of the case.

[48] See ECtHR, *R.R. and others v. Hungary*, Application No. 19400/11, Judgment of 4 December 2012, para 4.

As far as the preservation of embryos is concerned, it is worth noting that according to the Court's settled case-law embryos do not in principle qualify *per se* for protection under Article 2 ECHR.[49] It follows that in such cases interim measures are clearly not intended *ab origine* to protect (either directly or indirectly) the right to life of the embryos, but rather the right to respect for private and family life of the donors whose claims over the embryos would be nullified by their destruction *pendente lite*. This approach seems to be a first step towards the recognition of a wider concept of "irreparable harm" which is not necessarily related to the protection of the life and physical integrity of an individual, but can also encompass the destruction of an element essential for the examination of the application.

As far as the protection of an individual's personal security is concerned, the Court's application of Rule 39 to the withdrawal of witness protection in *R.R. v. Hungary* was premised on the state's obligation to take appropriate operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[50] Interim measures were therefore granted for a genuine preventive purpose, being aimed at avoiding the materialization of the risk before a final adjudication of the applicants' complaint under Article 2 ECHR. This approach suggests an open reading by the Court of the requirement of imminence that could be followed in all cases where the applicant alleges that the authorities are falling short of their positive obligation to protect the right to life in the context of the above-mentioned duty to prevent imminent offences against the person, provided that it is possible to establish at the interim measures stage that the state authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

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[49] See ECtHR, *Evans v. the United Kingdom*, *supra* note 47, paras 54–56, where the Grand Chamber reiterated its conclusion in *Vo v. France* [GC], Application No. 53924/00, Judgment of 8 July 2004, para 82, according to which "in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere". Accordingly, since under English law an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life under Article 2, the Grand Chamber held that the embryos created by the applicant "do not have a right to life within the meaning of Article 2 of the Convention, and that there has not, therefore, been a violation of that provision".

[50] According to a well-established case-law of the Court, the state's obligation under Article 2 ECHR extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances "a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual" (see ECtHR, *L.C.B. v. the United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, para 36). Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, where there is an allegation that the authorities have violated this positive obligation, the Court must establish to its satisfaction that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (see ECtHR, *Osman v. the United Kingdom* [GC], Application No. 23452/94, Judgment of 28 October 1998, paras 115–116).

Should the Court uphold this open reading in the future, interim measures could be sought and granted to impose on the state concerned a positive obligation (independent from the principal one allegedly violated) to adopt measures of personal protection that are reasonably required to prevent life-threatening offences by third parties (for instance, where the applicant is a victim of reiterated threats in the context of domestic violence which did not yet materialise into an physical offence).[51]

11.2.4 Protection of Family Life and Domicile

In addition to the embryo-related cases mentioned above, there are other instances in which the Court has exceptionally applied Rule 39 to avoid irreparable damage to the applicant's right to respect for family life and domicile under Article 8 ECHR.

Among the few reported cases, interim measures were granted in order to stay the forced return of children to one of the parents under the terms of the Hague Convention of 1980 on the civil aspects of international child abduction;[52] to suspend the deportation to a third state which would disproportionally affect the family life established in the sending state;[53] to secure the visiting rights of the mother and the reestablishment of contacts with the children pending the procedure before the Court;[54] to suspend the forced eviction of the applicants from housing reception centres, unlawfully occupied buildings or Roma unauthorized settlements.[55]

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[51] On the positive obligations under Article 2 ECHR in the context of domestic violence see the leading case ECtHR, *Opuz v. Turkey*, Application No. 33401/02, Judgment of 9 June 2009, paras 128–130, and most recently *Talpis v. Italy*, Application No. 41237/14, Judgment of 2 March 2017, paras 95–106.

[52] See ECtHR, *Eskinazi and Chelouche v. Turkey*, Application No. 14600/05, Decision of 6 December 2005; *Neulinger and Shuruk v. Switzerland* [GC], Application No. 41615/07, Judgment of 6 July 2010, para 10, and *B. v. Belgium*, Application No. 4320/11, Judgment of 10 July 2012, paras 35–41.

[53] See ECtHR, *Hamidovic v. Italy*, Application No. 31956/05, Decision of 13 September 2011, concerning the applicant's expulsion to Bosnia Herzegovina.

[54] See ECtHR, *Soares de Melo v. Portugal*, Application No. 72850/14, Judgment of 16 February 2016, para 4.

[55] See ECtHR, *Petrache and Tranca v. Italy*, Application No. 15920/16, Decision of 4 October 2016, para 9, concerning the applicants' eviction from an emergency social housing centre, where the application was ultimately declared inadmissible for failure to exhaust domestic remedies which could lead to the suspension and annulment of the municipality's eviction order; *A.M.B. and others v. Spain*, Application No. 77842/12, Decision of 28 January 2014, paras 21–25, concerning the applicants' eviction from an unlawfully occupied flat belonging to a social housing institute; *Raji and others v. Spain*, Application No. 3537/13, Decision of 16 December 2014, para 15, concerning the applicants' eviction from an unlawful construction, where the Court ordered a stay of the eviction until the Government had provided the Court with precise and accurate information as to the arrangements made by the domestic authorities for securing adequate housing and social services to the applicants; and *Yordanova and others v. Bulgaria*, Application No. 25446/06, Judgment of 24 April 2012, para 4, concerning the eviction of Roma from a settlement in Sofia, where the Court ordered a stay of the eviction until such time as the authorities gave assurances about the measures

While the application of Rule 39 remains truly exceptional when the principal complaint concerns (only) an alleged violation of the rights protected under Article 8 ECHR, it seems that also in this context the Court's practice is gradually evolving towards the recognition of a broader notion of "irreparable damage" for the purpose of interim relief, which prescinds from the establishment of an actual or potential harm for the applicants' life or physical integrity.

It is true that, as we pointed out in the past,[56] an interference with the right to respect for family life and domicile may also entail a significant impact on the well-being of the person especially where the victim of such interference belongs to a group of particularly vulnerable persons (such as minors, women and ethnic minorities). However, the most recent reported cases of Article 8-related interim measures seemingly show a particularly far-reaching approach to the potential emotional consequences resulting from the alleged violation, which may ultimately dilute the narrow interpretation of the "irreparable damage" requirement so as to potentially attract into the domain of Rule 39 any violation of the Convention rights that is likely to cause to the victim a high degree of emotional distress irrespective of whether the situation could be reversible after a judgment on the merits (for instance, by reestablishing the family life or by awarding pecuniary compensation).

11.2.5 Interim Measures to Ensure the Proper Conduct of the Proceedings

As pointed out above, under Rule 39 provisional measures may be ordered by the Court also for the purpose of ensuring the "proper conduct of the proceedings" before it when this may be hindered by the state's acts or omissions pending a final adjudication. This means that interim relief may be granted also for "procedural purposes" which are not related to the avoidance of an imminent risk of irreparable harm to the individual rights allegedly violated.

While the traditional substantive interim measures of protection (such as typically the stay of expulsion or extradition orders) may also simultaneously serve a procedural purpose (notably, that of ensuring the effective participation of the applicant to the Court's proceedings which could be hampered by a removal to a third unsafe country), the past practice of the Court and (previously) of the Commission counted only a very limited number of cases in which Rule 39 was specifically applied for such purpose.[57]

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they had taken to secure housing for the children, elderly, disable or otherwise vulnerable people. A similar interim measure has been adopted by the Court on 23 July 2018 to suspend the forced eviction of a Roma community from a settlement located in Rome (Camping River).

[56] See Saccucci 2006, pp. 340–346.

[57] For one of the rare examples, see ECtHR, *Ocalan v. Turkey*, *supra* note 14, para 5, where the Court ordered *inter alia* that the applicant was able to exercise his right of individual application to the Court effectively through lawyers of his own choosing.

Over the last decade, however, recourse to interim measures for securing the proper conduct of the proceedings has become more frequent in the Court's practice as an instrument to ensure the full observance by the Contracting States of their procedural undertakings under the ECHR enforcement machinery, and namely the obligation to secure unhindered access to the Court by prospective applicants laid down in Article 34 ECHR and the obligation to cooperate in good faith with the Court in the examination of the case and to furnish all necessary facilities for the effective exercise of its supervisory functions in accordance with Article 38 ECHR.[58]

Interim measures for procedural purposes are prominently granted to allow the applicant to have access to a lawyer for being represented before the Court[59] and to dispose over adequate time and facilities to consult and to prepare his case,[60] including the preparation of the hearing before the Court;[61] to appoint a lawyer to represent the applicant in the proceedings before the Court when he or she is deprived of the capacity to choose a legal representatives under the terms of domestic

[58]The Court's jurisprudence has emphasized the fundamental importance of the principle, enshrined in Article 38, that the Contracting States have a duty to cooperate with it (see ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, para 148). Most recently, the Court reiterated that the Contracting States must furnish "all necessary facilities" for the effective conduct of the investigation and that such "facilities" entail, first and foremost, access to the country, to those applicants whom the Court decides to question and to premises that it considers necessary to visit (see *Shamayev and others v. Georgia and Russia*, *supra* note 10, para 496). According to the Court, the obligation under Article 38 is of the utmost importance for the effective operation of the system of individual petition insofar as it makes possible a proper and effective examination of applications (see *Bazorkina v. Russia*, Application No. 69481/01, Judgment of 27 July 2006, para 170, and *Tahsin Acar v. Turkey* [GC], Application No. 26307/95, Judgment of 6 May 2003, para 253). A failure by the Government to furnish all necessary facilities to the Court without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance with the state's obligations under Article 38 ECHR (see *Imakayeva v. Russia*, Application No. 7615/02, Judgment of 9 November 2006, para 200, and *Janowiec and others v. Russia* [GC], Application No. 55508/07 and Application No. 29520/09, Judgment of 21 October 2013, para 202).

[59]See ECtHR, *D.B. v. Turkey*, Application No. 33526/08, Judgment of 13 July 2010, para 5, where the Court requested the Turkish Government under Rule 39 to allow the applicant's representative or another advocate to have access to the applicant in the admission and accommodation centre where he was detained with a view of obtaining a power of attorney and information concerning the alleged risks that the applicant would face if returned to Iran.

[60]See ECtHR, *Shtukaturov v. Russia*, Application No. 44009/05, Judgment of 27 March 2008, paras 31–40, where the Russian Government was directed to organize, by appropriate means, a meeting between the applicant and his lawyer. That meeting could take place in the presence of the personnel of the hospital where the applicant was detained, but outside their hearing. The lawyer was to be provided with the necessary time and facilities to consult with the applicant and help him in preparing the application before the European Court. The Government was also requested not to prevent the lawyer from having such a meeting with his client at regular intervals in the future. The lawyer, in turn, was obliged to be cooperative and comply with reasonable requirements of hospital regulations.

[61]See ECtHR, *Shamayev and others v. Georgia and Russia*, *supra* note 10, para 24, where the Court requested the Russian Government—following the applicants' extradition from Georgia—to

law;[62] to provide information concerning the applicant's allegations by allowing the investigators examining these allegations to have full access to the premises where they have allegedly taken place;[63] to set up special expert commissions or to have access to medical files and to independent medical experts with a view to assessing the applicant's state of health.[64] Similar measures may also be used to preserve evidence which would otherwise be dispersed or to allow the applicant to prepare a request for referral of the case to the Grand Chamber pursuant to Article 43 ECHR.[65]

Failure to comply with interim measures of this kind may give rise either to a breach of Article 34 ECHR (if it encroached on the effective exercise of the right of individual petition)[66] or to a breach of Article 38 ECHR (if it prevented the Court from carrying out its supervisory functions).[67] However, as for substantive interim measures, also procedural interim measures are legally binding on the Contracting States at the moment in which they are issued and may engage their responsibility under the above provisions even if *ex post* the effective exercise of the right of individual petition or the Court's examination of the case were not ultimately impaired

grant their unhindered access to their Georgian lawyers especially for the preparation of the hearing before the Court.

[62] See ECtHR, *X v. Croatia*, Application No. 11223/04, Judgment of 17 July 2008, para 61.

[63] See ECtHR, *Suleymanov v. Russia*, Application No. 32501/11, Judgment of 22 January 2013, paras 98–102, where the interim measures adopted by the Court were intended to provide the investigators examining the claims of unlawful detention and ill-treatment of the applicant's son with full access to the premises of the District Department of the Interior in Chechnya and to take all necessary steps to establish whether he was detained there.

[64] See the cases quoted *supra* notes 37 and 38. See also the interim measures granted by the Court on 21 August 2020 on behalf of Aleksey Navalnyy (following his alleged poisoning) to ensure access by his family members and medical practitioners to his medical file and his person in order to establish whether he was fit for transfer for further treatment in Germany (*Press Release of 21 August 2020*, ECHR 235 2020).

[65] As pointed out above (see Sect. 11.2.1), in its judgment of the merits the Court may decide to continue in force the application of interim measures to stay the applicant's removal to a third state until the judgment has become final. Such measures—while being primarily intended to avoid irreparable damage to the rights at stake—also serve a specific procedural purpose, that is to allow the applicant to challenge the Chamber's findings before the Grand Chamber under the terms of Article 43 ECHR. For an example in which the applicant's request for a referral was granted and the Grand Chamber reversed the Chamber's findings of no violation, see *Paposhvili v. Belgium*, *supra* note 23.

[66] See ECtHR, *D.B. v. Turkey*, *supra* note 59, paras 65–67, where the Court found a breach of Article 34 ECHR due to the authorities' delay of 18 days in allowing the applicant to meet an advocate and sign an authority form empowering this individual to represent him in the proceedings before the Court; and *Shtukaturov v. Russia*, *supra* note 60, paras 135–149, where the Court found a breach of Article 34 ECHR due to the authorities' refusal to allow the applicant to meet his lawyer.

[67] See, in particular, *Shamayev and others v. Georgia and Russia*, *supra* note 10, paras 492–504, where the Court found that Russia failed to discharge its obligations under Article 38 ECHR by obstructing its fact-finding visit and denying unhindered access to the applicants detained in Russia, thereby unacceptably hindering the establishment of part of the facts in this case.

by the state's non-compliance, a risk of impairment being sufficient for a finding of violation.[68]

From a general standpoint, the use of interim measures for procedural purposes reflects the progressive strengthening of the ECHR enforcement machinery and the corresponding broadening of the states' obligations instrumental to ensure its proper functioning and effectiveness, which may otherwise be irreversibly hampered. It should be noted in this respect that failure to comply with such obligations may indeed result into the applicants being prevented from pursuing their case before the Court and their application being struck off the list,[69] or the Court being prevented from examining the merits of the applicants' complaints.[70]

While these measures are commonly issued in combination with substantive interim measures of protection (notably, to stay a removal order or to protect the health of detainees), they have an independent legal standing and their compliance is the object of a separate assessment by the Court.[71] This means that, as a matter of principle, Rule 39 can be applied for ensuring the proper conduct of the proceedings even if the rights allegedly violated are not at risk of irreparable damage and thus even beyond the limited scope of substantive interim relief outlined above.

In such cases, provisional measures are intended to secure *pendente lite* the observance of the procedural obligations inherent to the supervisory system which otherwise risk to be put in jeopardy by the state's conduct.

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[68] For instance, in *D.B. v. Turkey*, *supra* note 59, paras 65–67, the Court considered that the application was put in jeopardy, since the applicant could not sign a power of attorney and provide more detailed information concerning the alleged risks that he would face in Iran, and that "the fact that the applicant was subsequently able to meet a lawyer, sign the authority form and provide information regarding his situation in Iran does not alter the fact that the lack of timely action on the part of the authorities was incompatible with the respondent Government's obligations under Article 34 of the Convention". Similarly, in *Shtukaturov v. Russia*, *supra* note 60, paras 141–148, the Court noted that "the fact the individual actually managed to pursue his application does not prevent an issue arising under Article 34; should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to 'hindering' his rights under Article 34".

[69] See, for example, ECtHR, *Hussun and others v. Italy*, Application No. 10171/05 and others, Decision of 19 January 2010, and *Sharifi and others v. Italy and Greece*, Application No. 16643/09, Judgment of 21 October 2014, para 134, where the Court decided to strike the case off the list because the applicants had lost contacts with their lawyers following their deportation.

[70] See, for example, ECtHR, *Shamayev and others v. Georgia and Russia*, *supra* note 10, para 517, where the applicants were denied unhindered access to their lawyers and to the Court after their extradition to Russia and the Court subsequently found that the "examination of the admissible part of the application against Russia has proved impossible".

[71] In fact, the Court may conclude that the state has fully complied with procedural interim measures even in cases where it found a breach on the merits of the substantive rights at stake. See, for instance, ECtHR, *Suleymanov v. Russia*, *supra* note 63, paras 161–162, where the Court observed that the Russian authorities took the requested actions and furnished the requested information and that in such circumstances the Russian Federation was not in breach of its obligations under Article 34 of the Convention despite the established violation of Article 3 ECHR on account of the lack of adequate investigations.

11.2.6 Interim Measures in Inter-state Procedures

A last remark on the current scope of interim measures deserves to be made with regard to the application of Rule 39 in inter-state cases brought before the Court under the terms of Article 33 ECHR.

While—as pointed out above—interim measures are prominently considered as a fundamental accessory to the right of individual petition under Article 34 ECHR and their binding nature has been so far construed with reference to the effective exercise of this right, the Court did not have any hesitation to apply Rule 39 also in the context of inter-state procedures for the purpose of avoiding irreparable damage to the individual rights allegedly put at risk, usually on a large scale in the context of armed conflicts.

Notably, the Court has indicated provisional measures in the case *Georgia v. Russia (II)* inviting both parties to comply with their engagements under the Convention particularly in respect of Articles 2 and 3 ECHR in the context of the conflict in South Ossetia and Abkathia;[72] in the case *Ukraine v. Russia (I)* inviting both parties to refrain from taking measures, in particular military measures, which might entail breaches of the Convention rights of the civilian population, including by putting their life and health at risk, and to comply with their engagements under Articles 2 and 3 ECHR in the context of the conflict in Crimea and Eastern Ukraine;[73] in the case *Ukraine v. Russia (III)* inviting both parties to ensure respect for the Convention rights of certain individuals including, in particular, respect for security of their person and their right to legal assistance;[74] in the case *Ukraine v. Russia (VII)* inviting the Russian Government to ensure that appropriate medical treatment be administered to those captive Ukrainian naval personnel who required it, in particular any who might be wounded in the naval incident that took place in the Kerch Strait;[75] and most recently in the case *Armenia v. Azerbaijan* calling upon both parties and even upon third states involved in the conflict of Nagorno-Kabarakh to refrain from taking any measures, in particular military action, which might entail breaches of the

[72] See ECtHR, *Georgia v. Russia (II)*, Application No. 38263/08, Decision of 13 December 2011, para 5.

[73] See ECtHR, *Ukraine v. Russia (I)*, Application No. 20958/14, lodged on 13 March 2014. To make its processing of this case more efficient, the Court decided on 9 February 2016 to divide it geographically. All the complaints related to the events in Crimea up to September 2014 remained as case Application No. 20958/14, while complaints relating to events in Eastern Ukraine and Donbass up to September 2014 were put under *Ukraine v. Russia (V)*, Application No. 8019/16. A further inter-state application *Ukraine v. Russia (IV)* was lodged on 27 August 2015 in relation to events in Crimea and Eastern Ukraine from September 2014. As with the earlier application, the Court decided, on 25 November 2016, to split the case into two for ease of handling. Events in Crimea remained under the original application number, while those in Eastern Ukraine and Donbass were registered as *Ukraine v. Russia (VI)*, Application No. 70856/16.

[74] See ECtHR, *Ukraine v. Russia (III)*, Application No. 49537/14, Decision of 1 September 2015. The case was struck off the list upon the request of the applicant Government owing to the fact that an individual application was meanwhile lodged by one of the individuals concerned in relation to the same subject matter.

[75] See ECtHR, *Ukraine v. Russia (VII)*, Application No. 55855/18, lodged on 29 November 2018.

Convention rights of the civilian population, including putting their life and health at risk.

The Court's practice in this respect is relevant for at least three reasons.[76]

First, interim measures in inter-state cases are often directed to protect a whole group of individuals which is particularly exposed to a real risk of suffering a violation of the right to life and to physical integrity. Notably, in the context of armed conflicts, such measures may be addressed to both parties to the proceedings (and not only to the requesting party) and even to third states involved (such as in the case *Armenia v. Azerbaijan*) with a view to safeguarding the rights of the entire civilian population from states' military actions that may infringe their obligations under Articles 2 and 3 ECHR (as interpreted by the Court in relation to conflict situations).

Second, the Court's application of Rule 39 in an inter-state case may give rise to an overlap with the interim measures adopted by other international tribunals that were seized of the same subject-matter although in relation to the alleged violation of different international obligations, given that the admissibility condition precluding parallel proceedings laid down in Article 35(2) (b) ECHR only applies to individual applications.[77] This was particularly the case in *Georgia v. Russia (II)*, where provisional measures were also indicated by the International Court of Justice under Article 41 of its Statute,[78] and in *Ukraine v. Russia (VII)*, where provisional measures were also indicated by the International Tribunal for the law of the sea under Article 290 of the United Nations Convention on the law of the sea.[79]

Third, the indication of interim measures in inter-state cases will make it necessary for the Court to return again to the question of the legal foundation of their binding character under the Convention, since the reliance on the obligation not to hinder the effective exercise of the right of individual petition laid down in Article 34 ECHR will hardly fit that effect.[80]

11.3 General Issues Concerning the Procedural Administration and Legal Effects of Interim Measures

Generally speaking, the developments in the Court's practice on provisional measures outlined above confirm the ever-raising importance of interim relief in the framework of the ECHR and its critical function in ensuring the effective protection of

[76] For a broader analysis of interim measures in inter-state cases and their legal features, see Saccucci 2009, p. 129 *et seq*.

[77] In relation to the concurrent proceedings before the International Court of Justice, see *Georgia v. Russia (II)*, *supra* note 72, para 79.

[78] See ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008. In this respect, see also Palchetti 2009, p. 111 *et seq*.

[79] See *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019.

[80] See *infra* Sect. 11.3.3.

the Convention rights (both substantive and procedural) which may be otherwise irreversibly frustrated pending a determination by the Court on the merits of the complaints, depriving its final judgment of any *effet util* for the individuals concerned.

The post-*Mamtkulov* jurisprudence of the Court has given an important contribution with regard to the definition of the scope of interim measures, their interplay with domestic remedies, their legal effects under the Convention, and the nature of the Contracting States' responsibility in case of non-compliance, including by streamlining the practical application of Rule 39.[81] However, these developments are still far from being satisfactory and leave many questions open to debate, which require further clarification and adjustment by the Court.

In the following subsections, we will try to investigate more deeply some of the evolutive trends emerging from the Court's recent practice and the major issues which need to be addressed in the future.

11.3.1 Prior Exhaustion of Domestic Remedies and Subsidiarity of the Court's Interim Protection

A first question that deserves to be addressed concerns the application at the interim measures stage of the rule of prior exhaustion of domestic remedies and of the underlying principle of subsidiarity. Is this rule applicable to interim measures and, if so, how is subsidiarity assessed by the Court in relation to situations of imminent risk of irreparable damage which arise when domestic remedies are still pending?

This issue has prominently arose in relation to interim measures aimed at suspending the enforcement of domestic administrative or judicial decisions that may expose the applicant to a risk of irreparable damage (such as, for instance, deportation to an unsafe country, discontinuation of life-sustaining treatment, or eviction orders),[82] but it may also become relevant in relation to other kind of interim measures of substantive protection imposing a positive action on the state concerned

[81] See in particular the Practice direction on requests for interim measures issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003 and later amended on 16 October 2009 and on 7 July 2011.

[82] The importance of this issue in the field of expulsion and extradition cases was particularly emphasized by the Contracting States in the Follow-up Plan appended to the Izmir Declaration adopted on 27 April 2011 by the High Level Conference on the Future of the European Court of Human Rights. While rhetorically welcoming the improvements in the practice of interim measures already put in place by the Court, the Contracting States recalled that the Court should not operate as "an immigration Appeals Tribunal or a Court of fourth instance" and that "the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity". Notably, they invited the Court, "when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances" (para A.3.).

(such as, for instance, the protection of life and physical integrity of detainees or other vulnerable persons).[83]

In principle, it being an admissibility requirement of individual applications, the rule of prior exhaustion must be at least *prima facie* satisfied in the context of the preliminary examination of a Rule 39 request.[84] However, domestic remedies—while being available *in abstracto*—may turn out to be ineffective *in concreto* for the purpose of avoiding the execution *pendente lite* of a decision that may expose the rights of the person concerned to an imminent risk of irreparable damage. This is notably the case in expulsion and extradition matters when the domestic remedies have no suspensive effect as required by Article 13 ECHR.[85]

In such instances, the Court's practice has clarified that the applicant must first pursue domestic avenues which are capable of suspending removal before applying to the Court for interim measures under Rule 39. When it remains open to an applicant to pursue domestic remedies which have suspensive effect, the Court will not apply Rule 39 to prevent removal,[86] unless there is a serious risk that the impugned measure may be enforced before the domestic courts have had an opportunity to take a decision on its provisional suspension (if this effect is not automatic under domestic law).[87]

On the contrary, if domestic remedies do not have suspensive effect, the Court may apply Rule 39 to stay the execution of the removal order even when domestic proceedings that may lead to its annulment are still pending.[88] Likewise, even when pending domestic proceedings have suspensive effect, applicants are invited to submit

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[83] For a case in which the issue of the previous exhaustion arose in connection with the alleged non-compliance with the interim measures indicated by the Court to ensure immediate access to a hospital see ECtHR, *Ahmet Tunc and others v. Turkey*, Application No. 4133/16 and Application No. 31542/16, Decision of 29 January 2019, paras 141–145.

[84] In general, on the preliminary assessment of admissibility requirements for the purpose of indicating interim measures, see *amplius* Saccucci 2006, p. 361 *et seq*.

[85] As the Court put it in *N.A. v. the United Kingdom*, Application No. 25904/07, Judgment of 17 July 2008, para 90, "where the applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect" (*Jabari v. Turkey* (dec.), Application No. 40035/98, 28 October 1999). Conversely, where a remedy does have suspensive effect, the applicant will normally be required to exhaust that remedy (*Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998–I, §§ 47 and 48). Judicial review, "where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to exhaust before lodging an application with the Court or *indeed requesting interim measures under Rule 39* of the Rules of Court to delay a removal" (emphasis added). The same principles have been reiterated in the subsequent case-law (see, for instance, ECtHR, *H.S. and others v. Cyprus*, Application No. 41753/10, Judgment of 21 July 2015, para 257).

[86] See Practice direction on requests for interim measures, *supra* note 81, para IV.

[87] See ECtHR, *A.M.B. and others v. Spain*, *supra* note 55, paras 8–11, where the Court granted interim measures while the request of suspension of the contested eviction was awaiting decision by the competent domestic court, given the risk of imminent enforcement.

[88] See, for instance, ECtHR, *Paposhvili v. Belgium*, *supra* note 23, para 85, where the Court ordered the suspension of the enforcement of the order for the applicant to leave the country "pending the outcome of the proceedings before the Aliens Appeals Board"; *B. v. Belgium*, *supra* note 52, para 35, where the Court ordered the suspension of the enforcement of the decision to return the applicant's

their request for interim measures without waiting for the final decision if this decision is imminent and there is a risk of immediate enforcement, especially in extradition or deportation cases, indicating clearly the date on which it will be taken and that the request is subject to the final domestic decision being negative.[89] In such cases, interim measures will be conditionally subject to the adoption of a negative decision.

The Court has moreover clarified that the respect of the rule of previous exhaustion for the purpose of interim measures must be appreciated at the time of the introduction of the Rule 39 request even if the principal application was only later lodged with the Court.[90]

The above practice allows the following conclusions:

First, at the interim measures stage the principle of subsidiarity operates under the same general terms of the Court's jurisprudence on effective remedies that would apply to the determination of the admissibility in the principal proceedings, but the effectiveness of such remedies is appreciated by the Court—at the time of the introduction of the interim measures request—with exclusive regard to the possibility for the applicant to obtain effective interim relief at the domestic level which is capable of avoiding the risk of irreparable damage complained of.[91] The fact that a domestic remedy with no suspensive effect is still pending and that it could ultimately result in the annulment of the impugned measure does not prevent the Court from granting interim relief "in replacement" of national authorities, at least until such time the competent authorities have taken the matter into their own hands.

Second, while a positive outcome of the domestic proceedings following the adoption of interim measures by the Court may result in the case being struck off the list on the ground that the applicant has lost his or her victim status under Article 34 ECHR[92] or that the matter has been resolved under Article 37 ECHR,[93] the fact that those proceedings were not yet completed at the time of the introduction of the Rule 39 request should not affect in principle the admissibility of the principal application under the rule of prior exhaustion of domestic remedies (unless the domestic remedies have meanwhile regained their effectiveness through the suspension of the impugned measure, in which case the Court's interim measures are usually lifted).

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daughter to the United States under the Hague Convention "jusqu'à la fin de la procedure devant la Court de cassation".

[89] See Practice direction on requests for interim measures, *supra* note 81, para III.

[90] See ECtHR, *A.M. c. France*, Application No. 12148/18, Judgment of 29 April 2019, paras 65 and 68.

[91] As the Court pointed out in *Mamatkulov and Askarov*, *supra* note 6, para 124, the notion of an effective remedy under Article 13 ECHR "requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention".

[92] See, for instance, ECtHR, *Sabri Ali Al-Jazaeery v. Hungary*, Application No. 45163/99, Decision of 4 May 1999, and *Zefiri v. Italy*, Application No. 55764/00, Decision of 18 April 2002.

[93] This is particularly the case when a friendly settlement is reached. For the relevant practice in expulsion and extradition cases, see Saccucci 2006, pp. 168–175.

However, the Court's approach in this respect is not always fully consistent. For instance, in *Petrache and Tranca v. Italy*, the Court first granted interim measures to stay the forcible eviction of the applicants (on the assumption that they could not seek an interim suspension of this measure from domestic courts and that a suspensive remedy was required in this case under the terms of Article 13 ECHR),[94] but it then declared the application inadmissible for failure to exhaust domestic remedies because the Italian legal system provided for the possibility to challenge the contested eviction before the administrative court and to ask for its immediate suspension (even if the applicants' request in this respect had been meanwhile rejected by the competent court).[95] Underlying its subsidiary role *vis-à-vis* the national authorities, the Court concluded that the applicants disposed of an effective domestic remedy to seek the suspension and the annulment of the eviction order and that, being the proceedings before the administrative court on the merits still pending, there was no exceptional circumstance that exonerated the applicants from their obligation to exhaust domestic remedies.[96]

A similar conclusion was reached in *A.M.B. and others v. Spain* where the Court first granted interim measures to stay the imminent enforcement of the applicants' eviction given that the domestic court had not ruled on their request for interim suspension, but then it declared the application inadmissible and lifted the interim measures because an *amparo* appeal was later lodged by the applicants and was still pending (even if with no suspensive effect).[97]

While these decisions may have been influenced by the specific circumstances of each case, they do not appear entirely coherent with the Court's approach to the rule of previous exhaustion described above and leave the question open whether, for the purpose of the admissibility of the principal complaint, the applicant is required to make use of remedies not having suspensive effect at the time of the introduction of the Rule 39 request (irrespective of whether such remedies are to be regarded as "effective" under Article 13 ECHR for the purpose of interim protection).

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[94] See *Petrache and Tranca*, *supra* note 55, para 30, where the Court pointed out that "dans des circonstances exceptionnelles comme celles de la présente affaire, où les requérantes ont été confrontées à un risque soudain de perte de leur domicile, en application d'un acte de l'administration adopté sans aucune forme de contrôle judiciaire préalable et en l'absence d'une alternative de logement (voir Connors c. Royaume-Uni, no 66746/01, §§ 94–95, 27 mai 2004), l'absence de caractère suspensif d'un remède interne donné pourrait exempter le requérant de l'obligation d'épuiser les voies de recours internes et s'analyser sur le terrain de l'article 13 de la Convention".

[95] See *ibid*., paras 27–29 and 32–33, where the Court also pointed out that—based on the information provided by the Italian Government—in the case of other residents of the same housing centre the administrative court had in fact ordered the stay of the eviction and that in the applicants' case the municipality of Rome had in the meantime suspended the enforcement of the eviction and undertaken to find alternative accommodation.

[96] See *ibid*., para 35.

[97] See *A.M.B. and others v. Spain*, *supra* note 55, paras 8–12 and 21–30.

11.3.2 Procedural Arrangements for the Examination of Rule 39 Requests

With regard to the practical application of Rule 39, the Court has put in place several procedural arrangements that are intended to streamline the handling of the increasing number of requests for interim measures and to enhance the effectiveness and promptness of its response in urgent cases.

The first arrangement concerns the processing of Rule 39 requests in situations where the risk of irreparable damage potentially affects a large number of individuals giving rise to a flow of similar applications.

Leaving aside the instances in which interim relief was granted in inter-state cases to protect the civilian population affected by an armed conflict,[98] such situations may arise as a result of asylum policies exposing the members of certain groups to a risk of ill-treatment in case of return. For example, if the authorities of a given state are consistently refusing to grant asylum or other forms of international protection to individuals belonging to a specific national or ethnic minority who allege to be victims of widespread human rights violations in their country of origin, it is likely that the Court will be asked to intervene under Rule 39 in a large number of cases.

In order to reduce the strain that the processing of numerous Rule 39 applications places on judicial time and resources, the Court has therefore adopted the practice of inviting the state concerned to refrain from issuing removal directions in respect of any member of the group pending the final adjudication of a leading case on the existence of the alleged risk of ill-treatment in the state of destination.

This was the case for instance with the UK policy of denying asylum to members of the Tamils ethnic group who therefore faced deportation to Sri Lanka. As noted in *N.A. v. the United Kingdom*, given the increasing number of requests for interim measures from Tamils who were being returned to Sri Lanka from the United Kingdom and the fact that Rule 39 had been applied in many individual cases, the Court decided that, having regard to the security situation in Sri Lanka and pending the adoption of a lead judgment in one or more applications, "Rule 39 should continue to be applied *in any case* brought by a Tamil seeking to prevent his removal" and also invited the respondent Government to stay any removal of Tamils who claimed that their return to Sri Lanka might expose them to treatment contrary to the Convention.[99]

Although in this case the UK Government did not accede to the Court's request to suspend removals of all Tamils holding that each case should have been assessed on its merits against the available evidence, this precedent shows the Court's readiness to extend the subjective scope of application of Rule 39 and may pave the way to a further development of its practice.

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[98] As pointed out above, in case of widespread human rights violations taking place in the context of an armed conflict, interim measures may also be granted by the Court in relation to particularized situations upon request of individual applicants (see *supra* note 40).

[99] See ECtHR, *N.A. v. the United Kingdom*, *supra* note 85, paras 21–22.

On one side, even if the Court has not yet formally adopted a "general interim measure" suspending all removals, this was indeed the practical effect of its provisional view relating to the existence of a general situation of insecurity in the state of destination,[100] which gave rise to a presumption of irreparable damage in favor of any Tamil applicant affected by a removal order. On the other hand, the Court has speeded up as much as possible the examination of a lead case on the matter[101] in order to give direction to the respondent Government (and to any other Contracting State potentially concerned) about whether the removal of Tamils to Sri Lanka would expose them to a serious risk of treatment contrary to the Convention.[102]

The Court followed a similar approach in relation to transfers of asylum seekers to Greece under the Dublin Regulation especially after its findings in *M.S.S. v. Belgium and Greece*. While it did not issue a general interim measure to suspend all such transfers, it regularly granted Rule 39 requests in respect of various Contracting States based on the established existence of a systemic defect in the Greek legal order concerning the reception of asylum seekers and their practical access to asylum procedures.[103]

This procedural arrangement could be further enhanced in the future by explicitly providing the possibility for the Court to adopt "pilot interim measures" in the event of the existence of a generalized risk of irreparable damage affecting a whole class of vulnerable individuals. This would allow a more efficient processing of Rule 39 requests and could trigger—already at the interim measures stage—the application of the so called "pilot judgment procedure" under Rule 61 of the Rules of Court for the disposal of the leading case that could result in the indication of general measures of implementation of the final judgment under Article 46(1) ECHR (including a suspension of all domestic decisions that would expose other applicants to the same violation of their Convention rights).

A second procedural aspect deserves to be mentioned in this respect. Under the current Court's priority policy,[104] all applications for which interim measures have been granted are considered to fall into the first category of urgent cases and are accorded priority treatment pursuant to Rule 41 of the Rules of Court. This means

[100] As a result of this position, the Court continued to apply Rule 39 in each individual case in respect of 342 Tamil applicants (see *ibid*., para 22).

[101] The judgment in *N.A. v. the United Kingdom*, *supra* note 85, was in fact delivered only 9 months after the adoption of the said invitation.

[102] The Court ultimately found on the merits that, given the climate of general violence prevailing in Sri Lanka at the relevant time, the applicant's expulsion would be in violation of Article 3 of the Convention (see *ibid*., paras 93–147).

[103] For a comprehensive review of the relevant practice see the Factsheet—"Dublin cases" prepared by the Press Unit of the European Court of Human Rights, available at: https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf (last accessed on 7 April 2020). Even before the adoption of the leading judgment in *M.S.S. v. Belgium and Greece*, *supra* note 22, the Court has granted many interim measures to stop Dublin transfers to Greece (see ECRE Information Note on *Interim Measures (Rule 39) to stop Dublin transfers*, available at the following address: http://cmr.jur.ru.nl/cmr/docs/ecre.rule39.pdf (last accessed on 7 April 2020).

[104] See ECtHR, *Court's priority policy*, available at the following address: https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf (last accessed on 7 April 2020).

that interim measures cases are processed with priority over all other cases and a judgment on the merits may be delivered in a very short time if compared with the Court's average timing.

The establishment of this "fast-track" procedure is principally intended to avoid a prolonged limitation on the exercise of states' sovereign powers which may ultimately result to be unjustified under the primary obligations imposed by the Convention.[105] However, it also ensures a more expedited disposal of cases where the individual rights are at risk of irreparable harm.

Against the positive developments described above there are a number of procedural issues which remain highly problematic and leave room for concern.

First, according to the current practice, Rule 39 requests are processed by a special Unit of the Registry which is entrusted with a preliminary examination of the request based on the information provided by the applicant and which may decide on its own discretion whether it manifestly falls "outside the scope of Rule 39". If this is considered to be the case in light of the current practice of the Court, the request is not submitted to the President of the Section or to the duty judge for consideration.

Based on this practical arrangement, many requests for interim measures are refused at the preliminary examination stage by the Registry and are not even accounted for in the Court's official statistics on the application of Rule 39. In addition to exposing the applicants to unpredictable and unreviewable decisions, this non-judicial filtering—which is not even envisaged by the Rules of Court—has an obvious chilling effect on any possible progressive development of the Court's jurisprudence on the scope of interim measures, which ultimately lies (not on a decision by the judges but) on the open-mindedness of the Court's Registry and its willingness to submit to judicial consideration a request of interim measures that does not fall within any of the categories of cases presently considered to give rise to a risk of irreparable damage under the narrow approach referred to above.

This problem is particularly acute if one consider that, for instance, a request to stay an expulsion or an eviction in alleged breach of Article 8 ECHR may be rejected as being outside the scope of Rule 39 or, exceptionally, may be subjected to judicial consideration (and ultimately granted)[106] depending on the Registry's assessment of the particular circumstances of the case.

Second, especially with regard to requests of interim measures to stop the enforcement of an expulsion or extradition order, the Court may dispose of the admissibility of the principal application together with the Rule 39 request. Therefore, if the interim measures sought are refused on the basis of a preliminary examination of the alleged risk of ill-treatment in the receiving state (which is usually carried out within a few hours), the President of the Section, sitting as a single judge pursuant to Article

[105] It is no surprise that the need for an accelerated disposal of interim measures cases was particularly emphasized by the Contracting States in the *Follow-up Plan* appended to the Izmir Declaration, quoted above, para A.3., where they invited the Court to put in place a system "to trigger expedited consideration, on the basis of a precise and limited timeframe, of the merits of cases, or of a lead case, in which interim measures have been applied" (para A.3.).

[106] See the examples referred to *supra*, Sect. 11.2.4, spec. notes 52–54.

27 ECHR, may also decide to declare the complaint inadmissible as manifestly ill-founded under Article 35(3) (a) ECHR.[107] A decision of inadmissibility may also be taken by a Chamber pursuant to Article 29 ECHR.[108]

This practice is hardly reconcilable with the Convention and the Rules of Court as it improperly merges the summary assessment of the alleged risk of irreparable damage for the purpose of interim relief with the preliminary examination of the merits of the complaints for the purpose of the determination of the admissibility of the principal application, depriving the applicant of the opportunity to further elaborate his or her complaints through an adversarial procedure. Notably, the immediate disposal of the admissibility seems to be conflicting with the Court's own jurisprudence according to which the indication of interim measures "on no account prejudges the examination of the application under Article 34 of the Convention" and at the interim measures stage "it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so".[109]

Third, the vast majority of Rule 39 requests are processed by the President of the Section (or the duty judge)[110] on the sole basis of the information provided by the applicant without allowing the state concerned to submit its observations before a decision is taken. This is particularly true with regard to requests of stay of expulsion or extradition where interim measures are commonly indicated *inaudita altera parte* by the acting President. An exchange of written submission between the parties is instead often required in relation to Rule 39 requests concerning life-threatening health conditions or other risks of irreparable damage, where the Court seems unwillingly to rely exclusively on the applicant's version of the facts.[111]

While this arrangement may be regarded as necessary in some cases for the purpose of ensuring a prompt and timely response to urgent requests (especially with regard to removals that could be imminently enforced) and while it is always

[107]Unfortunately, single-judge decisions of inadmissibility adopted pursuant to Article 27 ECHR are not published. For an unreported example of the practice referred to above see the ECtHR, *Canessa v. the United Kingdom*, Application No. 34016/16, concerning the applicant's extradition to Peru.

[108]See, for instance, ECtHR, *Haji Hussein v. Sweden*, Application No. 18452/11, Decision of 20 September 2011.

[109]See ECtHR, *M.S.S. v. Belgium and Greece*, *supra* note 22, para 355.

[110]The cases in which interim measures are indicated by a Chamber or by the Grand Chamber are very uncommon. Indeed, when a Rule 39 request is made before or together with the lodging of the principal application, the case is not yet allocated to a judicial formation and the constitution of a Chamber or even more of the Grand Chamber usually takes some time. In addition to post-merits interim measures that are indicated by the Chamber in its judgment (see *supra* Sect. 11.2.1), a collegial decision is sometimes adopted when the state is invited to submit its observations on the Rule 39 request or when the subject-matter of the application touches upon very sensitive issues which require a more in-depth assessment of the *fumus boni juris* (for an example, see *Gard and others v. the United Kingdom*, *supra* note 26, and *Lambert and others v. France*, *supra* note 26, para 4).

[111]See, for instance, *Jashi v. Georgia*, *supra* note 38, para 20, in relation to the medical examination of the applicant's mental health; *Temchenko v. Ukraine*, *supra* note 35, paras 40 and 46, in relation to the applicant's transfer to a specialized institution; *A.M.B. v. Spain*, *supra* note 55, para 11, in relation to the suspension of an eviction order.

open to the state concerned to seek a lifting of the measure after it has been indicated *inaudita altera parte*, the lack of an adversarial procedure on Rule 39 requests may affect their proper examination by the Court, which may not dispose of all the information needed for that purpose. It may also nuance the authority of interim measures in the eyes of the states concerned.

The Court's practice in this respect is at variance with the practice followed by other international tribunals, and notably by both the Inter-American Court and the African Court, which regularly require written submissions from the parties on the request for provisional measure and even hold hearings before taking a final decision on interim relief. Indeed, the need to ensure an immediate response to particularly urgent matters is no obstacle to an adversarial procedure which could take place also after a provisional application of Rule 39 by the acting President.

Lastly, interim measures granted by the Court do not contain any reasoning or any explanation as to the assessment on which they are premised. They are simply communicated to the parties through a standard letter of the Registry in which it is stressed that any failure by the Government to comply with interim measures may give rise to a violation of Article 34 ECHR. This aspect is particularly relevant in connection with the binding effect of interim measures, which will be addressed in the following subsection.

11.3.3 Binding Character and Execution of Interim Measures

As pointed out above, since its landmark judgment in *Mamatkulov and Askarov* the Court has firmly stated the binding character of interim measures indicated under Rule 39.[112] Notably, the existence of a Convention obligation upon the Contracting States to comply with interim measures has been extracted, by means of evolutive interpretation, from the obligation not to hinder the effective exercise of the right of individual petition laid down in the last sentence of Article 34 ECHR, read in light of Articles 1 and 46 ECHR.

According to the *Mamatkulov* jurisprudence, interim measures play "a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted". Accordingly, "a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the

[112]The previous jurisprudence of the Court had instead refused to consider interim measures as legally binding upon the Contracting States in the absence of a treaty provision explicitly granting the Court the power to grant interim relief and of a general principle of international law on provisional measures (see, in particular, ECtHR, *Cruz Varas and others v. Sweden*, Application No. 15576/89, Judgment of 20 March 1991, paras 90–105). For a review of the Court's previous approach, see Cohen-Jonathan 1991, p. 205 *et seq.*; Saccucci 2004, spec. p. 98 *et seq.*

Convention". Moreover, interim measures "also subsequently allow the Committee of Ministers to supervise execution of the final judgment", thus enabling "the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention".[113]

The subsequent case-law of the Court, while reiterating the binding nature of interim measures, has provided some important clarifications regarding the scope of the Contracting States' obligation to comply with those measures under Article 34 ECHR.

First of all, the Court acknowledged the self-standing character of such an obligation, which must be assessed independently from the primary substantive obligations allegedly violated by the state's act or omission that gave rise to the risk of irreparable damage. It follows that interim measures must be complied with by states (and their responsibility may be engaged under Article 34 ECHR in case of non-compliance) even if the applicant's principal complaints are ultimately found to be inadmissible as manifestly ill-founded[114] or are rejected at the merits stage.[115]

This is particularly true in expulsion or extradition cases where the preliminary assessment of the risk of ill-treatment in case of removal at the interim measures stage is often reversed following a more in-depth examination of the case at the admissibility or merits stage also in the light of the information provided by the respondent state (for instance, about available domestic remedies with suspensive effect or about assurances given by the receiving state or about the existence of a general situation of insecurity in that state). Still, the Court requires full compliance with its interim measures and the state's failure to stay the removal may result into an independent breach of Article 34 ECHR.

Secondly, the Court has further elaborated its findings in *Mamatkulov and Askarov* by stating that the breach of the obligation under Article 34 ECHR to comply with interim measures is not dependent on the *actual impairment* of the effective exercise of the right of individual petition in the particular circumstances of the case. Notably, in *Olaechea Cahuas v. Spain*, the Court addressed the question of whether a Contracting State's obligation to comply with interim measures is linked with a subsequent finding that the effective exercise of the right of individual application has been hindered, for instance by preventing the applicant to pursue his case before the Court or by hampering the Court's examination of the case. According to the Court, "an interim measure is provisional by nature and the need for it is assessed at a given moment because of the existence of a risk that might hinder the effective exercise of the right of individual application protected by Article 34"; therefore, even if the risk does not materialize following the applicant's removal, "the interim measure must be considered to have binding force" and "[f]ailure to comply with an

[113] See ECtHR, *Mamatlulov and Askarov v. Turkey*, *supra* note 6, para 125.

[114] See, for instance, *Mostafa and others v. Turkey*, *supra* note 25, paras 31–44, where the Court ultimately declared inadmissible as manifestly ill-founded the complaint under Article 3 ECHR, but it found a violation of Article 34 ECHR due to non-compliance with interim measures.

[115] See, for instance, *Aoulmi v. France*, *supra* note 20, paras 101–112, where the Court ultimately found no violation of Article 3 ECHR, but it found a violation of Article 34 ECHR due to non-compliance with interim measures.

interim measure indicated by the Court because of the existence of a risk is in itself alone a serious hindrance, at that particular time, of the effective exercise of the right of individual application".[116]

Accordingly, Article 34 ECHR is violated even if no actual harm is established *ex post* in respect of the applicant's capacity to bring or actively pursue his or her case before the Court or in respect of the Court's capacity to properly complete its examination on the admissibility and merits of the complaints due to non-compliance with interim measures,[117] and even if the applicant did not suffer any irreparable damage that interim measures were designed to prevent.[118]

Notwithstanding this position of principle, the Court often indulges on considering whether and to what extent non-compliance with interim measures has actually hindered the effective exercise of the right of individual petition in the particular circumstances of the case.[119] Moreover, it sometimes seems to attach decisive weight to these considerations in reaching the conclusion that Article 34 ECHR has not been violated by the non-compliant state.

For instance, in *Hamidovic v. Italy*, the Court declared inadmissible as manifestly ill-founded the complaint under Article 34 ECHR despite the failure by the Italian Government to stay the applicant's deportation to Bosnia Herzegovina in alleged breach of Article 8 ECHR due to a culpable administrative delay in the transmission of the information concerning the application of Rule 39 to the responsible authorities.[120] In this case, the Court held that, unlike in *Mamatkulov and Askarov*, the

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[116]See *Olaechea Cahuas v. Spain*, *supra* note 25, paras 75–83. On this important development see, among others, Haeck et al. 2008, p. 41 *et seq.*; Harby 2010, p. 73 *et seq.*

[117]See, for instance, *D.B. v. Turkey*, *supra* note 59, paras 65–67, and *Shtukaturov v. Russia*, *supra* note 60, paras 135–149, where the Court found a breach of Article 34 ECHR due to the authorities' failure or delay in allowing the applicants to meet their lawyers notwithstanding this had not prevented them to effectively pursue their case before the Court and to provide all the necessary elements for the examination of their complaints; *Mannai v. Italy*, Application No. 9961/10, Judgment of 27 March 2012, paras 49–57, where the Court found a breach of Article 34 ECHR due to the authorities' failure to stop the applicant's expulsion to Tunisia notwithstanding "le requérant est actuellement libre de ses mouvement et a pu garder les contacts avec son avocat".

[118]See, for instance, *Salakhov and Islayamova v. Ukraine*, *supra* note 35, paras 216–224, concerning a three-day delay in the applicant's transfer to an hospital for treatment, where the Court held "[w]hether or not the three-day delay in fact caused the damage which the interim measure was designed to prevent, is irrelevant for the Court's assessment".

[119]See, for instance, ECtHR, *Trabelsi v. Italy*, Application No. 50163/08, Judgment of 13 April 2010, paras 67–70, where the Court noted that "ayant perdu tout contact avec son avocat, [le requérant] a été privé de la possibilité de susciter, dans le cadre de l'administration des preuves, certaines recherches propres à étayer ses allégations sur le terrain de la Convention. Les autorités tunisiennes ont par ailleurs confirmé que le représentant du requérant devant la Cour ne pourra pas être autorisé à visiter son client en prison", and concluded that "les faits de la cause (…) montrent clairement qu'en raison de son expulsion vers la Tunisie, le requérant n'a pu développer tous les arguments pertinents pour sa défense et que l'arrêt de la Cour risque d'être privé de tout effet utile".

[120]See ECtHR, *Hamidovic v. Italy*, *supra* note 53, where the Court noted a regrettable delay in the transmission of the Rule 39 decision from the Italian Permanent Representation to the Ministry of Interior and from the latter to the other competent domestic authorities. In other cases, however, a comparable administrative delay was sufficient to conclude for the violation of Article 34 ECHR: see ECtHR, *Kamaliyevy v. Russia*, 52812/07, Judgment of 3 June 2010, para 77, where the applicant was

Government's failure to comply with Rule 39—while attributable to a "regrettable mistake in the handling of the domestic procedure"—did not result into the applicant losing contacts with her lawyer nor gave it rise to an irreversible situation preventing the Court from properly examining the applicant's complaint relating to the potential violation of Article 8 ECHR, taking also into account that "le risqué de préjudice de la requérant au égard de la Convention ne portait pas sur l'un des droits relevant du noyau dur des droits protégés par la Convention".[121]

Reading this decision, one may still wonder whether interim measures are always regarded by the Court as being legally binding *per se* or whether it has to be satisfied that an actual hindrance to the right of individual petition has materialized and whether this depends also on the nature of the right at stake.

Despite the above inconsistencies, the Court's case-law seems predominantly to uphold the view that *any* inobservance of interim measures gives rise to the state's responsibility under Article 34 ECHR.

In fact, turning to the third consideration, the Court has repeatedly pointed out that a state cannot escape its obligation to comply with interim measures by adducing practical difficulties in their implementation due to administrative delays or legal obstacles. Notably, the Court has stressed that in view of their vital role "interim measures must be *strictly* complied with by the State concerned" (emphasis added)[122] and that a state can be absolved from its responsibility under Article 34 ECHR only where there was an "objective impediment" which prevented compliance and the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation.[123] Again, this conclusion is not altered by the fact that, ultimately, the risk did not materialize and that information obtained subsequently suggests that the risk may have been exaggerated.[124]

This principle has been stated in relation to any interim measures, irrespective of whether they pursue a substantive purpose of protection (such as typically in the event of removals to a third countries[125] or of poor conditions of detention of seriously ill

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put on a plane about 26 h after the notification of the interim measure to the respondent Government, a time-period which included one full working day, when all the relevant offices had been open and no difficulties in communication had been reported.

[121] In this decision, the Court seems to have ultimately called into question the very existence of an alleged risk of irreparable damage ensuing from the applicant's deportation, also in light of the Italian Government's subsequent undertaking to allow the applicant to return to Italy.

[122] See, for instance, ECtHR, *Andrey Lavrov v. Russia*, *supra* note 35, para 39.

[123] See, for instance, ECtHR, *Paladi v. Moldova*, *supra* note 36, para 92, *Amirov v. Russia*, *supra* note 38, para 68, and *Makharadze and Sikharulidze v. Georgia*, *supra* note 35, para 102.

[124] See ECtHR, *Paladi v. Moldova*, *supra* note 36, para 104.

[125] In addition to *Kamaliyevy v. Russia*, *supra* note 120, see also ECtHR, *Al-Sadoon and Mufdhi v. the United Kingdom*, *supra* note 20, paras 160–166, where the Court concluded that the British authorities did not take all steps which could reasonably have been taken in order to prevent the applicants' transfer to the Iraqi authorities and did not inform the Court, for example, of any attempt to explain the situation to the Iraqi authorities and to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination; *Abdulkhakov v. Russia*, Application No. 14743/11, Judgment of 2 October 2012, paras 222–231, concerning an interim measure suspending the applicant's extradition to Uzbekistan, where the Court found a

persons)[126] or a purely procedural purpose (such as in the case of access to a lawyer for the preparation of the case before the Court).[127]

According to this jurisprudence, the state's responsibility under Article 34 ECHR is construed as a form of *strict liability* under international law in relation to which wrongfulness can be excluded only by situations of *force majeure* or supervening impossibility of performance, no other justification being admissible.[128]

Against these important developments there remain a number of relevant issues concerning the binding force of provisional measures and their practical implementation that need to be tackled by the Court in the future.

First, the Court has still to shed light on the legal basis for asserting the binding nature of interim measures indicated in the framework of inter-state cases initiated pursuant to Article 33 ECHR. While there can be little doubt that also these measures should eventually be regarded as legally binding under the Convention, it is at the same time rather obvious that their binding force cannot be grounded in the obligation to secure the unhindered exercise of the right of individual petition under Article 34 ECHR.

The Court will therefore need to look elsewhere in the Convention to possibly reach the same conclusion. Awaiting the Court's first ruling on the matter,[129] there are in particular two avenues that appear feasible. The first option would be to construe by way of analogy an obligation not to hinder the effective exercise of the states' right of petition implicit in Article 33 ECHR; this solution, however, seems to be at odds with the primary function of interim measures in the inter-state procedures which is that to protect the rights of individuals and not of states. A second option would be to link directly the binding nature of interim measures to the substantive or procedural obligations under the Convention which they inherently purport to safeguard against an imminent risk of irreparable damage. Such an approach, in addition of being

violation of Article 34 ECHR due to the applicant's secret transfer to Tajikistan from where he would face removal to Uzbekistan; *Mukhitdinov v. Russia*, *supra* note 25, paras 91–96, concerning an interim measure suspending the applicant's extradition to Uzbekistan, where the Court found a breach of Article 34 ECHR as a result of the applicant's disappearance and of the failure of the Russian authorities to take appropriate protective measures; *M.A. v. France*, Application No. 9373/15, Judgment of 1 February 2018, paras 64–71, concerning an interim measure suspending the applicant's deportation to Algeria, where the Court found a breach of Article 34 ECHR holding that "les autorités françaises ont créé des conditions dans lesquelles le requérant ne pouvait que très difficilement saisir la Cour d'une seconde demande de mesure provisoire".

[126]See ECtHR, *Salakhov and Islayamova v. Ukraine*, *supra* note 35, paras 216–224.

[127]See, for instance, *D.B. v. Turkey*, *supra* note 59, paras 65–67, and *Shtukaturov v. Russia*, *supra* note 60, paras 135–149.

[128]The lack of cooperation by the applicant or his lawyer with the domestic authorities in the execution of the interim measure may also give rise to an impossibility of performance precluding wrongfulness. See, for instance, ECtHR, *Jashi v. Georgia*, *supra* note 38, para 68, where no issue arose under Article 34 ECHR with regard to the delay in the enforcement of the interim measure due to the "applicant's initial uncooperative conduct".

[129]The issue could be addressed for the first time in the inter-state case *Georgia v. Russia (II)*, *supra* note 72, where the applicant Government also alleged that the Russian Federation continued to violate their obligations under Articles 2 and 3 ECHR despite the indication of interim measures (para 10).

consistent with the particular content of the interim measures so far indicated by the Court in inter-state cases (which urge the states concerned to comply with their commitments under Articles 2 and 3 ECHR pending final adjudication), would also pave the way to the assertion of an aggravated responsibility of the non-compliant state for any violation of the substantive rights occurring under the force of interim measures.[130]

Second, as pointed out above, the Court continues to apply Rule 39 (both in individual and inter-state cases) without providing any reasons or explanations for its decisions.

Interim measures are not embedded in an official and publicly available judicial decision,[131] but they are merely communicated by a letter of the Registry informing the respondent state that the Court has decided to grant the measures requested and that any failure to comply with them may result in a violation of Article 34 ECHR.[132] This practice has long been decried by the doctrine and the legal practitioners,[133] and has no equal before any other international court.[134]

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[130]For further analysis of the legal grounds and implications of such an approach, we refer to Saccucci 2009, spec. p. 147 *et seq*.

[131]Rule 39 decisions are not published by the Court, but only reported in the annual numerical statistics. In some exceptional cases, however, the Court's Registry may issue a press release (not binding on the Court) concerning the adoption (or the refusal) of interim measures which also contain a statement of the relevant facts and of the underlying legal issues. For a recent example of this practice, see *Press Release issued by the Registry, ECHR 2040 (2019)*, 25 June 2019, concerning the Court's decision not to indicate an interim measure requiring that the applicants be authorized to disembark in Italy from the ship Sea-Watch 3, which was prevented access to the port of Lampedusa after an operation of search and rescue at sea; *Press Release issued by the Registry, ECHR 209 (2020)*, 8 July 2020, concerning an "out of the scope" refusal of interim measures for the purpose of freezing the enforcement of constitutional amendments terminating the office of the applicants as judges of the Constitutional Court.

[132]Only exceptionally, the letter of the Registry informing the parties about the indication of provisional measures contains some additional information regarding the grounds on which the decision was taken. For instance, in *K.R.S. v. the United Kingdom*, *supra* note 22, this letter stated as follows: "Th[e] indication [of provisional measure] has been made in light of the UNHCR report dated 15 April 2008 (a copy of which is attached). The parties' attention is drawn to para 26 of the report that states that 'In view of EU Member States' obligation to ensure access to fair and effective asylum procedures, including in cases subject to the Dublin Regulation, UNHCR advises Governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. UNHCR recommends that Governments make use of Article 3(2) of the Dublin Regulation, allowing States to examine an asylum application lodged even if such examination is not its responsibility under the criteria as laid down in this Regulation".

[133]In this regard see, among others, Garry 2001, p. 399, and more recently Haeck et al. 2008, spec. pp. 57–59.

[134]Notably, both the Inter-American Court of Human Rights and the African Court of Human Rights adopt fully reasoned decisions on the application of provisional measures containing a brief statement of the relevant facts and of the grounds underlying the granting of such measures. A practice of non-reasoned interim measures may instead be found before non-judicial bodies such as the UN Committees, the Inter-American Commission of Human Rights, and the African Commission on Human and Peoples' Rights.

While being dictated by the practical difficulties to handle a large number of requests and by the heavy work-load already pressing on the Court, the absence of a reasoned decision—in addition of being at variance with the general duty to provide reasons for "judgments and decisions" laid down in Article 45 ECHR—may have adverse repercussions on the binding force and ultimately on the effectiveness of interim measures. Notably, it may substantially weaken the authority of interim measures and their force of "moral suasion" on the state authorities, which may find hardly acceptable an obligation to *strictly* comply with a non-reasoned decision communicated by simple correspondence which is purported to limit the exercise of their governmental powers (such as the enforcement of a removal order or the treatment of a detainee). The absence of reasoning of interim measures has in fact sometimes prompted non-compliant decisions by the national courts.[135]

It is thus no surprise that the Contracting States themselves have recently invited the Court to consider providing "brief reasons for its decisions indicating provisional measures".[136] Unfortunately, this call has also remained to date unanswered.

The last issue about the legally binding effects of interim measures that still needs to be clarified concerns the distribution of competence between the Court and the Committee of Ministers to supervise the actual implementation of these measures.

According to Rule 39(2) as in force after the 2012 amendments, the Court may—*when it considers it appropriate*—give immediate notice of the measure adopted in a particular case to the Committee of Ministers. The previous wording of this rule was different as it provided that notice of interim measures should *always* be given to the Committee of Ministers.[137] One may therefore wonder when the Court may consider it *appropriate* to give notice of interim measures to the Committee of Ministers and what the *purpose* of such notice is in respect of particular cases. So far, the Court's practice does not offer any clear guidance in this respect.

Before the judgment in *Mamatkulov and Askarov*, the communication to the Committee of Ministers of the (then) non-binding interim measures adopted by the Court was clearly instrumental to ensure a collective governmental control over the implementation of those measures which—albeit the absence of any explicit legal basis in the Convention[138]—could operate as a "political stimulator" of voluntary compliance by the states concerned. The control over the implementation of provisional measures was therefore entirely left in the hands of diplomats.

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[135]For instance, in the case *Olaechea Cahuas v. Spain*, *supra* note 25, a judge of the *Audiencia Nacional* refused to suspend the applicant's extradition to Peru stressing the lack of any reasoning grounding the interim measure adopted by the Court.

[136]See the Action Plan appended to the Brussels Declaration adopted on 27 March 2015 by the High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", para A.1 (d).

[137]The full original texts of Rule 34 of the Rules of Court adopted in 1959, which then became Rule 36 of the Rules adopted in 1982 and was then transfused in Rule 39 of the Rules adopted in 1998 following the entry into force of Protocol No. 11—are reproduced in Saccucci 2006, pp. 28–37.

[138]According to Article 46(2) ECHR, the Committee of Ministers is only entrusted with the supervision on the execution of the "final judgments" of the Court.

However, following the recognition of the binding force of interim measures under Article 34 ECHR, the ultimate authority to oversee the proper execution of interim measures lies upon the Court itself and the control thus became fully judicial. Indeed, it is only for the Court to establish whether the Contracting States have fully and promptly complied with interim measures under the terms of Article 34 ECHR or whether there exist exceptional circumstances excluding their responsibility.[139] The Committee of Ministers is only playing a role *ex post* under Article 46(2) ECHR when called to supervise the execution of a Court's judgment finding a breach of Article 34 ECHR owing to non-compliance with interim measures.

Against this background, the immediate notice of interim measures to the Committee of Ministers under Rule 39(2) should be construed as a supplementary mechanism of assistance which the Court may deem useful to trigger in particularly sensitive or unusual situations of urgency for the purpose of exerting political pressure on the state concerned to enforce interim measures. One may think in particular of interim measures adopted in the context of armed conflicts to protect the civilian population from the risk of violations of the right to life and to physical integrity[140] or cases where a state has openly and repeatedly refused to comply with interim measures.[141]

It is however open to the Committee of Ministers when exercising its supervisory functions under Article 46(2) ECHR to require from the state which was found in breach of Article 34 appropriate guarantees of non-repetition by putting in place general measures in the domestic legal system that would ensure in the future proper compliance with interim measures.[142]

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[139]This brings the European system in line with other human rights supervisory mechanisms and international jurisdictions, where the control over the execution of interim measures is generally carried out by the same judicial body that has indicated them.

[140]See *supra* note 40.

[141]A similar situation has for instance arisen with regard to the Russian authorities' repeated failure to comply with the Court's interim measures in respect of applicants prosecuted in Uzbekistan and Tajikistan in connection with extremist or terrorist charges (see ECtHR, *Kasymakhunov v. Russia*, Application No. 29604/12, Judgment of 14 November 2013, paras 183–189, *Savriddin Dzhurayev v. Russia*, Application No. 71386/10, Judgment of 25 April 2013, paras 216–219, and *Mukhitdinov v. Russia*, *supra* note 25, paras 92–95, where the Court pointed out that in such circumstances "[it] will consider the previous judgments, the position of the Committee of Ministers, and the unprecedented and recurring nature of similar incidents as a decisive contextual factor in the present analysis").

[142]For instance, in supervising the execution of a number of judgments against Italy where the Court had found a violation of Article 34 ECHR due to the non-compliance with interim measures (namely, ECtHR, *Ben Khemais v. Italy*, Application No. 246/07, Judgment of 24 February 2009; *Trabelsi v. Italy*, *supra* note 119; *Toumi v. Italy*, Application No. 25716/09, Judgment of 5 April 2011; and *Mannai v. Italy*, Application No. 9961/10, Judgment of 27 March 2012), the Committee of Ministers stressed once again the fundamental importance of complying with interim measures and urged the Italian authorities "to take all necessary steps to adopt sufficient and effective measures to prevent similar violations in the future" (see Committee of Ministers, Interim Resolution CM/ResDH(2010)83 of 3 June 2010). The Committee of Ministers was later satisfied that the measures adopted by the Ministry of Justice were sufficient under Article 46(1) ECHR to ensure future compliance with interim measures (see Committee of Ministers, Final Resolution CM/ResDH(2015)204 of 17 November 2015).

11.4 Conclusions and Expected Improvements

Generally speaking, the Court has made great efforts over the last 15 years to consolidate its findings in *Mamatkulov and Askarov* with a view to reinforcing the effectiveness of interim relief under the Convention.

However, the above analysis also shows a set of critical issues which requires further improvements.

While the current scope of application of Rule 39 still remains bridled by the narrow interpretation of the irreparable harm requirement affecting "core rights" under the Convention (see Sect. 11.2), the feeble signs of a more open-minded approach emerging from the Court's case-law risk to be chilled owing to the "out-of-the-scope" preliminary filtering carried out by the Registry (see Sect. 11.3.2) and to the persistent lack of any reasoning of Rule 39 decisions (see Sect. 11.3.3). Moreover, the remaining of some inconsistencies in the Court's jurisprudence regarding the application of the rule of prior exhaustion of domestic remedies at the interim measures stage (see Sect. 11.3.1) and the binding force *per se* of interim measures irrespective of any actual hindrance of the right of individual petition under Article 34 ECHR (see Sect. 11.3.3) may disorient individual applicants and respondent states, lending force to the latter's claim for an even more restrictive use of interim measures, especially in the traditional field of extradition and expulsion (see Sect. 11.3.1).

The challenges that the Court need to address in this respect are certainly not easy, especially bearing in mind its ever-increasing work-load and the practical difficulties it daily strives to accommodate in the management of large flows of individual applications.

However, given the "vital role" of interim measures for the effective functioning of the protection system under the Convention, the Court should not abdicate its responsibility to promote a more efficient application of Rule 39, first and foremost by providing reasons for its decision on interim measures, as auspicated by the 2015 Brussels Declaration. Such an improvement, albeit putting an additional burden on the Court, would certainly serve the purpose of facilitating a progressive development of its case-law regarding the relationship between interim relief and principal adjudication in light of the principle of subsidiarity, it would help to clarify the requirements that must be satisfied for interim protection to be granted, and it would also strengthen the authority and binding force of provisional measures thereby promoting compliant practices by the Contracting States.

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Chapter 12
Provisional Measures Under the African Human Rights System

Giuseppe Pascale

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Abstract This chapter discusses the legal characteristics of provisional measures under the African Human Rights System, partly with the aim to fill the gaps found in the works of the Rapporteur on provisional measures of the Institute of International Law. After a brief overview of the provisional measures issued by the African Commission, it examines the precautionary power of the African Court, reaching the conclusion that the Court is inconsistent in the use of such power. This conclusion derives from an analysis of three main and interrelated critical issues, namely: (i) the binding or recommendatory nature of the provisional measures of the African Court; (ii) their domestic implementation; and (iii) the potential responsibility of States that fail to implement them. These critical issues are introduced and observed through the lens of the paradigmatic *Saïf al-Islam Kadhafi* case, where the African Court first stated that the provisional measures were binding on the State concerned but then, after ascertaining the lack of compliance with such measures, abstained from declaring any resulting international responsibility of that State.

Keywords African Human Rights System · *Saïf al-Islam Kadhafi* case · Provisional measures of the African Court · Inconsistency of the African Court · Works on provisional measures of the Institute of International Law

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12.1 Introduction. The Absence of References to the African Commission and African Court on Human and Peoples' Rights in the Works of the Rapporteur on Provisional Measures of the Institute of International Law

During its 2017 plenary session in Hyderabad, the Institute of International Law adopted a Resolution establishing guiding principles in relation to provisional measures issued by international courts and tribunals.[1] The Resolution takes inspiration from the Final Report on the matter, prepared and presented to the Third Commission of the Institute of International Law by the Rapporteur, Lord Lawrence Collins of Mapesbury, a few months prior.[2] Both the Resolution and Final Report deserve praise, insofar as they represent an attempt to systematise the complex and diverse practices concerning provisional measures in international law.[3] At the same time, however, the theoretical approach and research methodology on which these documents are based seem questionable.

In his Final Report, Lord Collins states that he has examined provisional measures in both public international law and private international law, taking also into account, for comparative purposes, civil and commercial domestic law.[4] In other words, the Resolution and the Final Report both focus on the relevant case-law of international courts and tribunals, as well as on issues connected with the use of provisional measures in civil domestic procedures with transnational character, and even in commercial arbitration. Two different topics are thus brought together in these documents. As a consequence, the Resolution and the Final Report do not always deal with provisional measures in a clear way, sometimes creating confusing overlaps between domestic legal systems and the international legal order. For this reason, it

[1] Hereinafter I will mostly use the expression "provisional measures", despite the fact that in international practice the adjective "provisional" is sometimes replaced with "interim", "precautionary", "emergency", "urgent" or "conservatory". These are all synonyms.

[2] The task of studying the topic of provisional measures issued by international courts and tribunals had been conferred upon the Third Commission of the Institute of International Law during the 2009 plenary session in Naples. A Resolution, entitled "Provisional Measures", was later adopted on 8 September 2017 and is now available at www.idi-iil.org and in Yearbook of the Institute of International Law, vol. 78, Session of Hyderabad, 2017, pp. 127–130. The Final Report of Lord Collins, previously published on 23 December 2016 at www.idi-iil.org is now available in Yearbook of the Institute of International Law, *supra*, pp. 259 *et seq*. The Final Report is mostly an update of the course that the Rapporteur delivered at the Hague Academy of International Law: see Collins 1992, pp. 9–238. For a comment on the outcomes of the Institute of International Law concerning provisional measures, see Ruozzi 2018, pp. 1182–1210.

[3] It is not possible to take into account here the entire legal literature dealing with provisional measures in international law. Apart from this volume and by way of illustration only, see Bernhardt 1994; Gaeta 2000; Rosenne 2005; Oellers-Frahm 2012a, pp. 389–410; Miles 2017. With regard to provisional measures issued by international courts and tribunals operating in the field of human rights, see Cohen-Jonathan and Flauss 2005; Pasqualucci 2005, pp. 1–49; Saccucci 2006; Rieter 2010.

[4] See the relevant remarks by Lord Collins in the Final Report, *supra* note 2, mainly p. 265.

seems that a better approach would have been to devote a separate study to provisional measures in private international law and commercial arbitration and, therefore, include any insightful reference to these fields only in the introductory section of the current Final Report, so as to concentrate the analysis solely on provisional measures in public international law.[5]

Moreover, the multifaceted and broad research methodology chosen by Lord Collins has left no room for an examination of the various functions that provisional measures may have in the many diverse contexts of public international law. It is well known, for instance, that provisional measures pursue different aims—and raise different doubts—depending on whether they are issued with regard to inter-state disputes or disputes between States and individuals. The same problems arise if one compares provisional measures issued at the request of a party in disputes concerning synallagmatic obligations and those issued *motu proprio* by an international court or tribunal when general interests are at stake.

The choice to deal with provisional measures in both public international law and private international law also explains why the Resolution and the Final Report cannot pay attention to the case-law of "peripheral" international bodies. Indeed, these documents are almost exclusively based on the case-law of just two international judicial organs: the International Court of Justice and the International Tribunal for the Law of the Sea.[6] In addition, the Final Report makes a few references also to the Inter-American Court of Human Rights and the European Court of Human Rights.[7] On the contrary, the case-law of other international bodies would have deserved attention. For instance, a remarkable case in point is that of the bodies operating in the African Human Rights System, namely the African Commission on Human and Peoples' Rights ("African Commission" or "Commission") and the African Court on Human and Peoples' Rights ("African Court" or "Court").[8]

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[5] Another member of the Institute of International Law, Santiago Torres Bernárdez, openly expressed his disagreement as to the focus of the research on provisional measures in both public international law and private international law: see the memorandum submitted on 14 January 2016 and then attached to the Final Report, *supra* note 2, pp. 367 *et seq.*

[6] The International Court of Justice may issue provisional measures pursuant to Article 41 of its Statute and Rule 75 of its Rules of Procedure (for details, see Chap. 6 by Wittich in this volume). The International Tribunal for the Law of the Sea may order provisional measures pursuant to Article 290 of the United Nations Convention on the Law of the Sea and Article 25 of its Statute, both defining such measures as binding (for details, apart from Chap. 7 by Marotti in this volume, see Rosenne 2005, *passim*; Virzo 2005, pp. 383–412; Virzo 2012, pp. 1352–1354).

[7] The Inter-American Court of Human Rights may adopt provisional measures pursuant to Article 63(2) of the American Convention on Human Rights and Rule 25 of its Rules of Procedure, while the Inter-American Commission of Human Rights may recommend provisional measures pursuant to Rule 25 of its Rules of Procedure. Even if the European Convention on Human Rights does not include any provision concerning the precautionary power of the European Court of Human Rights, this Court (and previously the European Commission of Human Rights) has often issued provisional measures. The precautionary power of the European Court is currently enshrined in Rule 39 of its Rules of Procedure. For details on the provisional measures of the European Court, see Chap. 11 by Saccucci in this volume.

[8] The African Human Rights System has its roots in the African Charter on Human and Peoples' Rights, adopted in 1981 and entered into force in 1986. At present, all the African States are parties

Partly with the aim of contributing to fill the relevant gaps in the works of the Institute of International Law, this chapter attempts to examine the main legal features of provisional measures under the African Human Rights System. After a brief overview of the non-binding provisional measures recommended by the African Commission, it discusses the precautionary power of the African Court, taking into due account the general legal framework. The chapter then focuses on a paradigmatic case, the *Saïf al-Islam Kadhafi* case, to try to shed light on three main and interrelated critical issues concerning the provisional measures of the African Court: (i) their binding or recommendatory nature; (ii) their domestic implementation; and (iii) the potential responsibility of States that fail to implement them. Examination of these critical issues will reveal a fundamental inconsistency in the African Court's use of its precautionary power: on the one hand, the Court confers binding effects on its provisional measures; on the other, however, after ascertaining that a State has not complied with provisional measures, it does not usually declare that State's responsibility for non-compliance with provisional measures.

12.2 Provisional Measures Issued by the African Commission

The legal basis of the power of the African Commission to issue provisional measures is not provided by the African Charter on Human and Peoples' Rights ("African Charter" or "Charter"), namely the international legal instrument that created the Commission, but by the Rules of Procedure of the Commission, namely by a non-binding instrument.[9] In particular, under Rule 98(1), the Commission may, at any

to the African Charter, the only exception being Morocco. The first part of the African Charter sets out civil and political rights, a catalogue of economic, social and cultural rights, a list of collective rights and some human duties. The second part of the African Charter focuses on the African Commission on Human and Peoples' Rights. The Commission can receive communications from States, individuals and NGOs and has a general power to issue non-binding acts only. The African Human Rights System was renewed by the Protocol instituting the African Court on Human and Peoples' Rights, signed in Ouagadougou in 1998, and come into force in 2004. Currently, it has been ratified by 30 African States. The African Court can pass binding judgements. The African Commission, States Parties to the Ouagadougou Protocol, African intergovernmental organisations, individuals and NGOs are entitled to submit cases before the African Court. For details on these points as well as other aspects concerning the African Human Rights System that will be mentioned hereinafter, see Pascale 2017.

[9]The same happens in the European Human Rights System. As recalled *supra*, note 7, the European Court of Human Rights has the power to issue provisional measures pursuant to Rule 39 of its Rules of Procedure. However, the European Court has relied on the European Convention, especially Article 34, to assert the binding nature of provisional measures: see *infra*, note 52. As yet, nothing similar has occurred in the case-law of the African Commission.

time after the receipt of a communication from an individual[10] and before the determination on the merits, request that the State concerned adopt provisional measures to prevent irreparable harm to the victim of the alleged violation as urgently as the situation demands; the Commission may issue provisional measures on its initiative or at the request of a party to the communication.[11]

In its report concerning the *Ken Saro-Wiwa* case, the African Commission without any further explanation added that a State that fails to implement provisional measures is responsible for a breach of its obligations under the African Charter which is separate from the human rights violations alleged in the case.[12] As a result, the provisional measures of the African Commission should be intended as having a binding force.

This statement is inconsistent with the African Commission's general power to issue non-binding acts only.[13] The non-binding nature of the provisional measures of the Commission is clear also from the relevant follow-up mechanism. Pursuant to Rule 118(2) of its Rules of Procedure, as well as to Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the "African Court Protocol"), the Commission may file an application before the African Court against the State that has not implemented the provisional measures it requested.[14] This follow-up mechanism entails that the Commission cannot take direct action against the non-complying State, because it lacks a general power to issue binding acts, as noted above.

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[10]The African Commission cannot issue provisional measures in cases stemming from inter-state communications since its role in the relevant procedure is to "diplomatically facilitate" rather than settle any possible inter-state dispute.

[11]Rule 98(2–5) further provides as follows: "2. If the Commission is not in session at the time that a request for provisional measures is received, the Chairperson, or in his or her absence, the Vice-Chairperson, shall take the decision on the Commission's behalf and shall so inform members of the Commission. 3. After the request for provisional measures has been transmitted to the State party, the Commission shall send a copy of the letter requesting provisional measures to the victim, the Assembly, the Peace and Security Council, and the African Union Commission. 4. The Commission shall request the State party concerned to report back on the implementation of the provisional measures requested. Such information shall be submitted within fifteen (15) days of the receipt of the request for provisional measures. 5. The granting of such measures and their adoption by the State party concerned shall not constitute a prejudgment on the merits of a communication".

[12]ACoHPR, Communications Nos. 137/94, 139/94, 154/96, 161/97, *International Pen, Constitutional Rights Project, Civil Liberties Organizations and Interights (on behalf of Ken Saro-Wiwa) v. Nigeria*, Report of 31 October 1998, paras 7–9, 30–37, 48, 103–116.

[13]The position of the African Commission is very similar to that of several United Nations Committees, whose provisional measures cannot bind the States concerned, notwithstanding the statements of some Committees trying to suggest the binding nature of their provisional measures. Indeed, these Committees are quasi-judicial bodies that can issue non-binding acts only. For further analysis, see Oellers-Frahm 2012a, pp. 398–399, 403–404.

[14]According to Article 5(1)(a) of the African Court Protocol, the African Commission is an applicant before the African Court as far as the cases already submitted to the African Commission itself are concerned. In addition, Rule 118(2) of the Rules of Procedure of the African Commission states that, when the Commission finds that a State has not complied with the provisional measures previously recommended, it may refer the relevant case to the African Court, after informing the complainant and the concerned State.

As a matter of fact, States have rarely implemented the provisional measures recommended to them by the African Commission. In the *Ken Saro-Wiwa* case, for instance, Nigeria gave them no consideration: the Nigerian authorities ordered the execution by hanging of insurgent poet Ken Saro-Wiwa and his companions regardless of the request to stay the executions as a provisional measure. Two other cases are especially telling in this regard. As later emerged from the proceedings before the African Court, Kenya failed to implement the provisional measures issued by the Commission in the *Mau Forest* case, despite the extreme gravity of the situation and the urgent need to avoid irreparable damage to the Ogiek, indigenous people who were forcibly being evicted from their ancestral lands.[15] Similarly, Libya disregarded the provisional measures recommended by the African Commission in the *Saïf al-Islam Kadhafi* case, despite the fact that the victim risked being sentenced to death by an illegal court and as a result of an unfair trial.[16]

In none of the cases mentioned above did the African Commission later declare the international responsibility of the States concerned for failing to implement the provisional measures recommended, which would have been expected had the provisional measures really been regarded as binding, as the Commission had previously stated in the *Ken Saro-Wiwa* report. Indeed, in that same report the Commission did not even consider the possibility of declaring Nigeria's international responsibility for failing to adopt the provisional measures formerly requested to it, which says it all. With regard to both the *Mau Forest* and *Saïf al-Islam Kadhafi* cases, the African Commission confined itself to submitting an application to the African Court.

12.3 Provisional Measures Issued by the African Court: General Framework

Pursuant to Article 27(2) of the African Court Protocol, in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons or in the interest of justice, the Court will adopt such provisional measures as it deems appropriate. Rule 51 of the Rules of Procedure of the African Court contains further specifications.[17] In particular, it states that the Court may order provisional measures on its

[15] ACoHPR, Communication No. 123/09, *Centre for Minority Rights Development (CEMIRIDE) v. Kenya*, Order of 9 November 2009. As regards the subsequent proceedings before the African Court, see *infra*, Sect. 12.4 of this chapter.

[16] ACoHPR, Communication No. 411/12, *Mishana Hosseinioun v. Libya*, Order of 18 April 2012. A human rights activist, not acting under mandate from the victim, brought this communication before the African Commission. The Commission admits such a procedure and, unlike the European Court of Human Rights, does not require that the victim of the alleged violation and the individual filing the claim be the same person. With regard to the subsequent proceedings concerning the *Saïf al-Islam Kadhafi* case before the African Court, see *infra*, Sect. 12.4 of this chapter.

[17] Neither Article 27(2) of the African Court Protocol nor Rule 51 of the Rules of Procedure of the African Court specify the kind of act to be adopted for the purposes of provisional measures. In any case, as practice shows, the Court usually issues an "order" in these cases.

own initiative or at the request of one of the parties to the case under scrutiny. So far, the Court has issued approximately twenty-seven orders for provisional measures.

When intending to issue provisional measures, the African Court ascertains first and foremost whether there is a situation of extreme gravity and urgency.[18] Then, it assesses its *prima facie* jurisdiction in the case.[19] To this end, the Court carries out a minimal test, usually *inaudita altera parte*.[20] At this stage of the procedure, it neither takes admissibility criteria into consideration,[21] nor does it focus extensively on the plausibility of the rights allegedly violated.[22] Quite clearly, the Court usually follows this very rapid procedure due to the extreme gravity and urgency of the situation in question.

The provisional measures issued by the African Court pursue broader purposes than those recommended by the African Commission, whose aim is simply to prevent irreparable harm to the victim of the alleged violation. Indeed, while Article 27(2) of the African Court Protocol refers to that same aim, Rule 51(1) of the Rules of

[18] International courts and tribunals typically verify the existence of a situation of extreme gravity and urgency before of issuing provisional measures. See in particular: ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, paras 23 *et seq.* For updates concerning the International Court of Justice, see Virzo 2019, pp. 2140 *et seq.* As a matter of principle, the extreme gravity and urgency of a situation depend on the imminence of an impending event, mostly irreparable, to be avoided. So, with regard to the international protection of human rights, the European Court of Human Rights usually admits that a situation of extreme gravity and urgency arises when the life of the alleged victim is (even indirectly) at risk because of: the imminence of his/her expulsion or extradition; the impending execution of a death penalty previously decided by a domestic judge; the lack of basic medical treatment while the victim is in prison. The practice of the Inter-American Court of Human Rights is very similar, given that even this Court issues provisional measures when human life is at stake. In addition, the Inter-American Court often orders provisional measures in cases concerning indigenous peoples. See Wolfrum 2006, paras 32 *et seq.*; Rieter 2010, pp. 971 *et seq.*, *et passim.* For a general assessment of conditions for the issuance of provisional measures, see Chap. 3 by Le Floch in this volume.

[19] The scrutiny of *prima facie* jurisdiction of an international court or tribunal when intending to issue provisional measures represents a sort of "compromise" between the urgency of the judicial action and respect for the sovereignty of States (since the consent of the State is the ultimate basis of international dispute settlement). Of course, the *prima facie* assessment does not prevent any international court or tribunal from carrying out a subsequent in-depth assessment of its jurisdiction on the merits of the case. On this point, see Oellers-Frahm 2012a, pp. 393 *et seq.* With regard to the International Court of Justice, also see Rosenne 2005, pp. 85 *et seq.*

[20] As regards this point, the practice of the African Court is in principle in line with that of the European Court but partially inconsistent with that of the Inter-American Court. Indeed, when intending to issue provisional measures, the latter usually gives to both parties the faculty to quickly produce their written statements. The International Court of Justice seemingly applies this same procedure, although there are some important exceptions, especially arising when human life is at stake, as in the *LaGrand* case (about this case, see *infra*, notes 53 and 71). In general, also see Pasqualucci 2005, pp. 39–40.

[21] With regard to the criteria concerning the admissibility of cases, Article 6(2) of the African Court Protocol refers to Article 56 of the African Charter relating to the admissibility of individual communications before the African Commission. The criteria enshrined in Article 56 of the African Charter are thus duplicated in Rule 40 of the Rules of Procedure of the Court.

[22] Problems relating to the scrutiny of plausibility of the rights at stake when an international court or tribunal intends to issue provisional measures are currently of great interest. See Chap. 5 by Sparks

Procedure makes it clear that, pending a judgment on the merits, the Court can issue provisional measures in order to protect the legal positions of all the parties involved in the dispute (be they persons or States). Furthermore, Article 27(2) of the Protocol confers on the Court the additional power to order provisional measures in the interest of justice, that is to say, in order to ensure the smooth operation of judicial procedures and to safeguard the effectiveness of its own function.[23] This contributes to explain why the Court can also issue provisional measures on its own initiative.[24]

12.4 The *Saïf al-Islam Kadhafi* Case and the Three Main Critical Issues Raised by the Provisional Measures of the African Court

The *Saïf al-Islam Kadhafi* case, which concerns human rights violations allegedly inflicted upon Muammar Kadhafi's son while he was held in detention by an insurgent group after the 2011 "Arab Spring", is a useful example to illustrate the main critical issues raised by the provisional measures of the African Court, that is to say, their legal nature (binding or recommendatory), their domestic implementation, and the international responsibility of States that fail to comply with such measures.

As briefly mentioned above, an individual initially submitted a communication to the African Commission concerning human rights violations allegedly suffered by Saïf al-Islam Kadhafi, who also risked a death sentence as the main consequence of an unfair trial. The Commission recommended that Libya implement a number

and Somos in this volume. Among the many other relevant essays, see Marotti 2014, pp. 761–786; Lando 2018, pp. 641–668. In a broader frame, see also the interesting pages by Papa 2006, pp. 24–25, and Virzo 2019, pp. 2138–2139.

[23] On the aims of provisional measures in international law, see for instance: ICJ, *Fisheries Jurisdiction (Germany v. Iceland; United Kingdom v. Iceland)*, Orders of 17 August 1972, respectively at para 22 and para 23. For updates concerning the International Court of Justice, see Virzo 2019, pp. 2137 *et seq*. With specific reference to provisional measures concerning the protection of human rights, see recently: IACtHR, *Comunidad de Paz de San José de Apartadó c. Colombia*, Resolution of 5 February 2018, para 3, pp. 2–3 ("resolution" is the name of the acts containing provisional measures in the practice of the Inter-American Court). See also the very broad analysis by Rieter 2010, pp. 589 *et seq*., *et passim.*

[24] The Inter-American Court of Human Rights, the European Court of Human Rights and the International Court of Justice can issue provisional measures both at their own initiative and following a request of one of the parties to the case under scrutiny. Only the European Court can issue provisional measures also at a request "of any other person concerned" (see Rule 39 of its Rules of Procedure). Furthermore, all the just mentioned international courts as well as the African Court have a faculty—and for sure not an obligation—to issue provisional measures. For details on the latter point, see also Saccucci 2006, pp. 124 *et seq*. For a specific reference to the African Court, see Rieter 2010, p. 168.

of provisional measures.[25] As a result of non-compliance with those measures, the Commission brought an application before the African Court against Libya.[26]

The African Court later issued two orders for provisional measures.

In the first one, it requested that Libya refrain from causing irreparable harm to the victim (i.e., from executing him); that the victim be allowed to meet his family and lawyers; that a new, fair trial be arranged; and that a report concerning the implementation of the aforesaid measures be prepared and delivered within fifteen days.[27] Despite an extension of the submission deadline,[28] Libya did not present any report to the Court. When it became clear that Libya would never comply with the provisional measures, the Court submitted an interim report to the Executive Council of the African Union, in accordance with Rule 51(4) of its Rules of Procedure, which provides that the Court will present an annual report to the African Union on the provisional measures it ordered during the period under review and, in the event of non-compliance with these measures by the States concerned, will make all such recommendations as it deems appropriate.[29] Interestingly, the Court clearly stated in its interim report that "an order of provisional measures issued by the Court is as binding as any judgment of the Court" and, therefore, "by not informing the Court of the measures taken to implement the order, in spite of an extension of time to do so, Libya has failed to comply with a judgment of the Court".[30] After receiving the interim report, the Executive Council met several times, but it did nothing more than acknowledge receipt of the interim report.[31]

When the Assize (Criminal) Court of Tripoli sentenced Saïf al-Islam Kadhafi to death,[32] the President of the African Court issued a second order. He acted on its

[25] See *supra*, Sect. 12.2 of this chapter, mainly note 16 and the corresponding text.

[26] Thus, the African Commission acted pursuant to Rule 118(2) of its Rules of Procedure, and to Article 5(1)(a) of the African Court Protocol, as already described *supra*, Sect. 12.2 of this chapter, in particular note 14.

[27] ACtHPR, Application No. 002/13, *African Commission on Human and Peoples' Rights v. Libya*, Order of 15 March 2013.

[28] ACtHPR, Application No. 002/13, *African Commission on Human and Peoples' Rights v. Libya*, Order of 12 April 2013, para 5.

[29] Whereas Rule 51(4) of the Rules of Procedure states that in similar situations the African Court must address the Assembly of Heads of State and Government of the African Union, the Court sent its interim report to the Executive Council of the African Union. Indeed, according to practice, the Assembly adopts its decisions relying on recommendations by the Executive Council. The latter is made up of Ministers of Foreign Affairs or High Representatives for Foreign Policy of African Union Member States.

[30] ACtHPR, *Interim Report of the African Court on Human and Peoples' Rights Notifying the Executive Council of Non-Compliance by a State*, 4 June 2013, mainly at paras 8–10.

[31] See for instance Executive Council of the African Union, Decision No. 806, *Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights*, 28 January 2014, para 1, and Decision No. 842, *Decision on the Mid-Term Activity Report of the African Court on Human and Peoples' Rights*, 24 June 2014, paras 3–4.

[32] The Assize (Criminal) Court of Tripoli sentenced Saïf al-Islam Kadhafi to death on 28 July 2015, *in absentia.* Meanwhile, the defendant had been transferred to a jail in Zintan, a town in an area under the control of another insurgent group.

own initiative, while the Court was not being in session, because of the urgency of the situation, pursuant to Rule 51(2) of the Rules of Procedure. The President requested once again that the Libyan authorities stay the execution of the death sentence; arrange a new, fair trial; and draw up and send a report detailing the proper implementation of these provisional measures. What is more, he also confirmed that the Court's orders for provisional measures have the same binding force as its judgments. Hence, he added that a State that failed to comply with such an order could be considered internationally responsible for a violation of Article 27(2) of the African Court Protocol, which would be a separate breach, independent from any human rights violations initially alleged.[33]

The theory of the autonomous responsibility of States that fail to implement provisional measures had already been advanced by the African Commission in its *Ken Saro-Wiwa* report.[34] This same theory was also supported by two dissenting opinions attached to the order rendered (just one year before the second order of the African Court) by the International Court of Justice in the case concerning *Questions Relating to the Seizure and Detention of Certain Documents and Data*.[35] It seems plausible that the President of the African Court took inspiration from those precedents.

The Libyan Government disregarded both orders. Surprisingly, in spite of the relevant statements included in those orders, the African Court did not hold Libya internationally responsible. In particular, in its judgment on the merits, the Court

[33] ACtHPR, Application No. 002/13, *African Commission on Human and Peoples' Rights v. Libya*, Order of 10 August 2015.

[34] See *infra*, Sect. 12.2 of this chapter.

[35] Dissenting Opinions appended by Judge Cançado Trindade (para 71) and Judge Greenwood (para 6) to the Order passed by the ICJ on 3 March 2014 in the case concerning *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v. Australia*). About the possibility of ascertaining an autonomous responsibility of States not implementing provisional measures, see Marotti 2014, pp. 776 *et seq*., elaborating on this point in light of the two mentioned dissenting opinions. Similarly, see Miles 2017, pp. 319 *et seq*. Some years before these two dissenting opinions, see the insightful remarks by Mendelson 2004, pp. 35 *et seq*. In any case, as underlined by Oellers-Frahm 2012a, p. 407, "[t]here can be no doubt that non-compliance with the orders contained in provisional measures may result in a violation of international law leading to the application of the rules on State responsibility". Instead, at least with regard to the European Human Rights System, where there are no proper treaty provisions conferring a precautionary competence upon the European Court (see: *supra*, notes 7 and 9; *infra*, note 52), Saccucci 2006, pp. 599 *et seq*.; Saccucci 2009, pp. 148–150, argues that a State non-complying with provisional measures risks being considered as "gravely" responsible (thus an "autonomous" responsibility would not arise) in the subsequent judgment on the merits because of a functional link between provisional measures and treaty obligations of a substantial nature requesting a stronger and preventive protection, even by means of provisional measures. Such argumentation seems to have its roots in the case-law developed by the European Court of Human Rights before the case *Mamatkulov and Askarov v. Turkey* (about which, see *infra*, note 52). By contrast, the documents on provisional measures of the Institute of International Law do not refer at all to the responsibility potentially arising from the lack of compliance by a State with provisional measures issued by international courts and tribunals: for some remarks on this point, see Ruozzi 2018, pp. 1200–1202.

ascertained the responsibility of the State concerned only with reference to the violations of the human rights to liberty and security and to a fair trial as enshrined in the African Charter.[36]

As already noted, this case is a paradigmatic example which can be used to illustrate the three main critical issues raised by the provisional measures of the African Court.

12.4.1 First Issue: Binding or Recommendatory Nature

While it is true that Article 27(2) of the African Court Protocol does not define the legal nature (binding or recommendatory) of provisional measures,[37] it seems reasonable to agree with the President of the African Court when, in the context of the *Saïf al-Islam Kadhafi* case, he argued that the provisional measures of the African Court are legally binding. After all, unlike the African Commission, the African Court is a judicial organ empowered to adopt binding acts.[38] In addition, as far as it has been possible to ascertain, African States have never protested or complained about the binding force of provisional measures indicated by the African Court. To be more precise, the binding character of such measures can be demonstrated in light of at least three evidences.[39]

[36] ACtHPR, Application No. 002/13, *African Commission on Human and Peoples' Rights v. Libya*, Judgment of 3 June 2016. Eventually the death penalty was not applied and Saïf al-Islam Kadhafi was released from prison in June 2017. Among the many journalistic sources, see: Libia, il figlio di Gheddafi è stato liberato. La Stampa, 11 June 2017; Saïf al-Islam Kadhafi Freed from Prison in Zintan. Al Jazeera, 11 June 2017; Un groupe armé libyen a annoncé avoir libéré le fils de Kadhafi. Libération, 11 June 2017. The release of Saïf al-Islam Kadhafi happened in light of an agreement reached by some insurgent groups acting in the North of Libya. It is very likely that the provisional measures of the African Court did not play a role in the context of such agreement.

[37] The African Court Protocol does not state in any other provision whether or not provisional measures issued by the Court have a binding or recommendatory nature.

[38] On the other hand, the African Commission is a quasi-judicial body and is able to deliver non-binding acts only: see Sect. 12.2 of this chapter.

[39] When the African Court Protocol had not yet entered into force, Quillère-Majzoub 2000, p. 774, wrote about the potential effects of provisional measures issued by the African Court and relied on the lack of reference to the binding nature of such measures in the Protocol to suggest that "il s'agit en quelque sorte d'une pression morale supplémentaire qui s'exerce à l'encontre de l'État visé". About the binding or recommendatory effects of provisional measures issued by the African Court in light of the recent practice, see also Pascale 2019, pp. 1959–1984. In any case, the question concerning the effects of provisional measures issued by international courts and tribunals has always been controversial: see Oellers-Frahm 2012b, p. 1062.

12.4.1.1 Article 30 of the African Court Protocol

First of all, Article 30 of the African Court Protocol provides that each State involved in a case where the Court has issued provisional measures must guarantee the execution of such measures within the time stipulated. At first sight, it might seem that Article 30 refers only to judgments, given that the word "judgment" is employed in its English version.[40] Nevertheless, the French version uses the word "décisions",[41] in the plural, which clearly encompasses provisional measures.[42] As is well known, in cases of interpretative inconsistencies between different linguistic versions of the same provision, the authoritative one is to be taken into account.[43] The English and French versions of the African Court Protocol, however, are equally authoritative.[44]

To solve this legal-linguistic dilemma, one can take into consideration the provisions of the American Convention on Human Rights concerning the precautionary power of the Inter-American Court,[45] since the African human rights instruments draw general inspiration from their American equivalents.[46] In particular, Article 30 of the African Court Protocol corresponds *mutatis mutandis* to Article 68(1) of the

[40]The English version of Article 30 of the Protocol states that "[t]he States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".

[41]The French version of Article 30 of the Protocol states that "[l]es États parties au présent Protocole s'engagent à se conformer aux décisions rendues par la Cour dans tout litige où ils sont en cause et à en assurer l'exécution dans le délai fixé par la Cour".

[42]Even Article 94(1) of the Charter of the United Nations uses the word "decision" ("[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party"). Some scholars argue that this term refers not only to judgments, but also to other acts passed by the International Court of Justice, such as orders for provisional measures: see for instance Oellers-Frahm 2012b, pp. 1063–1064, and further bibliographical references here quoted.

[43]See Article 33(1) of the 1969 Vienna Convention on the Law of Treaties.

[44]Article 25 of the Constitutive Act of the African Union states that the official languages of the African Union are all African languages (without any further specification) as well as Arabic, French, English and Portuguese, without pointing out one authoritative language in particular. Said Article applies to any instrument stipulated under the aegis of the African Union, if not otherwise provided, thus including the African Court Protocol. However, as a matter of fact, only the French and English versions of this Protocol are available on the official website of the African Union.

[45]In case of conflict between treaty provisions available in different official languages, pursuant to Article 33(4) of the 1969 Vienna Convention on the Law of Treaties, the general rule of interpretation as codified in Article 31 applies first and foremost. If the conflict persists, an attempt must be made to apply the supplementary means of interpretation listed in Article 32, as for instance the *travaux préparatoires*. Since in this specific case the general rule of interpretation would not be helpful to find a solution, and given that the American Convention on Human Rights was the main basis for the *travaux préparatoires* concerning the African Court Protocol, Article 68 of the former has been taken into consideration in order to correctly interpret Article 30 of the latter. As a result, it is not necessary to apply the *extrema ratio* suggested by Article 33(4) of the Vienna Convention, that is to say, to search for a meaning that bridges the gap between the different official linguistic versions of the same provision.

[46]For further details on the inspirational role of the American Convention on Human Rights for the instruments at the basis of the African Human Rights System, see Viljoen 1999, pp. 659–670.

American Convention, which stipulates that "[l]os Estados partes en la Convención se comprometen a cumplir la decisión de la Corte en todo caso en que sean partes", thus using the term "decisión", which includes provisional measures.[47]

Therefore, there is a great chance that the French version of Article 30 of the African Court Protocol is more in line than the English one with the original intentions of the States parties.[48] Moreover, as noted above, the African Court itself had reached this conclusion in the *Saïf al-Islam Kadhafi* case, when it considered provisional measures to be on the same legal level as judgments.[49]

12.4.1.2 The Main Case-Law of Other International Courts and Tribunals

As far as the binding force of provisional measures is concerned, the case-law of the African Court is consistent with that of many other international courts and tribunals.[50] By way of illustration only, it is worth recalling that the Inter-American Court of Human Rights confirmed the binding character of its provisional measures a long time ago.[51] The European Court of Human Rights welcomed this same approach afterwards, through a teleological interpretation of the relevant treaty provisions.[52] Beyond the specific field of international human rights law, even the International

[47] For details about the interpretative problems concerning Article 68(1) of the American Convention on Human Rights, see Buergenthal 1994, pp. 84–88.

[48] Similarly, see Bostedt 2015, p. 335, and p. 376.

[49] See *supra*, Sect. 12.4 of this chapter. In particular, see again ACtHPR, *Interim Report*, *supra* note 30, para 8.

[50] An overview of the international case-law concerning the effects of provisional measures is offered by Udombana 2003, pp. 479–532, and Kolb 2005, pp. 117–129.

[51] In order to explain the binding nature of its resolutions on provisional measures, the Inter-American Court of Human Rights has relied on the principle of *bona fide*; the teleological interpretation of Article 1 (obligation of States to ensure the enjoyment of the proclaimed rights) read in conjunction with Article 68(1) (obligation of States to comply with any decision adopted by the Inter-American Court) of the American Convention on Human Rights; and the necessity to safeguard its proper judicial functioning. Among the most telling resolutions, see: IACtHR, *Corte costitucionale c. Perú*, Resolution of 14 August 2000. In literature, see Pasqualucci 2003, pp. 316 *et seq.*; Tigroudja and Panoussis 2003, pp. 125–126; Burbano-Herrera 2010, pp. 213 *et seq.*

[52] The European Court of Human Rights emphasised for the first time that its provisional measures produce binding effects in the Judgment of 4 February 2005 in the case *Mamatkulov and Askarov v. Turkey* [GC], Applications Nos. 46827/99 and 46951/99. Here, it mainly relied on the obligations of States to cooperate in good faith with the Court, to avoid hindering the correct functioning of the Court and not to create obstacles to the individual right to bring an application before the Court pursuant to Article 34 of the European Convention on Human Rights (see mainly paras 128–129 of the Judgment). In addition, dealing with a comparative examination of the international case-law in the field of precautionary action, the European Court found a broad consensus concerning the binding nature of provisional measures issued by international courts and tribunals. About the *Mamatkulov* case, see Cohen-Jonathan 2005, pp. 421–434. For developments, mainly see Saccucci 2009, pp. 145–150; Harby 2010, pp. 73–84.

Court of Justice reached very similar conclusions in the context of the seminal *LaGrand* case. [53]

12.4.1.3 Current Legal Literature

Scholars no longer deny the binding effects of provisional measures issued by international courts and tribunals, as many did until more or less twenty years ago in different ways and with different emphases.[54] Today, even though arguments change and are sometimes not entirely persuasive (e.g., relying on a general principle of law stemming from domestic orders; the crystallisation of an international customary norm; an obligation not to interfere with the right to submit applications; the purpose of ensuring the effectiveness of judgments on the merits; the principle of *Kompetenz-Kompetenz*; and so on), authors almost unanimously conclude that provisional measures have a binding force.[55] This conclusion is even more precise in the case of scholars dealing with international judicial bodies operating in the field of human rights.[56] In addition, the binding nature of provisional measures has also been asserted by the Institute of International Law.[57]

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[53] In its Judgment of 27 June 2001 in *LaGrand (Germany v. United States of America)*, paras 99–109, the International Court of Justice declared that its provisional measures are binding on the State concerned, thus providing a solution to the problems stemming from the difference between the French and the English versions of Article 41(1) of its Statute (in the French version it states that provisional measures "doivent être prises", while in the English version it uses the expression "ought to be taken") in light of the main aim of its precautionary power (namely to safeguard the legal positions of both parties while the case is still pending) and of the object and purpose of its Statute. Many comments have been published on the *LaGrand* case: see for instance Forlati 2001, pp. 711–722; Frowein 2002, pp. 55–60; Kammerhofer 2003, pp. 67–83. Also see Papa 2006, pp. 25 *et seq*., who in principle agrees with the idea of the binding effects of provisional measures issued by the International Court of Justice (pp. 30–31) but highlights that in para 110 of the *LaGrand* judgment the Court did not clearly state that all provisional measures must be considered binding under any circumstance: the Court is said to have alluded to the fact that in some cases provisional measures may have a recommendatory nature (p. 28). For a mention of this perspective, see Forlati 2001, p. 717; Mendelson 2004, p. 38.

[54] At least since the beginning of the 1980s, and sometimes even in the 1990s, the majority of scholars believed (though on different bases) that provisional measures issued by international courts and tribunals (mainly by the International Court of Justice) were not binding. See *inter alios*, Goldsworthy 1974, pp. 273–274; Villani 1974, pp. 670–681; Tesauro 1975, p. 894; Thirlway 1994, pp. 28–33. For a more detailed overview of this opinions, see Kolb 2005, pp. 127–128.

[55] See, *ex multis*, Pescatore 1987, pp. 349–351; Daniele 1993, pp. 149–153; Henkin 1998, pp. 679–683; Gaeta 2000, pp. 135 *et seq.* (even if under certain conditions); Kammerhofer 2003, p. 83; Udombana 2003, pp. 516–520; Mendelson 2004, pp. 35–38; Kolb 2005, p. 129; Rosenne 2005, pp. 34 *et seq*.; Papa 2006, pp. 25–31; Oellers-Frahm 2012a, pp. 396–401; Oellers-Frahm 2012b, pp. 1062–1069; Miles 2017, pp. 295–298.

[56] See MacDonald 1992, pp. 729–731; Pasqualucci 2005, pp. 20–23; Saccucci 2006, pp. 508 *et seq*.; Rieter 2010, pp. 933–935; Rieter 2012, pp. 186–190.

[57] See the Final Report, *supra* note 2, pp. 284 *et seq*., paras 67 *et seq*.

12.4.2 Second Issue: Domestic Implementation

Libya did not respect the two orders for provisional measures issued by the African Court in the *Saïf al-Islam Kadhafi* case. Not only is that not surprising, but it is also in line with a general trend. Indeed, while African States (according to available information) have never openly or formally protested against the binding force of the provisional measures of the African Court, they have very rarely complied with them.[58] At the end of the day, this enduring disrespect deprives the precautionary power conferred upon the Court of any "usefulness". In other words, even if the binding nature of provisional measures is not brought into question, said measures cannot "in practice" protect the legal positions of the parties concerned. This is demonstrated not only by the *Saïf al-Islam Kadhafi* case, but also by further relevant practice.

Be that as it may, a caveat applies, for it is not easy to find information about the domestic implementation of the provisional measures issued by the African Court. The States concerned seldom submit reports on their compliance with such measures, remaining indifferent to the Court's requests and the deadlines it sets.[59] Thus, information on State compliance is sometimes found in the judgments on the merits delivered by the Court in cases where it has previously adopted provisional measures. Occasionally, even mass media can be useful sources.

In the *Great Socialist People's Libyan Arab Jamahiriya* case, concerning the 2011 revolution in Libya, the African Court issued provisional measures on its own initiative. In particular, it ordered Libya to immediately refrain from any action that

[58]The lack of compliance with provisional measures is probably not a feature of the African Human Rights System only, concerning as it does other human rights systems as well. On this point, see Pasqualucci 2005, pp. 45–48; Rieter 2010, pp. 943 *et seq.*; Rieter 2012, pp. 165 *et seq.* The Final Report of the Rapporteur on provisional measures of the Institute of International Law deals with this problem but just focuses on provisional measures issued in the Inter-American Human Rights System, in addition to those delivered by the International Court of Justice and affecting the United States (p. 291 *et seq.*, paras 88 *et seq.*). Furthermore, as better observed in the next section of this chapter, the Final Report states nothing about the potential responsibility of the State not implementing provisional measures: on this point, see Ruozzi 2018, pp. 1200–1202.

[59]States very rarely produce the reports on the implementation of provisional measures that the African Court usually requests pursuant to Rule 51(5) of its Rules of Procedure, which generally stipulates that the Court can search for information about the implementation of provisional measures previously ordered. Initially the African Court requested that States submit their reports in fifteen days, even if this deadline was often extended *motu proprio* by the Court. Later on, the Court accepted that States produce their reports in thirty or forty-five days. Recently, in the context of the *Dexter Eddie Johnson* case, the Court ordered Ghana not to execute the death sentence to the detriment of the applicant as a provisional measure and established a sixty-day period for that State to submit a report on the implementation of such measure: see ACtHPR, Application No. 016/17, *Dexter Eddie Johnson v. Ghana*, Order of 28 September 2017, para 21. Some judges did not agree with this deadline which, in the light of the imminent risk posed to the applicant, was considered too long: see Separate Joint Opinion of Judges Bensaoula Chafika and Marie-Thérèse Mukamulisa, and Partially Dissenting Opinion of Judges Gérard Niyungeko and Rafâa Ben Achour. In any case, a deadline of sixty days was later granted in a new, very similar case: see ACtHPR, Application No. 001/2018, *Tembo Hussein v. Tanzania*, Order of 11 February 2019, para 20.

would result in loss of life or violation of the physical integrity of persons, as well as in breaches of the African Charter. The Court also added that Libya must quickly send a report on the implementation of those measures.[60] Libya neither complied with the provisional measures ordered nor provided any report. For its part, the Court never requested information or urged Libya to implement said measures, despite the fact that it could have done so pursuant to Rule 51(5) of its Rules of Procedure.[61] Eventually, because of the evolution of the Libyan domestic situation, the Court ordered that the application be struck out.[62]

In the *Mau Forest* case, the African Commission recommended some provisional measures that Kenya disregarded. Hence, the Commission lodged an application before the African Court, which again issued provisional measures. The Court requested that Kenyan authorities suspend the application of the domestic laws forcing the Ogiek indigenous people to leave their ancestral territories, and refrain from irreparably compromising the situation. Kenya was also ordered to promptly submit a report concerning the implementation of these measures.[63] From the judgment on the merits, later rendered by the Court, it emerges that Kenya did not implement the provisional measures and proceeded with the eviction of the Ogiek from their lands.

The African Court also issued provisional measures in the *Lohé Issa Konaté* case, concerning a journalist sentenced to life imprisonment for a defamation crime in Burkina Faso.[64] Since the beginning of his detention, the applicant had been deprived of essential medical treatment. Therefore, he had filed an application before the Court, requesting to be released for health reasons while awaiting the judgment on the merits. Even though the Court refused to accept the applicant's request of release, it ordered Burkina Faso to supply him with all the medical treatment he

[60] ACtHPR, Application No. 004/11, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order of 25 March 2011. As already highlighted in Sect. 12.2 of this chapter, this case was initially at the centre of an individual communication brought before the African Commission, to which the applicant also requested that provisional measures should be issued. The Commission did not implement such request, underlining in a following resolution that "the chances of such request eliciting a response from the Government are very slim taking into consideration the situation in Libya" (see resolution No. 181, Human Rights Situation in Libyan Arab Jamahiriya, of 3 March 2011). Later, when human rights violations perpetrated in Libya dramatically peaked, the Commission lodged an application before the African Court, which issued provisional measures. For comments, see Murray 2011, pp. 464–473; Oder 2011, pp. 495–510; Vezzani 2011, pp. 1–10; Juma 2012, pp. 344–373; Polymenopoulou 2012, pp. 767–775.

[61] See Dolidze 2011. In other words, the approach adopted by the African Court was less strict than that following the lack of implementation of provisional measures issued in the *Saïf al-Islam Kadhafi* case.

[62] See ACtHPR, Application No. 004/11, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order of 15 March 2013.

[63] ACtHPR, Application No. 006/12, *African Commission on Human and Peoples' Rights v. Kenya*, Order of 15 March 2013. The African Commission filed an application before the African Court because Kenya was alleged not to have complied with the provisional measures that the former had recommended, as already explained in Sect. 12.2 of this chapter.

[64] ACtHPR, Application No. 004/13, *Lohé Issa Konaté v. Burkina Faso*, Order of 4 October 2013.

needed. From the judgment that the Court later delivered, it is clear that Burkina Faso never implemented the provisional measures.[65]

In 2017, in the context of the *Léon Mugesera* case, the African Court ordered Rwanda that a prisoner be allowed to meet his lawyers and family as a provisional measure. With a letter sent to the Register of the Court during the initial procedural stage, even before the Court issued the abovementioned order, Rwanda declared its intention not to comply with any measure requested by the Court.[66]

At the time of writing, no news is available about the implementation of other provisional measures.[67]

It has been emphasized that, when a State fails to implement provisional measures, the African Court may submit a report to the African Union acting pursuant to Rule 51(4) of its Rules of Procedures. It has also been noted that the African Court did so for the first and only time in the context of the *Saïf al-Islam Kadhafi* case. In that case the African Union merely acknowledged receipt of the request from the African Court, without taking any concrete action.[68] As a result, in subsequent similar circumstances, the African Court no longer followed the procedure enshrined in Rule 51(4).

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[65] ACtHPR, Application No. 004/13, *Lohé Issa Konaté v. Burkina Faso*, Judgment of 5 December 2014.

[66] ACtHPR, Application No. 012/17, *Léon Mugesera v. Rwanda*, Order of 28 September 2017.

[67] In 2016, mostly at its own initiative, the African Court issued seventeen orders for provisional measures to stop Tanzania from executing the death sentences imposed on the applicants of seventeen different cases where the right to a fair trial—as enshrined in Article 7 of the African Charter and Article 14 of the International Covenant on Civil and Political Rights—was at stake. See ACtHPR, Application No. 001/15, *Armand Guehi v. Tanzania*, Order of 18 March 2016; Application No. 007/15, *Ally Rajabu and Others v. Tanzania*, Order of 18 March 2016; Application No. 003/16, *John Lazaro v. Tanzania*, Order of 18 March 2016; Application No. 004/16, *Evodius Rutechura and Theobard Nestory v. Tanzania*, Order of 18 March 2016; Application No. 015/16, *Habiyalimana Augustino and Mburo Abdulkarim v. Tanzania*, Order of 3 June 2016; Application No. 017/16, *Deogratius Nicolaus Jeshi v. Tanzania*, Order of 3 June 2016; Application No. 018/16, *Cosma Faustine v. Tanzania*, Order of 3 June 2016; Application No. 021/16, *Joseph Mukwano v. Tanzania*, Order of 3 June 2016; Application No. 024/16, *Amini Juma v. Tanzania*, Order of 3 June 2016; Application No. 048/16, *Dominick Damian v. Tanzania*, Order of 18 November 2016; Application No. 049/16, *Chrizant John v. Tanzania*, Order of 18 November 2016; Application No. 050/16, *Crospery Gabriel and Ernest Mutakyawa v. Tanzania*, Order of 18 November 2016; Application No. 051/16, *Nzigiyimana Zabron v. Tanzania*, Order of 18 November 2016; Application No. 052/16, *Marthine C. Msuguri v. Tanzania*, Order of 18 November 2016; Application No. 053/16, *Oscar Josiah v. Tanzania*, Order of 18 November 2016; Application No. 056/16, *Gozbert Henerico v. Tanzania*, Order of 18 November 2016; Application No. 057/16, *Mulokozi Anatori v. Tanzania*, Order of 18 November 2016. In 2019, the African Court issued another order for provisional measures in an identical context, but this time at the request of the applicant: see ACtHPR, *Tembo Hussein v. Tanzania*, *supra* note 59. A very similar situation occurred again with regard to a case involving Ghana: see ACtHPR, *Dexter Eddie Johnson v. Ghana*, *supra* note 59. In another case, the Court ordered Ghana not to seize the properties of the applicant as instead requested by a domestic judgment: see ACtHPR, Application No. 001/17, *Alfred Woyome v. Ghana*, Order of 24 September 2017. Lastly, in a case concerning Benin, the Court indicated, as a provisional measure, that the execution of a domestic judgment issued by a special criminal court be stayed: see ACtHPR, Application No. 013/2017, *Sébastien Germain Ajavon v. Benin*, Order of 7 December 2018.

[68] See *supra*, Sect. 12.4 of this chapter.

12.4.3 Third Issue: International Responsibility of Non-complying States

In accordance with its stated approach,[69] in the judgment on the merits concerning the *Saïf al-Islam Kadhafi* case, the African Court should have ascertained Libya's responsibility for non-compliance with the provisional measures previously issued, regardless of whether or not that State was responsible for the alleged human rights violations. In point of fact, in its judgment, the Court has almost never dealt with such responsibility.[70] The Court's inconsistency in its precautionary action is thus immediately evident.[71]

This inconsistency also emerges from other cases following the *Saïf al-Islam Kadhafi* case. As already noted, for instance, the judgment on the merits rendered by the Court in the *Lohé Issa Konaté* case reveals that Burkina Faso did not comply with the provisional measures previously ordered. In any case, the Court paid no attention to the non-compliance and made no reference to the potential, separate responsibility of Burkina Faso resulting therefrom.[72]

The *Mau Forest* case is also very telling. As is clear from the judgement on the merits, this is the only case where the State concerned reported to the African Court about the implementation of provisional measures.[73] In its report, Kenya apparently declared having suspended the application of the domestic laws on the forced eviction of the Ogiek from their ancestral lands. By contrast, the African Commission (acting as the applicant before the Court) and the representatives of the Ogiek submitted evidence that Kenya was still violating the human rights of this indigenous people.[74]

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[69] As explained above, Sect. 12.4 of this chapter, in the context of the *Saïf al-Islam Kadhafi* case, the African Court stated that provisional measures must have the same legal effects as judgments and that the lack of implementation of provisional measures entails a responsibility that is autonomous from that stemming from the human rights violations allegedly committed by that State.

[70] See again Sect. 12.4 of this chapter, in particular the final part.

[71] The inconsistency of the African Court is even more evident if one makes a comparison with the relevant case-law of the International Court of Justice. In the *LaGrand* judgment, the International Court of Justice highlighted the binding nature of provisional measures precisely in order to ascertain the responsibility of the United States for failing to implement those measures: see ICJ, *LaGrand*, *supra* note 53, paras 99–109 (as regards the declaration of the binding effects of provisional measures) and para 128, point 5 (as for the declaration of the responsibility of the United States for the lack of compliance with provisional measures). About the *LaGrand* case, also see *supra* note 53.

[72] ACtHPR, Application No. 004/13, *Lohé Issa Konaté v. Burkina Faso*, Judgment of 5 December 2014.

[73] ACtHPR, Application No. 006/12, *African Commission on Human and Peoples' Rights v. Kenya*, Judgment of 26 May 2017, para 17, where one reads that the Court received the report concerning the domestic implementation of provisional measures by Kenya on 30 April 2013. This report is not available on the official website of the African Court. At any rate, it is quoted and commented upon in the judgment delivered by the Court. For a brief overview of this judgment, see Pascale 2018a, pp. 366–367.

[74] ACtHPR, *African Commission on Human and Peoples' Rights v. Kenya*, *supra* note 73, para 21, paras 28 *et seq*., *et passim*.

What is more, it is not difficult to come across documents demonstrating that the Ogiek are still today suffering many human rights violations and are often "encouraged" by the Kenyan Government to leave the Mau Forest.[75] It may thus be supposed that the Court was aware of both the *mala fide* of the Kenyan report and the non-implementation of provisional measures. Nonetheless, it did not attribute any further and autonomous responsibility to Kenya.

The *Léon Mugesera* case deserves attention as well. As recalled above, predicting the adoption of provisional measures, Rwanda sent a note to the Registrar of the African Court to express its intention not to implement any measure potentially ordered by that Court.[76] Later on, the Court actually issued an order for provisional measures. Rwanda's previous note could have led the Court to emphasise in its subsequent order—even just as a deterrent—the international responsibility attributable to Rwanda because of its preliminary decision not to implement any provisional measure. Instead, the Court simply ordered that Rwandan authorities provide the victim with essential medical treatments and periodic meetings with relatives and lawyers.[77]

[75] With regard to the persistent human rights violations suffered by the Ogiek notwithstanding the judgments and orders issued by the African Court, see the reportage entitled "Battle for the Mau: Despite Court Ruling, Ogiek Face New Eviction Threats", published online by "The East African" in June 2018. Furthermore, see Magut 2016; Siegel 2018.

[76] ACtHPR, *Léon Mugesera v. Rwanda*, *supra* note 66, paras 13–15, which includes information about the note submitted by Rwanda.

[77] Rwanda clearly acted for political reasons. On 29 February 2016 the Rwandan Government had notified the President of the Commission of the African Union of its intention to withdraw from its declaration of acceptance of the Court's jurisdiction concerning applications submitted by individuals and non-governmental organisations. Rwanda aimed at escaping the Court's jurisdiction in the *Ingabire Victoire Umuhoza* case, concerning the human rights violations allegedly inflicted on the main opposing leader to the Rwandan President (see African Court, Application No. 003/2014, *Ingabire Victoire Umuhoza v. Rwanda*; the Judgment on the merits was then issued on 24 November 2017). With a decision rendered on 3 June 2016, the African Court admitted the legal validity of the Rwandan notification of withdrawal, whereas it denied any retroactive effect to said notification and confirmed its jurisdiction with regard to all pending cases against Rwanda, including the *Léon Mugesera* case, stemming from an application lodged before the Court the day before the submission of the Rwandan notification of withdrawal (see ACtHPR, *Léon Mugesera v. Rwanda*, *supra* note 66, para 20). It seems that the Court correctly implemented the general principle of law of *perpetuatio iurisdictionis*, stating that a procedure starting before a court or tribunal pursuant to the law in force at the time of the application shall continue until its conclusion (on the *perpetuatio iurisdictionis* in international law, in the context of a broader analysis, see Marongiu Buonaiuti 2012, p. 338). The decision of the African Court led Rwanda to stop cooperating with the Court with regard to all pending cases. On the relationship between the African Court and Rwanda in the light of the *Ingabire Victoire Umuhoza* case, see Pascale 2018b, pp. 610–612.

12.5 Inconsistency of the African Court in the Use of Its Precautionary Power

It seems that the African Court, on the one hand, tries to align itself with the prevalent tendency of other international courts and tribunals that attribute binding effects to their provisional measures but, on the other hand, prefers not to draw any conclusion with regard to the international responsibility of non-complying States.[78] Such an "attitude" of the Court could indirectly encourage African States not to implement provisional measures.[79] To be more precise, since the African Court generally abstains from assessing the international responsibility of States that have not implemented provisional measures, it somehow supports the situation of enduring disrespect for such measures and the resulting loss of their practical "usefulness". This would therefore also mean that the African Court, namely the organ that should and could mainly contribute to improve the functioning of the "fragile" African Human Rights System, is indeed one of the causes of a further weakening of this System.

Furthermore, the African Court does not appear to protect its own judicial function. As a matter of fact, in its judgments on the merits, the Court has never focused on the matter of the "damage" caused to the effectiveness of its judicial function by the States that fail to implement the provisional measures it has requested. Since the Court can order provisional measures also on its own initiative, it could take into consideration disrespect of such measures in order to safeguard its judicial function, namely also when a relevant request coming from the involved parties is missing.[80] After all, being the case formally pending, the principle *ne ultra petita* would not apply to the precautionary action.[81]

Ultimately, the "lack of interest" of the African Court with regard to the responsibility of States not implementing provisional measures is astonishing inasmuch as in its judgments on the merits the Court has shown awareness of many cases of non-compliance. Indeed, as underlined above, since States usually fail to send reports to the Court on the implementation of provisional measures, judgments on the merits are often a useful source of information. In a nutshell, the Court seems responsible for a sort of wilful blindness: a very negative outcome considering that the African

[78] On the relationship between the binding effects of provisional measures issued by international courts and tribunals and the potential responsibility of States non-complying with such measures, see again *supra*, Sect. 12.4 of this chapter, in particular the text corresponding to notes 34 and 35.

[79] On the general tendency of African States not to comply with decisions issued by the African Court, see Pascale 2017, pp. 268 *et seq.*

[80] According to a *de iure condendo* perspective, Zyberi 2010, pp. 581–582, suggests that international courts and tribunals (above all the International Court of Justice) apply a rule based on the domestic principle of "contempt of court", typical of common law domestic orders, with the aim to adopt penalties, even pecuniary penalties, when a State does not implement provisional measures previously ordered. It would also be interesting to verify the applicability to the African Court of the ideas elaborated with regard to the International Court of Justice by Palchetti 2017, pp. 5–22, arguing that there are differences between the "institutional dimension" and the "inter-state dimension" whenever the problem of lack of compliance with provisional measures arises.

[81] On this point, see Kolb 2012, p. 899. See also Tanzi 2019, pp. 2095–2127.

Court is an international judicial organ operating in the field of human rights in a continent where, as everyone knows, human rights are routinely violated.

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Part IV
Provisional Measures Issued by Commercial and Investments Arbitral Tribunals

Chapter 13
The Functions of Provisional Measures in International Commercial Arbitration: Between Efficacy and Innovation

Giovanni Zarra

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Abstract Interim measures are a pivotal tool to safeguard both the profitability of a future award and the integrity of the arbitral process. While one can easily perceive an expansion of the forms of interim protection in international arbitration as well as their increasing centrality, this nevertheless does not mean that they are less problematic. Indeed, the *status* of interim measures is still far from being clear. This chapter focuses on the functions of provisional measures in the context of international commercial arbitration by examining some of the most relevant measures granted by arbitral tribunals (anti-suit injunctions, Mareva injunctions) as well as their enforceability. Against this backdrop, following a business-oriented and pragmatic approach, it is contended that arbitrators should be provided with all the necessary instruments to successfully discharge their functions. In this respect, this chapter thus suggests that a case-by-case approach is required in order to ascertain what arbitrators can or cannot do in light of the concrete circumstances.

Keywords commercial arbitration · anti-suit injunctions · Mareva injunctions · emergency arbitrator · enforceability of provisional measures

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13.1 Introduction

Obtaining interim measures (i.e. temporary orders which preserve a legal or factual scenario pending the resolution of a dispute)[1] in a swift and effective manner is sometimes of extreme importance for the parties involved in a commercial arbitration, in order to safeguard either the profitability of the future award or the integrity of the arbitral process (e.g. evidence). It is not by chance, indeed, that—starting from an initial reluctance (in particular by states) in allowing arbitrators to issue provisional measures—this is today common practice.[2] With some notable exceptions,[3] both states arbitration laws and rules set forth by arbitral institutions currently allow the issuance of provisional measures.

The expansion of the forms of interim protection in international arbitration shall be observed in the wider framework of the progressive substantial equiparation of international arbitration to state justice, so as that we could easily affirm that international arbitration is today the "natural judge" for business disputes. This is due to the competence of adjudicators, to the perceived neutrality and flexibility of the proceedings, as well as to the ease in enforcing the resulting awards pursuant to the wide diffusion of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This does not mean, however, that interim measures are not a problematic character of international arbitration. Quite the contrary.[4] In general terms, provisional orders usually require the adjudicators to impose their execution (so-called *imperium*) and this is a quality which arbitration tribunals do not have. In addition, notwithstanding the arbitration-friendly attitude which capitalist states generally assume, some states still seem to be reluctant in allowing arbitrators to issue enforceable provisional measures following brief hearings or, even worse, pursuant to an *ex parte* application. This shall be added to the fact that the *status* of interim measures in international arbitration is still shrouded in ambiguity.[5] It is not clear, in fact, whether these measures can be compared to awards and can therefore be enforced in accordance with the New York Convention and, if this is not the case, what is the means to ensuring their effectiveness. Finally, it is very common that interim measures are issued by emergency arbitrators, i.e. "third subject[s], appointed by an

[1] These measures "distribute the risk for the duration of the main action between the dispute between the parties, shifting it from the party applying for interim measures to the other party"; see Lew et al. 2003, p. 586.

[2] Carlevaris 2006, p. 6.

[3] The most impressive exception concerning the possibility for arbitrators to issue provisional measures can be found in Italian law, where Article 818 of the Code of Civil Procedure still provides that "[a]rbitrators may not dispose either the seizure of assets or any other provisional measure, unless differently set forth in the law".

[4] Abascal Zamora 2007, pp. 751–752, where this problem is correctly associated to the scarcity of the case law in this regard, which renders quite difficult a scientific study of the subject. The author, pp. 753–754, also observes that the parameters set forth in the law are scarce.

[5] There is ambiguity also as to the same concept of interim measures, considering that, as noted by Carlevaris 2006, p. 8, this definition is sometimes used for different concepts.

arbitral institution upon the application of a party prior to the formation of the arbitral tribunal, who [are] entrusted with the power to issue interim measures as a matter of urgency".[6] Measures issued by emergency arbitrators pose the additional problem of understanding whether they have only a contractual value or a jurisdictional one, this circumstance depending on whether the emergency arbitrator is perceived as a third-party private adjudicator or as a true arbitrator with a narrower mission.

The alleged scepticism affecting the arbitrators' power to grant interim measures and the uncertainty surrounding these orders shall, however, be balanced with the essentiality of this kind of orders in any arbitration proceedings. As already said, the issuance of an interim measure can indeed be crucial in order to safeguard the effectiveness of arbitration; for this reason, it is not even conceivable to have a form of commercial dispute resolution in which provisional orders are not available. This is, probably, one of the concurring reasons why arbitration is still under-developed in a country like Italy.[7] A business-oriented, pragmatic approach is, therefore, required. Indeed, it would be nonsensical to—on the one hand—equalize in many aspects arbitration to state justice and—on the other hand—deprive arbitrators of an essential tool for the effectiveness of their proceedings. This does not mean that arbitrators' powers shall be without limits. It simply means that, within the borders of international public policy and mandatory rules (both substantive and procedural),[8] arbitration shall be provided with all the instruments aimed at granting the achievement of its objectives in a speedy and competent manner.

This chapter will be divided into four main parts. In the first part, I will try to offer a general reconstruction of the legal framework surrounding provisional measures in international commercial arbitration. In the second part, the focus will shift on a peculiar feature of international commercial arbitration introduced with the implied aim of minimizing the differences between arbitration and state justice in terms of interim measures, i.e. the emergency arbitrator. The third part of the work will be devoted at analysing the peculiarities of some forms of arbitral interim measures, namely anti-suit injunctions and Mareva injunctions. The fourth part of the work will briefly deal with the major problem of provisional measures in international arbitration, i.e. their enforceability. The conclusions will be aimed at analysing how, in light of the prior analysis, interim measures interfere with the constant dialogue between arbitration and state justice and how the regulation of these orders can reduce the still existing differences between those two forms of dispute settlement.

[6] Santacroce 2016, p. 290.

[7] Perlingieri 2014, p. 657 *et seq.*

[8] Zarra 2018.

13.2 Foundation and Features of Provisional Measures in International Commercial Arbitration

It is, first of all, necessary to briefly understand what is the source of the arbitrators' power to issue interim measures. This is primarily to be found in the law of the seat. In the cases where, as in Italy[9] (but also in other countries such as China,[10] Quebec, Thailand[11] and Argentina[12]), arbitral interim measures are absolutely forbidden by a mandatory rule of law, all arbitration tribunals seated in the Country will not have any chance to issue provisional measures.[13] Their power will be limited to the issuance of recommendations with a contractual value.[14] An Italian court would therefore likely consider a provisional measure issued by an arbitral tribunal seated in Italy as judicially unenforceable because against public policy. The impossibility to obtain the judicial enforcement of such a measure could also occur abroad, considering that if Italian law is the *lex loci arbitri*, a mandatory procedural provision of this law might be taken in due account also by foreign judges,[15] who, however, could also—on the contrary—give preference to a parties' agreement providing for the possibility to issue arbitral interim measures. Finally, it is doubtful whether an Italian judge would consider the possibility to give effect to a provisional measure issued by an arbitral tribunal seated abroad. While in principle it could be said that this would be against the public policy of the forum, in our opinion a more pragmatic approach—driven by the circumstances of the concrete case—should be endorsed: arbitrators should balance the interests of the forum in seeing the refusal of any effect for provisional measures with the openness of the legal system to international arbitration and the willingness to give effect to arbitral decisions issued abroad. In light of such a balancing test, it could also be accepted that, in light of the needs manifested in the concrete circumstances, a foreign arbitral decision concerning interim measures is enforced in Italy.

Where a prohibition for tribunals to issue provisional measures does not exist, it is the same law of the seat which generally provides (with different limits) for

[9] Article 818 of the Italian Code of Civil Procedure expressly forbids the issuance of arbitral interim measures. The rationale of this rule would be the alleged public character of interim protection. See Boccagna and De Santis 2017, p. 319. For a strong criticism (which is shared here) to this position, see Henke 2012. The rule results in difficulty, understandable also in light of the fact that Italian law admits some sort of arbitral interim protection in matters concerning company disputes (see Article 35(5) of legislative decree n. 5/2003).

[10] Hober 2007, p. 724.

[11] Henke 2012, p. 1207.

[12] Lew et al. 2003, p. 589.

[13] Drahozal 2003, p. 187.

[14] Carlevaris 2006, p. 277; Boccagna and De Santis 2017, p. 320.

[15] Mistelis 2006, p. 156. The relevance of the procedural law of the seat is recognized by Article V(i)(d) of the New York Convention (if such convention is considered applicable—see para 5 below) or equivalent provisions in domestic laws, stating that enforcement may be refused if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

the arbitrators' competence to issue interim measures. It is possible to mention, in this regard, three different approaches in arbitration laws.[16] The first and broadest is represented by the UNCITRAL Model Law, which, at Article 17, generally provides that arbitral tribunals may issue interim measures unless differently agreed by the parties.[17] Another approach is represented by Article 38 of the 1996 English Arbitration Act, which establishes a general power in relation to certain measures (i.e. those in relation to the property which is the subject of the proceedings), but requires an explicit agreement of the parties for the other kind of measures. Finally, laws such as the US and the Belgian do not say anything with regard to the arbitral power to issue provisional measures and, therefore, an agreement of the parties is required. A peculiar situation, which deserves a brief mention, is that of India: in this country, while Article 17 of the 1996 Arbitration Act recognizes the possibility of arbitral interim measures, Article 37 of the same Act gives the party the right to appeal such measures before domestic courts on the same grounds applicable for setting aside arbitral awards.[18] There is, therefore, on the one hand, an openness towards the arbitral power to issue provisional orders and, on the other, hand, a continuous control by national courts.

In any case, unless the cases where provisional measures are expressly prohibited, all statutory provisions governing arbitral interim relief are considered to be default rules, i.e. rules which can be derogated by the parties.[19] The parties can therefore modify them and attribute to arbitrators the power to issue interim measures either by setting forth this possibility in their arbitration agreement or by referring to a set of arbitration rules which encapsulate the possibility for tribunals to issue provisional measures. An example of this is Article 28 of the 2017 Rules of the International Chamber of Commerce (ICC), which provides that—upon request by a party—the tribunal may issue interim measures and require appropriate security. A similar provision can be found at Article 25 of the 2014 Rules of the London Court of International Arbitration (LCIA). The reference that all rules make to the necessity of a request by a party seem to exclude—save as for cases where there is a different agreement between the parties (allowing the tribunal to issue interim measures *motu proprio*)—the possibility that arbitrators may *ex officio* grant interim measures that they consider necessary for safeguarding the smooth prosecution of the proceedings.[20] In this regard, it shall also be noted that, while in many cases arbitrators may (upon request by a party) issue all kind of measures they deem appropriate, some

[16] Lew et al. 2003, p. 591.

[17] Similarly see Article 183(1) of the Swiss Private International Law Act.

[18] See *Indian Supreme Court, National Highways Authority of India v. Gwalior Jhansi Expressway Limited*, Civil Appeal No. 3288 of 2018, available at: https://indiankanoon.org/doc/24276649/.

[19] Drahozal 2003, p. 185.

[20] An award of interim measures would be, in this case, *extra petita*. Hence, as we will see in Sect. 13.5 below, if the 1958 New York Convention is considered to be applicable to the enforcement of interim measures, the enforcement could be denied on the basis of Article V(1)(c) of the Convention (which precludes awards *ultra* or *extra petita*). If the New York Convention is not considered to be applicable to the enforcement of interim measures, the reference shall apply to the standards for enforcement of provisional orders set forth by national laws (or case law).

rules (such as Article 26 of the UNCITRAL Arbitration Rules) limit this power to measures related to the subject matter of the dispute.

The arbitral empowerment to issue interim measures does not prevent, in any case, the states' power to issue interim measures. In this regard, we could say that there is a concurring power of judges and arbitrators[21] and that the arbitrators' powers concerning interim measures are the product of concurrent sources (i.e. law of the seat, arbitration agreement, arbitral rules).[22] The current trend seems to be that, in general, interim measures are requested to arbitrators but—in those cases where an exercise of *imperium* is required (e.g. for a seizure of assets, or whether it is necessary to affect the rights of third parties not involved in the arbitration)—it is still necessary to refer to national courts. An express confirmation of this can be found at Article 28 of the 2017 ICC Rules, where it is said that "[b]efore the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, *the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal*" (emphasis added). A very similar wording may be found at Article 25.3 of the 2014 LCIA Rules. This means that arbitral institutions acknowledge the importance of judicial support in matters of interim measures and do not see it as an attempt to diminish the role of the tribunal in the management of the dispute.

On the other hand, the attitude assumed by national courts towards the issuance of arbitral interim measures could be a crucial element in granting the effectiveness of such a power. An example of *favor*, in this regard, is given by French Courts. As a consequence of the negative effect of *kompetenz-kompetenz*,[23] French courts, which follow a strict court subsidiary approach, assume jurisdiction on applications for interim or conservatory measures only before the tribunal is constituted (i.e. after the arbitrators' acceptance of their mandate) or with the leave of the arbitral tribunal. After such moment, they will refer the matter to arbitrators.[24]

The competence for the issuance of interim measures in support of arbitration proceedings is first of all on the court of the seat, but nothing excludes that other courts—due to the concrete circumstances of the case—can be better suited to issue the order. This is confirmed either by case law[25] and by scholarship.[26] For all the

[21] Carlevaris 2006, p. 37; Henke 2012, p. 1219; Marongiu Buonaiuti 2009, p. 245 *et seq.*

[22] Concurring powers are recognized by many domestic laws. See, e.g., Article 9 of the UNCITRAL Model Law, or Article 183(1) of the Swiss Private International Law Act. See Henke 2012, p. 1222 *et seq.*

[23] "The 'negative effect' concept typically refers to the circumstances under which a national court will stay its own proceedings (hence the 'negative effect') and refer the parties to arbitration so that an arbitral tribunal can make the first decision on the existence, validity and scope of the alleged arbitration agreement". See Barcelo 2017, p. 1.

[24] Paraguacuto-Mahéo and Lecuyer-Thieffry 2017, p. 754.

[25] *Konkola Copper Mines v. U&M Mining Zambia Ltd*, [2013] EWHC 260 (Comm).

[26] Briguglio 2017, Carlevaris 2006, p. 307.

above reasons, it has been correctly affirmed that an exclusive arbitral competence on provisional measures would be inopportune and would run against the same goals of effectiveness which are at the basis of the issuance of provisional measures.[27]

The requirements for the issuance of provisional measures are often not specified in arbitration rules. It is often said that arbitrators may issue interim measures which are "necessary" for the case at hand, or those which they "deem appropriate".[28] However, generally speaking, the order of interim measures can be traditionally connected to those requirements which are applied in domestic litigation (see, e.g., Article 17 of the UNCITRAL Model Law),[29] even if, as obvious, "whether interim measures are appropriate (…) is determined according to the specific facts of each dispute and the arbitrators' subjective perception of the risks involved".[30] The reference firstly applies to the so-called *periculum in mora* consisting in that a party risks to suffer an harm not adequately reparable (in the economic sense) by an award of damages if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted (a proportionality analysis is therefore required of arbitrators prior to the issuance of an interim measure).[31] Secondly, it is required that there is a reasonable possibility that the requesting party will succeed on the merits of the claim (*fumus boni iuris*). Obviously, this evaluation shall not affect the discretion of the arbitral tribunal in making any subsequent determination and can never constitute a pre-judgment of the case. Exactly for the risk of being interpreted as a pre-judgment of the case (and therefore as an *indicium* of lack of arbitrators' independence) the *fumus boni iuris* requirement has generated some perplexed reactions in some commentators, who noted that arbitrators often prefer not to make use of this requirement.[32] Finally, in particular with regard to requests of provisional measures made to the emergency arbitrator[33] (on which see Sect. 13.3) and, more generally, in all cases where interim measures are required before the tribunal has determined its jurisdiction on the case, it will be necessary to carry out a *prima facie* assessment of the arbitral jurisdiction on the dispute.[34]

A final (but crucial) problem concerning the issuance of interim measures in international commercial arbitration is the respect for due process. While national courts often issue *ex parte* provisional measures, this is mainly considered to be precluded to arbitrators,[35] who shall generally grant that both parties have the possibility to

[27] Carlevaris 2006, p. 36.

[28] See, e.g., Article 28 of the 2017 ICC Rules or Article 25.1 of the LCIA Rules. See Hober 2007, p. 731.

[29] For an example see Morviducci 2004, p. 143 *et seq.*

[30] Lew et al. 2003, p. 586.

[31] Hanessian and Dosman 2016, p. 228.

[32] Lew 2000, p. 25; Abascal Zamora 2007, p. 765.

[33] See, e.g. Article 1(5) of Appendix V to 2017 ICC Rules, Article 9B(6) of the LCIA Rules.

[34] Lew et al. 2003, p. 606; Abascal Zamora 2007, p. 759.

[35] Stalev 1994, p. 111; Sherwin and Rennie 2009, p. 330; Henke 2012, p. 1215.

present their case with regard to each debated issue.[36] A notable exception, in this regard, is Article 26(3) of the 2012 Swiss Arbitration Rules, which provides that "*[i]n exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party*, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard" (emphasis added). A similar possibility seems to be afforded by Article 9B(7) of the LCIA Rules (concerning emergency arbitrators) which provides that each party shall have, "*if possible*, an opportunity to be consulted on the claim for emergency relief" (emphasis added). It is our opinion that, also in this case, a pragmatic approach based on a balance of interests should be endorsed: while in general due process—which is a principle of procedural public policy whose respect is mandatory in international arbitration[37]—is to be respected prior to the issuance of provisional measures, there are certain cases where it is necessary that the interim order comes as a surprise (e.g. when it is likely that the asset which is the subject of the arbitration is going to be sold). As domestic systems of civil procedure teach us[38] (and as reflected in Article 26(3) of the 2012 Swiss Rules), in these exceptional cases it can be sufficient that the initial lack of due process is subsequently rectified: a party may be informed of the interim order contextually with its issuance and can immediately have the possibility to contest it and obtain its deletion or rectification. In some cases, Tribunals adopted the *escamotage* of recurring to "temporary restraining measures" granted "pending further determination of a request for interim measures";[39] this seems a good way of balancing the opposing needs outlined above and, indeed, could be a valuable solution aimed at avoiding that a party nullifies the effects of provisional measures prior to their issuance.[40]

[36] *Ex parte* arbitral interim measures were considered inadmissible by the Iran-US Claims Tribunal. See *Component Builders Inc.*, Iran–Unites States Claims Tribunal Case No. 395, Iran-US CTR 5. For other cases, see Abascal Zamora 2007, p. 764, footnote 21. Another delicate matter related to due process concerns the case where an arbitral tribunal issues an order of interim measures *ultra petita.* In this case, as already said with regard to *ex officio* interim measures issued without the agreement of the parties, if the 1958 New York Convention is considered to be applicable to the enforcement of interim measures, the enforcement could be denied on the basis of Article V(1)(c) of the Convention (which precludes awards *ultra* or *extra petita*). If the New York Convention is not considered to be applicable to the enforcement of interim measures, the reference shall apply to the standards for enforcement of provisional orders set forth by national laws (or case law).

[37] Zarra 2018, p. 556 *et seq.*

[38] See, e.g., Article 669-*sexies* of the Italian Code of Civil Procedure, on which see Turroni 2016.

[39] Abascal Zamora 2007, p. 763.

[40] The UNCITRAL Model law at Articles 17B and 17C considers the possibility of issuing *ex parte* "preliminary orders" which do not constitute awards.

13.3 The Emergency Arbitrator: Functions and Nature

As already noted, the emergency arbitrator has been ideated with the purpose of overcoming the problem arisen in situations where—pending the constitution of the arbitral tribunal—one of the parties had the urgent necessity of requiring the issuance of provisional measures.[41] The institution of the emergency arbitrator, therefore, filled in an important gap in the protection of disputing parties' rights in international arbitration and further reduced the differences between arbitration and state justice with regard to the subject of provisional measures. As of today, this is a very popular feature of international arbitration, being acknowledged by the vast majority of arbitration rules.[42] A similar mechanism—aimed at avoiding situations of legal vacuum pending the constitution of the tribunal—was already well-known in the international law of the sea: indeed, Article 290(5) of the United Nations Convention on the Law of the Sea expressly provides that "[p]ending the constitution of an arbitral tribunal [pursuant to Annex VII to UNCLOS], any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures (…)".

The mission of the emergency arbitrator is very narrow: he shall grant interim relief and his mandate will terminate once the competent tribunal is constituted. The reasons why parties might prefer referring the matter to the emergency arbitrator instead of domestic courts may stay in the willingness to preserve the confidentiality of the dispute and the need to avoid the length of domestic proceedings (which, in some cases, take time also to address a request of provisional measures). Indeed, it is usually said that emergency arbitrators shall, once appointed, issue their decision in a very short time, such as 5 days (SCC) 14 days (LCIA), or 15 days (ICC). Usually, prior to issuing the decision, emergency arbitrators have to ascertain their *prima facie* jurisdiction[43] and set forth a procedural timetable (in ICC arbitration this shall happen within 2 days after the appointment) and shall give the respondent the possibility to file its objections. *Ex parte* relief is usually not admissible (but,

[41] Ghaffari and Walters 2014; de Los Santos Lago and Bonnin 2012.

[42] The reference applies, inter alia, to ICC, LCIA, Stockholm Chamber of Commerce (SCC), International Centre for Dispute Resolution of the American Arbitration Association (ICDR), The Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC).

[43] Santacroce 2016, p. 294.

in this regard, please refer to the consideration we made in the previous section).[44] Also, emergency arbitrations have a seat (see Article 4 of Appendix V of the 2017 ICC Rules), which usually coincides with the seat of the main proceedings; this means that arbitrators will usually take into account the mandatory rules of this state. For this reason, it is likely that emergency arbitrators cannot be appointed for proceedings seated, e.g., in Italy (where, as known, arbitral provisional measures are forbidden). Proceedings before the emergency arbitrator may, in any case, be conducted in a flexible and smooth way. As Article 5(2) of Appendix V of the 2017 ICC Rules expressly says, "[t]he emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and urgency of the application".

From the above brief considerations, we might try to understand the *status* of emergency arbitrators. Are they true arbitrators or closer to third party adjudicators? This is not a merely academic consideration,[45] given that in the former case, their decisions will be equalized to arbitral interim measures issued by the full-fledged tribunal, while in the latter case such decisions may only be considered as contractual instruments (and, therefore, in this last case, parties might prefer referring to state courts).[46] In order to answer to such a question, it is, obviously, prior necessary to define what is an arbitrator.[47] As Fabio Santacroce puts it, an arbitrator is "an independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgment rendered by state courts".[48] In this regard, what we think is the essential element for distinguishing an arbitrator from other forms of adjudicators, is the necessary respect for procedural guarantees. As noted by Pietro Perlingieri "a process, a trial, whichever form it has, shall guarantee the respect for procedural fundamental principles".[49] When the respect for the principles of fair trial and *audi alteram partem* is granted (i.e. both parties have equally contributed to the formation of the adjudicators' decision) we are certainly closer to a real form of jurisdiction rather than to a form of third-party adjudication. In light of this consideration and of the above description of the features of emergency arbitration (which certainly reflect the due process guarantees which are proper of the arbitral process), we would be keen to propend for acknowledging the jurisdictional nature of emergency arbitrators and, hence, for a total equalization of their orders to interim measures issued by arbitral tribunals. Indeed, when the emergency arbitrator carries out his mission to issue an interim measure of protection, "[t]his entails the

[44] A noteworthy exception is, as already said, Article 9B(7) of the LCIA Rules, which provides for "the need to afford to each party, *if possible*, an opportunity to be consulted on the claim for emergency relief".

[45] For a contrary opinion, see Paraguacuto-Mahéo and Lecuyer-Thieffry 2017, p. 762, who state that given the high level of spontaneous compliance with emergency arbitrators' decisions, the matter does not have a particular practical interest.

[46] Paraguacuto-Mahéo and Lecuyer-Thieffry 2017, p. 751.

[47] Santacroce 2016, p. 291.

[48] *Ibid*.

[49] Perlingieri 2002, p. 30 (author's own translation).

impartial and independent adjudication of a legal dispute (…) and [i]n this respect, the emergency arbitrator's mission is akin to that of a proper arbitrator and a state judge when confronted with a request for interim relief".[50] This is evidently more than a mere contractual settlement of the dispute.[51]

13.4 Peculiarities of Some Kinds of Arbitral Provisional Measures and Their Functions

Generally speaking, the reasons why provisional measures are issued in international commercial arbitration are not different from those existing in the other forms of dispute resolution. In particular, they concern, inter alia, (i) the maintenance the *status quo* pending the final resolution of the dispute; (ii) the prevention of harm to the arbitral process itself; (iii) the preservation of assets on which the possible award creditor will be satisfied (mainly aimed at securing enforcement); (iv) the preservation of evidence; (v) interim payments; (vi) security for costs.[52] In their general terms, all these measures have been largely debated in scholarship and do not require further in-depth analysis.[53]

Here we would like to draw the attention on two peculiar kinds of interim measures, which are likely to generate more problems in their application and in the evaluation of the opportunity to recur to them in international arbitration.

The first form of interim measures which deserve particular attention are anti-suit injunctions, i.e. orders forbidding a party from commencing or continuing an action in another jurisdiction or arbitral tribunal, before a final determination of the dispute has been reached by the tribunal that issued the injunction. Anti-suit injunctions are, today, common practice in international arbitration and are considered as an effective tool to maintain the *status quo* between the litigating parties and/or as an instrument aimed at avoiding the aggravation of the dispute. Borrowing the wording used by the Iran-US Claims Tribunal in *Paul Donin de Rosiere v. Iran*,[54] it could be said that

[50] Santacroce 2016, p. 293. Similarly see Paraguacuto-Mahéo and Lecuyer-Thieffry 2017, p. 767.

[51] For a contrary opinion, see Baigel 2014, p. 9; see also the isolated decision of the Paris Court of Appeal *Total Fina Elf E&P Congo v. Société Nationale des Pétroles du Congo et République du Congo*, 4 Revue de l'Arbitrage 2003, p. 343 *et seq*., where it was said that the value of the decision of the *référé pre-arbitral* (i.e. the form of protection which the ICC granted prior to the institution of the emergency arbitrator) had a mere contractual value. This decision, due to the structural differences existing between the *référé pre-arbitral* and the emergency arbitrator, however, do not seem relevant in this case. In particular, as noted by Santacroce 2016, p. 301, today emergency arbitrators' decisions seem to be equalized to other provisional measures (see Article 29(2) ICC Rules or Article 9(3) SCC Rules Appendix II). The *Total Fina* decision has been, indeed, largely criticized in scholarship. See Paraguacuto-Mahéo and Lecuyer-Thieffry 2017, p. 772; for a general comment to the decision, see Gaillard and Pinsolle 2004.

[52] Hill 2018, p. 592.

[53] In this regard, please refer to Lew et al. 2003, p. 595 *et seq*.; Carlevaris 2006, p. 407 *et seq*.

[54] *Paul Donin de Rosiere v. Iran*, Iran-United States Claims Tribunal Case No. 498, Award No. ITM 64-498-1 of 4 December 1986, 13 Iran-US CTR 193, p. 194.

the rationale of the issuance of an anti-suit injunction is the fact that an adjudicator has the "inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel or duplicative proceedings instituted in other fora have rendered this necessary".

In general terms, anti-suit injunctions are admissible if their issuance is allowed by the relevant arbitral rules or the *lex loci arbitri*.[55] However, this is a particularly intrusive form of interim measures, considering that, even if indirectly (being *in personam* orders) they affect either an arbitral tribunal's power to determine its own jurisdiction (*kompetenz-kompetenz*) or the sovereignty of a state (by limiting its courts' power to decide on the matter) by forcing a party to waive its right to continue proceedings before such adjudicators, also recurring to the threat of the imposition of damages on recalcitrant parties.[56] An example of this very intrusive practice can be found in the *Chevron v. Ecuador* dispute, where the arbitral Tribunal issued two interim decisions in the form of preliminary awards aimed at imposing that Ecuador suspended or waived proceedings it started before its domestic courts.[57] The recourse to an *award* directed to Ecuador's judiciary is, indeed, a very strong intrusion by the arbitral tribunal in Ecuador's domestic legal affairs.[58] For these reasons, the issuance of anti-suit injunctions—while not forbidden by any international law instrument[59]—is largely considered inopportune, both in the context of common law litigation (where they originated)[60] and in international arbitration.[61] The continued recourse to anti-suit injunctions by arbitral tribunals has induced an author to speak about a "rise of arbitral power over domestic courts" considering that—through these orders—arbitral tribunals control the private parties' access to such courts (and to other arbitration tribunals).[62] More advisably, Laurent Levy stated that "arbitrators should only issue anti-suit injunctions when it comes to their attention that one of the parties has committed fraud or otherwise engaged in abusive behaviour in order to revoke the arbitration agreement".[63] This seems a more poised approach, in which the issuance of these highly debated interim orders is based on a balancing of interests and on the necessity of the concrete circumstances. Self-restraint in the issuance of anti-suit injunctions is also advisable because both part of scholarship[64] and part

[55] Leandro 2015, p. 818.

[56] Goldhaber 2013, p. 382; Atteritano 2010, pp. 450, 458–459.

[57] *Chevron Corp. v. Republic of Ecuador*, PCA Case No 2009-23, First Interim Award on Interim Measures of 25 January 2012, p. 16 and Second Interim Award on Interim Measures of 16 February 2012, p. 2.

[58] For a general criticism to undue effect of anti-suit injunctions on states' sovereignty, see Benedettelli 2014, p. 707.

[59] Benedettelli 2014, p. 717.

[60] Zarra 2014.

[61] Benedettelli 2014, p. 731 *et seq.*; Zarra 2017, p. 94 *et seq.*

[62] Goldhaber 2013.

[63] Levy 2005, p. 126.

[64] Benedettelli 2014, p. 730. The author refers at least to the cases where the anti-suit injunction is issued jointly with a provision of damages for the cases of non-fulfillment of the order. See also D'Alessandro 2015, p. 302.

of the case law consider that anti-suit injunctions can be regarded as awards which are susceptible of being enforced in accordance with the 1958 New York Convention. The reference applies, in particular, to the Court of Justice of the European Union's (CJEU's) *Gazprom* decision,[65] where the Court has several times referred to anti-suit injunctions as arbitral awards (see, e.g., para 25) which are outside the scope of application of EU Regulation 44/2001 (today replaced by EU Regulation 1215/2012). In this regard, while (as we will see below) the possibility of recognizing interim measures as awards is still subject to debate, it is likely that a possible award containing an anti-suit injunction is considered, due to its strong interference with states' sovereignty, as a breach of the international public policy of all those states where this kind of orders is unknown.

Another kind of provisional orders which is worthy of attention are the so-called Mareva injunctions, which impose on a party not to dispose of his assets which are, as a consequence, frozen. These injunctions are often used in common law litigation[66] and judges direct them also to third parties (e.g. banks) in order to avoid that a party in the process disposes of its assets which are in the possession of those third parties. While arbitrators might, in principle, intimate a party not to dispose of his assets (threatening them with a possible award of damages), they do not have jurisdiction over third parties and this is the reason why the recourse to Mareva injunctions in arbitration is limited. However, arbitrators in some cases have not hesitated to issue such orders; in *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*[67] an ICDR arbitrator issued a freezing order and such a possibility was recognized by a New York Court notwithstanding the fact that this kind of interim measures is not recognized by New York law, on the basis of the consideration that ICDR Rules empower the arbitral tribunal to "take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property", among which Mareva injunctions are included. Also national courts where these orders are used have sometimes recurred to Mareva injunctions in support of arbitration proceedings, even in cases where the proceedings where not seated within their jurisdiction.[68] In particular, in the *Front Carriers* case[69] the High Court of Singapore accepted that it could grant interim measures in the form of Mareva injunction in support of an arbitration not seated in Singapore. While the Court of Appeal in Singapore in another case[70] subsequently overturned this approach, scholarship seems to

[65] CJEU, Case C-536/13, *Gazprom OAO v. Lietuvos Respublika*, Judgment of 13 May 2015.

[66] McLachlan 1987.

[67] *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, 2012 WL 6178236 (SDNY 10 December 2012).

[68] In England, pursuant to The Siskina [1979] AC 210, it is often said that a Mareva injunction can only be granted if it is connected with an underlying dispute potentially subject to the jurisdiction of English courts. See McLachlan 1987, p. 676.

[69] *Front Carriers Ltd v. Atlantic & Orient Shipping Corp* [2006] SGHC 36. The decision overcame the different approach assumed by the same High Court in *Swift-Fortune Ltd. v. Magnifica Marine SA* [2006] SGHC 36.

[70] *Swift-Fortune Ltd. v. Magnifica Marine SA* [2006] SGCA 42.

be still favourable to it in light of a business-oriented, pro-arbitration approach.[71] In Australia, indeed, in *Sanko Steamship v. DC Commodities*, the Supreme Court of Western Australia expressed the position that a Mareva injunction can be granted in favour of an arbitration seated abroad.[72]

In this regard, it seems impossible to take an abstract, preconceived position: in some cases, it might be worth that the order is granted by a court which is "closer" to the asset on which the order shall produce its effects and that can, therefore, better grant an effective protection to the requesting parties. In other cases, however, it might seem that the request for the issuance of Mareva injunctions abroad is a form of forum shopping that should be avoided. It is the sensibility of the adjudicator that, on a case by case basis, shall grant an adequate balance between the need of protecting the effectiveness of the arbitration and the necessity to avoid abusive practices.

13.5 The Enforceability of Provisional Orders (in Brief)

At this point, a reference to the enforceability of provisional measures in international commercial arbitration is also necessary. This will be the subject of another chapter of the present book and, therefore, only some brief insights will be offered here.

The main question is whether arbitral interim measures—both issued by full-fledged tribunals and by emergency arbitrators—may be classified (as it was boldly done by the CJEU in the abovementioned *Gazprom* case) as awards (i.e. decisions which finally settle with binding force a point of law and/or of fact between the parties) and can, therefore, take benefit of the advantaged enforcement mechanism set forth in the 1958 New York Convention. There is high controversy in case law in this regard. The negative approach has prevailed for long time and originated in the Queensland Supreme Court decision in *Resort Condominium International v. Bolwell*,[73] where it was said that interim measures have "an interlocutory and procedural nature and [are] in no way purport[ed] to finally resolve the disputes or any of them referred by [the claimant] for decision or to finally resolve the legal rights of the parties. They [are] provisional only and liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced them". However, several domestic laws have set forth mechanisms expressly aimed at giving execution to interim measures issued in the course of arbitration seated in the state,[74] while others (e.g. Article 2(1) of the 2000 Zambian Arbitration Act) expressly equalize provisional orders to awards. This is also the approach assumed in US law, where the courts have repeatedly enforced interim measures issued in domestic arbitration cases as awards

[71] Chalk and Choong 2007, pp. 55–56.

[72] *Sanko Steamship v. DC Commodities* [1980] WAR 51.

[73] *Resort Condominium International v. Bolwell* [1995] 1 Qd R 406, XX Yearbook of Commercial Arbitration 628.

[74] See, e.g., Article 17A of the UNCITRAL Model Law (on which see Hill 2018, p. 597); S. 42 of the 1996 English Arbitration Act.

by saying that interim measures are "*confirmable final award[s]* (…) on an issue distinct from the controversy on the merits"[75] (emphasis added). In the *True North* case,[76] the US courts even considered an order issued in an English arbitration as an award and enforced it in accordance with the 1958 New York Convention.

Different opinions have been also sustained in scholarship.[77] Gary Born has strongly affirmed that interlocutory decisions shall be regarded as awards to be enforced in accordance with the New York Convention.[78] Contrariwise, other scholars have excluded this possibility, considering that interim measures lack the element of finality which is required for arbitral awards.[79]

It is our opinion that—due to the existing legal framework—it is, also in this case, impossible to assume a definitive position. While the US approach on the concept of finality is probably a stretch of the same concept (far from what was intended when the 1958 New York Convention was drawn up), it seems that the US courts are driven by policy concerns which deserve some attention, i.e. the need to ensure that interim measure can effectively carry out their function and are not pieces of paper deprived of any practical usefulness. The present analysis cannot avoid to take into account, on the one hand, that "the concept of an award is evolving, rather than static"[80] and, on the other hand, that certain similarities between interim measures and arbitral awards are in fact present (e.g. the existence of a seat, the necessity to respect due process prior to the issuance of the order). In this regard, Jonathan Hill[81] affirms that "in policy terms, the most 'arbitration friendly' solution is not to treat interim measures as awards, but to make provision for the enforcement of interim measures as interim measures, thereby enabling enforcement without creating the possibility of annulment". This is, indeed, the solution that some states have approved but a wide application of this method is still far to be accepted.[82] For this reason, it is the present author's opinion that a preconceived closure to the applicability of the 1958 New York Convention (which, it is to be highlighted, does not define what an arbitral award is) to interim measures could, at least in some cases, be detrimental to the effective resolution of disputes. Indeed, if the obvious goal of this treaty is to

[75] *Pacific Reinsurance Management Corporation v. Ohio Reinsurance Corporation*, 935 F2d 1019 (9th Cir, 1991). See also *CE International Resources Holdings LLC v. S.A. Minerals Ltd. Partnership*, US District Court for the Southern District of New York 2012 WL 6178236 (10 December 2012); *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Spp. 2d 310 (SDNY 2013). For other cases in this line, see Hanessian and Dosman 2016, p. 229 *et seq*.

[76] *Publicis Communications v. True North Communications Inc.*, 206 F3d 725 (7th Cir, 2000).

[77] For a negative opinion, see e.g. Carlevaris 2006, p. 515. In favour of the equiparation of (at least certain kinds of) provisional measures to awards, see Benedettelli 2014, p. 730.

[78] Born 2014, p. 2515; see also Henke 2012, p. 1230.

[79] Di Pietro 2008, p. 156.

[80] Hill 2018, p. 605.

[81] Hill 2018, p. 607.

[82] Other authors, such as Carlevaris 2006, p. 593, hope for the creation of an international convention aimed at granting the enforcement of arbitral provisional measures.

encourage the diffusion of arbitration rendering it an effective tool for the resolution of transnational disputes, it could be considered in compliance with this goal to accept a broader definition of award and allow the enforcement of foreign interim measures.[83]

13.6 Conclusions

In retracing the legal foundation and the main features of interim measures in international commercial arbitration, this chapter has tried to let emerge the continuous tension between the states' willingness to safeguard their courts' monopoly in relation to the issuance of interim measures fitted with *imperium* and the need to incentivize the recourse to international arbitration (i.e. the method of dispute settlement more apt for international business). Due to the scarcity of legal sources, arbitral precedents and scholarly opinion, the sensibility of the single adjudicator, to be driven by the needs of the concrete cases and by the necessity to adequately balance the principles and values at stake, assumes a central role.

According to Jose Maria Abascal Zamora, a leading Mexican practitioner, in matters related to interim measures "[t]here are no boilerplate solutions; the basis for wise solutions is not to be found in definite dispositions, rules or principles, but indeed it is an art. The foundations of such art are in the will of the parties and the inherent power of arbitrators",[84] which are granted by the very flexible parameters (such as "necessity" and "appropriateness") to which the issuance of provisional measures in international arbitration is related. On the one hand, "[e]xtensive court experience and actual practice show that interim measures are unavoidable",[85] and, on the other hand, the analysis of the case-law shows that sometimes (as, e.g., in the case of anti-suit injunctions) this practice could be detrimental to other fundamental principles and values, such as state sovereignty or, sometimes, due process.

In light of the abovementioned tension, we could identify three tendencies in the current state of affairs in relation to arbitral interim measures. Firstly, in very few cases (such as Italy) there is a total closure of domestic systems towards this form of protection of the disputing parties. Secondly, and oppositely, in other cases—such as through the issuance of anti-suit injunctions directed at restraining proceedings pending before national courts—arbitrators have abused of their position by unduly limiting (even if indirectly) states' sovereignty. Thirdly, and finally, in other cases we find forms of collaboration (such as the attitude assumed by French courts, or the explicit acceptance of possibility to ask interim measures to state courts which can be found in certain arbitral rules) which can be the best way of reaching the objective that both states and private parties want to reach through the recourse to international arbitration: the smooth and effective resolution of international business disputes.

[83] This position is also expressed in Santacroce 2016, pp. 304–309.

[84] Abascal Zamora 2007, p. 752.

[85] *Ibid*.

Indeed, it appears that in certain circumstances state justice is not replaceable by international arbitration, considering that in some cases it is—as we have seen—necessary to solve certain needs of the parties; indeed, the two mechanisms should be seen as complementary, considering that arbitration offers advantages in terms of confidentiality, competence, neutrality and flexibility that not always may be found before national courts.[86]

Except for the cases in which states completely forbid arbitral interim measures, it is impossible to assume preconceived positions in relation to the possibility for arbitrators to do or not to do something (in relation to the issuance of interim measures): a reasonable balancing of the opposite needs shall be achieved in light of the concrete circumstances. This may conduct to different solutions in relation to different situations and all these solutions may, in principle, be admissible provided that the mandatory procedural guarantees of international arbitration are (sooner or later) duly respected.

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[86] Gaillard and Pinsolle 2004, p. 23.

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Chapter 14
The Enforcement of Provisional Measures

Andrea Carlevaris

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Abstract The peculiar features of interim and provisional measures entail the need for specific rules on their recognition and enforcement, inasmuch as the enforcement regime of awards is not automatically applicable. This chapter deals with some of the available solutions, analysing a potential revision of the New York Convention; the UNCITRAL Model Law; and, the possibility of a separate multilateral binding instrument on the issue. In this regard, spontaneous reforms at the national level seem the best way forward in order to implement a harmonized, effective regime.

Keywords enforcement · recognition · Model Law · New York Convention · national legislator

14.1 Introduction

Giving effect to provisional measures involves, as a matter of principle, the same problems as enforcing awards on the merits. However, the peculiar features of interim relief, including instability, temporariness and urgency, prevent the enforcement regime of awards from being automatically applicable to interim and provisional measures.

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The jurisdiction of international arbitral tribunals to order provisional measures is, today, generally recognized in national legislations, international conventions and arbitration rules, with only a few important exceptions. For example, it is well-known that under Italian law arbitrators are prevented from ordering attachments or other provisional measures, and interim relief is still reserved to the courts.[1]

Depending on their content and nature, provisional and conservatory measures ordered by arbitrators must be implemented through either the parties' conduct or the establishment of a new legal relationship between the parties. The first obvious form of implementation of arbitral orders consists in the parties' wilful compliance with the arbitrators' decision. However, whenever a party does not voluntarily abide by the order, coercive mechanisms become available to ensure compliance.

The general trend towards wilful compliance with arbitral decisions, including decisions on interim relief, which has been pointed out by commentators and is confirmed by statistical surveys,[2] largely depends on the existence of adequate sanctions for the case of non-compliance, which is the best guarantee of the measures' effectiveness.[3] If the parties do not voluntarily implement the arbitral decision, the involvement or state courts becomes necessary to obtain judicial recognition and enforcement.[4] The distinction between the notions of "recognition" and "enforcement" reflects the difference in the effects of the judge's intervention and of the nature of the measure to be enforced. The concept of recognition applies when a party seeks to introduce the interim measure into the national legal order without actually having it enforced, such as for measures of a merely declaratory or constitutive nature or for measures that do not require any form of cooperation by the party against which they are issued. The concept of enforcement (*rectius*, enforceability) comes into play when the order must be given the particular effect consisting of compulsory enforcement through the cooperation of state authorities.[5] Enforcement presupposes recognition.[6] However, the distinction between recognition and enforcement does not have any specific consequence on the applicable legal regime.[7]

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[1] See Article 818 of the Italian Code of Civil Procedure: "Gli arbitri non possono concedere sequestri, né altri provvedimenti cautelari, salva diversa disposizione di legge". The arbitrators' lack of power to order interim measures has been confirmed, despite numerous contrary opinions, in the last reform of Italian Arbitration law (see d. lgs. No. 80/2006), which only added to the text of Article 818 the last sentence, "salva diversa disposizione di legge", "except where otherwise provided by the law".

[2] For a survey of arbitrations administered by the American Arbitration Association, which evidenced compliance with the arbitral orders in 90% of cases, see Naimark and Keer 2001, p. 26. See also Bond 1993, p. 334; Lew et al. 2003, p. 610; Yesilirmak 2005, p. 238.

[3] Kojović 2001, p. 512; Tommaseo 1999, p. 28.

[4] Born 2014, p. 2511.

[5] On the distinction between recognition and enforcement in general, see Gaillard and Savage 1999, pp. 889 *et seq.*

[6] See Briguglio 1999, pp. 185–186.

[7] For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards refers to both notions but does not differentiate the legal regime applicable.

14.2 The Coercive Tools Available to Arbitrators

Unlike judges, arbitrators have no coercive powers to enforce their decisions. However, they dispose of several potential coercive mechanisms, or sanctions, to pressure recalcitrant parties to abide by their provisional measures. These tools do not replace the intervention of state courts but are just aimed at obtaining voluntary compliance.[8]

The first such mechanism is compensation for damages. Arbitral interim measures have an undeniable *inter partes* binding nature, derived from the power conferred on the arbitrators by the parties in the arbitration agreement. As a consequence of a breach of the contractual obligation to comply with their orders, arbitrators may be empowered to sanction non-compliance by ordering the recalcitrant party to compensate the other party for any damage incurred.[9] However, this remedy is not particularly effective for several reasons. First, in the absence of a specific reference in the arbitration agreement or applicable arbitration rules, it is not even sure arbitrators would have jurisdiction to award damages for non-compliance, which may be considered not part of the substantive dispute referred to arbitration. Second, it may prove difficult to establish a compensable damage, or the damage required to grant interim relief may be considered, as is often the case, "irreparable", which would make an award for damages inadequate by definition, if not even contradictory with the premise.[10] Third, and alternatively, the beneficiary of the measure could obtain an award ordering specific performance of the obligation, but this is likely to be incompatible with the urgency that characterizes most cases of interim relief.

A more effective remedy theoretically available to arbitrators is the possibility of drawing adverse inferences against the non-compliant party concerning the merits of the dispute. The parties will obviously be reluctant to disregard an order to avoid negatively influencing the arbitrators pending a decision on the merits. However, a negative attitude from the arbitrators in their decision on the merits would be unjustified in most cases.[11] Orders on interim relief and awards on the merits are subject to different substantive requirements. Unless there is a causal link between a party's failure to comply and the outcome of the arbitration (e.g., in case of interim measures concerning the production or preservation of evidence),[12] the tribunal may not penalize the recalcitrant party in the final award. Conversely, nothing prevents

[8] Carlevaris 2007, pp. 505 *et seq.*; Carlevaris 2006, pp. 490 *et seq.*

[9] This possibility is referred to, for example, in the ICC Pre-Arbitral Referee Rules, Article 6(8)(1) of which provides as follows: "The competent jurisdiction may determine whether any party who refuses or fails to carry out an order of the Referee is liable to any other party for loss or damage caused by such refusal or failure". See also Article 29(4) of the ICC Rules (on emergency arbitrator proceedings): "The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order". See Besson 1998, p. 314; Schwartz 1993, pp. 61–62.

[10] Pozzi 2005, pp. 32–33.

[11] Poudret and Besson 2007, p. 540; Reiner 1998, p. 861.

[12] Yesilirmak 2005, p. 242.

the tribunal from sanctioning a party's non-compliance with an order for provisional measures in its decision on the costs of the proceedings, for which arbitrators can take numerous circumstances, including the parties' procedural conduct, into account.[13]

"*Astreintes*", or penalties for non-compliance are a familiar concept in French, Belgian, and Dutch law and is another coercive remedy that might be available to arbitrators to ensure respect of their orders for interim measures. It consists of an ancillary and prospective order for payment of a pre-determined sum of money supplementing a principal order, if such principal order is not complied with within a specified time limit. Arbitrators' power to order *astreintes* is controversial.[14] In France, for example, where no express legislative solution exists, authors and state courts tend to approve allowing arbitrators the power to enforce both decisions on the merits and procedural orders by *astreintes*. However, they also tend to deny that arbitrators also have the power to liquidate the penalty, i.e. to determine its precise amount, which would be reserved for state courts and would be subject to the previous *exequatur* of an award incorporating the arbitral order.[15] The need for recourse to state courts for recognition of the award and, according to the majority view, for the liquidation of the penalty, is likely to reduce the effectiveness of this remedy, which largely depends on its immediate coercive effect.[16]

14.3 Judicial Recognition and Enforcement

Judicial enforcement of provisional orders is obviously governed by the *lex fori*, i.e. the law of the state where the order must be enforced. However, the scope of the national rules on recognition and enforcement is generally limited to domestic orders. Only in a few cases are such rules also applicable to orders rendered in foreign proceedings. This circumstance represents a significant drawback of the efficiency and harmonization of the system, since, in an international setting, provisional orders must frequently be implemented in a legal order other than the jurisdiction in which they are rendered.

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[13]This is expressly contemplated in Section 41(7)(d) of the English Arbitration Act, which however only allow the recovery of the costs incurred as a consequence of non-compliance with the interim measure: "If a party fails to comply with any other kind of peremptory order [other than security for costs], then, without prejudice to Section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following […]: (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance".

[14]Besson 1998, pp. 317–319.

[15]The arbitrators' power has been implicitly admitted by the Court of Appeal of Rennes, 26 September 1984, *Société Auvinet SA v. SA Sacomi et Poirier*, Revue de l'arbitrage 1986, p. 441, which dismissed the request for liquidation of an *astreinte*, since the award in which it was contained had not been the object of *exequatur*. Expressly in the same sense, Court of Appeal of Paris, 8 June 1990, *Société Hoche Friedland v. Société Le Grand Livre du mois*, Revue de l'arbitrage 1990, pp. 917 *et seq.*

[16]Lévy 2001, p. 21.

Numerous jurisdictions have adopted specific rules on the recognition of interim measures. Although the approach taken varies significantly, two main substantially homogeneous models can be identified.[17] The more common approach consists of allowing enforcement of the measure by a declaration of enforceability, as in the case of awards. By means of an *exequatur*, the arbitral measure is introduced in the national legal system and produces the same effects as a decision of a state authority. This approach, which can be named the "*exequatur* model", does not presuppose the characterization of the arbitral decision as an award and its adoption in the form of an award. Certain jurisdictions provide that the measure must take the form of an award, others simply put provisional orders on the same footing as awards *quoad effectum*, irrespective of their form. The second model can be defined "court assistance model". It consists of a state court order confirming the arbitrator's decision or forcing the recalcitrant party to comply with it.

In jurisdictions following the *exequatur* model, the intervention of the judge is limited to ensuring that the arbitral decision meets certain basic and mandatory requirements and to declaring it enforceable (or denying its enforceability), without reproduction or modification. In jurisdictions following the court assistance model, the judge issues a self-standing order following the arbitral measure. The court pursues the aim of the arbitral measure, but the content of its own order may vary, and the judge generally has a limited power to adapt the measure to his own procedural law.

One of the first jurisdictions that adopted the *exequatur* approach was the Netherlands. The Dutch Code of Civil Procedure provides that the rules applicable to awards are also fully applicable to arbitral decisions taken in "summary proceedings".[18] Dutch law does not require that the order be made in the form of an award and only puts arbitral awards and interim measures on the same footing *quoad effectum*.

The recognition of arbitral provisional measures through a mere declaration of enforceability is increasingly common in recent national legislation, which frequently simply extends the regime applicable to arbitral awards to cover orders for interim relief. This approach is particularly common among jurisdictions that have adopted the UNCITRAL Model Law, which, in most cases, have extended the scope of provisions dealing with the recognition and enforcement of awards (Articles 35 and 36 of the Model Law) to provisional measures.[19] After the 2006 revision, which is further examined below, the Model Law provides for a specific enforcement regime applicable to interim measures, which follows the *exequatur* approach.[20]

In certain cases, the adoption of the *exequatur* model is not the result of express legislative provisions, but of jurisprudential and doctrinal elaborations. In France.

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[17] Carlevaris 2007, pp. 512 *et seq.*; Carlevaris 2006, pp. 504 *et seq.*

[18] Article 1051(3) of the Dutch Code of Civil Procedure: "A decision rendered in summary proceedings shall be regarded as an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable". The provisions referred to concern the formal and substantive requirements of awards, enforcement and recourses.

[19] See Binder 2005, p. 154.

[20] See Article 17H and 17I of the Model Law, as amended in 2006.

for example. the possibility of incorporating an interim measure into an enforceable award has long been admitted by most commentators.[21]

Among the jurisdictions following the *exequatur* approach, the Hong Kong legislation is among the few that expressly provide that the legal regime of awards is also applicable to foreign provisional orders.[22] When no similar solution is provided, the relevant rules only allow the recognition and enforcement of provisional orders made in arbitrations having their seat in the same state. The territorially limited applicability of the relevant regime is thus unsuitable for ensuring transnational recognition and enforcement.

The paradigm of the court assistance model is represented by Article 183(2) of the Swiss Private International Law Act, which provides: "*[s]i la partie concernée ne s'y soumet pas volontairement, le tribunal arbitral peut requérir le concours du juge compétent. Celui-ci applique son propre droit*". The judicial assistance provided by this norm is generally considered the only available mechanism to obtain the implementation of an interim measure in Switzerland. A party seeking to enforce an order cannot avail itself of the possibility of obtaining the *exequatur* that Article 193 of the same law reserves to awards on the merits.[23]

According to the majority view, in the court assistance model, the court has no discretion in its intervention.[24] Besides the case where the type of decision to be enforced is unknown to the jurisdiction of enforcement, the judge can withhold his assistance only in cases of manifest invalidity or inapplicability of the arbitration agreement, irregular constitution of the arbitral tribunal, or, according to some commentators, non-conformity with public policy and breach of due process.[25]

A variant of the court assistance system is provided by German law. To avoid the risk of conflicting enforceable measures, Section 1041(2) of the ZPO allows the party that has obtained the order to apply to the judge for its enforcement, provided however that no similar request for interim measures has already been submitted to the courts.[26] Moreover, the enforcement court is empowered to reclassify the arbitral order to adapt its content to the types of measures available under German law. German judges are thus not authorized to replace the arbitral order whenever the latter is capable of enforcement in its original formulation. However, they can deny their assistance whenever there is no corresponding measure in German law.[27]

The *exequatur* of the arbitral order only produces its effects in the jurisdiction in which it is made, while the court's order in support of the arbitral measure is no

[21] See Robert 1967, pp. 263–264; Besson 1998, pp. 292–293.

[22] Morgan 2000, p. 379.

[23] Poudret and Besson 2007, p. 545; Lalive et al. 1990, p. 362.

[24] Lalive et al. 1990, p. 366; Besson 1998, p. 309.

[25] See the authors referred to in Carlevaris 2007, p. 517.

[26] See Donovan 2005, p. 210.

[27] Niggemann 1998, p. 656. For a case in which an order akin to a "Mareva Injunction" has been reformulated as an injunction known to German law, see the decision of the Court of Appeal of Karlsruhe reported in Kojović 2001, p. 517.

different from any ordinary judicial decision and may circulate on the basis of the applicable rules on the recognition and enforcement of foreign judicial decisions.

A mixed approach, which combines elements of the *exequatur* model with elements of court support mechanisms yet contains certain aspects which are manifestly different from either model, is provided by English law. Section 42 of the Arbitration Act, which regulates the enforcement of arbitral "orders" in general, provides that English courts have no power to either adopt a self-standing decision on the basis of the arbitral order (as in court support mechanisms), but only the power to vest the arbitral order with the legal force it originally lacks, or to revise or modify the arbitral measure. However, unlike jurisdictions following the *exequatur* model, English law does not put orders on the same footing as awards *tout court*, but rather provides for a specific enforcement mechanism with different characteristics and effects. The court issues an order requiring a party to comply with an arbitral "peremptory order", which the arbitral tribunal is empowered to make only after the party has failed to comply with a previous order "without showing sufficient cause".[28] Therefore, in order for the interested party to obtain the courts' assistance in enforcing the arbitral measure, a double refusal by the other party is necessary: first, with respect to the original order, and then with respect to the more coercive "peremptory order". Seeking court assistance is subject to a party's exhaustion or all available remedies for non-compliance before the arbitrators ("any available arbitral process": Section 42(3)) and to the expiration of any deadline set by the arbitrators to abide by the order. In the English legislator's intention, this provision represents an expression of the "subsidiarity principle", which largely inspires English arbitration law. An important difference between the English mechanism and the enforcement regime of awards under Section 66 of the Act lies in the fact that the former is applicable only to arbitrations having their seat in England (see Sections 2(1) and (3)).[29]

An additional legislative model consists in the issuance of an autonomous order based on the factual and legal assessment already made by the arbitrator. However, in this case, the court order is not limited to the enforcement of the arbitral one but is based on the courts' concurrent jurisdiction to adopt provisional measures in the presence of an arbitration agreement.

[28] Merkin 1996, p. 110.

[29] This situation is partially remedied by Section 2(4) of the Act, which authorizes the parties to seek recourse in the English courts when the place of arbitration has not been determined and the court deems it appropriate to provide its assistance "by reason of a connection with England and Wales or Northern Ireland".

14.4 The UNCITRAL Model Law

The UNCITRAL Model Law, in its original text, did not address the enforcement of interim measures made by arbitrators.[30] As stated above, the 2006 revision resulted, *inter alia*, in the addition of two new provisions (Articles 17H and 17I) specifically devoted to the recognition and enforcement of arbitral provisional measures. The decision to amend the Model Law prevailed over alternative projects which had previously been proposed, such as an amendment of the New York Convention aimed to extend its scope to also cover interim measures, or the adoption of a separate and complementary protocol.[31]

The lack of a satisfactory and harmonized enforcement regime makes this development particularly interesting. The need for an amendment of the uniform text in this respect, which UNCITRAL found of crucial importance in order to ensure its effectiveness, is also demonstrated by the fact that no less than 22 states among those which had adopted the Model Law before its amendment had integrated and amended it to provide for specific enforcement mechanisms.

Article 17H is drawn up on the basis of the enforcement regime of arbitral awards (Articles 35 and 36).[32] This approach, which therefore follows the *exequatur* model, eventually prevailed over an alternative proposal, which provided for a succinct text adopting the court support mechanism.[33] In deciding to follow this model, the Working Group that was in charge of the reform admittedly took into account the "distinctive temporary character" of interim relief by introducing specific grounds for refusing enforcement and by recognizing the discretion of the court in assessing those requirements.[34] In this latter respect, the Working Group has, on the one hand, provided for the court's duty to grant the *exequatur* unless any of the grounds for refusal occurs (Articles 17H(1) and 17I(1)), and, on the other hand, recognized a limited discretion of the court with respect to the actual impact of those requirements

[30] However, early drafts of the Model Law included a provision that would have provided expressly for the recognition and enforcement of tribunal-ordered provisional measures, which was eventually not retained: see Report of the Working Group on International Contract Practices on the Work of Its Sixth Session, UN Doc. A/CN.9/245, Article XIV. See Donovan 2005, pp. 82 *et seq.*, also for an analysis of the preparatory works.

[31] On the Working Group's long hesitancy in determining the most appropriate instrument to achieve the reform, see Kojović 2001, p. 529.

[32] Article 17H(1): "An interim measure of protection issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17I".

[33] UNCITRAL, Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation, UN Doc. A/CN.9/WG.II/WP.110, para 55: "The court may, upon application by the interested party, order enforcement of an interim measure of protection referred to in Article 17, irrespective of the country in which it was made". For a comment, see Kojović 2001, p. 530.

[34] Yesilirmak 2005, p. 266.

in specific cases. This would allow the court to grant enforcement unless the refusal is necessary to pursue the objective of the new legislative regime.[35]

Just like most legal systems allowing the *exequatur* of interim orders, the text recognizes the parties' right to seek enforcement of the order in several jurisdictions simultaneously and provides that an application made in one jurisdiction is not a bar to seeking enforcement in other states.[36] The text also provides that the form of the measure is irrelevant for the purpose of its enforcement and recognizes that the new regime applies to interim measures made both in the form of arbitral awards and of orders. Among the most innovative aspects of the new provisions, it is worth mentioning their extension to all provisional measures, regardless of the place of origin (Article 17H(1): "irrespective of the country in which it was issued").

Article 17H(2) and (3) deals with procedural aspects. It establishes a coordination between arbitral and enforcement proceedings by creating a duty on the party which has obtained the *exequatur* of the order to promptly inform the judge of its "termination, suspension or modification" by the arbitrator.[37] The provision also empowers the state court to order the party seeking enforcement to provide appropriate security unless the arbitral tribunal has already made a similar determination or whenever it is necessary to protect the rights of third parties.[38]

The text provides for the mandatory nature of the grounds for refusing enforcement of the *exequatur* and does not allow the courts any discretion in elaborating additional requirements. It distinguishes grounds which have to be raised by a party (Article 17I(1)(a)) and grounds which can be raised by the court on its own motion (Article 17I(1)(b)). Some of these grounds for refusal correspond to those provided by the same Model Law and the New York Convention with respect to awards (e.g., violation of due process, invalidity of the arbitration agreement and contrast with public policy), others reflect the peculiarities of interim relief (termination, suspension. or modification or the measure by the arbitral tribunal or by a competent jurisdiction and incompatibility of the requested form of relief with the procedural law of the state in which enforcement is sought).

Grounds which have to be raised by the party and are common to arbitral awards are defined by reference to the grounds for refusing the enforcement of awards under Article 36(1)(a) of the Model Law, with the only exclusion being the non-binding

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[35] *Ibid*.

[36] UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-eighth session, UN Doc. A/CN.9/524, para 21.

[37] Article 17H(2): "The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure". See Barletta 2003, p. 1209 and footnote 46.

[38] Article 17H(3): "The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties".

nature of the arbitral decision (Article 36(1)(a)(v)).[39] The approach of the reform in this respect is not free from criticism, since some of those requirements (e.g., the connection of the order with the arbitration agreement and the regular constitution of the arbitral tribunal) seem incompatible with the summary assessment leading to the granting of interim orders. Others, such as the validity of the arbitration agreement and the respect of due process, should be adapted to the specific characteristics of interim relief. Subordinating enforcement to the full assessment of the validity of the arbitration agreement entails the risk of encouraging dilatory objections by the party against which the interim measure is sought. It would have been preferable to make enforcement dependent on a *prima facie* assessment of the tribunal's jurisdiction.[40] The grounds for refusal set out in Article 17I(1)(a)(ii) and (iii) concerning non-compliance with the order to provide security, and the termination, suspension or modification of the measure by the arbitral tribunal, respectively, are peculiar to interim relief and do not correspond to any of the grounds for refusing enforcement of awards.[41]

The requirements set out in Article 17I(1)(b) can be raised by the court on its own motion.[42] The first case contemplated by this provision seems inspired by the abovementioned Section 1041(2) ZPO and allows the court to refuse enforcement if it is incompatible with its powers, or to "reformulate" the interim measure to the extent necessary to adapt it to its procedural law without, however, modifying its substance. Finally, it is worth mentioning Article 17I(2), which limits the effects of the court's assessment to the recognition and enforcement of the order, confirms that the denial of the *exequatur* has no impact on the validity or on the effectiveness of the measure in the arbitral proceedings and prohibits any review of its substance by the court.[43]

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[39] Article 17I(1): "Recognition or enforcement of an interim measure may be refused only: (a) At the request of the party against whom it is invoked if the court is satisfied that: (i) Such refusal is warranted on the grounds set forth in Article 36, paras (1)(a)(i), (ii), (iii) or (iv)".

[40] This defect is only partially remedied by the language adopted in the provision, which is intended to allow the denial of enforcement only in the exceptional circumstances where it is deemed necessary in the light of the interests protected by the provision at issue ("such refusal is warranted […]"). The court may declare the measure enforceable despite the lack of any of those requirements if, in the specific case, the denial of enforcement is not inevitable. See Kojović 2001, p. 531.

[41] Article 17I(1)(a): "(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted".

[42] Article 17I(1)(b): "(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance: or (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure".

[43] Article 17I(2): "Any determination made by the court on any ground in para (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure".

14.5 Recognition and Enforcement of Foreign Interim Measures Under the New York Convention and Other Instruments

The recognition and enforcement of interim measures adopted in foreign arbitral proceedings is possible on the basis of either ordinary legislative provisions or conventional instruments applicable in the jurisdiction where enforcement is sought.

As far as national legislation is concerned, as stated above the relevant regime is generally not extended to foreign orders.[44] In this respect, the amendment of the UNCITRAL Model law, which provides for the applicability of its regime irrespective of the localization of the arbitration, is indeed an important development, which however, is only applicable in jurisdictions which will adopt or amend the Model Law after the 2006 revision.

The 1961 Geneva Convention on International Commercial Arbitration does not deal with the recognition and enforcement of interim measures. Bilateral conventions on the enforcement of awards generally set out an enforcement regime similar to that of either the New York Convention or conventions on the enforcement of judicial decisions, and expressly limit their scope to arbitral decisions that can be qualified as awards.[45] The privileged recognition and enforcement regime provided by the 1965 Washington Convention (Article 54) is only applicable to arbitral decisions that the same Convention qualifies as "awards". This excludes all decisions other than a final award on the merits and renders the ICSID Convention inapplicable to interim measures.

The question of the applicability of the New York Convention to foreign interim orders has given rise to wide theoretical debate. The Convention notoriously contains neither a provision specifically dealing with the recognition and enforcement of foreign provisional measures nor a definition of the notion of "arbitral award" that would allow a precise definition of its scope *ratione materiae*.[46] Irrespective of the methodological approach to the latter problem, interim measures can *prima facie* hardly be qualified as awards, due to their provisional and instable character.[47] This impression is confirmed by the Convention's substantive regime, which, in its relevant part, is examined below.

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[44] Born 2014, pp. 2516–2517.

[45] The few bilateral conventions that expressly contemplate interim measures exclude them from their scope: see, for example, the Bilateral Conventions between Italy and Switzerland (Article 9) and between Belgium and Switzerland (Article 1(2)), which expressly exclude the *exequatur* of arbitral decisions ordering attachments and analogous measures.

[46] The reference to the notion of "award" is aimed at including in the scope of the Convention awards rendered both in institutional arbitrations and in *ad hoc* proceedings, and is therefore irrelevant for our present purposes (see Article I(2) of the New York Convention). See Bernardini 2006, p. 89; Carlevaris 2002, pp. 470 *et seq.*

[47] See, in Switzerland, the ruling of the Federal Tribunal of 13 April 2010, DFT 136 III 2010, holding that "[s]ince the appeal is directed not against an award, but against a decision on provisional measures as defined in Article 183 PILA, this matter is consequently not capable of appeal"; see also Karrer 2001, p. 108.

Despite some contrary views,[48] the form in which an arbitrator adopts an interim measure is irrelevant for the purpose of determining whether it is capable of enforcement under the Convention. A court in which recourse is sought for the enforcement of a measure would in fact be free to characterize the measure as it deems appropriate, regardless of the form chosen by the arbitrator. Furthermore, it would not be open to the parties to influence the enforceability or the order by jointly requesting that it be issued in the form of an award.[49] The applicability of the Convention is therefore independent of the form of the order.

The theories in favor of the applicability of the New York Convention to interim measures are generally aimed at ensuring that measures be fully effective and circulate in the jurisdictions of all contracting states.[50] Some commentators also rely on more specific arguments and theories, such as the one referring to the "contractual basis" of interim measures, which would allow characterizing interim measures as final decisions, albeit only for the duration of the arbitral proceedings, relating to an aspect of the contractual relationship covered by the arbitration agreement, which would lead to their assimilation to awards, albeit *sui generis*.[51]

In one of the few reported cases on the applicability of the New York Convention to interim orders, in a thoroughly motivated ruling in *RCI v. Bolwell*, the Australian Supreme Court of Queensland resolutely denied that the New York Convention is applicable to interim orders.[52] The Court was requested to examine whether a decision labelled "Interim Arbitration Order and Award", made by an arbitrator to protect the contractual rights of a party "until such time as the arbitrator enters a final award in this matter",[53] was capable of recognition and enforcement in Australia under the Convention. It separately examined the questions of the final nature of the order

[48] See Kojović 2001, pp. 524 *et seq.* The enforceability of foreign interim measures adopted in the form of an award on the basis of domestic legislation or the New York Convention has been recognized also in jurisdictions which provide that the arbitrators have no power to order interim measures, such as Italy: see Tommaseo 1999, pp. 14 *et seq.*; Bernardini 1993, pp. 24–25.

[49] Carlevaris 2002, pp. 469 *et seq.* (and arbitral practice and case law mentioned therein).

[50] See, for example, Born 2014, p. 2515: "It is also highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be able and significantly more willing to refuse to comply with provisional relief, resulting in precisely the serious harm that provisional measures were meant to foreclose"; see also Veeder's statement reported in Kojović 2001, p. 532: "If an award can be enforced under the New York Convention, then why not an interim order made by the same tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common sense"; Yesilirmak 2005, p. 265; de Boisséson 1990, p. 750.

[51] Schlosser 1989, pp. 566 *et seq.*; van den Berg 2001, p. 141; Reiner 1998, p. 899.

[52] Supreme Court of Queensland, *Resort Condominiums International, Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty. Ltd.*, 29 October 1993, Yearbook Commercial Arbitration 1995, pp. 628 *et seq.*; see Pryles 1994, pp. 385 *et seq.*

[53] The decision of the sole arbitrator was based on a previous 'preliminary injunction' ordered by a US court and regulated several aspects of the relationships between the parties pending an award on the merits. Under the order, the respondents were prevented from entering into agreements of the same type as the one in dispute with other parties in the same territory, from using information obtained on the basis of the contract in dispute for purposes other than those specified in the same contract, and from altering registrations made during the contractual relationship. The parties were

and its characterization as an "award", on one hand, and, on the other hand, the applicability of the New York Convention. On the first point. the Supreme Court found that the injunctions contained in the order were to be rescinded, suspended, varied, or re-opened by the tribunal which pronounced them, and concluded that its nature was interlocutory rather than final.[54] On the second point, the analysis was conducted in light of the regime of the Convention. The Court attached decisive relevance to the Convention's scope, which under Article I(1) is limited to decisions "arising out of 'differences' between persons". According to the Court, the term "differences" would have a meaning only with respect to the merits of the subject matter referred to the arbitrators and would exclude merely procedural issues.[55] The notion of award adopted by the Convention would therefore encompass only "an award that determines rights, and not an interlocutory or procedural order". Furthermore, according to the ruling, Article V(1)(e) of the Convention would draw a parallel between the enforceability of interim orders and the possibility of challenging them, and would therefore exclude from the scope of the Convention all decisions which are not capable of being challenged before state courts.[56]

In light of the overall regime of the Convention, the conclusion reached by the Australian court can certainly be shared and, in fact, has been approved by most commentators.[57] However, its motivation is not as convincing and appears to be based on an incorrect reading of some of the Convention's provisions.

First, contrary to the finding in *RCI v. Bolwell*, the New York Convention does not presuppose the "final" nature of the order, as it was instead the case under the previous regime, which would undoubtedly exclude decisions that are, by definition, provisional and susceptible to revocation or modification. The requirement under the Convention that awards be binding on the parties (Article V(1)(e)) would therefore not *per se* constitute an insurmountable obstacle to the enforceability of interim measures. The requirement in question is not contradicted by the revocable and modifiable nature of interim orders, since they can be considered "binding" according to their own content and within their temporal limits.

Second, Articles V(1)(e) and VI prevent enforcement (or provide a suspension of enforcement proceedings) when the award has been annulled or suspended, or if the relevant proceedings are pending before a competent judge. These provisions seem to presuppose as a condition for enforceability, that the decision to be enforced can be subject to judicial control and may be interpreted so as to exclude the applicability

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further required to open an escrow account in which the revenues of the activities carried out under the contract should have been deposited for the duration of the proceedings.

[54] See *Resort Condominiums International*, *supra* note 52, p. 630.

[55] According to the Supreme Court, the term "differences" clearly refers to the subject-matter of the dispute, rather than to some interlocutory or procedural direction or order which does not resolve the dispute submitted to arbitration (*ibid*., p. 638).

[56] *Ibid*., p. 638: "The award referred to in article V(1)(e) of the Convention is a type of award that a foreign court may set aside or suspend viz. an award which has determined some or all of the issues submitted to an arbitrator for determination rather than an interlocutory order of an arbitrator of the kind referred to in this application".

[57] See Berger 1993, pp. 343–345; Besson 1998, pp. 343 *et seq*.; Craig et al. 2000, p. 466.

of the Convention to arbitral decisions that cannot be impugned.[58] However, that an arbitral interim measure be challenged before state courts, although unlikely, cannot be excluded *a priori*. Moreover, even assuming that interim measures cannot be challenged before state courts, only the above provisions of the Convention would become inapplicable, not the Convention regime as a whole. The consequence would be that such orders would become more easily enforceable since the particular grounds for refusing enforcement under Articles V(1)(e) and VI would be inoperable.

Third, the reference to the notion of "difference" in the Convention (Articles I, II(1) and V(1)) does not necessarily exclude its applicability to interim measures. This term could be referring to the particular aspect of the main dispute represented by the "difference" on the application for interim measures.[59]

The applicability of the Convention may be questioned also with reference to Article V(2)(b), which allows non-conformity with the public policy of the state in which enforcement is sought as a ground for refusing enforcement that can be raised by the judge *ex officio*. The lack of conformity with public policy might depend on the content of the order, on its type (possibly unknown to the legal order in which enforcement is sought) or on the general attitude of the jurisdiction with regard to arbitral interim relief.[60] However, conformity with public policy can only be assessed on a case-by-case basis, which *per se* excludes the Convention from being declared inapplicable in general terms in this respect.

The requirement that due process be respected in the proceedings leading to the decision to be enforced (Article V(1)(b) of the Convention) may also raise doubt as to the applicability of the Convention to decisions on interim relief, as the urgent and summary nature of the relevant proceedings can be seen as hardly compatible with full respect of due process. The standards of due process applicable in ordinary proceedings on the merits are indeed subject to adjustments in proceedings leading to the making of interim measures in which temporary and limited restrictions of the right of defence are admissible to ensure the rapidity of the procedure and the effectiveness of the measure. However, due process, albeit adjusted to the specific characteristics of interim relief, is not totally excluded. Article V(1)(b) of the Convention allows the state courts to refuse recognition of awards issued against parties that were not given proper notice of the appointment of the arbitrators or of the arbitral proceedings, or were "otherwise unable to present [their] case". This provision would prevent the application of the Convention to *ex parte* measures, which are extremely rare in practice, but not to arbitral interim measures in general.

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[58] Besson 1998, p. 341.

[59] *Ibid*., p. 330.

[60] Some commentators are of the opinion that arbitral interim measures are in any event contrary to the public policy of jurisdictions that prohibit arbitrators from ordering provisional measures. In this respect, one could consider the recognition of arbitral measures contrary to Italian public policy under Article 818 of the Code of Civil Procedure. The prohibition would prevent not only the making of orders in arbitrations having their seat in the state but also the enforcement of measures made in arbitrations seated abroad, on the assumption that the prohibition is based on an intrinsic lack of *imperium* of the arbitrators and constitutes a fundamental principle of these legal systems. For an illustration of, and a critical comment on, this theory, see Barletta 2003, p. 1197.

While the abovementioned analysis of the specific provisions of the Convention does not necessarily lead to the exclusion of its application altogether, a systematic interpretation of the Convention reveals its inherent incompatibility with interim relief.[61] When the New York Convention was adopted, arbitral interim relief was extremely rare in practice and was not regulated by domestic legislation. It is therefore not surprising that its drafters failed to consider the specific features of interim relief for the purpose of enforcement.[62] Moreover, the specific objects of the Convention are, on one hand. the recognition of the arbitration agreement, and, on the other hand, the recognition of arbitral awards made pursuant thereto. It would be inconsistent to consider interim measures excluded from the scope of the Convention with respect to the former, yet covered by it with respect to the latter.[63] Admitting that interim measures can be recognized and enforced on the basis of the Convention would necessarily lead to admitting that arbitrators have exclusive jurisdiction to make provisional measures under Article II(3) of the Convention, which, on the contrary, is almost universally denied.

Finally, a systematic analysis of the requirements for the recognition of awards under the Convention leads to the conclusion that it is inadequate to regulate the enforcement of interim measures.[64] The grounds for refusal set out in Articles V and VI were clearly intended to regulate the recognition of final decisions on the merits, not interim measures. This is particularly true with respect to Article V(1)(a), which allows the courts of the state in which recognition is sought to refuse the *exequatur* if the arbitration agreement is invalid or inapplicable, thus implying a previous and positive assessment of the arbitrator's jurisdiction on the merits. However, due to urgency, interim measures are frequently ordered before a full assessment of the tribunal's jurisdiction.[65] Another ground for refusing enforcement under the Convention that is hardly compatible with the recognition and enforcement of provisional measures is the lack of conformity with the public policy of the state in which enforcement is sought (Article V(2)(b)). Public policy is a useful standard for the purpose of challenging the effectiveness of decisions on the merits when they conflict with fundamental principles of the legal order of the state in which recognition is sought. The same concept does not make much sense with respect to provisional measures, which largely depend on a comparative assessment of the interests of the parties involved and are generally neutral with regard to public policy.[66]

[61] Carlevaris 2006, pp. 542 *et seq.*

[62] See Bahmaei 2002, p. 249; *contra*, Born 2014, p. 2516.

[63] Poudret and Besson 2007, p. 546; Besson 1998, p. 346.

[64] Kojović 2001, p. 528.

[65] Carlevaris 2007, p. 532.

[66] Besson 1998, pp. 345–346.

14.6 The Enforcement of Emergency Arbitrators' Orders

Most arbitration rules provide for the appointment of an "emergency arbitrator" to hear applications for urgent measures before the constitution of the arbitral tribunal.[67] These mechanisms, which have been introduced by arbitral institutions over the last 10/12 years, are aimed at filling the gap existing at the early stage of a dispute, when no arbitral tribunal has been constituted yet and a party that needs urgent relief would have no option but to resort to the courts.

Although the legislation in most jurisdictions that have adopted an enforcement regime of arbitral interim measures does not expressly refer to emergency arbitration, such regime is in principle available also to obtain the recognition and enforcement of decisions made by emergency arbitrators,[68] provided however that emergency arbitrators can be characterized as real arbitrators, and not as mechanisms of a different nature, having mere contractual value and effects. There is still limited case law addressing whether national courts are empowered to enforce orders made by emergency arbitrators under the enforcement rules applicable to arbitral tribunals' orders.[69] It is therefore difficult to draw general conclusions in this respect.

In a 2003 case, the Paris Court of Appeal examined this question not with reference to emergency arbitration, which at the time was provided by neither the ICC nor any other international arbitration rules, but with reference to the ICC "Pre-Arbitral Referee Rules", a separate set of rules that the ICC offers to users to obtain relief akin to that today also available under the ICC Emergency Arbitrator Provisions. Requested to annul the order of a Pre-Arbitral Referee, the Paris Court held that the rules in question do not provide for an arbitral mechanism, but for a different and purely contractual mechanism, and that the decision of the Pre-Arbitral Referee has

[67] See e.g. Article 29 and Appendix V of the ICC Rules; Appendix II of the SCC Rules; Article 9B of the LCIA Rules; Article 43 of the Swiss Rules.

[68] For an apparently different view, see ICC Commission's Report on Emergency Arbitrator Proceedings, 2019 ("ICC Report"), para 184: "Most national laws seem to strictly apply to arbitral tribunals only and not to an EA".

[69] See ICC Report, paras 186–188: "Even where there is yet to be explicit confirmation from local courts, most reports from countries that have incorporated the UNCITRAL Model Law (and in particular its provisions on enforceability of interim measures), tend to favour the enforceability of EA decisions considering that full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and that it is reasonable to assume that the EA has the same powers as an arbitrator. In those countries where the UNCITRAL Model Law has only inspired the local arbitration law, then the position as to enforceability of EA decisions varies widely, even when the arbitration law expressly authorises arbitral tribunals to grant interim measures. In countries such as Belgium, Colombia, Portugal, Brazil, Nigeria, Poland, Spain, Ukraine, Turkey and Venezuela, National Committees tend to consider that arbitral tribunals' power to grant interim measures are consequently extended to EAs, while countries such as India, Macedonia, Malaysia, Serbia and Thailand, are reported to have a restrictive interpretation of EAs' powers. Further, in countries where statutory provisions allow arbitral tribunals to grant interim measures, national laws and practice often draw distinctions between domestic-seated and foreign-seated arbitration. In certain countries, enforcement is easier in domestic-seated arbitration, while in others enforcement is made easier in foreign-seated arbitration where the law of the parties is given prevalence".

the authority of the "*chose convenue*" and not that of the "*chose jugée*".[70] The ICC Pre-Arbitral Referee Rules differ from the Emergency Arbitration Rules on several accounts. First, emergency arbitrator rules are, in most arbitral systems (including the ICC's), part of the ordinary arbitration rules, and not a separate set of rules. Second, unlike the Pre-Arbitral Referee Rules, which refer to a "referee", emergency arbitrator rules refer to the notion of "arbitrator". Third, and most importantly, emergency arbitrator rules present a closer link with the arbitral proceedings, as evidenced by the fact that the party seeking urgent relief from an emergency arbitrator is generally required to commence the arbitration within a specified time limit, failing which the emergency arbitrator proceedings may be terminated and any order made by the emergency arbitrator would be deprived of effect. These characteristics support the conclusion that emergency arbitration is indeed an arbitral mechanism, subject to the legal regime of arbitral proceedings and decisions, including for the enforcement of the relevant decisions.[71]

As stated above, only few courts have so far directly addressed emergency arbitrator proceedings. However, some courts that have considered an emergency arbitrator's decision have treated it for all purposes as if it were an award made by an arbitral tribunal.[72] In other cases, courts have given indirect support to orders made by emergency arbitrators.[73]

Depending on the applicable rules, emergency arbitrators' decisions can be made in the form of orders or awards.[74] However, for the reasons mentioned above with respect to arbitral interim measures in general, which are *a fortiori* valid for emergency arbitrators' decisions, regardless of their labelling the decisions can hardly be characterized as arbitral awards and be subject to the enforcement regime of awards, New York Convention *in primis*. Their inherently provisional and unstable nature is at odds with the notion of award accepted in most, if not all, jurisdictions. However, as also discussed above, the applicability of most domestic law provisions on the

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[70] *Société Nationale des Pétroles du Congo et République du Congo v. Total Fina Elf E&P Congo*, Paris Court of Appeal, 29 April 2003, Revue de l'arbitrage 2003, p. 1296; confirmed by French Cour de Cassation, 12 October 2011, Revue de l'arbitrage 2011, p. 1095.

[71] For a different view, according to which "it is unlikely that French courts will enforce EA decisions as long as such definition of award stands", see ICC Report, para 197.

[72] See, *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (confirming an EA award issued pursuant to the AAA Rules ordering specific performance to restore the status quo); *Blue Cross Blue Shield of Mich. v. Medimpact Healthcare Sys.*, Inc., No. 09-14260, 2010 WL 2595340 (E.D. Mich. June 24, 2010).

[73] At least in one known instance, the preliminary relief judge of the Amsterdam District Court provided indirect support to the enforceability of an ICC emergency arbitrator order: *Pre-Paid Legal Services, Inc. v. Kidd*, 26 October 2011 (the Court directed the parties to submit to the emergency arbitrator proceedings and extended the emergency temporary restraining order sought by the applicant "to allow the parties to properly present, and the emergency arbitrator to properly consider, a request for emergency measures"); see ICC Report, footnote 164.

[74] Emergency arbitrators' decisions are made in the form of an order under the ICC Rules (Article 29(2)). Other institutional Rules, such as the NAI Rules or the SIAC Rules, recognise the emergency arbitrator's power to give its decision the form of an order or of an award (the SIAC Rules, however, provide that the notion of award covers also awards made by emergency arbitrators).

recognition and enforcement of arbitral interim measures does not depend on their legal nature or title and is applicable to interim measures regardless of their form.

The question whether emergency arbitration is indeed arbitration is irrelevant in the few jurisdictions, including Hong Kong,[75] Singapore[76] and New Zealand,[77] which have adopted specific legislation expressly applicable to the enforcement of emergency arbitrators' decisions.

14.7 Conclusions

The almost universal recognition of arbitrators' power to adopt interim measures is not sufficient to ensure their real effectiveness, for which satisfactory enforcement mechanisms are required. Although numerous jurisdictions have adopted provisions on the enforcement of arbitral interim measures, these provisions are far from harmonized. Moreover, they are inadequate to ensure the recognition of orders made in foreign proceedings.

Commentators concur on the need to elaborate an adequate regime, but no agreement exists as to the best instrument to obtain harmonization. Some authors support the adoption of an international convention,[78] while others are in favour of harmonization among the various legal systems, to be fostered through soft law instruments such as the Model Law.[79] Among the former, some advocate a revision of the New York Convention, while others support the idea of a separate protocol. [80] Only isolated voices are in favour of the direct applicability of the Convention in its present form.[81] Until the 2006 amendment of the Model Law, an analogous difference of views divided the supporters of a flexible legislative model, with a majority underscoring the need for a modification of the text and others being in favour of an extension of the existing provisions concerning the enforcement of awards to interim measures.[82]

The amendment of the UNCITRAL Model Law addresses the lack of harmony among the various legal orders and, as such, is a welcome and interesting development. However, apart from the doubts as to the specific regime adopted, which have

[75] See Section 22A and 22B of the Hong Kong Arbitration Ordinance, which expressly provide for the enforceability of emergency arbitrators' orders.

[76] See Section 2(1) of the International Arbitration Act and Section 2(1) of the Arbitration Act, which expand the notion of arbitral tribunal to cover also emergency arbitrators, whose orders are therefore declared enforceable as if made by a court.

[77] See Section 2(1) of the Arbitration Act, which enlarges the scope of the notion of "arbitration" to encompass also emergency arbitrator proceedings.

[78] Lew et al. 2003, p. 614.

[79] van den Berg 1999, pp. 41 *et seq.*

[80] Veeder 1999, pp. 21–23; Wang 2003, p. 1059; Yesilirmak 2005, pp. 266–267; in favour of a "new additional New York Convention", Karrer 2001, p. 108.

[81] Born 2014, pp. 2514–2515.

[82] In favour of an amendment of Article 35 of the Model Law, Blessing 1999, p. 281 and footnote 6.

been highlighted above, the nature of this instrument seems inadequate to achieve the desired level or harmonization. First, this solution is not binding on states, which remain entirely free to disregard the uniform text. Second, the reformed text is likely to be adopted in jurisdictions that have already adopted the Model Law but will probably not be compatible with jurisdictions whose arbitration legislation follows different approaches. Finally, the provisions adopted in 2006 are not even capable of immediate implementation in the legislation of all Model Law jurisdictions, since some of them have already introduced modifications and amendments to the provisions on the recognition of interim measures following an approach very different from that chosen by UNCITRAL.[83]

The adoption of an international binding instrument therefore seems the most adequate manner for achieving real harmonization. However, neither the revision of the New York Convention, aimed at covering also interim measures, nor the adoption of a new instrument seem to be an appropriate or viable solution. The re-opening of negotiations on the Convention might jeopardize its success by inducing states who disagree with the revision to withdraw their participation from the Convention. Furthermore, a revision would inevitably result in a lengthy and burdensome process, during which no uniformity would be realized between states that have already ratified the revised text and states that have not yet done so.[84] Most importantly, since the Convention was drafted in view of final decisions on the merits and is as such not applicable to interim measures, its extension would inevitably lead to numerous radical modifications and would result in the mere combination of different, non-homogeneous regimes.

The adoption of a distinct international instrument, drawn up on the basis of the experience of the New York Convention but substantially different in its content, does not seem a more realistic prospect. As also shown by the difficulties experienced during the revision of the UNCITRAL Model Law, the adoption of such an instrument would most probably prove unrealistic. Given the different approaches to the notion of interim measures, including the recent emergence of new forms of relief subject to different characterization in different legal systems (e.g., emergency arbitrators' orders), the definition of the scope of any such instrument would *per se* be problematic.

Spontaneous reforms at the national level, possibly inspired by the guiding principles of the Model Law provisions, rather than the adoption of a new multilateral binding instrument, seem the best way forward to achieve an effective and harmonized enforcement regime for several reasons. First, national legislators are increasingly adopting specific provisions on the enforcement of arbitral interim measures. Second, the Model Law has also been amended through the inclusion of specific provisions on enforcement, which may lead to the adoption of a more uniform regime in the near future. Third, and finally, specific provisions on the enforcement of emergency arbitrators' decision have been adopted or are being considered in a growing number of jurisdictions, which is likely to contribute to greater harmonization also in this specific field.

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[83] Yesilirmak 2005, pp. 266–267.

[84] Reiner 1998, p. 903.

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Chapter 15
Provisional Measures in ICSID Arbitration Proceedings: Between the Current Legal Framework and the Proposed Reform

Domenico Pauciulo

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Abstract Provisional measures have an enormous importance in the context of investment arbitration given the continuous recourse to interim protection by disputing parties. While the letter of Article 47 ICSID Convention and Arbitration Rule No. 39 is silent on the necessary requirements for the adoption of provisional measures and on the legal nature of provisional orders, ICSID tribunals have adopted a significant number of decisions which seems to clarify the effective limits of ICSID arbitral tribunals' precautionary powers and a plain influence of the International Court of Justice's jurisprudence on provisional protection of rights. This chapter therefore addresses procedural and substantial issues regarding the adoption of provisional measures by ICSID arbitrators, also identifying *typical* interim orders—through the analysis of the arbitral practice—and the possible consequence in case of non-compliance by the opposing party. Lastly, in consideration of the ongoing amendment process of the ICSID Rules, this chapter proposes a scrutiny of the anticipated reform of ICSID rules on provisional measures.

Keywords investment arbitration · ICSID · Article 47 ICSID Convention · requirements of provisional measures · types of provisional measures · ICSID amendment process

15.1 Introduction

In judicial and arbitral proceedings, the protection of parties' rights cannot always await the final resolution of the dispute. Provisional measures, thus, constitute decisive tools to preserve both parties' claims and the factual situation existing upon the initiation of the proceeding.[1] These procedural orders, therefore, have an ancillary purpose to the judgement on the merits by the arbitral tribunal and/or its enforcement.

International courts and tribunals and, above all, national legal systems, know a multitude of provisional, conservatory or precautionary measures, each of which

[1] Wolfrum 2006. There is no widely uniform definition of the concept of provisional measures, therefore, for the purpose of this chapter, the term "provisional measures" is used to refer to protective, conservatory, precautionary and interim measures. The author will use those terms as synonymous, notwithstanding existing differences.

has its own characteristics[2] and finalities.[3] Their impact is particularly significant in investor-state arbitration, pondering the economic importance and technical complexity of the questions submitted to international investment arbitration. As a matter of fact, the International Centre for the Settlement of Investment Disputes (ICSID), the principal arbitral institution for investment disputes, lists more than 170 cases where the parties requested provisional orders,[4] showing a massive increase in the past 20 years in parallel with the bolstered confidence in arbitration.[5] These measures appear essential by virtue of the length of these proceedings: ICSID statistics demonstrates that the average duration of an investment arbitration procedure is 3 years and 8 months.[6] In such a long period of time, it is vital to preserve the *status quo*, avoiding that parties transfer money or assets in order to undermine future potential enforcement proceedings. In sum, provisional measures are indispensable to ensure an *effective* arbitral proceeding, where rights and interests at stake are *temporarily* protected until the final decision on the merits is issued.[7]

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[2] Yesilirmak 2005, pp. 6–8, highlights essential features of provisional measures in arbitration: (i) they presuppose the existence of a dispute; (ii) they are temporary/provisional in nature; (iii) provisional measures cannot exceed the final relief but they can just complement it; (iv) they should be granted only when there is risk in awaiting the final relief; (v) they can be modified, reviewed, amended or terminated if the circumstances of the case so require; (vi) the need for provisional relief is based on the condition that the decision on the merits could not satisfy the parties' rights and interests at stake; (vii) provisional measures can be decided also *ex parte*, under certain circumstances; (viii) unlike judicial provisional orders, arbitral provisional measures are not self-executing, standing the lack of coercive powers by arbitral tribunals; (ix) arbitral provisional measures do not bind third parties to arbitration.

[3] See UNCITRAL, Working Group on Arbitration, Settlement of Commercial Disputes. Possible Uniform Rules on Certain Issues concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form of the Arbitration Agreement, UN Doc A/CN.9/WG.II/WP.108 14 January 2000, para 63, that lists the main purposes of provisional measures, including (i) facilitating the conduct of arbitral proceedings (as for the preservation of evidence or to protect the confidentiality of the proceeding); (ii) avoiding loss or damage and preserving certain state of affairs until the dispute is resolved (as injunctions or order for the continued performance of a contract until the award is made); (iii) expediting the later enforcement of the award (as attachments of assets, order for the custody of money or movable property, or for the posting of security).

[4] See https://icsid.worldbank.org/en/Pages/process/Decisions-on-Provisional-Measures.aspx.

[5] The United Nations Conference on Trade and Development (UNCTAD) has developed an Investment Dispute Settlement Navigator, a database inventorying all the known treaty-based investment cases. Last update (31 December 2019) shows a total of 1023 known cases, of which 343 are pending. In addition, in the fiscal year 2020, the ICSID Secretariat registered 40 new cases, topping a total of 768 cases administered by the Centre since its first case was registered in 1972, see 2020 ICSID Annual Report. Excellence in Investment Dispute Resolution, 15 October 2020, Washington DC.

[6] See ICSID, Proposals for Amendment of the ICSID Rules—Working Paper (hereafter, Working Paper No. 1), 2 August 2018, Schedule 9—Addressing Time and Costs in ICSID Arbitration, p. 900, available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf. See Peterson 2018.

[7] See Maniruzzaman 2015, pp. 183–197; Malintoppi 2009, p. 157.

This chapter, then, addresses the current framework for the adoption of provisional measures' orders during ICSID arbitration proceedings, by focusing on the necessary requirements that such orders must meet (Sects. 15.2 and 15.3) and analysing the practice of ICSID tribunals so to shed some light on the rights worthy of protection through provisional measures and the *categories* and legal nature of measures usually granted (Sects. 15.3–15.7). Lastly, the focus will move on the ongoing amendment reform of ICSID arbitral rules on provisional measures (Sects. 15.8 and 15.9).

15.2 Provisional Measures Before ICSID Arbitral Tribunals: Procedural Matters

ICSID rules on provisional measures are considered directly inspired and modelled around Article 41 of the Statute of the International Court of Justice (ICJ):[8] therefore, ICSID arbitrators' precautionary practice is importantly influenced by ICJ case law.

Article 47 of the ICSID Convention regulates the recourse to provisional measures during arbitration proceedings.[9] The legal framework is completed by Arbitration Rule No. 39, governing the procedural aspects of ICSID arbitral tribunals' precautionary power.[10] Also, specific rules on provisional measures exist in the framework of the ICSID Additional Facility Rules (AF).[11] These rules entrust arbitrators with wide discretion on the ordering of provisional measures.[12]

Indeed, arbitral tribunals, if they consider that the circumstances so require, may issue "any provisional measures" to preserve the respective rights of the parties.[13]

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[8] Schreuer et al. 2009, pp. 759. See ICJ, Statute of the International Court of Justice, 18 April 1946, Article 41(1): "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".

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, in 575 UNTS 159 (hereafter ICSID Convention).

[10] ICSID, Rules of Procedure for Arbitral Proceedings, 10 April 2006, (hereafter Arbitration Rules), Rule No. 39, available at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx.

[11] See Article 46 of the ICSID, Additional Facility Arbitration Rules, available at: www.icsidfiles.worldbank.org (hereafter AF Rules). The ICSID Additional Facility (AF) was developed in 1978 to create a procedural framework for disputes not falling within the jurisdiction of the Centre: in these cases, the ICSID Convention does not apply and the arbitration is conducted under these specific set of rules with important difference with the Arbitration Rules.

[12] See *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para 175: "[…] A tribunal enjoys broad discretion when ruling on provisional measures […]". Also see Sarooshi 2013, p. 363: "[Article 47 ICSID Convention] gives Tribunals a broad discretion in being able to decide this matter since it is left for them to decide whether 'the circumstances so require' in a particular case".

[13] Article 47 of the ICSID Convention: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party".

Additionally, the ICSID legal framework does not provide for any time-limit for the party to seek the issuance of an interim order, neither for an adoption *proprio motu* by arbitrators. Provisional reliefs can be requested "[A]t any time" after the institution of the proceeding,[14] even before the arbitral tribunal's assessment of its jurisdiction or any ruling on preliminary objections.[15] Contrarily, the adoption of interim measures preceding the constitution of the arbitral tribunal is not permitted.[16] In case a party seeks provisional measures *prior* to the constitution of the tribunal, Rule No. 39(5) provides that the ICSID Secretary General shall set a deadline within which the parties to the dispute can file their observations, in order for the tribunal to consider both the request and parties' submission promptly upon its constitution.[17] Such *fast-tracked* path for interim orders applications is confirmed by the arbitral tribunal's express obligation to decide preliminarily on requests for provisional measures, once each party has presented its observations.[18]

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[14]Rule No. 39 of the Arbitration Rules. According to Rule 6(2) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), available at: https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf, the date of the institution of the proceeding is the date of the registration of the Request for Arbitration by the ICSID Secretariat.

[15]See *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on Claimant's Application for Provisional Measures and Temporary Relief of 15 February 2017, para 114; *Hydro S.r.L. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures of 3 March 2016, para 3.7; *Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures of 26 February 2010, para 105.

[16]On this issue, the difference between ICSID and other arbitral frameworks is evident, since ICSID Arbitration Rules do not provide for the possibility of resorting to the so-called *emergency arbitrator* in case of extreme urgency, therefore when a party cannot await the establishment of the arbitral tribunal for the issuance of an interim measure, as prescribed by *Article* 29 of the *Rules of Arbitration of the International Chamber of Commerce*, issued on 1 March 2017, available at: https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf, or by the new rules established in *Appendix II of the Rules on Arbitration Institute of the Stockholm Chamber of Commerce*, available at: https://sccinstitute.com/media/293614/arbitration_rules_ita_17_web.PDF. In literature, regarding urgent requests for provisional measures, see Carlevaris 2017a; Osadchiy 2017; Shaughnessy 2017; Fumagalli 2013.

[17]Rule No. 39(5) of the Arbitration Rules.

[18]Rule No. 39(2) and 39(4) of the Arbitration Rules. See Malintoppi 2009, p. 157, who highlights that "parties usually exchange written submissions and it is not uncommon for tribunals to convene brief oral hearings or hold conference calls specifically devoted to requests for provisional measures". Also Luttrell 2015, p. 396, highlights: "Although the term 'observations' implies a certain collegiate informality, the reality is that provisional measures applications are often more like hard-fought mini-trials, with detailed legal pleadings and supporting evidence (including witness statements). In practice, the sequence comprises two, and often three, steps: the request (in the form of an application), the responding party's observations (in the form of a reply), and (somewhat less frequently) the applicant's rejoinder. More often than not, a hearing will be held". Notwithstanding, in *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Directions Concerning Claimants' Applications for Provisional Measures of 12 June 2012 (13 June 2012), para 7, the

In the absence of specific requests from the parties, arbitrators have nonetheless the power to adopt provisional orders *proprio motu* or even to indicate measures other than those requested by the parties, with the sole limitation of them being *fit* to pursue the same objective sought by the applicant.[19] In any case, provisional measures must be deemed *temporary*, in the sense that they are in force for the duration of the proceedings: accordingly, tribunals may at any time modify or revoke such measures if the circumstances leading to their issuance change.[20]

Lastly, the ICSID framework regarding provisional measures regulates arbitral tribunals' interactions with domestic courts: Rule No. 39(6) clarifies that, except when otherwise agreed (i.e. in the agreement registering parties' consent to arbitration or in the applicable treaty), parties cannot recourse to interim protection before national jurisdictions, whether before or after the institution of the proceeding.[21]

15.3 The Requirements to Adopt Provisional Measures

The ICSID Convention and the ICSID Arbitration Rules do not set forth any requirement for the issuance of interim reliefs. Therefore, ICSID tribunals have investigated the jurisprudence of the ICJ to determine applicable standards for the issuance of provisional measures.[22] ICSID case law is therefore consistent in considering provisional measures as *extraordinary remedies*, that should be adopted only when strictly

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ICSID tribunal directed provisional measures to the respondent prior to respondent's observations on the request. The President of the tribunal determined that it was appropriate to make an interim order for the preservation of the status quo pending further consultation between the parties in light of the "*potential consequences that might result from the Respondent's proposed actions*", i.e. the intention of coercively obtain documents from the claimants outside the arbitration proceeding, whose stay was requested by the claimants.

[19] See Rule No. 39(3) of the Arbitration Rules. This power was used by the arbitrators in the very first ICSID arbitration in the case *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Provisional Measures of 2 July 1972, as reported by Lalive 1980, pp. 135–137. See also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, para 14.

[20] See Rule No. 39(3) of the Arbitration Rules. Consistently, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 of 16 October 2002, in ICSID Review—FILJ, 2003, p. 328: "It is scarcely necessary to add that this like any procedural order on provisional measures may be re-visited on the application of either party and after hearing the other party, should circumstances change materially during the pendency of the jurisdictional phase of this proceeding".

[21] See Rule No. 39(6) of the Arbitration Rules: "Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests". Contrariwise, Article 46 of the AF Arbitration Rules authorizes the parties to request assistance from local court in order to obtain interim reliefs. In literature, see Carlevaris 2006, pp. 132–152.

[22] Frutos-Peterson and Ziyaeva 2015, p. 217. See also *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decisión sobre la adopción de medidas provisionales solicitadas por las partes of 25 September 2001, para 2: "Lo dispuesto en el artículo

necessary and after a careful evaluation of the parties' interests.[23] For instance, investment arbitral tribunals normally assess the existence of some conditions to adopt such orders. Commonly, (i) *prima facie* jurisdiction; (ii) necessity; and (iii) urgency are always scrutinized by arbitral tribunals. In most cases, arbitrators have also examined (iv) *fumus boni iuris* and, after having ascertained the previous requirements and decided for the adoption of a measure, they have focussed on the (v) proportionality of the measures requested.[24]

15.3.1 Prima Facie *Jurisdiction*

In ordering provisional measures, ICSID arbitral tribunals recurrently evaluate the existence of a *prima facie* basis for their jurisdiction. The necessity of satisfying this test was firmly established by the ICJ in its jurisprudence.[25] Coherently, this line of precedents was embraced also by ICSID tribunals. As a consequence, arbitral

anterior no constituye de ninguna manera una innovación en la historia de la jurisdicción internacional; es inspiración directa del artículo 41 del Estatuto de la Corte Internacional de Justicia". Critical on this practice by ICSID tribunals, Sarooshi 2013, pp. 365–377.

[23] See *City Oriente Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters of 13 May 2008, para 72 (hereinafter *City Oriente—Revocation*), according to which: "provisional measures must not be ordered lightly, but only as a last resort, after careful consideration of the interests at stake, weighing the harm spared the petitioner and the damage inflicted on the other party". On the same line, *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2011, para 93; *Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington's Request for Provisional Measures of 29 June 2009, para 78; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures of 8 May 2009, para 43; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/05, Decision on Provisional Measures of 6 April 2007, para 33; *Saipem S.p.A., supra* note 12, para 175; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures of 17 May 2006, para 32; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of 6 September 2005, para 38; *Emilio Augusto Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Resolución Procesual No. 2 of 28 October 1999, para 10. See also *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL (ad hoc), Order on Interim Measures of 2 September 2008, para 39.

[24] Yesilirmak 2005, pp. 170–182. See also *Sergei Paushok, supra* note 23, para 45.

[25] See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Order of 10 May 1984, para 24. See also ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order of 13 July 2006, para 57; ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, para 58.

tribunals conduct a factual analysis of claimants' allegations to determine whether, *at first sight*, they hold jurisdiction to rule on the merits.[26]

At this stage, however, any findings on jurisdiction are without prejudice to any further determination on jurisdiction and competence:[27] indeed, even after having appraised its jurisdiction for the purpose of adopting provisional measures, the parties still possess the "right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal or any other aspect of the dispute".[28]

Eventually, the assessment of *prima facie* jurisdiction can also be *facilitated* by the successful screening of the case by the Secretary-General of the Centre on the basis of Article 36(3) of the ICSID Convention.[29] However, this threshold must be considered consistently lower than the one adopted by arbitral tribunals for their *prima facie* review, since the former is exclusively aimed at avoiding the registration of frivolous actions or of cases manifestly outside the jurisdiction of the Centre.[30] In addition, arbitrators do not consider the registration of the request for arbitration by the Secretary-General as a final evidence of their jurisdiction,[31] even if it offers "a useful basis […] to recommend provisional measures".[32]

15.3.2 Necessity

ICSID jurisprudence is clear in affirming that provisional measures are awarded only if a substantial *threat* to the rights in dispute is proven.[33] This standard, known as

[26] See *Menzies Middle East and Africa S.A. et Aviation Handling Services International Ltd. viRépublique du Sénégal*, ICSID Case No. ARB/15/21, Ordonnance de Procédure No. 2 of 2 December 2015, para 110; and *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for provisional measures submitted by the Claimants of 9 December 2009, para 42. Therefore, only in case of a clear lack of jurisdiction, tribunals dismiss the requests, see Pey Casado, supra note 22, para 12. See also Bismuth 2009, p. 813, according to which the requirement of prima facie jurisdiction "is not difficult to meet in investment arbitration, as a clear basis for jurisdiction is likely to be found in investment treaties or arbitration agreements".

[27] See *Helnan, supra* note 23, para 25; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, para 47; and *SGS, supra* note 20, p. 298.

[28] See *Holiday Inns S.A., supra* note 19, p. 645.

[29] Article 36(3) of the ICSID Convention.

[30] Kaufmann-Kohler et al. 2018, p. 600: "In practice, tribunals either examine whether there is no manifest reason for excluding their jurisdiction (the 'unless approach' giving the benefit of the doubt to the claimant) or whether a provision confers prima fade jurisdiction upon them". See also Miles 2017, p. 159.

[31] See *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures of 21 January 2015, para 119; *Menzies, supra* note 26, para 109; *Millicom, supra* note 26, para 42; *Perenco, supra* note 23, para 39; *Pey Casado, supra* note 22, para 11.

[32] Schreuer et al. 2009, p. 772.

[33] Malintoppi 2009, pp. 161–164; Miles 2017, pp. 257–263.

necessity, is often addressed altogether with the urgency test.[34] More precisely, an interim order is *necessary* when it is appropriate to preserve the *status quo* or to avoid any harm, prejudice or damage to the rights that might subsequently be adjudged to belong to one of the parties.[35] Arbitral tribunals however disagree on the *level* of harm to be shown by the applicant: indeed, as affirmed by the tribunal in *PNG*, the degree of "gravity or seriousness of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party […]".[36] Several arbitral tribunals, in assessing necessity, relied on the case law of the ICJ,[37] and adopted the high threshold of "irreparable harm" or "irreparable prejudice",[38] deemed as an irreversible loss of the rights petitioned resulting in the

[34] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 5 of 3 April 2013, para 55 (hereinafter *Bernhard von Pezold* n. 5); *Occidental Petroleum, supra* note 23, para 59.

[35] *Italba Corporation, supra* note 15, para 34; *Phoenix Action, supra* note 23, para 33; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 of 18 January 2005, para 8 (hereinafter *Tokios Tokelés 3*). Therefore, arbitrators must "demonstrate that circumstances are likely to cause a violation or an aggravation of the violation of rights entitled to protection", see Bismuth 2009, p. 817, who also suggests that arbitral tribunals must carry out a "prospective analysis […] in order to demonstrate that certain circumstances are, first, likely to occur in the future and, secondly, likely to affect the rights deserving protection".

[36] See *PNG, supra* note 31, para 109.

[37] Sarooshi 2013, pp. 361–380, believes that ICSID tribunals should not consider themselves bound in any way by decisions of other courts and tribunals, including the ICJ, since (in short) there is a lack of an "international jurisprudence" on provisional measures and because of the different nature of ICJ cases compared to ICSID arbitrations. This position is supported also by Brown 2008, p. 4. However, as eminently stated by Pellet 2013, pp. 223–240, ICSID tribunals show particular deference to the jurisprudence of the World Court, adhering to its jurisprudence in a "pragmatic manner, without resorting to predetermined methods it is never a mere 'application' of the Court's jurisprudence, but it constitutes a subsidiary means for determination of rules of law" […]. In practical terms, ICSID tribunals "do systematically refer to the Court's jurisprudence, but they are more likely to do so when resolving procedural issues (lato sensu) or questions of general international law rather than when dealing with investment protection standards".

[38] See ICJ, *Vienna Convention on Consular Relations—LaGrand* (*Germany* v. *United States of America*), Provisional Measures, Order of 3 March 1999, para 22, confirmed by the most recent case law, see ICJ: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia* v. *Myanmar*), Provisional Measures, Order of 23 January 2020, para 64; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran* v. *United States of America*), Provisional Measures, Order of 3 October 2018, para 77; *Jadhav case* (*India* v. *Pakistan*), Provisional Measures, Order of 18 May 2017, paras 49–56; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation*), Provisional Measures, Order of 19 April 2017, paras 87–98; *Immunities and Criminal Proceedings* (*Equatorial Guinea* v. *France*), Provisional Measures, Order of 7 December 2016, paras 82–83; *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste* v. *Australia*), Provisional Measures, Order of 3 March 2014, para 31.

impossibility of receiving adequate compensation[39] or in a "serious risk of destruction of a going concern that constitutes an investment".[40] Some tribunals, however, have held that the harm is not *irreparable* when it can be compensated by monetary damages,[41] as recognised by Article 17(A)(a) of the 2006 UNCITRAL Model Law on International Commercial Arbitration.[42] Therefore, these tribunals, noting that Article 47 of the ICSID Convention and Rule No. 39 do not require interim reliefs to be ordered exclusively to prevent irreparable harm, adopted a less demanding standard (the *significant harm* standard),[43] to be intended as a "substantial, serious harm" that can be considered sufficient to satisfy the requirement of necessity.[44] Therefore, a clear standard is not identifiable in ICSID case law: arbitral tribunals

[39] See *Perenco, supra* note 23, para 43.

[40] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures of 3 March 2010, para 55.

[41] *Hydro, supra* note 15, para 3.31; *Occidental Petroleum, supra* note 23, para 92; *CEMEX, supra* note 40, para 55; *Quiborax, supra* note 15, para 156; *Perenco, supra* note 23, para 43; *Helnan, supra* note 23, para 34; *Plama, supra* note 23, para 46; *Tokios Tokelés 3, supra* note 35 para 8; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision by the Tribunal of 31 March 1998, para 8. *Contra*, other tribunals have adopted provisional measures where monetary damages might otherwise have been available, see *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, paras 166–168; *Sergei Paushok, supra* note 23, para 62; *Saipem, supra* note 12, para 182.

[42] See UNGA, Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of Article II, para 2, and Article VII, para 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, A/RES/61/33, 4 December 2006 (hereafter UNCITRAL Model Law), Article 17(A)(1):"The party requesting an interim measure under Article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted […]". The adoption in ICSID proceedings of this threshold ("harm not adequately reparable by an award of damages") deriving from commercial arbitration poses immediate problems, as in investment arbitration the overwhelming majority of claimants demands compensation as remedy. Indeed, if any breach of the rights claimed in arbitration would result in damages (and, as a consequence, could be compensated), no irreparable harm would exist. See Miles 2017, p. 259; Bismuth 2009, p. 818.

[43] Sarooshi 2013, p. 370, considers this standard "*more appropriate*" for ICSID Tribunals rather than using the ICJ's higher threshold of irreparable prejudice, in consideration of the (i) non-existence of an international jurisprudence on provisional measures, and (ii) because of the different nature and characteristics of ICSID arbitration with respect to other judicial frameworks.

[44] See *PNG, supra* note 31, para 109: "it suffices it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures", replicated also in *Hydro, supra* note 15, para 3.13. Contrariwise, *CEMEX, supra* note 40, paras 40–43, where the tribunal determined that the applicable criterion is however the irreparable harm, strongly criticizing arguments requiring a different threshold, highlighting that the concept of irreparable harm is "[…] always required by the International Court of Justice for provisional measures", in consideration that the ICSID framework regarding interim measures is directly inspired by Article 41 of the ICJ Statute.

seem having adopted a widening and more flexible margin of appreciation in determining whether provisional measures are necessary. Necessity, therefore, shall be assessed taking into consideration the specific facts and circumstances of the case at stake.[45] Notwithstanding the above, arbitrators still usually deny provisional reliefs when monetary damages are sufficient to compensate the claimants.

15.3.3 Urgency

Urgency constitutes the imminence of damage or prejudice upon the applicant. As for the requirement of necessity, urgency is not mentioned in relevant provisions of the ICSID Convention nor in the Arbitration Rules. However, urgency constitutes the main intrinsic feature of provisional measures as well as the decisive factor justifying a prior and prompt decision on requests for provisional measures.[46] Obviously, if a decision could await the final determination of the parties' case, there would be no reasons for seeking interim protection of rights. Therefore, provisional measures are appropriate only when there is a well-founded risk that actions prejudicial to the rights of either party might be taken before the tribunal has issued its final award.[47] ICJ's case law is also consistent in affirming this principle.[48]

However, the necessary degree of urgency to be satisfied depends upon the circumstances of the case and the type of reliefs requested. In certain cases, the threshold is met even if the requested measure is not promptly needed. In any case, the applicant

[45] See *Sergei Paushok, supra* note 23, para 69: "The Tribunal […] considers that the "irreparable harm" in international law has a flexible meaning".

[46] Yesilirmak 2005, pp. 178–179.

[47] Schreuer et al. 2009, p. 775. See also *Hydro, supra* note 15, para 3.25; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures of November of 22 November 2016, para 73; *PNG, supra* note 31, para 115; *Quiborax, supra* note 15, para 150; *Millicom, supra* note 26, para 48; *Burimi SRL and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 on Provisional Measures Concerning Security for Costs of 3 May 2012, para 36; *Burlington, supra* note 23, para 73; *Perenco, supra* note 23, para 43; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures of 15 October 2008, para 34; *City Oriente Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures of 19 November 2007, para 67 (hereinafter *City Oriente*); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 of 31 March 2006, paras 68 and 76 (hereinafter *Biwater Gauff 1*); *Tokios Tokelés 3, supra* note 35, para 8.

[48] ICJ, *Passage through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order of 29 July 1991, para 23, confirmed by the most recent case law, ICJ: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Request for the Indication of Provisional Measures, Order of 23 January 2020, paras 64–65; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v. United States of America*), Request for the Indication of Provisional Measures, Order of 3 October 2018, para 78; *Jadhav case* (*India v. Pakistan*), Request for the Indication of Provisional Measures, Order of 18 May 2017, paras 49–50.

shall prove that there is a need to obtain the relief *during* the arbitral procedure and before the issuance of the award.[49] Accordingly, arbitrators have requested evidence that a "material risk" of injury *could* occur.[50] Therefore, the requesting party must show that a conduct suitable to cause substantial or irreparable harm is "in the works and likely to take place during the course of the arbitration".[51] In light of that, several ICSID tribunals refused to grant provisional measures because the applicant had failed to provide any evidence on the likelihood of the action feared and because the harm seemed purely hypothetical and potential.[52]

15.3.4 Prima Facie *Establishment of a Case (or Right)*

In arbitral case law, *fumus boni iuris* is often included among the essential requirements for the issuance of provisional measures. This condition, also known as *prima facie (establishment of a) case*, entails that the tribunal must assess the reasonableness of the claimant's case and the likeliness that an award could be issued in its favour once the facts alleged are proven.[53] Essentially, the arbitral tribunal should undertake a *prima facie* analysis of the merits contended by the parties and decide whether the claims are not frivolous, vexatious or manifestly outside the competence

[49] See *Hydro, supra* note 15, para 3.29, where the arbitral tribunal, in deciding whether to halt the extradition proceedings against some of the claimants in the United Kingdom, recognized that there was no *immediate* need of an order since the extradition proceedings would have taken time. Nonetheless, it adopted the interim relief because extradition could have become an accomplished fact by the time the claimants sought another order from the arbitral tribunal.

[50] *PNG, supra* note 31, para 111, that clarifies: "The requirement of showing material risk does not, however, imply a showing of any particular percentage of likelihood, or probability, that the risk will materialize. The proper requirement is that the requesting party must establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted".

[51] Mouawad and Silbert 2013, p. 389.

[52] See *Occidental Petroleum, supra* note 23, paras 88–90; *Railroad Development Corporation, supra* note 47, para 35; *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures of 20 December 1999, para 18. In this regard, in deciding whether to grant provisional measures, arbitrators also generally look at the nature of the measures requested: a strong showing of urgency (and necessity) is not typically required to request the preservation of evidence or to enforce confidentiality obligations, while requests for injunctions or for specific performance do need it. Indeed, arbitral tribunals' case law clarifies that the urgency requirement may be deemed automatically satisfied when the request for protection involves procedural rights, namely temporary orders directed to prevent the aggravation of a dispute, to protect tribunal's jurisdiction or the integrity of the arbitral proceeding, In such cases of *axiomatic urgency* the urgency/immediacy test is satisfied "by definition" and measures are considered urgent ipso facto, see *Italba Corporation, supra* note 15, para 32; *Quiborax, supra* note 15, para 153; *Burlington, supra* note 23, para 74; *City Oriente, supra* note 47, para 69, and Luttrell 2015, p. 402.

[53] See *Sergei Paushok, supra* note 23, para 55. See also *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Amended Application for Provisional Measures of 17 September 2013, para 15 (hereinafter *Lao Holdings N.V.*).

of the tribunal.[54] However, ICSID case law does not shed any light on the application of this requirement:[55] tribunals refer to a duty in "asserting a credible claim by the applicant"[56] or that arbitrators must be just satisfied that the right "exists prima facie".[57] In some cases, conversely, tribunals argued that it might be sufficient the assessment of a "theoretically existing right, as opposed to proven to exist in fact",[58] meaning "as an actual right or legally protected interest, by opposition to a simple interest which does not entail legal protection".[59] Whatever the standard used by arbitrators is, arbitral tribunals must never pre-assess the merits of the case when deciding whether to grant provisional measures: therefore, an interim order shall not prevent the tribunal from ultimately decide any aspects of the parties' respective claims, counterclaims and defences.

15.3.5 Proportionality

After having ascertained the *prima facie* requirements and the urgent need for provisional measures, ICSID arbitral tribunals have often considered the proportionality of the relief requested, striking a "balance of inconvenience in the imposition of interim measures upon the parties".[60] In practical terms, a party seeking provisional measures must demonstrate that its need for the measures is not outweighed by the

[54] On the same issue, the International Court of Justice has developed the standard of *plausibility* of the rights invoked, on which see Chap. 5 by Sparks and Somos in this book.

[55] Miles 2017, pp. 205–208, has identified in ICSID jurisprudence the emergence of "two schools of thought". The first, according to the author, requires an inquiry into the existence of the rights with respect to which protection is claimed; the second line of precedents focuses on the *substance* of the claims, that must be not manifestly lacking legal merit or frivolous.

[56] *PNG, supra* note 31, para 123. See also *City Oriente—Revocation, supra* note 23, para 20, where the arbitral tribunal specified "the party requesting the measure need only prove that its claim has the appearance of good right, fumus boni iuris, or, in other words, the petitioner must prove that the rights invoked are plausible".

[57] *Burlington, supra* note 23, para 53. See also *Maffezini, supra* note 23, para 13 where, in interpreting *Rule No.* 39(1) of the *Arbitration Rules*, the tribunal affirmed that the rights to be protected "deben existir al momento de la solicitud, no deben ser hipotéticos, ni se han de crear en el futuro".

[58] *Occidental Petroleum, supra* note 23, paras 63–64. This position was affirmed for the first time in *Pey Casado, supra* note 22, para 49.

[59] *Occidental Petroleum, supra* note 23, paras 65–66. See also *Tethyan Copper Company Pty Limited v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures of 13 December 2012, para 117, where the tribunal held that "it suffices that the party requesting the provisional measure establishes a prima facie case that it owns a legally protected interest".

[60] *Sergei Paushok, supra* note 23, para 79. See also *Hydro, supra* note 15, para 3.37.

hardships which the other party would face if the measures are granted.[61] This criterion is also codified in Article 17(A)(1)(a) of the UNCITRAL Model Law,[62] which is not binding on the parties of an investment dispute but that constitutes a prominent standard for the conduct of arbitration proceedings.[63] Accordingly, the tribunal shall ensure that the requested relief "does not result in a burden out of proportion" on the party against whom it is directed.[64]

15.4 The Rights to Be Protected Through Recourse to Provisional Measures

Generally, interim orders are requested to temporary protect parties' rights in the course of a proceeding.[65] Nonetheless, the ICSID Convention and the Arbitration Rules are silent regarding *which* rights might be protected. Clearly, the nature of the measures to be adopted depends on the circumstances of the case and, of course, on the rights or interests at stake.[66] Due to several different objectives that provisional measures may pursue, arbitral practice shows a broad range of requests, reflected in a far-reaching selection of orders.[67]

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[61] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 of 12 April 2017, para 36. See also *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures of 29 March 2017, para 237; *Lao Holdings N.V., supra* note 53, para 23; *Quiborax, supra* note 15, para 158.

[62] Article 17(A)(a) of the UNCITRAL Model Law.

[63] *Burlington, supra* note 23, para 80.

[64] This principle should apply to decisions on provisional measures and also on final reliefs, as stated by the arbitral tribunal in *Occidental Petroleum, supra* note 23, para 82; and in *CMS Gas Transmission Company v. Argentine*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para 406.

[65] Wolfrum 2006, para 7: "Generally speaking, provisional measures in international adjudication are meant to protect the object of the litigation in question and, thereby, the integrity of the decision as to the merits. Neither party to the conflict shall change the relevant situation that prevailed upon the initiation of the proceedings so as to render the proceedings meaningless by frustrating its potential result. This equally embraces the objective of ensuring the proper conduct of the proceedings […] or the possibility of the execution of whatever judgment may finally be rendered. This objective is reflected, although in abbreviated form, in Article 41 ICJ Statute which states that provisional measures are meant 'to preserve the respective rights of either party', pending a final decision".

[66] Kaufmann-Kohler et al. 2018, p. 638. In opposite fashion, see the practice of the International Tribunal for the Law of the Sea (ITLOS) analysed in Virzo 2018, pp. 145–161.

[67] Malintoppi 2009, p. 172: "The ICSID Convention and Rules contain no specific indications as to the types of measures that may be sought and granted, with the result that the practice of arbitral tribunals reflects the tribunals' discretion and thus includes a variety of measures, depending on the nature and factual context of the cases involved". Some orders, indeed, have a concrete and detailed content, identifying all the activities that must be put into place by the parties, while other are more *general*. According to Schreuer et al. 2009, p. 759, "[T]he purpose of provisional measures is to induce behavior by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties' rights, preventing self-help, safeguarding

Arbitration Rule No. 39 (1) requires that "the rights to be preserved" to be specified in the application, along with the requested measure and the circumstances justifying it.[68] Arbitral case law, however, differs with regard to the *existence of the right*: while several ICSID tribunals have specified that the rights to be protected must exist "at the time of the request, must not be hypothetical, nor are they to be created in the future",[69] others have held that the (proven) theoretical existence of a right is sufficient to obtain provisional measures.[70] Certainly, interim reliefs can be requested (and adopted) to protect contested rights, i.e. issues of a *substantive nature* that are the subject of the dispute and under the scrutiny of the arbitral tribunal.[71] ICSID tribunals have indeed recognized the "propriety and necessity of interim measures to protect and preserve a spectrum of property, legal, contractual and Treaty rights".[72]

However, multiple decisions have rejected this restrictive approach, holding that provisional measures may be granted *also* to protect those rights *connected* with those at dispute[73] or *linked* to the party's right to plead its case and to obtain a fair decision in the proceeding.[74] As a consequence, ICSID arbitrators have accepted requests for the adoption of interim remedies concerning a party's procedural situations, considered as "self-standing rights".[75] As a matter of fact, in the ICSID context, provisional measures stemming from procedural situations are requested quite often, and they are generally aimed at protecting the rights to (i) maintain the *status quo* and not

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the awards' eventual implementation and generally keeping the peace. They have to be taken at a time when the outcome of a dispute is still uncertain. Therefore, the Tribunal has to strike a careful balance between the urgency of a request for provisional measures and the need not to prejudge merits of the case". See also Roth 2012, pp. 426–427.

[68] See Rule No. 39 of the Arbitration Rules.

[69] *Maffezini, supra* note 23, para 13.

[70] *Pey Casado, supra* note 22, para 45.

[71] See *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures of 9 December 1983, p. 411; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 3 of 4 March 2013, paras 49–50 (hereinafter *Churchill Mining 3*).

[72] Mouawad and Silbert 2013, pp. 393–399.

[73] See *Plama, supra* note 23, para 30. See also *Churchill Mining 3, supra* note 71, para 48; and *Quiborax, supra* note 15, paras 117–118.

[74] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures of 8 April 2016, para 177. See also *Quiborax, supra* note 15, paras 117–118; and *Millicom, supra* note 26, para 44.

[75] *Burlington, supra* note 23, para 60. See also *Hydro, supra* note 15, para 3.17; *Teinver, supra* note 74, para 177; *Churchill Mining PLC v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 14 (22 December 2014), para 71 (hereinafter *Churchill Mining n. 14*); *Quiborax, supra* note 15, para 117; *Biwater Gauff 1, supra* note 47, para 71. In opposite fashion, *SGS, supra* note 20, p. 301, where the tribunal considered that requests for provisional measures shall be "not too broad". A leading author has defined those measures aimed at the non-extension of the dispute and at protecting the tribunal's powers to adjudge as "atypical", since they aim to pursue objectives that are not listed in the relevant conventional instrument or in the rules of procedure, see Virzo 2018, pp. 156–160.

to have the dispute aggravated or extended; (ii) have a fair arbitration procedure ("integrity of the proceeding"); and, finally, (iii) exclusivity of the ICSID arbitration procedure.[76]

15.4.1 Procedural Rights: Maintenance of the Status Quo and Non-aggravation of the Dispute

ICSID arbitral tribunals have often ordered the parties not to undertake any activity resulting in an escalation of the dispute,[77] in compliance with the general obligation to conduct the arbitration proceeding in good faith.[78] As held in *Pey Casado*, this limitation can be considered a "general principle" frequently reaffirmed by international courts and arbitral tribunals[79] or as a "good and fair practical rule" aimed at preventing that the parties' conduct hinder or nullify the resolution of the dispute or the execution of the award.[80] The influence of ICJ's case law seems plain with regard to this power.[81]

Provisional measures intended to maintain the *status quo* and to prevent the aggravation of the dispute may present different forms and contents: they can concern the production or release of documents,[82] the confidentiality of the arbitration[83] and,

[76] During the drafting process of the Convention, several references were also made to the possibility to adopt provisional measures to ensure the non-frustration of the award, namely with the finality to secure assets out of which the award may be satisfied, see Schreuer et al. 2009, pp. 778–780. While this issue had limited practical significance in the earliest stage of ICSID case law, nowadays tribunals have accepted that they have the authority to decide the posting of security or financial guarantees.

[77] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. Arb/10/25, Procedural Order No. 4 of 16 March 2013, para 31 (hereinafter Bernhard von Pezold n. 4); *Occidental Petroleum, supra* note 23, paras 68 and 96; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of 29 September 2006, para 135 (hereinafter *Biwater Gauff* n. 3); *Pey Casado, supra* note 22, paras 67–69.

[78] *Churchill Mining PLC v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 9 Provisional Measures of 8 July 2014, para 104 (hereinafter *Churchill Mining n. 9*); *Caratube International Oil Company LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Claimants' Request for Provisional Measures of 31 July 2009, para 120.

[79] *Pey Casado, supra* note 22, para 67. Regarding the practice of the ICJ, see Palchetti 2008, pp. 623–642.

[80] *Amco, supra* note 71, p. 412.

[81] See PCJI, *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Request for the Indication of Provisional Measures, Order of 5 December 1939. Moreover, see ICJ, *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, Request for the Indication of Provisional Measures, Order of 10 January 1986, para 18.

[82] *Churchill Mining n. 14, supra* note 75, paras 28–29. See also Sinclair and Repousis 2017, p. 440.

[83] *Teinver, supra* note 74, paras 198–210; *Biwater Gauff n. 3, supra* note 77, paras 84 and 163. See also *Metalclad Corporation* v. *United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision

above all, the stay of judicial and administrative national proceedings.[84] Furthermore, in some cases, arbitral tribunals, whilst not requested by the parties, have affirmed that the disputing parties were under a general obligation to "cease" any behaviour that could worsen the ongoing dispute.[85] This approach was rarely criticized, in consideration that non-aggravation measures would have an "ancillary" purpose and follow orders regarding the conduct of the proceedings or to protect substantive rights.[86] However, it is nowadays well established that ICSID arbitrators identify the maintenance of the *status quo* and the non-extension of the dispute as a generally recognized and self-standing right. As a consequence, non-aggravation orders would be justified if "states of tension" between the parties exist and that can therefore generate a high level of conflict.[87] The applicant, therefore, in order to obtain such provisional reliefs, shall present sufficient evidence about "the need for such measures at [the] time".[88]

15.4.2 Integrity of the Arbitration Proceedings

Arbitral tribunals have granted temporary or provisional measures also to protect the general interest to an effective *administration of justice*. As held in *Libananco*, this interest comprises several procedural concerns, as the "basic procedural fairness; respect for confidentiality and legal privilege […]; the right of parties both to

on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information of 27 October 1997, paras 1–10.

[84] *Burlington, supra* note 23, para 65; *Tokios Tokelés 3, supra* note 35, para 7.

[85] *Pey Casado, supra* note 22, p. 640, where the arbitral tribunal invited the parties to "[…] se impida todo acto, de cualquier naturaleza, que pudiera agravar o extender la diferencia sometida at the Tribunal de Arbitraje". See also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para 13; *International Quantum Resources Limited, Frontier SPRL et Compagnie Miniere de Sakania Sprl* v. *République Démocratique du Congo*, ICSID Case No, ARB/10/21, Procedural Order No. 1 of 1 July 2011, para 28: "Toutefois, le Tribunal rappelle qu'il est un principe général applicable à toute partie à un arbitrage de s'abstenir dans la mesure du possible et raisonnable de tout acte susceptible d'aggraver le différend".

[86] See *CEMEX, supra* note 40, para 65, consistently with the decision of the ICJ in *Pulp Mills, supra* note 25, para 49.

[87] *Quiborax, supra* note 15, para 132, where the applicants claimed that the criminal proceedings instituted by Bolivia had altered the *status quo* of the dispute as "[…] have created serious obstacles for Claimants' presentation of their claims" "as they have become defendants in Bolivia", producing an "intolerable pressure […] to abandon their claim". The arbitral tribunal, while agreeing that criminal proceedings against the actors could exacerbate the climate of hostility in which the proceeding was taking place, considered that the adoption of precautionary measures was not necessary. See also *SGS, supra* note 20, p. 397 and *Pey Casado, supra* note 22, para 74.

[88] *Ceskoslovenska Obchondi Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 3 of 5 November 1998, p. 3. More recently, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 Decision on the Parties' Requests for Provisional Measures of 11 January 2016, para 89; *Churchill Mining n. 9, supra* note 78, paras 91–95.

seek advice and to advance their respective cases freely and without interference; […] respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention".[89] Generally, the correct functioning of the arbitration is protected through the adoption of orders to suspend domestic proceedings (especially, of criminal nature) whose continuation is likely to jeopardize the impartiality and fairness of the arbitration. This limitation of a state's sovereign power to exercise its jurisdiction in criminal matters can be justified only by *exceptional circumstances*, as when a party's participation in the arbitration is specifically threatened.[90] Similarly, in order to protect the claimants' proper representation in the arbitration, tribunals have warned the suspension of criminal proceedings brought against parties' counsels and legal advisors and, generally, ordered to refrain from the exercise of illegitimate influences[91] or from recording communications between the parties and their own counsels.[92]

In addition, provisional measures have been adopted in order to safeguard collection and access to evidence. ICSID tribunals have indeed condemned host states' practice of exercising *pressure* against potential witnesses through criminal indictments.[93] It is also commonly accepted that the power of arbitral tribunals under Article 47 of the Convention includes also the authority to recommend measures to protect access to and preservation of documentary evidence essential to the arbitration proceedings when under a risk of destruction.[94]

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[89] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/08, Decision on Preliminary Issues of 23 June 2008, para 78; *Plama, supra* note 23, para 40.

[90] In *Convial Callao S.A. y CCI—Compañía de Concesiones de Infraestructura S.A. v. República del Perú*, ICSID Case No. ARB/10/2, Decisión sobre Solicitud de Medidas Provisionales of 22 February 2011, paras 107–114, arbitrators considered that claimants' limitations of liberty by the host States would have reduced their possibility to participate to the arbitration and, as stated in *Hydro, supra* note 15, paras 3.17–3.23, created a "*serious concern regarding the procedural integrity of the arbitration*". Consequently, have called for the suspension of the domestic proceedings, see Zarra 2017, pp. 83–108.

[91] A famous example—conducted under the UNCITRAL Arbitration Rules—can be identified in the *Chevron* case, where claimants' legal counsels were subjected to criminal proceedings for long time, leading the arbitral tribunal to specify that: "The Respondent is ordered to facilitate and not to discourage, by every appropriate means, the Claimants' engagement of legal experts, advisers and representatives from the Ecuadorian legal profession for the purpose of these arbitration proceedings (at the Claimants' own expense)", see *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009–23, Order on Interim Measures of 14 May 2020, p. 5. See also *Teinver, supra* note 74, paras 198–210; and *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award of 1 October 2014, para 59.

[92] See *Libananco, supra* note 89, para 82.

[93] Similar situation would have made "unlikely that the persons charged will feel free to participate as witnesses in this arbitration", see *Quiborax, supra* note 15, para 143.

[94] *Biwater Gauff n. 3, supra* note 77, para 84. See also *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award of 16 February 1994, pp. 76–77, and *Agip S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award of 30 November 1979, para 42. Similar considerations were expressed also in *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 11 of 27 June 2012, para 21 (hereinafter, *Abaclat*

15.4.3 Exclusivity of ICSID Arbitration

ICSID case law includes, among the rights that fall within the scope of provisional measures, the right embedded in Article 26 of the Convention, establishing the exclusivity of ICSID jurisdiction to the exclusion of any other remedy.[95] Indeed, ICSID arbitration was conceived as an almost autonomous and self-contained system which functions in an independent manner from domestic legal frameworks and from *political* intervention by states through the recourse to diplomatic protection or from the scrutiny and control with respect to the enforcement and recognition of ICSID arbitral awards. Therefore, arbitral tribunals have constantly reaffirmed that "that the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision".[96] Specifically, parties to the arbitration shall cease any other proceedings before domestic or international courts,[97] "[U]nless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits".[98] As a consequence, ICSID arbitrators have recurrently recommended the suspension of domestic proceedings likely to endanger ICISD tribunals' exclusive jurisdiction,[99] whether or not ongoing between the same parties.[100] Suspension, however, is normally ordered only if an "obvious interest in the outcome of the […] proceedings" exists, and, thus, the domestic proceeding might affect the claims

n. 11); *Quiborax, supra* note 15, paras 160–165; *Railroad Development Corporation, supra* note 47, paras 35–36.

[95] Article 26 of the ICSID Convention. See *Tokios Tokelés 3, supra* note 35, para 7. In literature, see Palombino 2019.

[96] See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 Claimant's Request for Provisional Measures (1 July 2003), para 2 (hereinafter Tokios Tokelés).

[97] *Ibid*. See also the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at: http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section05.htm#06, para 32: "It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of local remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy".

[98] *Perenco, supra* note 23, para 61.

[99] *Ceskoslovenska Obchondi Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 5 of 1 March 2000, paras 1–2 and Procedural Order No. 4 of 11 January 1999, para 1. See also *SGS, supra* note 20, p. 305.

[100] See *Plama, supra* note 23, para 39, and *Pey Casado, supra* note 22, para 62.

presented in the ICSID arbitration.[101] For these reasons, arbitral tribunals are reluctant in ordering the stay of domestic criminal proceedings, since they fall outside the jurisdiction of ICSID tribunals, which cover only disputes "directly arising out of an investment".[102]

15.5 Types of Provisional Measures: Orders to Stay National Proceedings

As mentioned above, ICSID case law shows that parties commonly ask for a stay of parallel domestic proceedings. *Anti-suit injunctions* are normally issued by ICSID arbitral tribunals in order to protect their own jurisdiction: therefore, such requests often invoke Article 26 of the ICSID Convention, which excludes any remedy other than ICSID arbitration,[103] or rather argue that national proceedings may aggravate or extend the dispute submitted to arbitration or threaten the integrity of the ICSID proceeding. In assessing whether to grant provisional measures, tribunals shall consider whether the national court will determine the merits of the case earlier than ICSID arbitrators, therefore prejudging the issues at stake.[104]

In numerous cases, orders of suspension concerned commercial and civil litigation before domestic courts: mostly, these decisions invited a party to cease, suspend or refrain from filing a related litigation against the other party through "toute mesure nécessaire".[105] Case law shows that ICSID tribunals order stay or

[101] See *Millicom, supra* note 26, para 45. On the same rationale, in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimant's Request for Provisional Measures of 30 April 2015, para 206, the applicants claimed that continued health and safety inspections to the plant could result in an extension of the dispute: however, the tribunal rejected the request, noting that there was no intent by the respondent State to create unjustifiable *pressure* on the claimants.

[102] See *Convial Callao, supra* note 90, para 108; and *Quiborax, supra* note 15, paras 125–131. However, as specified above, domestic criminal proceedings might affect the right to maintenance of the *status quo* or the right to the integrity of the arbitration proceeding.

[103] Article 26 of the ICSID Convention.

[104] *Burlington, supra* note 23, para 65.

[105] *International Quantum, supra* note 85, paras 16–23. See also *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Award of 30 November 2017, para 41; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 2 Regarding Claimant's Request for Provisional Measures of 19 April 2015, paras 11–15; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, paras 28–29; *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/10, Procedural Order No. 1 concerning Provisional Measures of 17 June 2009, para 53.

suspension with regard to bankruptcy proceedings,[106] tax-collection proceedings,[107] and ongoing domestic arbitration.[108] Also, in other cases, tribunals demanded the withdrawal of assets seizures[109] or to refrain from their enforcement,[110] as well as to stay proceedings concerning the termination of contracts or concessions and/or the subsequent payment of a sum.[111] Orders of discontinuance of domestic civil (or also administrative) litigation are normally adopted when national and international proceedings entail the same facts,[112] sometimes disregarding the circumstance that domestic proceedings were pending before different parties.[113]

With regards to domestic criminal proceedings (and related investigations), the threshold to grant provisional measures for a stay is considered particularly "high".[114] Indeed, tribunals appears reluctant in interfering with the sovereign right of a state to investigate or prosecute criminal offences[115] and in several cases arbitrators have

[106] *Ceskoslovenska Obchondi Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, *Procedural Order No. 5* (1 March 2000), paras 1–2, and *Procedural Order No. 4* (11 January 1999), paras 1–2. A similar request was however rejected in *Plama, supra* note 23, para 43.

[107] *Gabriel Resources, supra* note 47, paras 34–49; *Hydro, supra* note 15, paras 2.6–2.19; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Procedural Order No. 2 of 24 November 2014, paras 31–35; *Lao Holdings N.V., supra* note 53, para 9. See also *Sergei Paushok, supra* note 23, p. 16.

[108] *SGS, supra* note 20, pp. 302–303. In this case, the claimant sought interim relief ordering Pakistan to withdraw from and discontinue any proceedings pending before local courts relating to ICSID arbitration, including the stay pronounced by the Supreme Court that enjoined the claimant from pursuing or participating in the ICSID arbitration. The tribunal, at p. 300, noted that the "right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court".

[109] *Nova Group, supra* note 61, para 353; *Tokios Tokelés 3, supra* note 35, para 14. See also *CEMEX, supra* note 40, paras 57–61, where the tribunal denied an order to cease any "efforts" to seize vessels or any other form of assets in favour of the claimants.

[110] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, paras 85–112, where the tribunal ordered the respondent to lift garnishments of claimants' bank accounts.

[111] *Millicom, supra* note 26, para 47; *Burlington, supra* note 23, para 65; *City Oriente, supra* note 47, paras 59–60; *Bayindir, supra* note 27, para 35.

[112] See *Churchill Mining n. 9, supra* note 78, paras 86–87, and *Millicom, supra* note 26, para 43. Consistently, in *Plama, supra* note 23, para 44, the tribunal held: "[…] the tax claims of the ASR and the state aid claims of CPC relating to Nova Plama, which are the subject of the proceedings in Bulgaria, are not presently claims before this Tribunal and will not affect Claimant's pursuit of its claims here or of the Tribunal's ability to dispose of them".

[113] See *Millicom, supra* note 26, para 43. Contrariwise, *Pey Casado, supra* note 22, para 62: "Cabe mencionar en este contexto que las partes no coinciden […]" and *Plama, supra* note 23, paras 42–43.

[114] *Teinver, supra* note 74, para 185; *EuroGas, supra* note 88, para 85; *Gavrilovic, supra* note 101, para 211; *Caratube, supra* note 78, para 137.

[115] See *Nova Group, supra* note 61, para 328; *Italba Corporation, supra* note 15, para 115; *Hydro, supra* note 15, para 3.20; *Gavrilovic, supra* note 101, para 197; *PNG, supra* note 31, para 145; *Churchill Mining n. 14, supra* note 75, para 72; *Convial Callao, supra* note 90, para 113; *Gustav*

underlined the absence of a power to order the cessation of national criminal proceedings.[116] Therefore, tribunals must separate the right of the state to fight criminal activities with the abuse by the same state of its prosecutorial power to intimidate a claimant or interfere with a claimant's ability to bring its claims.[117]

In few cases, arbitrators have also stated that criminal proceedings do not *per se* threatens the exclusivity of ICSID proceedings, since Article 26 of the ICSID Convention applies only to investment dispute: indeed, the jurisdiction of the Centre and the competence of the arbitral tribunal cover investment disputes, i.e. whether the respondent breached its international obligations under the applicable BIT, under the relevant investment contract or national law.[118] Accordingly, ICSID tribunals have ordered a stay of national criminal proceedings and related investigations when the same claim or right petitioned in the arbitration proceeding was the object of a parallel proceeding in another forum or if the actions "relate to the subject matter of the case before the tribunal" and thus not to separate, unrelated issues or extraneous matters.[119] Arbitral tribunals found these criteria to be met in several cases, where national procedures of arrest and consequent extradition were stayed since these would have prevented the claimants to fully participate in the arbitration and, consequently, to present their case.[120]

F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 January 2010, para 297; *Caratube, supra* note 78, para 135; *Quiborax, supra* note 15, para 123.

[116] *Italba Corporation, supra* note 15, para 116: "The Tribunal does not have the power to order or recommend the cessation of a criminal investigation that is being conducted by the relevant organs of Uruguay in relation to an alleged criminal action on its territory". See also *Teinver, supra* note 74, para 190; *Gavrilovic, supra* note 101, para 198; *Lao Holdings N.V*, Ruling on Motion to Amend the Provisional Measures Order of 30 May 2014, para 21; *Abaclat*, Procedural Order No. 13 of 27 September 2012, paras 39–45.

[117] Commission and Moloo 2018, p. 44.

[118] See *Churchill Mining n. 9, supra* note 78, para 85; *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Decision of 26 July 2013, paras 76–77; *Convial Callao, supra* note 90, para 91; *Quiborax, supra* note 15, para 128; *Barmek Holding A.S. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/16, Decision on Provisional Measures of 29 August 2007.

[119] See *Maffezini, supra* note 23, para 23. See also *Fouad Alghanim, supra* note 107, para 72, and *Tokios Tokelés 3, supra* note 35, para 11.

[120] In *Nova Group, supra* note 61, para 324, the Tribunal granted the requested measures seeking Romania to withdraw (or otherwise suspend the operation of) the transmission of the European Arrest Warrant issued *vis-à-vis* the claimant and to refrain from reissuing or transmitting this or any other warrant or request for extradition related to the subject matter of the arbitration. In similar fashion, *Hydro, supra* note 15, para 3.20, and *Convial Callao, supra* note 90, para 42. Contrariwise, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award of 16 May 2014, para 14.

15.5.1 Injunctions

In several cases, ICSID arbitrators received requests for provisional measures ordering the other party to refrain from an activity (injunctions).[121] This is undoubtedly the broadest category of interim measures, including, *inter alia*, to cease surveillance activities towards claimants and their counsels and witnesses;[122] to not engage in any *construction* activity;[123] to avoid any action aimed at evicting the claimant from their property and to stay any sale procedure to other parties;[124] to abstain from sale or transfer actions of a company;[125] to obtain the release of vessels detained by the respondent state;[126] to release funds frozen by the state;[127] or to refrain from demanding or coercing payment of monetary sums.[128] While in some cases arbitrators have granted (in total or in part) the requested interim orders, it appears that injunctions are normally refused when the recommendation sought is plainly directed at affecting a fundamental change to the *status quo* or improving the situation of the applicants.[129]

Additionally, ICSID tribunals have issued non-disclosure orders:[130] arbitrators have indeed requested the parties to refrain from making public or media statements or disclosing documents pertaining to arbitration in several cases.[131] In those decisions, the tribunals were persuaded that the "prosecution of a dispute in the media or in

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[121] Commission and Moloo 2018, p. 41.

[122] *Europe Cement Investment & Trade S.A.* v. *Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award of 13 August 2009, paras 35–36. See also *Mr. Saba Fakes* v. *Republic of Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, para 10.

[123] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of the Tribunal of 17 February 2000, para 43.

[124] *Helnan, supra* note 23, paras 28–39. In this case, the claimant, subsequently to the taking over of its property (the Shepheard Hotel), requested from the arbitral tribunal a recommendation that Helnan be reinstated in the Shepheard Hotel and on a subsidiary basis that Egypt be restrained from selling the property to a third party. Similarly, in *Phoenix Action, supra* note 23, para 12, the claimant asked the tribunal to order the blocking of all properties allegedly owned by the claimant itself, pending a determination on the ownership before domestic courts. In *Spyridon Roussalis, supra* note 105, paras 23–24, upon request by Romania, the claimant was directed by the arbitral tribunal to do not sell or alienate any property belonging to the company owned by the claimant.

[125] *ABCI Investments N.V. v. La République Tunisienne*, ICSID Case No. ARB/04/12, Décision sur la competence of 18 January 2011, para 17.

[126] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award of 22 August 2017, paras 26–31. See also *CEMEX, supra* note 40, paras 57–61.

[127] *Phoenix Action, supra* note 23, paras 40–41.

[128] *Burlington, supra* note 23, para 1.

[129] *Phoenix Action, supra* note 23, para 37, and *Helnan, supra* note 23, para 32.

[130] Mouawad and Silbert 2013, pp. 400–402.

[131] See *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Procedural Order No. 9 (Confidentiality Order) of 7 June 2019, paras 11–19 (hereinafter *Gramercy Funds n. 9*) and *Abaclat*, Procedural Order No. 3 (Confidentiality Order) of 27 January 2010, para 153: "[…] the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonize the Parties". See also *Garanti Koza LLP v. Turkmenistan*,

other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure", consequently ordering the parties to limit parties' statements.[132] In other decisions, however, tribunals have not granted such orders since neither the ICSID Rules, including the Additional Facility Rules, nor the instruments registering the consent to arbitration incorporated a "general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party".[133] Arbitrators, therefore, even acknowledging that media or public statements might have a negative effect on the *reputation* of a host state, rejected parties' requests,[134] stressing however that it would be to the advantage of the orderly unfolding of the arbitral process if the parties limit the discussion of the case to a minimum as a general duty arising from the principle of good faith.[135]

15.5.2 Requests for Specific Performance

Requesting parties often seek ICSID tribunals to compel the other party to perform a definite action, claiming a right to specific performance. It is however discussed whether such a right exists under the ICSID Convention: indeed, ICSID tribunals have primarily granted pecuniary relief rather than ordered specific performance.[136]

ICSID Case No. ARB/11/20, Award of 19 December 2016, para 3; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures of 12 May 2016, para 114; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Procedural Order No. 2 on Confidentiality of 24 November 2015, paras 9–19; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 of 30 May 2008, paras 46–54; *Biwater Gauff n. 3, supra* note 77, paras 114–165.

[132] *Biwater Gauff n. 3, supra* note 77, para 136.

[133] *Metalclad Corporation, supra* note 83, para 9. In the case at stake, the tribunal recognized that the claimant, being a public company traded on a public stock exchange, was under a positive obligation to provide certain information about its activities to its shareholders, especially regarding its involvement in a proceeding the outcome of which could perhaps significantly affects the company's value. See also *Churchill Mining n. 14, supra* note 75, para 46; *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, para 16; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction of 5 January 2001, para 26; *Amco, supra* note 71, p. 412.

[134] See *Churchill Mining n. 14, supra* note 75, para 44. A similar request was presented also in *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25), Award of 10 March 2015, para 45.

[135] *Metalclad Corporation, supra* note 83, para 10. See also *EDF, supra* note 131, para 54; *Churchill Mining n. 14, supra* note 75, para 57; *Biwater Gauff n. 3, supra* note 77, para 163.

[136] Nonetheless, this is not due to any restrictions on arbitral tribunals' powers to do so, see Schreuer 2004, p. 329. See also *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April

In several cases requests for a provisional order were aimed at enforcing rights contained in a contractual agreement or in an administrative concession: in *Tethyan Copper*, as an example, the applicant submitted that it had satisfied all the requirements set for a mining license under the law of Pakistan and that, therefore, it was entitled to it as restitution in the form of specific performance.[137] The tribunal, in that case, relied on a previous decision in *Occidental Petroleum*, where the tribunal affirmed that, in principle, "in the event of injury suffered as a result of an illegal act, the injured claimant has a right to specific performance unless specific performance is impossible".[138] However, arbitrators recognized that "[I]t is well established that where a state has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible".[139] Indeed, specific performance, even if it can be granted, will nevertheless be refused if it imposes a too heavy burden on the party against whom it is directed, namely a possible interference with the sovereignty of the state.[140]

ICSID case law shows also that applications for provisional measures have requested the performance of activities of different nature, including demands for the protection of the life and safety of the claimants through police measures;[141] to ensure claimants' access to their factories or properties;[142] the destruction of false statements published online;[143] the procurement of bank statements and certificates of payments received on behalf of the claimants, together with the creation of an inventory of all ledgers, papers, records, documents and correspondence seized by the respondent state at the time of the occupation of claimants' offices;[144] the deposit

1990, Reports of International Arbitral Awards 2006, pp. 215–284, para 114 and see *Ioan Micula, supra* note 41, para 166; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, para 79.

[137] *Tethyan Copper, supra* note 59, paras 63–67. See also *Burlington, supra* note 23, paras 38–33; *Tanzania Electric, supra* note 52, paras 12–18.

[138] *Occidental Petroleum, supra* note 23, para 75: "[…] Specific performance is, of course, a conditional right, as it is precisely conditioned on the possibility of performance, and consequently hindered by its impossibility. Restitution in kind is never guaranteed to an injured claimant. Whether restitution in kind is possible or impossible must necessarily and logically be ascertained when a tribunal is seized of the matter".

[139] *Ibid*., para 79. See also *CMS Gas Transmission Company supra* note 64, para 406.

[140] This assumption is consistent with the regime regarding State's responsibility for international wrongful acts, See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc. A/56/10 (2001), Article 35(b).

[141] *Bernhard Von Pezold n. 5, supra* note 34, para 65, *Bernhard Von Pezold n. 4, supra* note 77, paras 25–31.

[142] *Abengoa S.A. and Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013, para 60.

[143] *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures of 25 January 2016, para 90.

[144] *Biwater Gauff 1, supra* note 47, paras 20–21.

of funds in an escrow account,[145] or the disclosure of a *third-party funding* arrangement.[146] Therefore, it seems that, in addition to declaratory powers and authority to order compensation and determine its amount, ICSID tribunals may also order injunctive reliefs or the performance of rights under a treaty or under a contractual agreement, even if such power was limitedly resorted to by arbitral tribunals.[147]

15.5.3 Preservation of Documentary Evidence

It is uncontroversial that arbitral tribunals' powers under Article 47 of the ICSID Convention include the authority to recommend the preservation of evidence (including documents), that constitutes one of the most common forms of interim relief. Access to evidence, however, might also be secured through Article 43 of the ICSID Convention:[148] the two above-mentioned procedures, nonetheless, "are aimed at different issues: Article 47 is designed to ensure that the Arbitral Tribunal can properly discharge its mandate, whilst Article 43 is one element in a range of provisions that structures how the mandate is to be discharged".[149] Notwithstanding, ICSID arbitrators are normally faced with requests for provisional measures aimed at preserving documents, specifically to ensure their physical existence and avoid an irreparable loss or destruction of the documentary evidence.[150] Requests for the preservation of evidence, therefore, shall demonstrate the existence of an actual threat

[145] *Burlington, supra* note 23, paras 86–88; *Paushok*, p. 17. Similarly, in *Europe Cement, supra* note 122, and in *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award of 17 September 2009, para 57, where the tribunals ordered the deposit of shares certificates in custody to a bank.

[146] *Eskosol, supra* note 61, paras 40–45.

[147] See *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award of 10 February 1999, where the tribunal, in its decision (however embodying the settlement between the parties), ordered the reimburse of tax and duties illegally imposed and collected and, also, the creation of a new tax regime of exemptions.

[148] Article 43 of the ICSID Convention. See also *Arbitration Rules*, *Rule No.* 34(2).

[149] Production, to be intended as *disclosure* of evidence, therefore, does not fall within the scope of Article 47, see *Biwater Gauff 1, supra* note 47, para 100.

[150] In *Abaclat n. 11, supra* note 94, paras 16–21, for example, the respondent solicited the arbitral tribunal to order claimants to refrain from altering or destroying the original documents regarding the powers of attorney and mandates conferred by the claimants, a group of Italian bondholders. Similarly, in *Nova Group, supra* note 61, paras 360–364, the claimant requested the tribunal to order Romania to take all necessary steps to "(i) preserve all documents potentially relevant in this arbitration […], (ii) reconstruct any lost […] data". While the tribunal relied on the State's assurances of recovery of documents and files, arbitrators reminded both parties "that it would be inconsistent with their general duty of good faith for documents that are currently in existence […] to become unavailable unexpectedly at the time of the document production of this case", suggesting parties to make steps to secure potentially relevant files and documents for later use in the arbitration proceeding (see also *Gabriel Resources*, Procedural Order No. 2 of 20 October 2016, paras 25–34; *Churchill Mining n. 14, supra* note 75, paras 10–22; *Caratube, supra* note 78, paras 99–104; *Abaclat n. 11, supra* note 94, paras 16–21; *ABCI Investments N.V., supra* note 125, para

for the integrity of the documents and the necessity for the parties to rely on them to plead their case.[151] Additionally, measures for the preservation of evidence might be linked to orders for the preservation of the integrity of the ICSID arbitration and/or for the non-aggravation or extension of the dispute and the conservation of the *status quo*.[152]

15.5.4 Security for Costs

The form of relief known as *security for costs* tackles the possibility that a party may not comply with a costs award rendered against it. Therefore, an order for security for costs requires a party to provide a warranty to cover the estimated costs that the other party will incur in the proceeding, including arbitration costs and costs for legal representation.[153] This provisional order is normally requested by respondent states when there is a serious concern that claimant does not have sufficient funds to cover respondent's costs, in the event claimant's claims will ultimately fail and costs are awarded to the respondent.[154]

While the ICSID Convention and Arbitration Rules are silent on the matter, tribunals have often considered applications for security for costs as falling within their powers to order provisional measures. However, such a request was upheld notably in few cases conducted under the ICSID *Arbitration Rules*,[155] including

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18; *Railroad Development Corporation, supra* note 47, paras 3–8; *Biwater Gauff 1, supra* note 47, para 20; *Vacuum Salt, supra* note 94, paras 11–22; *Agip S.p.A., supra* note 94, paras 7–9).

[151] As a consequence, requests characterized by "excessive breadth" are normally rejected, since they impose an excessive burden on the other party, see *Railroad Development Corporation, supra* note 47, para 36. In the latter, the tribunal rejected claimant's request for an interim measure of protection mandating Guatemala to preserve certain categories of documents while the arbitration was pending. The tribunal found no evidence that the new-born Government had destroyed or lost documents in the past nor that the destruction of documents relevant for the arbitration was imminent.

[152] See *Churchill Mining n. 14, supra* note 75, paras 67–87.

[153] Applicants for security for costs and arbitral tribunals have identified different forms of security, as deposits into an escrow account; letters of credit; bank guarantees; bonds. See *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision of 21 January 2016, para 16; *EuroGas, supra* note 88, para 114; *Burimi, supra* note 47, para 15; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Decision on Provisional Measures of 5 November 2008, para 3; *Libananco, supra* note 89, para 31; *Maffezini, supra* note 23, paras 2–3. See also, *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013–15, Procedural Order No. 10 of 11 January 2016, para 12.

[154] Commission and Moloo 2018, p. 38.

[155] During the final editing process of this chapter, two ICSID tribunals ordered security for costs. See *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Procedural Order No. 8, 8 June 2020, not public, and *Mr. Eugene Karzim v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 Decision on Respondent's Application for

RSM v. Saint Lucia[156] and *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*.[157] As a matter of fact, ICSID arbitrators have applied a high threshold for the applicants in such cases,[158] because they require the presence of "exceptional circumstances", as bad faith, abusive conducts or the failure to comply with previous costs obligations.[159] These *extreme* conditions were considered met primarily in *RSM v. Saint Lucia*, where a "material risk that Claimant will be unable or unwilling to comply with a costs award issued against it" was recognized by the tribunal.[160] Indeed, claimant had an history of non-compliance with ICSID obligations under costs awards or requests for payment of

Security for Costs, 13 April 2020. These decisions are not considered in this chapter, and will be analyzed in a subsequent study.

[156]*RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision of 13 August 2014, para 90. Similarly, see in *Manuel García Armas, Pedro García Armas, Sebastián García Armas, Domingo García Arma, S Manuel García Piñero, Margaret García Piñero, Alicia García González, Domingo García Cámara, Carmen García Cámara v. Repúblicana Bolivariana de Venezuela*, PCA Case No. 2016–08, Orden Procesal No. 9 Decisión sobre la Solicitud de Medidas Provisionales de la Demandada of 20 June 2018, para 261.

[157]See *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim of 27 January 2020, para 83.

[158]Indeed, tribunals have been particularly reluctant to order security for costs, even in cases where the investor had no assets or was in financial difficulties and/or had obtained funding by a third-party entity, conditions that *per se* do not justify such an order, see Kalicki 2006, p. 2. In case law, see *South American Silver, supra* note 153, para 63: "the general position of investment tribunals in cases deciding on security for costs is the that the lack of assets […] are not per se reasons or justifications sufficient to warranty security for costs"; and *Manuel Garcia Armas, supra* note 155, para 243; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010, para 5.19; *EuroGas, supra* note 88, para 123; and *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, paras 691–692.

[159]*Lao Holdings N.V. and Sanum Investments Limited v. Lao's People Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ADHOC/17/1, Procedural Order No. 6 of 26 July 2018, para 21; *Eskosol, supra* note 61, paras 35–36; *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Procedural Order No. 6 of 1 February 2017, para 47; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2 of 13 February 2016, para 59; *Transglobal Green Energy, supra* note 153, paras 23–25; *EuroGas, supra* note 88, para 123; *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3 of 25 November 2015, para 71; *RSM Production Corporation v. Saint Lucia* supra note 155, para 75; *Burimi, supra* note 47, para 34; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs of 20 September 2012, para 45; *Rachel S. Grynberg*, *supra* note 157, para 5.20; *Libananco, supra* note 89, para 57; *Alasdair Ross Anderson, supra* note 153, para 24; *Pey Casado, supra* note 22, para 86; *Maffezini, supra* note 23, para 10. See also *Manuel García Armas, supra* note 155, para 250; *South American Silver, supra* note 153, paras 59–61; *Guaracachi America and Rurelec v. The Plurinational State of Bolivia*, PCA Case No. 2011–17, Procedural Order No. 14 of 11 March 2013, para 6.

[160]See *RSM Production Corporation v. Saint Lucia, supra* note 155, para 26.

the advance on costs in previous proceedings, a situation that ingenerated in arbitrators a "substantial doubt" about claimant's willingness or ability to pay.[161] Moreover, claimant relied on a third-party funder and this contributed to the necessary "good cause" to order security for costs.[162] The existence of a funding agreement was considered more extensively in *Dirk Herzig*, where the explicit non-liability of the third-party funder for a costs award adverse to the funded party was identified as practical factor that would make effectively impossible for the insolvent claimant to pay an adverse costs award.[163]

These decisions nowadays remain (almost) isolated in the investor-state arbitration's panorama. Arbitral tribunals seemed indeed not particularly inclined to protect *a right to claim reimbursement of the costs* incurred by the prevailing party,[164] which is a conditional and prospective right.[165] Moreover, in several cases, arbitrators have

[161] See *ibid*., para 50. See also para 82: "[…] Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide for compelling grounds for granting Respondent's request". In particular, the respondent State referred to an ICSID proceedings where the claimant did not honour the costs award rendered against it in the case *Rachel S. Grynberg*, *supra* note 157, while the subsequent annulment proceedings was discontinued due to the claimant's failure to pay the advances on costs, see *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of 28 April 2011.

[162] *Ibid*., para 77. Arbitrator Gavan Griffith, in his assenting opinion attached to the decision (para 16), pointed out that "[…] unless there are particular reasons militating to the contrary, exceptional circumstances may be found to justify security of costs orders arising under BIT claims as against a third-party funder, related or unrelated, which does not proffer adequate security for adverse cost orders", identifying third-party funding as the main reason for ordering security for costs.

[163] As a consequence, without security, it will be effectively impossible for the State to enforce and collect upon such an award, see *Dirk Herzig, supra* note 156, paras 47–60. In the present case, the Respondent claimed also that the funder was present also in another ICSID case in which the claimant failed to remit an advance on payment for six months, causing a momentary suspension of the proceeding, alleging a possible withdrawal of the financial support during the arbitration. Similarly, in *Manuel Garcia Armas, supra* note 155 the fact that adverse costs were not covered by the funding agreement was a key factor in finding there was a risk that the claimants would not be able to pay adverse costs. In general terms with regard to third-party funding and security for costs, see Kirtley and Wietrzykowski 2013.

[164] Malintoppi 2009, p. 175: "[…] ICSID tribunals are reluctant to grant requests for guarantees to cover the costs of arbitrations, as such requests are based on hypothetical assumptions which may prejudge issues relating to the merits of a given case".

[165] In *Dirk Herzig, supra* note 156, para 52, an undisclosed majority of the tribunal has reckoned that the right to an enforceable order for costs as worthy of protection under ICSID provisional measures' framework. Several tribunals, however, have questioned the ability to collect a potential costs award as a "right" requiring protection through provisional measures, see *Lao Holdings N.V. and Sanum Investments Limited, supra* note 158, para 35; *Valle Verde, supra* note 143, para 78; *Rachel S. Grynberg*, *supra* note 157, para 5.16; *Alasdair Ross Anderson, supra* note 153, paras 16–25. In particular, in *Eskosol, supra* note 61, paras 33–39, the tribunal casted several doubts on the existence of the right to claim reimbursement, rather identifying a "right to effective relief". The tribunal deemed the issue here to be related to collection of any compensation granted in an award, and on this question the ICSID Convention reserves the "execution of the award" to national laws. For the tribunal, "there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant's ability to collect on a possible merits award, nonetheless should intervene to protect a State's asserted "right" to collect on a possible

identified *mitigating* circumstances, such the third-party funder's consent to cover costs or the existence of an ATE insurance policy.[166] Also, arbitral tribunals assess whether the investor is insolvent because of the state's unlawful conduct and, also, whether the application for security for costs is improperly used to stifle a meritorious claim by the investor, in order to cut its finances and limit its access to justice.[167]

15.5.5 Order for Non-aggravation of the Dispute and for the Preservation of the Status Quo

In several occasions, claimants have sought interim measures for the other party to refrain from any action that would aggravate or extend the dispute or threaten the *status quo*. Such provisional measure is often granted together with other measures addressing more specific imperatives, particularly when a "change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect of the relief".[168] These orders are, therefore, normally adopted when the party against whom the measures are granted "has shown a proclivity to aggravate the dispute",[169] in breach of the general duty arising from the principle of good faith not to take any action that may complicate the resolution of the dispute or affect the integrity of the proceedings,[170] as well as to have a prejudicial

costs award" (para 35). Recently, in the decision in *Jochem Bernard Buse* v. *Republic of Panama*, ICSID Case No. ARB/17/12, the tribunal has rejected a security for costs application made by the respondent State, arguing that there was no real *right to recover costs*, since the idea that Panama would prevail and that the tribunal would as a consequence order the claimant to pay Panama's costs was "speculative". In addition, the tribunal considered that the alleged right to security for costs was "more of an interest than a right", as reported by Bohmer 2019.

[166]See *Eskosol, supra* note 61, paras 37–39.

[167]Indeed, additional expenditure might unduly impinge party's ability to pursue a legitimate claim and prevent the proceeding, see *Eskosol, supra* note 61, para 38, and *Gustav Hamester, supra* note 115, para 17. Proportionality, therefore, remains a necessary criterion in assessing provisional measures. In *Manuel Garcia Armas, supra* note 155, paras 228–237, the tribunal analysed in detail the proportionality of the order of security for costs, finding that the harm to the host State would outweigh the hardship to investors, in particular because they had proclaimed their solvency in their defences. See Markert 2018, pp. 235–240.

[168]See *Plama, supra* note 23, para 45.

[169]Commission and Moloo 2018, p. 46.

[170]*Gramercy Funds n. 9, supra* note 131, paras 77–86; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Procedural Order No. 5 of 29 August 2018, para 77; *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 2 of 10 August 2018, para 115; *Nova Group, supra* note 61, para 365; *Italba Corporation, supra* note 15, para 126; *Teinver, supra* note 74, para 239; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, *and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on the Applicant's Application for Provisional Measures of 17 March 2016, para 37; *EuroGas, supra* note 88, para

effect on the issuance or implementation of an eventual ICSID award.[171] Investment tribunals, however, have denied such requests absent a sufficient evidence for "an actual threat" of aggravation of the dispute to exists or be plausible.[172]

15.6 The Binding Nature of ICSID Provisional Measures

While the type of ICSID provisional measures diverges, the unique legal nature of decisions granting provisional measures was largely debated.[173] Both Article 47 and Rule No. 39, indeed, use the term "recommend", originating from the concerns expressed during the drafting of the Convention by several Member States that believed that binding procedural orders might have impaired the judicial sovereignty of national courts.[174] However, with the growth of arbitration proceedings, arbitral tribunals later acknowledged the binding nature of their interim orders.[175] First, in *Maffezini*, the arbitrators established that Article 47 of the Convention's wording "to recommend" was equivalent to "to order", deeming these terms' difference as "more apparent than real",[176] relying also on the Spanish version of the Rules whose language can be read as conferring binding nature to provisional measures.[177] This reasoning was confirmed in the *LaGrand* case, where in interpreting Article 41 of its Statute, the ICJ made a teleological or *effet-util* argument, qualifying its orders on provisional measures as binding.[178] Later in time, several ICSID tribunals held that the ICJ findings could be applied by analogy to investor-state arbitration, since provisional measures' orders "[…] derive their mandatory force from the function of provisional remedies, which is to secure the applicant's rights while the proceedings

125; *Menzies, supra* note 26, para 134; *Churchill Mining n. 14, supra* note 75, para 92; *Caratube, supra* note 78, para I.4; *Biwater Gauff n. 3, supra* note 77, para 163.

[171] *Azurix*, *supra* note 19, para 14; *Tokios Tokelés, supra* note 96, para 2.

[172] *EuroGas, supra* note 88, paras 89–90.

[173] Zarra 2017, pp. 85–90.

[174] See *History of ICSID Convention*, Washington DC, 1970, Volume I, p. 206, and Volume II, pp. 812–815, according to which in the first drafts of the treaty the presence of the word "prescribe" was criticized by representatives of some Member States and later changed in "recommend".

[175] Inversely, in the practice of dispute resolution under the United Nations Convention on the Law of the Sea (UNCLOS), in particular before the International Tribunal for the Law of the Sea (ITLOS), provisional measures were deemed as having binding effect, as stated by Article 290 of the UNCLOS, that dictates that the tribunal "[…] may prescribe any provisional measure […]". See Virzo 2016 and Chap. 7 by Marotti in this book.

[176] See *Maffezini, supra* note 23, para 9.

[177] The Spanish version of *Rules No.* 39 used the term "dictación", that has a *mandatory* meaning: "En cualquier etapa una vez incoado el procedimiento, cualquiera de las partes puede solicitar que el Tribunal recomiende la adopción de medidas provisionales para la salvaguardia de sus derechos. La solicitud deberá especificar los derechos que se salvaguardarán, las medidas cuya recomendación se pide, y las circunstancias que hacen necesario el dictado de tales medidas".

[178] See *LaGrand, supra* note 38, para 102. Regarding the ICJ's practice on provisional measures, see Palchetti 2017a, b, pp. 19–26.

are pending".[179] Nowadays, ICSID case law is consistent in holding that, besides the words of the Convention, arbitral tribunals have the power to *order* provisional measures.[180] Indeed, in *Tokios Tokelés*, the tribunal affirmed that "according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them".[181] Therefore, a state's failure to comply with an order entailing provisional measures "[…] will automatically entail a breach of Article 47".[182] These findings have countered limited opposition: occasionally, arbitral tribunals have referred to their general power to issue recommendations, without taking any position on the issue,[183] while other arbitrators have been more critical and denied the binding nature of provisional measures.[184] In any case, the majority of ICSID arbitral tribunals agrees on the compulsory nature of provisional measures, as reflected by a consistent streak of precedents.[185] To this end, the attitude of respondent states

[179]See the Award of 16 September 2015 in *Quiborax, supra* note 15, para 579. See also *CEMEX, supra* note 40, para 39; *City Oriente, supra* note 47, para 52; *Pey Casado, supra* note 22, paras 19–20. See Frutos-Peterson and Ziyaeva 2015, pp. 212–219.

[180]See *United Utilities, supra* note 131, para 109; *Valle Verde, supra* note 143, para 75; *Transglobal Green Energy, supra* note 153, para 25; *Bear Creek Mining Corporation, supra* note 105, para 44; *PNG, supra* note 31, para 102; *RSM Production Corporation, supra* note 155, para 77; *Tethyan Copper, supra* note 59, para 120; *Occidental Petroleum, supra* note 23, para 58; *Quiborax, supra* note 15, para 108; *Burlington, supra* note 23, para 49; *Perenco, supra* note 23, para 43; *City Oriente, supra* note 47, para 52; *Tokios Tokelés, supra* note 96, para 4; *Pey Casado, supra* note 22, paras 19–20; *Maffezini, supra* note 23, para 9.

[181]*Tokios Tokelés, supra* note 96, para 4, confirmed also in *Perenco, supra* note 23, paras 66–67: "In becoming a Party to a treaty such as the ICSID Convention […], a State confers upon an arbitral tribunal jurisdiction over certain claims and assumes an obligation to take whatever steps might be necessary to comply with decisions rendered by the tribunal pursuant to the treaty. So long as and to the extent that the arbitration is in progress, both parties are under an international obligation to comply with whatever the tribunal issues as provisional measures for the purpose of protecting its jurisdiction and its ability, should it so decide, to grant the relief requested. State Parties to the ICSID Convention thus inherently are under an international obligation to comply with provisional measures issued by an ICSID tribunal".

[182]Again, the award in *Quiborax, supra* note 15, paras 570–583.

[183]See *Nova Group, supra* note 61, para 365; *Eskosol, supra* note 61, para 36; *Italba Corporation, supra* note 15, para 114; *Railroad Development Corporation, supra* note 47, para 31; *Saipem, supra* note 12, p. 49; *Phoenix Action, supra* note 23, para 29.

[184]*Caratube, supra* note 78, para 67. See also the dissenting opinions of arbitrator E. Nottingham in *RSM Production Corporation v. Saint Lucia, supra* note 155, para 16: "no matter how many times it is repeated, an order is not a recommendation" and M. G. Kohen in *Fouad Alghanim, supra* note 107, para 54: "the deliberate substitution of this verb with 'to recommend' in the ICSID Convention does not allow any doubt about its scope. This is a treaty concluded by States to which the general international law rules relating to interpretation of treaties […] apply. The term 'recommend' is explicit and cannot be interpreted in any other way than to suggest something without binding effect, i.e. that the addressee is not obliged to follow the recommendation".

[185]Even if arbitrators normally reaffirm or take note of past decisions, in investor-State arbitration there is no binding precedent, as expressed by the tribunal in *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 13 July 2005, para 30. However,

provides additional evidence: indeed, states have constantly executed and respected provisional measures orders, therefore accepting their binding nature.[186]

15.7 Consequences of Non-compliance with Provisional Measures

Although ICSID arbitral tribunals are entitled to issue a broad range of (binding) provisional measures, arbitrators lack the coercive powers to enforce and implement them. This constitutes a fundamental limit of arbitral functions, that might affect the efficacy of provisional measures orders.[187]

While arbitrators cannot impose *traditional* remedies proper of a judicial domestic court in case of a party's failure to comply with interim orders, arbitral tribunals might draw adverse inferences against the non-compliant party or, in some cases, impose costs on it. These *soft* consequences depend on the provisional measure requested. For example, the drawing of adverse inferences might follow a party's failure to preserve or produce evidence.[188] Such evidentiary rule, therefore, allows arbitrators to rely

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as specified by the arbitral tribunal in the case *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para 145: "unless there are compelling reasons to the contrary, [the tribunal] ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law". In literature, see Kaufmann-Kohler 2007.

[186]Gazzini and Kolb 2017, pp. 182–183, according to which this general acceptance by ICSID Member States "[…] may lead – or may have already led – to an informal modification of Article 47 of the ICSID Convention. From this perspective, the presence of two elements must be shown. On the one hand, a significant number of arbitral tribunals must have shared the interpretation outlined above. On the other hand, the great majority of the parties to the treaty, having had ample opportunity to react to the interpretation, must have endorsed the new reading of the relevant provision or have refrained from contesting its inaccuracy. In the case of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, both elements seem to be satisfied". Also, Malintoppi 2009, p. 180, observes "[…] there generally appears to be voluntary compliance by losing parties in the great majority of cases, mainly because parties are careful not to act in a way that may have an adverse effect on the conduct of the proceedings, alienate the tribunal, or aggravate the dispute".

[187]As stated, "[A]bsent the parties' agreement, an arbitral tribunal does not have the power to enforce its interim-measures orders with the threat of criminal or civil sanctions", see Mouawad and Silbert 2013, p. 423; Le Bars and Shiroor 2017, pp. 24–42. Indeed, as *private* judicial body, an arbitral tribunal does not possess the power to guarantee the respect of its decision, as on the contrary is prescribed for the judiciary. Therefore, any participation of arbitrators to the enforcement of arbitral decisions must be deemed impossible and left to national courts. In addition, arbitration proceedings suffer from intrinsic limits that make this instrument unsuitable for producing legal effects in the legal sphere of third parties, therefore not bound by the arbitration agreement. See Carlevaris 2017b.

[188]See Article 49 of the ICJ Statute: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of

on indirect evidence to ascertain a fact or an event, as admitted by the jurisprudence of the ICJ.[189] This principle, in the ICSID context, descends from the application of Rule No. 34(3), that establishes an obligation for the parties to "[…] cooperate with the Tribunal in the production of evidence […]". Accordingly, "the Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure".[190] As a consequence, arbitral tribunals normally react to the manifest disregard of their provisional orders regarding evidence's production,[191] concluding that "the evidence sought is 'adverse' or negative to that party's case if it unjustifiably does not comply with the request to produce the evidence presumably within its control".[192] However, the tribunal must not draw adverse inferences automatically or *in abstracto*: circumstances of the case and any other evidence on record shall be taken into consideration in the decision of a case.[193] Indeed, as a matter of fact, certain failures might be excused or mitigated.[194] Legal authorities have therefore set forth several *requirements* that must be met to allow arbitrators to draw opposing readings of a party's failure to

any refusal." Specifically with regard to international arbitration, the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) Article 9(5) provides "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party". The IBA Rules, adopted by Resolution of the IBA Council on the 29 May 2010, constitute a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration: therefore, they are considered best practices for the conduct of arbitration proceedings.

[189]For an analysis, see Tams and Devaney 2019, pp. 1416–1425.

[190]See Rule No. 34(3) of the Arbitration Rules. In literature, see Polkinghorne and Rosenberg 2015.

[191]See *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil & Gas Mineral Corporation ("Petrobangla")*, ICISD Cases Nos. ARB/10/11 and ARB/10/18, Procedural Order No. 18 of 23 March 2017, paras 122–123; *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, paras 244–265; *OPIC Karimun Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award of 28 May 2013, paras 125 and 145; *Europe Cement*, supra note 122, paras 99–103, 163–164; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paras 437–448; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para 30; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para 178. See also *Flemingo Dutyfree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award of 12 August 2016, paras 397–448.

[192]Solis 2018, p. 80. See also *Biwater Gauff*, Procedural Order No. 2 of 24 May 2006, para 6, and *Agip S.p.A., supra* note 94, para 132.

[193]*Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and ARB/12/40 (Annulment Proceeding), Decision on Annulment of 18 March 2019, para 120: "while adverse inferences are tools available for tribunals to deter parties from refusing to comply with their orders about the production of evidence, nothing requires that a tribunal grant such inferences". Indeed, "tribunals have discretion to draw adverse inferences when a party declines to produce certain evidence, but they have no obligation to do so" (para 121).

[194]See *Apotex Holdings Inc.* and *Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, para 8.72; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013, para 185; *Gemplus S.A., SLP S.A., Gemplus*

comply with interim orders.[195] In particular, one author, analysing the practice of the Iran—United States Claims Tribunal, concluded that arbitral tribunals shall ensure that (i) the party seeking the adverse inference must produce all available evidence corroborating the inference sought,[196] and that (ii) the requested evidence must be accessible to opponent. Moreover, the inference sought must be (iii) reasonable and logically related to the likely nature of the evidence withheld.[197] Also, the party seeking the adverse inference must (iv) produce *prima facie* evidence,[198] while (v) the inference's opponent must be aware of its obligation to produce evidence rebutting the adverse inference sought.

Alternatively, in few cases, ICSID arbitral tribunals have ordered substantial economic consequences in case of non-compliance with interim measures, taking into account the aggravation of the harm suffered (if any) when awarding costs. Indeed, while in the ICSID context is unclear if the breach of a provisional measures implies a responsibility of reparation as in other procedural framework,[199] arbitral tribunals nonetheless maintain broad powers of discretion in matters of arbitration costs and expenses incurred by the parties.[200] As an example, in *Agip*[201] and

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Industrial S.A. de C.V. v. The United Mexican States and *Talsud S.A. v. The United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award of 16 June 2010, paras 4–142.

[195] Sharpe 2006. See also Amaral 2018.

[196] See *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil & Gas Mineral Corporation ("Petrobangla")*, ICISD Cases Nos. ARB/10/11 and ARB/10/18, Decision on the Corruption Claim of 25 February 2019, paras 948–963, where the tribunal held that failure to produce evidence was attributable first to the conduct of the Respondents, therefore refusing to draw adverse inferences against the claimants.

[197] Sharpe 2006, pp. 558–564. The author considers therefore that the inference must conform to general know facts (the *commercial reality*, as defined by the author) and, at the same time, must lead to conclusions consistent with the facts in the record. Factual records contrary to the inference sought do not allow to draw said inference. In addition, there must be a logical nexus between the documents or evidence withheld and the inference derived therefrom.

[198] Amaral 2018, p. 10: "Notorious facts or a very high probability of the version of the facts brought by the requesting party may be deemed sufficient to replace the need for prima facie evidence or even the need for the production of all available evidence corroborating the inference sought".

[199] See *LaGrand, supra* note 38, paras 115–116, where the Court held that the respondent State did not discharge its obligation to comply with the Court's Order on Provisional Measures. See also *City Oriente, supra* note 47, para 53: "[…] a failure to comply with orders given to Respondents by the Tribunal in accordance with Article 47 of the Convention will entail a violation of Article 26 thereof, and engage Respondents' liability". *Contra*, Bismuth 2009, p. 802, according to which "binding interim measures do not create, in our view, new and specific subjective rights to their beneficiary that are distinct from those resulting from its cause of action".

[200] Article 61(2) of the ICSID Convention: "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".

[201] In *Agip, supra* note 94, para 42, the State disregarded the tribunal's order to preserve evidence, impeding the claimant's access to several documents important for the preparation of its case. As a consequence, the tribunal ordered Congo to pay all the costs related to the proceeding.

Maritime International,[202] ICSID tribunals ordered the non-complaint party to bear the costs of the proceedings. More recently, in another case, arbitrators, considering the behaviour of a party that "insufficiently cooperated in providing documents and testimonial evidence", ordered the allocation of 70% of the total costs on the losing party, as well as a contribution of 400.000 USD for legal expenses.[203] Therefore, according to the circumstances of the case, ICSID arbitral tribunals might *sanction* the un-cooperative party with an order on costs.[204] Contrarily, ordering a party to bear fees and expenses of the other party in a *punitive* way still look a belittled option for arbitral tribunals, reserved only for specific cases.[205] Indeed, the prospect of paying costs and fees—only a small sum with respect to the normal amount in controversy—is considered an insufficient deterrent for a party from withholding unfavourable evidence.[206]

15.8 The Way Forward: Reforming the ICSID Arbitration Rules

On 7 October 2016, during the 50th Meeting of the ICSID Administrative Council, the Centre launched its fourth amendment process to reform its Rules, inviting suggestions from the Member States and, later, also from the public, concerning the reform of its Rules.[207] On 3 August 2018, the ICSID Secretariat published its first Working

[202] In *Maritime International Nominees Establishment v. The Republic of Guinea*, ICSID Case No. ARB/84/4, Order for Interim Measures of 4 December 1985, the tribunal ordered the claimant to pay a portion of respondent's costs and legal fees incurring in defending in a parallel proceedings initiated by the claimant and that the tribunal ordered to immediately discontinue.

[203] See *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, paras 303–304.

[204] In *Saint-Gobain, supra* note 105, paras 47–48, the respondent State claimed that the applicant engaged in requests for provisional measures as "tactics to delay" the determination of the compensation, showing an unreasonable position that incurred in costs for the respondent. As a consequence, respondent demanded that a decision on costs shall be awarded to Venezuela. The tribunal, while dismissing in part the argument, did not consider "justified to order that Respondent shall bear the entirety of the costs incurred by Claimant in connection with this arbitration", condemning the claimant to pay the 70% of the total amount of the costs.

[205] See *Europe Cement, supra* note 122, para 185: "In the circumstances of this case, where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims". See also *Cementownia "Nowa Huta", supra* note 145, paras 177–178. On punitive damages in investment arbitration, see Bariatti et al. 2019; Zarra 2016, pp. 986–991.

[206] Sevan Bedrosyan 2016, p. 250; Polkinghorne and Rosenberg 2015, p. 743.

[207] The term *Rules* is used here to refer to the complete set of specialized rules governing ICSID proceedings, namely the *Administrative and Financial Regulations*, the *Institution Rules*, the *Conciliation* and *Arbitration Rules* and the *Additional Facility Rules*. For the purpose of this chapter, however, only provisions specifically affecting provisional measures will be analysed. The *Rules*

Paper No. 1—Proposal for Amendment of ICSID Rules,[208] which clarified also the core objectives of the amendment process: (i) modernization of the procedure; (ii) simplification and reordering of the Rules; (iii) reduction of time and costs of the procedure; (iv) respecting environmental concerns reducing the paper burden of proceedings.[209] ICSID subsequently held consultations with Member States and the public, receiving over a hundred written submissions on the proposals. Based on these inputs, ICSID published subsequent working papers in March 2019,[210] followed by an updated Working Paper No. 3—Proposals for Amendment of the ICSID Rules on 16 August 2019.[211] Finally, in February 2020, a Working Paper No. 4 was published, with the intention to be the final consultation before the amended *Rules* are placed before the Administrative Council for a vote.[212] The proposed reform affects also the framework regarding provisional measures, addressed below.

15.8.1 Innovations Affecting Provisional Measures

The proposed Rules contain some modifications regarding provisional measures. To a certain extent, the changes resemble consistent ICSID case law on the matter, clarifying obscure points of current rules: however, some provisions seems far distant from tribunals' views. First, current Article 47 of the ICSID Convention and Rule No. 39 of the Arbitration Rules do not specify the type of measures that can be requested: Proposed Rule No. 47 provides for a non-exhaustive list of measures that a party

were already amended in 1984, 2003 and 2006. Only the 2006 process, however, introduced substantial changes to the system, adding important provisions on transparency and open hearings, on the participation of *amici curiae* and on early dismissal of a claim.

[208]ICSID, *Working Paper No. 1* (n. 8), available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf.

[209]*Ibid*., para 5. For an overview of the principal innovations, see Flores 2019; Kinnear 2019; Polasek and Vis-Dunbar 2018; Kinnear 2018.

[210]See *Working Paper No. 2—Proposals for Amendment of the ICSID Rules* (hereafter *Working Paper No. 2*), available at: https://icsid.worldbank.org/en/Documents/Vol_1.pdf.

[211]The text of *Working Paper No. 3—Proposals for Amendment of the ICSID Rules* (hereafter *Working Paper No. 3*) is available at: https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf.

[212]See Working Paper No. 4—Proposals for Amendment of the ICSID Rules (hereafter *Working Paper No. 4*), available at: https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf. According to Article 6(1) ICSID Convention, the Administrative Council of the Centre adopts the rules for the institution and of procedure for conciliation and arbitration proceedings. The decision shall be adopted by a majority of two-thirds of the members of the Administrative Council.

may request,[213] mirroring rules existing in other arbitral frameworks.[214] While the proposed list does not intend to limit the measures that can be adopted (as clarified by the presence of the word "including"), it provides more certainty about the measures that can be requested. Nonetheless, arbitrators, in their margin of appreciation, are free to recommend measures of different nature, if the circumstances so require.[215]

Proposed Rule No. 47(2) specifies the procedure for the adoption of provisional measures, resembling current Rule No. 39(1) and (5). The principal innovation, however, is constituted by the provision mandating the arbitral tribunal to "issue its decision on the request within 30 days after the latest of: (i) the constitution of the Tribunal; (ii) the last written submission on the request; or (iii) the last oral submission on the request".[216] Additionally, the amendment process seeks to clarify the requirements that must exist for the issuance of an interim order: in conformity with ICSID case law, Proposed Rule No. 47(3) postulates that the tribunal must weigh all the circumstances of the case and prescribes the presence of the requirements of urgency and necessity, which have uniformly been required in cases to date, together with the consideration of "the effect that the measures may have on each party", imposing also an evaluation of the proportionality of the measures.[217] No other criteria are prescribed by the proposal since they are considered not uniformly adopted in case law and, also, not suitable in every circumstance. However, with their comments, several states and entities have suggested the inclusion of stricter requirements, including the necessity to show a *prima facie establishment of a case*,[218] the consideration of states' sovereign powers in pursuing public interest[219] or even the

[213] See Working Paper No. 4, Proposed Rule No. 47(1): "A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to: (a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process; (b) maintain or restore the status quo pending determination of the dispute; or (c) preserve evidence that may be relevant to the resolution of the dispute".

[214] See Article 17(A)(a) of the UNCITRAL Model Law, and UNGA, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new Article 1, para 4, as adopted in 2013), A/RES/68/109, 16 December 2013, Article 26(2).

[215] Correspondingly, the Proposed Rule No. 47(4) confirms that the arbitral tribunal may recommend provisional measure on its own initiative or also recommend measures different from those requested by a party.

[216] See Working Paper No. 4, Rule No. 47(2)(d). The proposed modification responds to the general objective of reducing time and costs of ICSID proceedings and of ensuring priority in the consideration of the request, as prescribed by current Rule No. 39(2).

[217] See *supra*, Sect. 15.3.5. It should be noted that in Working Paper No. 1 there was no reference to this balancing test, that was added in light of the comments received by ICSID Member States from the public, resembling preoccupations for the possible interference of provisional measures with sovereignty of the States, see ICSID, Rule Amendment Project—Member States and Public Comments on Working Paper No. 1 of 3 August 2018.

[218] See ICSID, Rule Amendment Project—Member States and Public Comments on Working Paper No. 1 of 3 August 2018, comments by The Argentine Republic, that demands tribunal to be satisfied that "[…] (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim".

[219] *Ibid*., comments by The Oriental Republic of Uruguay ("conducir investigaciones y procesamientos criminales dentro de su territorio […] debería de incluirse entre las consideraciones que

clean hands of the applicant.[220] The ICSID, Secretariat, on its part, reiterated the opportunity to leave these criteria to the appreciation of arbitral tribunals and to codify only requirements that are consistently applied in case law. In completing this provision, Proposed Rule No. 47(5) impose to the parties to "promptly disclose any material change in the circumstances upon which the Tribunal recommend provisional measures".[221]

While the above-mentioned provisions largely reproduce existing case law regarding interim measures, the working papers deviates from arbitral tribunals with regard to the binding effect of provisional orders. Indeed, Proposed Rule No. 47(1) maintains the same terminology of current Rule No. 39, using the word "recommend". Notwithstanding several tribunals have ruled that the verb equates to "order", the proposal signals that provisional measures are *not* binding. The commentary to the draft, unequivocally, states that "decision is a recommendation",[222] since this term appears in Article 47 of the ICSID Convention and, as a consequence, it can only be modified through an amendment to the Convention itself.[223] Of course, the amendment process protects peculiarities existing in the AF Rules, where Proposed (AF) Rule No. 57 parallels the draft provision of the Arbitration Rules, except that the word "order" replaces the word "recommend".[224] Therefore, the Working Papers No. 3 and No. 4 overturned the approach commonly upheld by ICSID arbitral tribunals. While it might be a surprising outcome, it will add more clarity on the controversial issue of the legal nature of orders on provisional measures.

15.8.2 A New Stand-Alone Provision on Security for Costs?

In the last years orders for security for costs have generated a passionate debate regarding the pros and cons of ordering security for costs: indeed, tribunals shall

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tendrá en cuenta el Tribunal al momento de realizar sus recomendaciones"); Colombia ("Colombia considera que cualquier orden de medidas provisionales debe tener en cuenta el derecho a regular y los deberes del Estado en la protección del interés público"); and Canada, that suggest that a third sentence be added to para 3, stating that "In recommending the provisional measures it determines are urgent and necessary, the Tribunal shall give due deference to the right of a State to regulate within its territory to achieve legitimate policy objectives".

[220] *Ibid*., comments by Algeria "Inclure une disposition qui interdit aux investisseurs poursuivis pour des infractions pénales, notamment le blanchiment d'argent et la corruption, de demander des mesures provisoires devant le tribunal arbitral".

[221] See Working Paper No. 4, Rule No. 47(5). Provisional measures indeed remain temporary, given the power of the arbitral tribunal to modify or revoke its order upon party's request or on its own initiative, see Working Paper No. 4, Rule No. 47(6).

[222] See Working Paper No. 1, paras 490–491; and Niemoj 2019.

[223] *Ibid*., mentioning also debates and disagreement between States during the draft process of the ICSID Convention and the clear opposition of some Member States to binding provisional measures.

[224] It should be noted that the current AF Rule No. 46 allows for the tribunal to order provisional measures at a party's request, and to recommend them on its own initiative. Under the Proposed AF Rule No. 57, however, the tribunal may also *order* provisional measures *proprio motu.*

balance claimants' right to access to justice with the right to obtain an effective relief when considering such requests.[225] To date, case-law analysis demonstrates arbitrators' divergent opinions on the nature of this provisional measure, whether it is included within tribunals' power to order provisional measure and, mostly, what are the necessary requirements for its adoption. The ongoing reform of the Arbitration Rules tackles this theme, proposing a clearer framework regarding orders for security for costs with a new, stand-alone provision focusing on security for costs.[226] Therefore, it intends to *codify* this right, as suggested by the numerous comments received by states on the first version of the draft Rules.[227] However, the Proposed Rule No. 53 seems to depart from existing case law on security for costs, developed under the provisional measures' regime. First, while the current ICSID case law requires the existence of "exceptional circumstances" to order security for costs,[228] the Proposed Rule No. 53 lowers the threshold that must be met for security for costs.[229] Indeed, in assessing whether to order security for costs, tribunals "shall consider all relevant circumstances, including:

(a) that party's ability to comply with an adverse decision on costs;
(b) that party's willingness to comply with an adverse decision on costs;
(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
(d) the conduct of the parties […].[230]

Therefore, the new provision entails some mandatory criteria, namely: the party's sufficient availability of funds or coverage of costs by a parent company or a third-party entity ("ability"); its *inclination* to comply with ICSID obligations on costs, to be ascertained analysing its previous *history* in arbitration procedure ("willingness"); if there is an abusive misconduct by the claimant or if its impecuniosity is the result of Respondent's actions ("conduct of the parties"). Also, Proposed Rule No. 53(3)(c) requires arbitrators to consider the effect that such an order may have on the party's ability to pursue its claims and its access to justice.[231] Moreover, Proposed Rule No. 53(4) includes a specific reference to third-party funding as factor that arbitrators may consider in determining circumstances under subparagraph (3),[232] incorporating

[225] See *Alasdair Ross Anderson, supra* note 153, para 27.

[226] Luttrell 2019.

[227] ICSID, Rule Amendment Project—Member States and Public Comments on Working Paper No. 1 of August 3, 2018.

[228] See *supra* note 176.

[229] See Working Paper No. 1, paras 501–502: "Evidence of "exceptional circumstances" is routinely required. In practice, it has been difficult for parties requesting security for costs to meet this burden."

[230] See Working Paper No. 4, Proposed Rule No. 53(3).

[231] See *Eskosol, supra* note 61, para 38: "A tribunal should not lightly recommend a provisional measure that could impede access to justice […]". Also, *Manuel Garcia Armas, supra* note 155, paras 231–237 and *Commerce Group, supra* note 158, para 52.

[232] The new arbitral framework provided for a disclosure obligation of any third-party funding agreement, see Working Paper No. 4, Proposed Rule No. 14: "A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds

suggestions by many states.[233] The Proposed Rule, however, specifies that third-party funding, *by itself*, is not determinative nor sufficient for an order, as affirmed by persistent case law.[234]

In addition to fixing a time limit for the tribunal to issue its decision,[235] the new framework on security for costs links important consequences to cases of non-compliance by the party against whom the measure is ordered. Indeed, the tribunal may suspend the proceeding until the order for security is implemented and, if the proceeding is suspended for more than 90 days, the tribunal, after having consulted the parties, *may* order the discontinuance of the proceeding.[236] As the Working Paper No. 1 notes, this "[…] would be unique within the AR, which otherwise give the Tribunal the power to discontinue the proceedings only with the (deemed) agreement or acquiescence of the parties".[237] Lastly, the Proposed Rule No. 53 differs from the new regime regarding provisional measures under Proposed Rule No. 47 since it states that tribunal may *order* any party asserting a claim or a counterclaim to provide security for costs.[238] In addition, the unique nature of security for costs is once again confirmed by the express provision that such orders might be made only upon the request of a party, since "[…] As any security ordered will be in favour of a party, it is reasonable to require that party to determine whether it wants a security and, if so, to make a reasoned request".[239] Therefore, there is no need for arbitrators to use this power: in any case, ICSID tribunals retain their power to specify any relevant terms in an order to provide security for costs, as well as time limit for the compliance with the order.[240] Notwithstanding the general compliance with awards on costs the way

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or equivalent support for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute ("third-party funding")".

[233]Indeed, in Working Paper No. 1 and Working Paper No. 2 there was no mention of third-party funding.

[234]See *supra* note 175.

[235]See Working Paper No. 4, Proposed Rule No. 53(2)(d): "The Tribunal shall issue its decision on the request within 30 days after the latest of: (i) the constitution of the Tribunal; (ii) the last written submission on the request; or (iii) the last oral submission on the request".

[236]Luttrell 2019, p. 396, notes that the draft rules "uses the permissive word 'may' (rather than the mandatory 'shall'), thereby signaling that the tribunal retains discretion to determine what consequences should follow from non-compliance with its security for costs order".

[237]See Working Paper No. 1, para 532. Indeed, in the context of security for costs, *normal* tools employed by arbitral tribunals to tackle non-compliance with provisional orders (as the drawing of adverse inferences) might be ineffective.

[238]See Working Paper No. 4, Proposed Rule No. 53(1). This distinction should in any case be considered consistent with the ICSID Convention, since security for costs is included in a separate provision that do not need to align with ICSID Article 47. A "peremptory" language shall be considered also preferable if tribunals will be empowered to suspend or discontinue the proceeding as a possible consequence of non-compliance with an order on security for costs.

[239]See Working Paper No. 1, para 518. The request must specify the circumstances that requires security for costs, see Working Paper No. 4, Proposed Rule No. 53(2).

[240]Clearly, terms for suspension and discontinuance will start from the time limit specified in the order. The relevant "terms" may also include, the form of security (e.g., a bond, bank guarantee, a deposit in an escrow account or a letter of credit), the duration of the security, the issuer of the

the new rule is drafted reflects the intention to ensure a greater recourse to orders regarding security for costs.[241]

15.9 Concluding Observations

Provisional measures have become a central issue in international arbitration. As mentioned above, a final award would not be worth much to the prevailing party if the counterparty manages to dispose of its assets or of the object of the dispute while the arbitral proceedings are in progress. In the ICSID context, these measures are more relevant than ever: with the overall increase of the number of investor-state arbitration, the requests for provisional measures have dramatically boosted. Parties consider the availability of effective interim relief vital to the ICSID arbitral process. However, ICSID tribunals are still very strict in establishing whether to grant interim protection, unless the applicant satisfies an ICSID test in which grey areas appear to endure. Indeed, even if a large number of ICSID awards have contributed in a fundamental way to the progressive interpretation and application of the ICSID Convention and of the Arbitration Rules on provisional measures, case law still does not identify a clear *path* for the issuance of these procedural orders. The lack of express mention of the necessary requirements for the adoption of provisional measures have definitely created discrepancies between arbitral decisions. Today, however, after 55 years of constant application of the Convention, a clear convergence can be identified. The stimulus of the ICJ jurisprudence has also contributed to the process of *consolidation* of ICSID arbitrators' practice regarding provisional measures.[242] The findings of the Court, indeed, have clearly influenced ICSID arbitrators, for example, with regard to the identification and application of the necessary requirements for the adoption of provisional measures orders or with respect to the legal force of interim orders. While slight differences still remain, it appears manifest that ICSID arbitrators acknowledged the ICJ's indispensable leading role in ensuring a harmonic system of international rules.

In any case, adjustments to the ICSID framework have become necessary, in order to smoothly protect parties' rights and interests before the final award and to modernize the procedure. The provision of a time-limit for the issuance of the order by the tribunal and the endorsement of a non-exhaustive *list* of provisional measures are

security and any specific requirements, including if a party has to bear the cost of the security, see Working Paper No. 1, para 520.

[241] See Survey for ICSID Member States on Compliance with ICSID Awards, 6 November 2017, available at: https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf.

[242] The guidance of the case law of the International Court of Justice for other international courts and tribunals was addressed, *ex pluribus*, by Gaja 2019, who suggests that courts and tribunals who have a special domain of competence (i.e. ICSID arbitral tribunals) should view questions within their respective domain in the larger context of overall international law. See also Del Vecchio 2015, pp. 337–346.

welcome innovations that offer more certainty and that update the Rules in line with what has already been established in other procedural frameworks. However, ICSID Secretariat has proposed some changes also in a direction that surprisingly contradicts arbitral tribunals' previous determinations. The proposal indeed qualifies arbitrators' interim decisions as recommendations, contrarily to the well-established case law, which has consistently reaffirmed the binding nature of provisional measures. The non-prescriptive nature of such measures and their irrelevance for third parties might affect the efficiency of ICSID arbitration, since parties might be induced to not comply with orders, pondering the absence of relevant consequences. In fact, the drawing of adverse inferences or the allocation of costs in a punitive way still constitute tools used very carefully by arbitral tribunals. ICSID's effectiveness might be impaired also by the absence of measures securing the execution of the award. While requests for posting a security are frequently presented by the parties, arbitral tribunals have accepted such requests in very few cases. However, the provision of a new *Rule* regarding security for costs orders can certainly lead to a new scenario, where reckless or vexatious claims might be barred or impeded, and costs decisions and awards might be more easily satisfied.

In conclusion, limits affecting the current framework on provisional measures might be overcome by the amendment process, even if some shortcomings might persist. Of course, these assumptions might be only *conditional*, since the reform in still ongoing and the updated Rules still have to be adopted by ICSID Member States. In any case, it appears opportune and timely that the Centre is upgrading the ICSID scheme after years of persistent critics and detractions, in order to develop a system more advantageous and effective for its parties.

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Chapter 16
Conclusion

Fulvio Maria Palombino

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Abstract This chapter discusses the main results of the inquiry, pinpointing to what extent international courts and tribunals consistently exercise their powers when dealing with provisional measures. In that respect, the question is analysed through the lens of fragmentation of international law (as a result of the proliferation of international judicial bodies) but seen as something positive in itself, insofar as it implies plurality, cross-pollination and ultimately a harmonious development of international law.

Keywords Consistency in provisional measures · Fragmentation · International courts and tribunals · Law development

This volume is a compilation of reflections on a theme which has attained an ever-increasing attention in international legal scholarship: the (international) law of provisional measures. The investigation hitherto carried out has tried to shed some light on the rules governing the issuance and execution of interim measures, as well as on the related practice of international courts and tribunals. Against this backdrop, the chapters in this volume display an intriguing diversity, which arguably reflects the concerned international court or tribunal and the respective field of international law. The notable variety of perspectives and the amount of thought-provoking considerations provided by the authors may appear, at first glance, hard to handle. Nevertheless, they all contribute to a coherent work, which offers a clear overview of how various international courts and tribunals deal with provisional measures.

Such a variety of approaches with regard to international adjudication cannot but raise the spectre of fragmentation. A whole generation of scholars, indeed, grew up with the fear of fragmentation, perceived as a threat to the coherence or unity of international law resulting from the proliferation of international courts

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and tribunals. As a result, the International Law Commission devoted a considerable amount of attention—arguably, too much—to the in-depth study of this topic. Contrariwise, several scholars, such as Benedetto Conforti in Italy or Alain Pellet in France, have repeatedly claimed that fragmentation is not something to be fearful of. Following in their footsteps, it is the author's own view that fragmentation implies plurality, cross-pollination, and—hopefully—the harmonious development of international law through the meeting and confrontation of different positions. From this point of view, rather than being a threat, fragmentation does eventually result in an opportunity. A circumstance like this may be plainly grasped insofar as the topic of provisional measures is concerned. Several authors, starting with Eva Rieter, seem to claim a judicial convergence in the matter at stake.[1] As far as inter-state arbitration is concerned, Yoshifumi Tanaka, through his analysis of three well-known cases (*Mox Plant*, *Enrica Lexie Incident* and *Indus Waters Kishenganga*), pinpoints the lack of uniformity "with regard to the requirements to prescribe provisional measures"[2] as well as the peculiar problem of the so-called dual provisional measures.[3] In this specific regard, in accordance with Tanaka's suggestion that the "unity and diversity of international law governing provisional measures should be a crucial issue that needs further consideration",[4] one can argue that diversity in judicial matters—and its careful analysis—is still positive inasmuch as it contributes to the development of international law.

Going further into detail, there are four main issues which seem relevant to address the question of whether international courts and tribunals do consistently exercise their powers when dealing with provisional measures.[5]

The first issue concerns whether international courts and tribunals, with the view to granting provisional measures, are required to establish jurisdiction over the merits of the dispute. Over the course of time, various positions have been put forward. On one side of the spectrum lies the view according to which the question of jurisdiction over the merits has to be definitively established. On the far other side, there is the view claiming that the issue of the court's jurisdiction is irrelevant to the granting of provisional measures.[6] The approach adopted by the International Court of Justice (ICJ), and followed by most international courts and tribunals, is placed halfway between these two extremes, i.e. the *prima facie* test. According to this, the Party requesting provisional measures is required to show a *prima facie* basis on which the jurisdiction of the concerned court might be found. A similar approach is also followed, *mutatis mutandis*, by the International Criminal Court when ordering what Péter Kovács has properly called interim measures *stricto sensu* and *lato sensu.*[7] Moreover, the same test is valid to the extent that interim measures are issued by

[1] See Chap. 4 by Rieter in this volume; Chap. 3 by Le Floch in this volume.

[2] See Chap. 9 by Tanaka in this volume.

[3] *Ibid*.

[4] *Ibid*.

[5] See Brown 2007, p. 119 *et seq.*

[6] See the analysis in Chap. 3 by Le Floch in this volume.

[7] See Chap. 8 by Kovács in this volume.

emergency arbitrators—a figure thoroughly discussed by both Giovanni Zarra[8] and Andrea Carlevaris.[9] In the same way as the *prima facie* requirement, it must be stressed that the *plausibility test*—which was critically discussed by Tom Sparks and Mark Somos[10] through the lens of the "humanization of international law" argument—has been developed in the context of the ICJ and, subsequently, followed by other international courts and tribunals.

The second issue, which may be of interest in terms of consistency among international courts and tribunals, concerns the circumstances deemed to be relevant in granting provisional measures. The constitutive instruments of international courts—as precisely observed by Guillaume Le Floch—"are usually written in a very primitive way and in very general terms".[11] Indeed, they often merely provide that the court may grant provisional measures if "the circumstances so require", or if to do so would be "appropriate under the circumstances". Moreover, the same instruments are generally silent on what these requirements actually mean. Additionally, some instruments do not even provide for the power of the international court or tribunal to order provisional measures, and an explicit provision can only be found in its rules of procedure.[12] Against this background, international courts and tribunals have accordingly, *and once again consistently*, developed the guiding criteria in their own case law. In greater detail, two criteria have established themselves as being crucial: the need to preserve the parties' rights from an irreparable prejudice pending the decision on the merits, and the urgency. In this respect, a thorough analysis is provided by Andrea Saccucci[13] and Massimo Francesco Orzan,[14] who respectively engage with the jurisprudence of the European Court of Human Rights and of the Court of Justice of the European Union. As far as the irreparable prejudice is concerned, the contribution of the late Hugh Thirlway must be acknowledged, as he provokingly reversed the traditional perspective by inquiring into the consequences of a (possible) irrevocable damage to the respondent's interests, following the issuance of provisional measures upon the request of the applicant.

The third issue to be discussed is whether provisional measures are binding; this is a very traditional issue which continues, at least in some respects, to be relevant. In this regard, a common approach recognizing the binding nature of these measures has clearly emerged, even in those cases where the court's constitutive instrument seems rather to suggest the opposite. In particular, one has to consider both Article 41 of the ICJ Statute—according to which the Court has the power to *indicate* provisional measures, and Article 47 of the ICSID Convention—providing that ICSID tribunals have the power to *recommend* provisional measures; a topic which has been plainly

[8] See Chap. 13 by Zarra in this volume.

[9] See Chap. 14 by Carlevaris in this volume.

[10] See Chap. 5 by Sparks and Somos in this volume.

[11] See Chap. 3 by Le Floch in this volume; see also Chap. 13 by Zarra in this volume.

[12] See Chap. 11 by Saccucci in this volume.

[13] *Ibid*.

[14] See Chap. 10 by Orzan in this volume.

developed by Loris Marotti[15] and Domenico Pauciulo.[16] Despite the controversial wording of their statutes, the ICJ—most probably on the basis of UNCLOS—and ICSID tribunals, which in turn referred to the ICJ decision in *La Grand*, held that their provisional measures did have binding effect. An additional example, in this respect, is offered by the African Court of Human Rights. As stressed by Giuseppe Pascale,[17] even if it is true that States are not inclined to implement provisional measures, it is also true that the same States have never contested the trend of the African Court to regard such measures as being binding.

The fourth and last relevant aspect in terms of commonality of approach among international courts and tribunals pertains to the scope of their power to grant provisional measures. In this respect, Stephan Wittich points out how international courts and tribunals generally consider themselves empowered not only to grant the provisional reliefs requested by the parties, but also to order *ultra petita* and *proprio motu* measures, which they deem to be necessary in light of the concrete circumstances of the case.[18] As a confirmation of this power, they have often included explicit provisions in their rules of procedure as testified by Article 75 of the ICJ Rules of Procedure, as well as by Article 27 of the Inter-American Court of Human Rights Rules of Procedure.

Finally, if one examines the international case law dealing with provisional measures, it is apparent how international courts and tribunals have made extensive reference to the external jurisprudence of other international tribunals when exercising their powers in this matter. Such a process of cross-referencing has eventually led to the emergence of substantial common features in the granting of interim measures. Even more, the *Institut de Droit International*—through the "broad comparison of the law and practice of international and national courts and tribunals"[19]—came to the conclusion that:

> [i]t is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the status quo pending determination of disputes or to preserve the ability to grant final effective relief.[20]

In light of the above remarks, the only conclusion that can be drawn is that—as suggested by Cameron Miles in his recent book on provisional measures in international law—the establishment of a common practice among international courts and tribunals will both increase the chances that provisional measures are accepted and implemented by the parties, while also promoting the harmonious development of international dispute settlement.[21]

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[15] See Chap. 7 by Marotti in this volume.

[16] See Chap. 15 by Pauciulo in this volume.

[17] See Chap. 12 by Pascale in this volume.

[18] See Chap. 6 by Wittich in this volume.

[19] Institut de Droit International, 3rd Commission, Final Resolution of 8 September 2017, p. 1, available at: https://www.idi-iil.org/app/uploads/2017/08/3-RES-FINAL-EN-COR.pdf.

[20] *Ibid*.

[21] See Miles 2017, pp. 475–476.

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