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The Content of Provisional Measures in Inter-State Proceedings

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*To my parents, who have always believed in me
more than I believe in myself.*

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List of Acronyms

AG	Advocate General
CACJ	Central American Court of Justice
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CTS	Consolidated Treaty Series
DRC	Democratic Republic of the Congo
Dz. U.	Dziennik Ustaw Rzeczypospolitej Polskiej
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEZ	Exclusive economic zone
EU	European Union
FRG	Federal Republic of Germany
GC	Grand Chamber
ICJ	International Court of Justice
IDI	Institut de droit international
ITLOS	International Tribunal for the Law of the Sea
JORF	Journal officiel de la République française
OJ	Official Journal of the European Union
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UAE	United Arab Emirates
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USA	United States of America
VCDR	Vienna Convention on Diplomatic Relations



Introduction

*[Provisional measures are] an essential instrument to enable any
international court or tribunal to perform its functions*

– Shabtai Rosenne¹

This study examines the content of provisional measures in inter-State proceedings. Instead of the outdated term ‘interim measures of protection’, it opts for the term ‘provisional measures’ and uses it interchangeably with ‘interim relief’.² To describe the act of addressing provisional measures to a party, this study employs the wording preferred by each international court or tribunal (international court) under consideration, as well as the verbs ‘grant’, ‘order’ and ‘address’, which do not prejudice the binding character of interim relief. The term ‘content’ refers to what is granted as a provisional measure.³ Other aspects of the law and practice concerning provisional measures fall outside the scope of this study.

The present study focusses exclusively on inter-State proceedings. It is for three main reasons. First, all international courts can examine inter-State disputes, even if they usually hear other type of cases. This makes inter-State proceedings the lowest common denominator for comparative analysis.⁴ Second, international courts have regularly refused

¹ Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2004) 4.

² See Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 120; Cameron Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017) 1 n 2; Sofia Pimenova, *Obespechitel'nye mery v praktike mezhdunarodnykh sudov i tribunalov* (Статьи 2023) 11.

³ For scholars adopting the same wording, see eg Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Kluwer Law and Taxation 1983) ch 3.4; Miles (n 2) ch 7.

⁴ See Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 34(1); Annex VI on Statute of the International Tribunal for the Law of the Sea to the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 20; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 art 259; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 221 art 33; Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998) OAU/LEG/MIN/AFCHPR/PROT.1/rev.2/1997 art 5(1)(b)–(d). As to the possibility of provisional measures before the International Criminal Court, see Péter Kovács, ‘Interim Measures in the Practice of the International Court of Justice and the International Criminal Court’ in Fulvio Maria Palombino,

to apply rules from non-inter-State cases in inter-State cases. *Chagos Arbitration*,⁵ *Obligation to Negotiate Access*⁶ and *Ukrainian Naval Vessels Arbitration*⁷ provide just a few examples of this approach. Third, this study analyses all decisions on interim relief issued by the international courts under consideration. It would not be possible regarding non-inter-State proceedings due to the overwhelming number of such cases.⁸ Moreover, a joint analysis of interim relief in inter-State and non-inter-State proceedings would unnecessarily ‘over-complicate’⁹ the present study.

While none of the previous studies on provisional measures adopted the comparative inter-State perspective,¹⁰ the existence of a ‘common law of provisional measures’ has long been argued.¹¹ It goes without saying that no international court is bound by the jurisprudence of other courts,¹² but they generally accord it at least due consideration.¹³

This study addresses the law and practice of only those international courts that have granted provisional measures in inter-State proceedings. These are the Central American Court of Justice (CACJ), the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ or the Court), the International Tribunal for the Law of

Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

⁵ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Reasoned Decision on Challenge) PCA Case No 2011-03 (1 December 2011) [166]–[168].

⁶ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) [2018] ICJ Reports 507, 559 [162].

⁷ *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v Russian Federation)* (Decision on Challenges) PCA Case No 2019-28 (6 March 2024) [87]–[89]; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v Russian Federation)* (Decision on Challenge) PCA Case No 2019-28 (11 April 2025), [82]–[83].

⁸ Between 2021 and 2023, the ECtHR received 7,676 requests for interim relief in individual-to-State disputes. Of these, 2,745 (36%) were granted. As Miles notes, ‘[t]he increase in judicial and arbitral output has been exponential’. Miles (n 2) 6 n 22.

⁹ Cf Rosenne, *Provisional Measures in International Law* (n 1) 6.

¹⁰ Cf Sztucki (n 3) 15; Rosenne, *Provisional Measures in International Law* (n 1) 7; Miles (n 2) 7; Guillaume Le Floch, ‘Requirements for the Issuance of Provisional Measures’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 22.

¹¹ See Brown, *A Common Law* (n 2) ch 4.

¹² See eg *Prosecutor v Kvocka, Kos, Radic, Zigic and Prcać* (Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December) ICTY-98-30/1 (25 May 2001) [18]. See further Bartłomiej Krzan, ‘The Proliferation of International Courts and Tribunals and Its Effect on Procedure in the Settlement of International Disputes’ in Joanna Gomula, Stephan Wittich and Markus Stemeseder (eds), *Research Handbook on International Procedural Law* (Edward Elgar Publishing 2024).

¹³ See eg Eric De Brabandere, ‘The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea’ (2016) 15 *Law & Practice of International Courts and Tribunals* 24.

the Sea (ITLOS or the Tribunal), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), the United Nations (UN) Tribunal in Libya, and inter-State arbitration within and outside the framework of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁴ For the above reason, this study does not cover, *inter alia*, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. This is because these international courts have never yet decided on provisional measures in inter-State cases.¹⁵

By their very nature, provisional measures can be used strategically. Compared to the lengthy proceedings on the merits, a party may receive a legally binding decision¹⁶ within a relatively short period of time.¹⁷ From a game theory perspective, having interim relief granted can change the cost-benefit account of the proceedings.¹⁸ This, in turn, makes provisional measures a fantastic tool in strategic litigation¹⁹ or even 'lawfare'.²⁰ As Thirlway argues:

In recent times, the indication of provisional measures has tended to become not so much an incident of litigation as an end in itself, and it is permissible to see a number of cases as having been brought primarily in the hope of obtaining an immediate cessation of an activity

¹⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. Given the *ad hoc* nature of arbitration, which requires at least a minimal degree of cooperation between the parties, requests for provisional measures are rarely made in such proceedings. See Rosenne, *Provisional Measures in International Law* (n 1) 15–6.

¹⁵ On interim relief before the former court, see Jo M Pasqualucci, 'Provisional Measures', *The practice and procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013); Clara Burbano-Herrera and Yves Haeck, 'Provisional Measures: Inter-American Court of Human Rights (IACtHR)', *Max Planck Encyclopedia of Public International Law online* (2019). On interim relief before the latter court, see Giuseppe Pascale, 'Provisional Measures Under the African Human Rights System' in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

¹⁶ It is unclear whether interim relief granted in inter-State cases before the ECtHR is binding. As regards interim relief in individual applications before the ECtHR, see *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR [GC], 4 February 2005).

¹⁷ For information on the length of proceedings for provisional measures, see Miłosz Gapsa, 'How Urgent Is Urgent?—Statistical Analysis of Procedural Urgency in Provisional Measures at the International Court of Justice' (2023) 22 Chinese Journal of International Law 789.

¹⁸ Erlend M Leonhardsen, 'Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-Compliance Is to Be Expected' (2014) 5 Journal of International Dispute Settlement 306, 328.

¹⁹ See Leonhardsen (n 18). See also Karin Oellers-Frahm, 'Use and Abuse of Interim Protection before International Courts and Tribunals' in Holger P Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill Nijhoff 2012).

²⁰ On the notion of 'lawfare', see Charles J Dunlap, 'Lawfare Today: A Perspective' (2008) 3 Yale Journal of International Affairs 146; Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press 2016).

objected to, on the basis of a *prima facie* case, which its authors appreciate might not stand up to full judicial scrutiny.²¹

ICJ Vice-President Sebutinde expressed a similar opinion. In her words:

[The increasing number of requests for provisional measures] may be attributed to the fact that the procedures offer easier and quicker means of obtaining binding orders from the Court, coupled with a relatively modest standard of proof required, even if ultimately, the success of the primary claim of an applicant seems bleak or uncertain. Furthermore, Article 74 of the Rules of Court gives priority to requests for the indication of provisional measures over other cases, ensuring prompt binding decisions from the Court, compared to substantive proceedings that could potentially span months or years before completion. Whilst the above characteristics underscore the importance and efficiency of provisional measures procedures within the Court's framework, the Court must jealously guard its judicial function by ensuring that these procedures are not abused or misused, and that applicant States strictly and transparently comply with the criteria the Court has developed in its jurisprudence relating to the indication of provisional measures.²²

At times, the strategic nature of orders on provisional measures may mean that their reasoning is more important than the ordered interim relief. By indicating provisional measures in *Ukraine v Russia (Genocide Convention)*, the ICJ found that Russia's 'special military operation' in and against Ukraine was undertaken to prevent the alleged genocide.²³ As Wyrozumska points out, this conclusion implicitly undermined Russia's argument that it has been acting in self-defence under Article 51 of the UN Charter.²⁴ For Ukraine and States supporting it, the political and legal significance of this statement is broader than that case itself. This is regardless the fact that the indication of provisional

²¹ Hugh Thirlway, *Non-Appearance before the International Court of Justice* (Cambridge University Press 1985) 83.

²² *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Provisional Measures) [2024] ICJ Reports 560, 570–1 [1] (Separate Opinion Sebutinde).

²³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) [2022] ICJ Reports 211, 223 [46].

²⁴ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16; Anna Wyrozumska, 'The Russian "Special Military Operation" in Ukraine before International Courts' (2022) XLII Polish Yearbook of International Law 9, 5. See also Michał Balcerzak and Katarzyna Widlas-Klimsiak, 'Silent Leges Inter Arma? Provisional Measures under the Convention on the Prevention and Punishment of the Crime of Genocide in the Ukraine v. Russian Federation Case at the International Court of Justice' (2022) 20 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 251, 253; Dai Tamada, 'War in Ukraine and the International Court of Justice: Provisional Measures and the Third-Party Right to Intervene in Proceedings' (2024) 26 International Community Law Review 39, 48–9. *Contra* Corneliu-Liviu Popescu, 'L'inutilité juridique de l'Ordonnance de la Cour Internationale de Justice du 16.03.2022 Ukraine c. Fédération de Russie (Convention sur le génocide)' (2022) 18(3) Noua Revistă de Drepturile Omului 7.

measures was only a “Pyrrhic victory” for Ukraine’, to cite Balcerzak and Widlas-Klimsiak,²⁵ as they have not been complied with.

Provisional measures have long been a subject of scholarly interest. Earliest studies focussed on the budding law and practice of the PCIJ.²⁶ Since its establishment,²⁷ the ICJ has remained the most frequently analysed international court.²⁸ Studies on UNCLOS tribunals most often take the form of comparative analysis with the ICJ.²⁹ Scholarship on the law and practice of the CJEU is limited to a few chapter-length studies.³⁰ There is even less literature on the ECtHR’s provisional measures.³¹ This is because this international

²⁵ Balcerzak and Widlas-Klimsiak (n 24) 262.

²⁶ See esp Edward Dumbauld, *Interim Measures of Protection in International Controversies* (Martinus Nijhoff 1932); Åke Hammarskjöld, ‘Quelques aspects de la question des mesures conservatoires en droit international positif’ (1935) 5 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 5; Edward Dumbauld, ‘Relief *Pendente Lite* in the Permanent Court of International Justice’ (1945) 39 *American Journal of International Law* 391.

²⁷ The earliest book-length studies date back to the 1980s. See Jerome B Elkind, *Interim Protection: A Functional Approach* (Nijhoff 1981); Sztucki (n 3).

²⁸ See eg Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press 2013) 929–70, 1770–811; Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff 2015) ch 11; Miles (n 2); Karin Oellers-Frahm and Andreas Zimmermann, ‘Article 41’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019).

²⁹ See esp Rosenne, *Provisional Measures in International Law* (n 1); Philippe Gautier, ‘Mesures conservatoires, préjudice irréparable et protection de l’environnement’ in Jean Pierre Cot, *Liber amicorum Jean-Pierre Cot: le procès international* (Bruylant 2009); Tullio Treves, ‘Les Mesures conservatoires au Tribunal de droit de la mer et à la Cour internationale de justice: Contribution au dialogue entre cours et tribunaux internationaux’ in Jean Pierre Cot, *Liber amicorum Jean-Pierre Cot: le procès international* (Bruylant 2009). For some exceptions, see Edward A Laing, ‘A Perspective on Provisional Measures under UNCLOS’ (1998) 29 *Netherlands Yearbook of International Law* 45; Rüdiger Wolfrum, ‘Provisional Measures of the International Tribunal for the Law of the Sea’ in P Chandrasekhara Rao and Rahmatullah Khan (eds), *The International Tribunal for the Law of the Sea* (Brill Nijhoff 2001); Thomas A Mensah, ‘Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)’ (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 43; P Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018); Rüdiger Wolfrum, ‘Provisional Measures: International Tribunal for the Law of the Sea (ITLOS)’ *Max Planck Encyclopedia of Public International Law online* (2019); Kriangsak Kittichaisaree, *International Tribunal for the Law of the Sea* (Oxford University Press 2021).

³⁰ See esp Albertina Albors-Llorens, ‘Provisional Measures: Court of Justice of the European Union (CJEU)’ *Max Planck Encyclopedia of Public International Law online* (2020); Massimo Francesco Orzan, ‘The Procedural Features of Interim Relief Before the Court of Justice of the European Union’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021); Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023).

³¹ See Cedric Marti, ‘Provisional Measures: European Court of Human Rights (ECtHR)’ *Max Planck Encyclopedia of Public International Law online* (2018); Lorenzo Acconciamezza, ‘Le misure cautelari nei giudizi interstatali sui diritti umani: la prassi recente della Corte Internazionale di giustizia e della Corte europea dei diritti umani’ (2021) 15 *Diritti umani e diritto internazionale* 413; Andrea Saccucci, ‘Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021). Only recently has a scholar published a comprehensive book on inter-State proceedings before the ECtHR. See Isabella Risini, *The Inter-State*

court does not issue formal decisions on interim relief, but merely communicates them to the parties. The only public source of information is its press releases. Nevertheless, comparative analysis of different international courts is now common practice.³²

The literature on provisional measures is overwhelming. As Lord Collins of Mapesbury wryly observes, ‘a cynic may think that the volume of [the literature on provisional measures] is in inverse proportion to the effectiveness of the remedy and to the respect shown by Respondent States to the orders of the [ICJ]’.³³ One should however lament that many (Western) scholars overlook the vast scholarship written in languages other than English and French.³⁴ Whatever the language, unfortunately, not all published studies are reliable.³⁵

Since *Honduras v El Salvador and Guatemala*, the very first decision on provisional measures delivered by the CACJ in 1908,³⁶ the subject matter of scholarly analysis has undergone significant changes. The focus has gradually shifted from the standard of the required jurisdiction,³⁷ the conditions for³⁸ and procedures of granting interim relief,³⁹ and

Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement (Brill Nijhoff 2018).

³² See eg Lawrence Collins, ‘Provisional and Protective Measures in International Litigation’ (1992) 234 *Recueil des Cours de l’Académie de Droit International* 9; Paola Gaeta, *La giustizia cautelare nel diritto internazionale* (CEDAM 2000); Rüdiger Wolfrum, ‘Interim (Provisional) Measures of Protection’, *Max Planck Encyclopedia of Public International Law online* (2006) 200; Brown, *A Common Law* (n 2) ch 4; Miles (n 2); Le Floch (n 10).

³³ Collins (n 32) 214.

³⁴ For some ‘omitted’ but valuable studies, see Sergey M Punzhin, ‘Protsessual-noe pravo Mezhdunarodnogo Suda OON: vremennye mery (chast– 1)’ (2015) 16 *Mezhdunarodnoe pravosudie* 51; Sergey M Punzhin, ‘Protsessual-noe pravo Mezhdunarodnogo Suda OON: vremennye mery (chast– 2)’ (2016) 17 *Mezhdunarodnoe pravosudie* 37; Sofia Pimenova, ‘Obespechitel’nye mery v praktike Mezhdunarodnogo Suda OON’ (2020) 34 *Mezhdunarodnoe pravosudie* 88; Sofia Pimenova, ‘Obespechitel’nye mery v praktike Mezhdunarodnogo Tribunala po Morskemu Pravu’ [2022] *Rossiiskii yuridicheskii zhurnal* 7; Pimenova, *Obespechitel’nye mery* (n 2).

³⁵ Unfortunately, this concerns Ewa Salkiewicz-Munnerlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* (TMC Asser Press 2022). As Becker argues, ‘In sum, this contribution ... regrettably does not live up to its ambitious goals. There is a *shortage of cogent analysis and the coverage of ICJ practice since the 1990s* is uneven. ... Unfortunately, the text is often error-prone and difficult to follow. However, the most egregious problem is that excerpts from ICJ decisions and documents such as the ICJ Statute are *misquoted* throughout the book ... the shortcomings noted above demand that the text be approached with caution’. Michael Becker, ‘Salkiewicz-Munnerlyn, Ewa: Jurisprudence of the PCIJ and the ICJ on Interim Measures of Protection’ (2022) 82 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 513, 520–1 (emphasis added).

³⁶ See *Honduras v El Salvador and Guatemala* (Interlocutory Decree) (1908) 2 *American Journal of International Law* 838.

³⁷ See eg *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Interim Measures of Protection) [1951] ICJ Reports 89, 96–8 (Joint Dissenting Opinion Winiarski and Badawi Pasha).

³⁸ See eg Inna Uchkunova, ‘Provisional Measures before the International Court of Justice’ (2013) 12 *Law & Practice of International Courts and Tribunals* 391.

³⁹ See eg Gapsa, ‘How Urgent Is Urgent?’ (n 17) paras 11–21.

their uncertain binding force,⁴⁰ to the ambiguities surrounding the condition of plausibility,⁴¹ the mechanism of ensuring compliance with interim relief,⁴² and the issue of the ‘unduly’ granted provisional measures.⁴³

Parties may request provisional measures in all types of contentious proceeding, including those unusual as for the interpretation of judgments.⁴⁴ The subject matter of the main case is irrelevant. As far as the content of interim relief is concerned, it can take different forms. Miles provides a sample list of provisional measures. He mentions decisions to cease nuclear testing, stay construction of certain parts of a dam, prevent the sale or deterioration of contested goods, freeze assets pending final judgement, observe a ceasefire agreement, and limit annual catches of fish.⁴⁵

To date, however, scholarship has largely overlooked the fundamental question of what is granted as provisional measures and why. This issue is more complex than it may first seem to be. Although international courts require a requesting party to propose the provisional measures it seeks, they reserve the right to grant whatever interim relief they deem appropriate. Rarely, if ever, is their choice explained. Typically, international courts simply state that, given the circumstances of the case, the provisional measures granted need not be the same as those requested.⁴⁶

⁴⁰ See eg Antonios Tzanakopoulos, ‘Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law’ (2004) 57 *Revue hellénique de droit international* 53.

⁴¹ See eg Lorin Marotti, ‘“Plausibilità” dei diritti e autonomia del regime di responsabilità nella recente giurisprudenza della Corte internazionale di giustizia in tema di misure cautelari’ (2014) 97 *Rivista di diritto internazionale* 761; Massimo Lando, ‘Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice’ (2018) 31 *Leiden Journal of International Law* 641; Cameron Miles, ‘Provisional Measures and the “New” Plausibility in the Jurisprudence of the International Court of Justice’ [2018] *British Yearbook of International Law*; Robert Kolb, ‘Digging Deeper into the “Plausibility of Rights”-Criterion in the Provisional Measures Jurisprudence of the ICJ’ (2020) 19 *The Law & Practice of International Courts and Tribunals* 365; Dimitris Kontogiannis, ‘Provisional Measures of the International Court of Justice: Recapturing the Plausibility Test as Foreshadowed’ (2022) 33 *Hague Yearbook of International Law* 31.

⁴² See eg Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22; Miles (n 41).

⁴³ Jean-Baptiste Merlin, ‘Unduly Indicated? Provisional Measures and Subsequent Adverse Findings at the International Court of Justice’ (2022) 22 *Law & Practice of International Courts and Tribunals* 90; Hugh Thirlway, ‘Provisional Measures: How “Provisional” Is “Provisional”?’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

⁴⁴ Yet this point raises controversies. See Oellers-Frahm and Zimmermann (n 28) 1174–7 paras 80–1. See also Hugh Thirlway, *The International Court of Justice* (Oxford University Press 2016) 152–3.

⁴⁵ Miles (n 2) 300 (internal citations omitted).

⁴⁶ See eg ‘*Enrica Lexie*’ *Incident Arbitration (Italy v India)* (Provisional Measures) PCA Case No 2015-28 (29 April 2016), [120]; *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)* (Provisional Measures) (2019) 2018–2019 ITLOS Reports 283, 309–10 [114]–[115]; *Application of the*

By examining the content of provisional measures, the present study addresses this gap in the literature. The central research question is what is granted as provisional measures and why. Auxiliary questions are: (1) what the legal basis is for granting provisional measures other than those requested; (2) whether there are patterns in ordering similar interim relief in comparable cases; and (3) what criteria guide the selection of the content of provisional measures. This study argues that the international courts' discretion in choosing the content of interim relief is not unlimited; it is constrained by legal criteria.

The methodology employed in this study is both dogmatic and comparative. The study examines and contrasts the provisions contained in the constitutive instruments of the international courts under consideration, their rules of procedure, and the relevant academic literature. At its core, the analysis offers a critical review of the international courts' extensive jurisprudence.

This study consists of five parts. These are the present Introduction, three Chapters, and the Conclusions. Chapter I analyses the procedural framework for granting provisional measures. It begins with a summary of the historical development of interim relief, and then compares the wording of the provisions on provisional measures. This chapter also explains the legal basis under which an international court may grant interim other than that requested. Chapter II compares all decisions in which international courts have ordered provisional measures. It categorises them according to their subject matter and the nature of the urgent risk of irreparable prejudice. This allows examining whether international courts have granted similar interim relief in comparable cases. The issue of criteria for selecting the content of provisional measures is the subject of Chapter III. Based on the jurisprudence of international courts, it identifies four criteria that condition the choice of interim relief. This chapter also discusses possible emerging criteria. The Conclusions provide observations *de lege lata* and proposals *de lege ferenda*.

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Chapter I

Procedural Framework for Granting Provisional Measures

*Times and conditions change so rapidly that we must keep our
aim constantly focused on the future*

– Walt Disney

1. Introductory Remarks

Provisional measures proceedings are governed by the constitutive instruments of international courts and their rules of procedure. This chapter discusses the content and context of these provisions. Of particular importance for both the practice of and the criteria for selecting the content of interim relief is the question of the legal basis for granting provisional measures other than those requested. For broader context, this chapter begins with an overview of the historical development of interim relief in international law.

2. Historical Development of Provisional Measures in International Law

Provisional measures in international law predates the law and practice of the PCIJ and the ICJ. As Miles points out:

In reading the first indication of provisional measures by the Permanent Court of International Justice – the Order of 8 January 1927 made in the *Sino-Belgian Treaty* case – it is clear that its author, President Max Huber, was drawing from an already coherent corpus of rules on the provision of interim relief in international disputes.⁴⁷

The concept of interim relief has its roots in municipal law.⁴⁸ The judicial settlement of international disputes is, in part, the reflection of municipal mechanisms. This is to say that when States established international courts, they aimed, at least in part, to mirror municipal

⁴⁷ Miles (n 2) 15 (internal citations omitted).

⁴⁸ '[Provisional measures in international law] se rapprochent souvent, quant à la forme de leur établissement et de leur contenu, des mesures conservatoires connues dans le système de la procédure civile et de la procédure administrative du droit interne.' Paul Guggenheim, 'Les mesures conservatoires dans la procédure arbitrale et judiciaire' (1932) 40 *Recueil des Cours de l'Académie de Droit International* 645, 651. See also '*ARA Libertad*' (*Argentina v Ghana*) (Provisional Measures) [2012] ITLOS Reports 332, 382 [4] (Separate Opinion Lucky).

legal procedures. The term ‘court’ in the international context was to have the same meaning as in municipal law.⁴⁹

Nevertheless, provisional measures in international law are not a mere transposition of a corresponding municipal concept. Nor are they a general principle of law under Article 38(1)(c) of the ICJ Statute. Interim relief is an autonomous concept in international law, fully distinct from any municipal legal system. As Guggenheim puts it, ‘la situation de fait et de droit qui est à la base de l’ordonnance des mesures conservatoires du droit interne diffère essentiellement de celle que nous rencontrons dans la communauté internationale’.⁵⁰

The origins of interim relief can be traced back to Roman law. In this legal system, however, there was no single rule for protecting the parties’ rights during proceedings. A case-by-case approach was followed.⁵¹ Canon law took over the idea of interim relief from Roman law. It is recalled that Canon law played a significant role in shaping national legal systems across continental Europe. Nevertheless, the concept of provisional measures has also found its way into common law and non-European legal systems.⁵² To give just a few examples, it can be found in the legal systems of England and Wales (common law),⁵³ France (civil law),⁵⁴ Poland (post-socialist law),⁵⁵ and Colombia (Latin American law).⁵⁶ Interestingly, municipal courts grant interim relief in similar circumstances. They require that a court have jurisdiction over the dispute, that there be a *prima facie* case, and that the content of a provisional measure ensure a fair balance between the parties.

Operating under Roman-Canon law, the *Reichskammergericht* (Imperial Chamber of Justice) was the highest court of the Holy Roman Empire until 1806.⁵⁷ Part of its

⁴⁹ Hugh Thirlway, ‘Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *American Journal of International Law* 622, 626 (internal citations omitted). See also Sztucki (n 3) 2. On the Central American Court of Justice, see ‘[i]t is the first constituted body of a permanent organization to sit in judgment of nations as our municipal tribunals do of individuals’. ‘Editorial Comment: The First Case Before the Central American Court of Justice’ (1908) 2 *American Journal of International Law* 835, 836.

⁵⁰ Guggenheim (n 48) 651.

⁵¹ Dumbauld, *Interim Measures of Protection* (n 26) 33. See also Miles (n 2) 16–9.

⁵² See esp Dumbauld, *Interim Measures of Protection* (n 26) 42–81. See also Miles (n 2) 21–31.

⁵³ *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1.

⁵⁴ Décret n° 75-1123 du 5 décembre 1975 instituant un nouveau code de procédure civile JORF 9 décembre 1975 rectificatif JORF 27 janvier 1976 arts 834–8.

⁵⁵ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (t.j. Dz. U. z 2023 r. poz. 1550 z późn. zm.) arts 730–57.

⁵⁶ Ley 1564 de 2012 (Julio 12) Por medio de la cual se expide el Código General del Proceso y se dictan otras disposiciones (Diario Oficial 48489 de julio 12 de 2012) modificado arts 298, 360, 588–90, 598.

⁵⁷ See Peter Oestmann, ‘Reichskammergericht’, *The Oxford International Encyclopedia of Legal History* (Ira Allen tr, Oxford University Press 2009).

jurisdiction concerned disputes between the Empire's various territorial entities. Because it could order provisional measures, the *Reichskammergericht* was first more-than-only municipal court authorised to grant interim relief. Although PCIJ Judge Schücking acknowledged the *Reichskammergericht*'s reputation for slowness, he noted that 'by its interim measures, it staved off many a crisis, by depriving the disputes of their acuteness'.⁵⁸

The history of interim relief then turned to the work of the *Institut de Droit International*. Following Asser's proposal, Article 19 of the 1875 *Projet de règlement pour la procédure arbitrale internationale* included the phrase '[l]e tribunal arbitral peut rendre des jugements interlocutoires ou préparatoires'.⁵⁹ As Mérignhac explains, this referred to the power to grant interim relief.⁶⁰ In practice, it meant that a court 'aura également le droit de prescrire une mesure provisoire, telle que la mise sous séquestre d'un territoire litigieux, ou de navires et marchandises capturés et sur la saisie desquels une difficulté s'élève'.⁶¹ Thus, the *Projet de règlement* was the first international document to directly refer to provisional measures as part of proceedings before an international court.⁶²

Neither the 1899 Hague Peace Conference nor the one in 1907 addressed the issue of interim relief.⁶³ The first treaty to apply it in practice was the 1902 Treaty of Corinto, which was signed between Costa Rica, El Salvador, Honduras, and Nicaragua.⁶⁴ Article XI stated that:

The governments of the states in dispute solemnly engage not to execute any act of hostilities, preparations for war, or mobilization of forces, in order not to impede the settlement of the difficulty or question by the means established in the present convention.

This provision does not appear to confer any power to grant interim relief. It merely required the parties to refrain from actions that would undermine the compulsory arbitration.

⁵⁸ PCIJ, 'Modification of the Rules' (1931) PCIJ Ser D Second Addendum to No 2, 185 (Schücking).

⁵⁹ IDI, 'Projet de règlement pour la procédure arbitrale internationale' (1er vote à Genève, 2ème vote à La Haye) 1 *Annuaire de l'Institut de Droit international* 126, 131.

⁶⁰ See Alexandre Mérignhac, *Traité théorique et pratique de l'arbitrage international: Le rôle du droit dans le fonctionnement actuel de l'institution et dans ses destinées futures* (Larose 1895) 274–5.

⁶¹ Mérignhac (n 60) 275.

⁶² Rosenne, *Provisional Measures in International Law* (n 1) 12–3. See Miles (n 2) 31–2.

⁶³ Rosenne, *Provisional Measures in International Law* (n 1) 13–4. See Miles (n 2) 32.

⁶⁴ Convention of Peace and Arbitration between Costa Rica, El Salvador, Honduras and Nicaragua (signed 20 January 1902) 190 CTS 537.

At that time, Central America was highly unstable and torn by various armed conflicts.⁶⁵ One of them gave rise to the arbitration between Honduras and Nicaragua. Honduran forces had violated Nicaraguan territory by pursuing Honduran revolutionaries allegedly supported by Nicaragua. This action was believed to lead to an inevitable war and triggered an arbitration proceeding. The arbitral tribunal held that ‘its principal duty is to see that the judgment it is going to deliver should become effective’. Acting under Article IX, it ‘[requested] in the most friendly manner from the Governments of Honduras and Nicaragua the most immediate disarmament and disbandment of forces, in order that things may return to the pacific state which the arbitral *compromis* contemplates’.⁶⁶ According to the Tribunal, its role was twofold: issuing an effective decision and preventing the dispute from escalating.

To resolve similar disputes, Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador signed the treaty establishing the CACJ in Cartago, Costa Rica.⁶⁷ The CACJ was the first permanent international court, operational from 1909 to 1918. It enjoyed broad jurisdiction, which covered ‘all controversies or questions which may arise among [the parties], of whatsoever nature and no matter what their origin may be’, provided that prior negotiations had failed.⁶⁸ Article XVIII read that:

From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *statu quo* pending a final decision.

Miles argues that Article XVIII was introduced only to prevent armed conflicts.⁶⁹ On the other hand, this provision seems to be broader in scope than Article XI of the Treaty of Corinto. Not only ‘[shall] the difficulty ... not be aggravated’ but also ‘things shall be

⁶⁵ For the historical background, see Charles Ripley, ‘The Central American Court of Justice (1907-1918): Rethinking the Word’s First Court’ (2017) 19 *Diálogos Revista Electrónica* 47, 50–2.

⁶⁶ The quoted passages are from (1917) 7 *World Peace Foundation* 120–1 (as cited in Miles (n 2) 33–4; Dumbauld, *Interim Measures of Protection* (n 26) 93–4).

⁶⁷ Convention for the Establishment of a Central American Court of Justice (20 December 1907) 206 CTS 78. On the CACJ, see generally Manley O Hudson, *The Permanent Court of International Justice, 1920–1942: A Treatise* (Macmillan Company 1943) ch III.

⁶⁸ Convention for the Establishment of a Central American Court of Justice (20 December 1907) 206 CTS 78 art I. Its additional jurisdiction, which is still rarely found even in the 21st century, covered disputes between individuals and a State (Article II), disputes between Central American States and other States if agreed (Article III), and disputes between ‘the Legislative, Executive, and Judicial Powers’ (Annexed Article).

⁶⁹ Miles (n 2) 35 (emphasis added).

conserved in *statu quo* pending a final decision’. The conjunction ‘and’ suggests that these two elements are interconnected. In any event, the provision in question ‘does not appear to have been developed by express reference to any municipal concept of provisional measures’.⁷⁰ Despite changes in the wording, Article XVIII should be understood as a continuation of, rather than a departure from, the principle already established in the Treaty of Corinto.

The CACJ had to decide on provisional measures already in its first-ever case. *Honduras v El Salvador and Guatemala* was a case concerning the alleged sponsorship of revolutionaries by El Salvador and Guatemala during disturbances in Honduras. The CACJ ‘fix[ed] the status’ of the respondents, ordering them to cease their military and related activities.⁷¹ In the later award, the CACJ explained that a provision on interim relief served a ‘humanitarian and unquestionably utilitarian purpose’. It further clarified that the right to have provisional measures granted follows from the ‘right to have recourse to the court without delay in matters of urgency’.⁷²

In parallel with *Honduras v El Salvador and Guatemala*, Nicaragua sent a telegram to the CACJ expressing its intention to initiate proceedings against El Salvador and Guatemala in relation to the same events.⁷³ Despite the unclear legal nature of the Nicaragua’s telegram, the CACJ ‘fix[ed] the *status quo*’ between the potential parties to the potential proceedings.⁷⁴ Ultimately, Nicaragua’s case was not filed.⁷⁵

In *Costa Rica v Nicaragua*, Costa Rica accused Nicaragua of breaching the boundary treaty by signing an agreement with the United States for the construction of an interoceanic canal between the Atlantic and Pacific Oceans. The CACJ ruled that ‘los Gobiernos de Costa Rica y Nicaragua están en la obligación de mantener el “statu que” que ha existido entre ellas, antes del Tratado que motiva la presente contienda’.⁷⁶ In other words,

⁷⁰ Miles (n 2) 35.

⁷¹ *Honduras v El Salvador and Guatemala* (Interlocutory Decree) (n 36) 839.

⁷² *Honduras v El Salvador and Guatemala* (Final Conclusions and Award) (1908) 4 American Journal of International Law 729, 730 ch I [4].

⁷³ The may be the first example of *actio popularis*, as Nicaragua claimed that it ‘[was] interested in the present case for the reason that it participated in the Washington treaties, because it [was] concerned in the maintenance of general peace in Central America, because its territory border[ed] that of Honduras, and because of the possible participation in the conflict of Nicaraguan emigrants, who might pursue ulterior ends against its own tranquillity’. *Nicaragua v El Salvador and Guatemala* (Interlocutory Decree) (1908) 2 American Journal of International Law 840, 840.

⁷⁴ *Nicaragua v El Salvador and Guatemala* (n 73) 840–1.

⁷⁵ In general, the CACJ appears to have acted *proprio motu* in the case at hand, which was not permitted under Article XVIII.

⁷⁶ *Costa Rica v Nicaragua* (Interlocutory Decree) (1916) V Anales 87, 89.

the CACJ required that the parties restore the situation that existed before Nicaragua had entered into the treaty with the United States. The CACJ granted analogous interim relief in *El Salvador v Nicaragua*, which concerned another Nicaragua–United States treaty.⁷⁷

The evaluation of the law and practice of the CACJ divides scholars,⁷⁸ but one may conclude that the differences in wording between Article XI of the Treaty of Corinto and Article XVIII of the CACJ Statute appear to have had little, if any, impact on the granted interim relief. Every decision on provisional measures seems to have been primarily driven by a strong desire to prevent armed conflicts in the region.

The so-called Bryan Treaties, agreements between the United States and a number of other States, obliged the parties to refer any disputes between them to the Permanent International Commission. The treaties with China, France, and Sweden each included an article, stating that:

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.⁷⁹

These provisions, to some extent, resembled judicial provisional measures. The reason for their introduction remains unclear.⁸⁰ Guggenheim suggests that they were intended to address the unsatisfactory experience of the CACJ.⁸¹ In any case, the same concept of interim relief was again expressed in different wording. This time, States used the phrase ‘to preserve the rights of each party’.

Inspired by the Bryan Treaties, Switzerland concluded a number of treaties of arbitration, conciliation, and judicial settlement with European States after the First World War.⁸² The first such agreement was with Germany. Its Article 18 read that:

⁷⁷ *El Salvador v Nicaragua* (Interlocutory Decree) (1916) V Anales 229, 229–31.

⁷⁸ For positive, see Guggenheim (n 48) 670; Rosenne, *Provisional Measures in International Law* (n 1) 19–21. For negative, see Dumbauld, *Interim Measures of Protection* (n 26) 99. For *via media*, see Miles (n 2) 44.

⁷⁹ Treaty between France and The United States for the Advancement of Peace (15 September 1914) 10 American Journal of International Law Supplement 278 art 4. See also Treaty between China and The United States for the Advancement of Peace (15 September 1914) 10 American Journal of International Law Supplement 268 art 4; Treaty between Sweden and The United States for the Advancement of Peace (13 October 1914) 10 American Journal of International Law Supplement 304 art 4.

⁸⁰ Rosenne, *Provisional Measures in International Law* (n 1) 20 n 45.

⁸¹ Guggenheim (n 48) 670.

⁸² Dumbauld, *Interim Measures of Protection* (n 26) 125 n 5.

The award pronounced as the result of the procedure of arbitration shall be carried out in good faith by the Parties concerned.

The Contracting Parties shall undertake during the course of the arbitration or conciliation proceedings to refrain as far as possible from any action liable to have a prejudicial effect on the execution of the award or on the acceptance of the proposals of the Permanent Board of Conciliation. They shall refrain from any act of a legal nature in connection with the conciliation proceedings until the expiration of the time limit fixed by the Permanent Board of Conciliation for the acceptance of its proposals.

At the request of one of the Parties, the 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 the Permanent Board of Conciliation may also formulate proposals to the same effect.⁸³

In other words, the parties directly committed themselves not to act in a way that could prejudice the enforcement of the final award in the proceedings. This obligation was closely linked to the power of an arbitral tribunal to order provisional measures for that aim. Miles rightly points out that the provision under consideration resembles earlier provisions on provisional measures.⁸⁴ This suggests that the same concept was again expressed in different terms. The reference to ‘the rights of each party’ from the Bryan Treaties was replaced with a direct focus on the enforceability of the future decision, as seen in the Treaty of Corinto. Notably, the Swiss-German treaty was signed on the Swiss side by Max Huber, who later became the President of the PCIJ and issued the first-ever order on provisional measures in *Sino-Belgian Treaty*.

During the interwar period, mixed arbitral tribunals, established under the armistice agreements with Germany,⁸⁵ Austria,⁸⁶ and Hungary,⁸⁷ further developed the law and practice of interim relief in individual-State proceedings.⁸⁸ Although the armistice agreements did not explicitly mention provisional measures, the mixed arbitral tribunals

⁸³ Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich (signed 3 December 1921) 12 LNTS 281 art 18.

⁸⁴ See also Miles (n 2) 46.

⁸⁵ See Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188 arts 304–5.

⁸⁶ See Treaty of Peace between the Allied and Associated Powers and Austria (adopted 10 September 1919, entered into force 16 July 1920) 226 CTS 8 arts 256–7.

⁸⁷ See Treaty of Peace between the Allied and Associated Powers and Hungary (adopted 4 June 1920, entered into force 31 July 1921) 6 LNTS 187 arts 239–40.

⁸⁸ Miles (n 2) 47–8. It is recalled that the PCIJ could still review the decisions of these tribunals. See eg *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University) (Czechoslovakia v Hungary)* (1933) PCIJ Series A/B No 61.

authorised themselves to grant interim relief in their rules of procedure. As Dumbauld notes, '[i]t must therefore be taken as settled by international practice and the common consent of states that when an international tribunal has power to regulate its procedure in accordance with justice and equity, it may provide for interim protection'.⁸⁹

To summarise, it is not entirely clear why the concept of provisional measures appeared in international law. It seems, however, that although different treaties adopted different wording of the provisions on interim relief, they expressed the same concept.

3. Judicial Interpretation of the Provisions on Provisional Measures

Apart from the ECtHR and the UN Tribunal in Libya, the provisions on granting provisional measures are generally found in the constitutive instruments of international courts. As with all legal provisions, it is jurisprudence that reveals their full meaning.

3.1. Article 41 of the PCIJ Statute

The PCIJ Statute was proposed by the Drafting Committee, formed by the Advisory Committee of Jurists convened by the League of Nations.⁹⁰ During this process, the League Secretariat presented a memorandum to the Drafting Committee, one point of which was whether 'the court [would be] competent to decree, regarding the subject-matter of the dispute, the maintenance of the *status quo* pending its decision'. In response, the Drafting Committee drafted Article 2*bis*, which, with minor amendments suggested by the Advisory Committee, stated that:

Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l'être, 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.

En attendant l'arrêt, cette indication de ces mesures est immédiatement transmise aux parties et au Conseil.⁹¹

⁸⁹ Dumbauld, *Interim Measures of Protection* (n 26) 143.

⁹⁰ On the drafting process, see briefly Hudson (n 67) 198–9 para 192.

⁹¹ The French version being the original. PCIJ, Advisory Committee of Jurists, 'Procès-Verbaux of the Proceedings of the Committee' (16 June–21 July 1920) Van Langenhuysen Brothers 637–9.

In Rosenne's view, that provision was 'apparently inspired by the [CACJ Statute]'.⁹² It rather seems that the draft more closely resembled the Bryan Treaties. This is because it used the word 'measures' and referred to the '*droit de chacun*'. As Oellers-Frahm and Zimmermann point out, 'Article 41 [of the PCIJ] seems to require more [than Article XVIII of the CACJ Statute], *i.e.*, the preservation of rights'.⁹³ In addition, the Advisory Committee explained in its final report that:

[it], drawing its inspiration from a provision contained in the treaties between the United States and certain other States (France, China and Sweden) which were signed in 1914 on behalf of the former by Mr Bryan, the then Secretary of State, [gave] the Court the power of suggesting the measures to be taken provisionally, to ensure that the respective rights are not prejudiced;⁹⁴

and it followed that:

[a]t the very outset of the case, circumstances may exist requiring that provisional measures be taken to ensure that the rights of each party are not prejudiced. This is the case in the event of a dispute arising out of an act just performed, for instance, the seizure of an object or the invasion of a territory. If such an act has just been, or is on the point of being, put into execution, it may be highly desirable to undo the consequences for the time being, or to prevent it from taking place if there is still time.⁹⁵

Notably, the report mentioned the possibility of indicating provisional measures 'in the event of a dispute arising out of an act just performed'. This was a matter of heated debate during the review of the proposed PCIJ Statute.⁹⁶ Ultimately, this and other contentious elements were either removed or revised.⁹⁷ The final version of Article 41 read as follows:

The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.⁹⁸

⁹² Rosenne, *Provisional Measures in International Law* (n 1) 24.

⁹³ Oellers-Frahm and Zimmermann (n 28) 1145–6 para 22.

⁹⁴ 'Procès-Verbaux of the Proceedings of the Committee' (n 91) 735.

⁹⁵ 'Procès-Verbaux of the Proceedings of the Committee' (n 91) 735.

⁹⁶ It should be noted that Max Huber was a member of the Sub-Committee.

⁹⁷ 'Procès-Verbaux of the Proceedings of the Committee' (n 91) 103, 107, 134 and 160.

⁹⁸ The ICJ itself noted that the French and English texts were 'not in total harmony' as to the binding force of provisional measures. *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Report 466, 502 [101]. See also *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Provisional Measures) [1990] ICJ Reports 64, 79 (Dissenting Opinion Thierry); Rosenne, *Provisional Measures in International Law* (n 1) 27–9; Miles (n 2) 53–4.

In 1922, the PCIJ adopted its first Rules of Procedure. As the drafters of the Rules considered interim relief to be non-binding, they saw no need to establish a special procedure for its granting.⁹⁹ Nor do they appear to consider provisional measures relevant at all. During the preliminary session, they dedicated the same amount of time to this issue as they did to organising a memorial service for Grotius¹⁰⁰ or discussing whether judges should wear robes.¹⁰¹ Nevertheless, the drafters decided that when the PCIJ was not in session, it was the President who would issue orders on provisional measures.¹⁰² *Sino-Belgian Treaty* was the only cases in which this possibility was used.¹⁰³

The revised Rules of 1931 deprived the President of the possibility to issue orders on interim relief when the PCIJ was not in session. With regard to the aim of provisional measures, Judge Negulesco observed that in some municipal systems, interim relief serve to ‘preserve rights claimed in an action at law’, while in others it aims to ‘re-establish or safeguard the *status quo ante*’.¹⁰⁴ Based on analogies with German law, Judge Schücking believed that Article 41 was intended to ‘prevent[] injury from ensuing in the course of proceedings’ rather than to ensure the effectiveness of the final decision.¹⁰⁵ Judge van Eysinga wisely cautioned that ‘it was necessary to be very cautious when it was a case of transferring to international law the rules laid down in systems of municipal legislation’.¹⁰⁶ The new 1936 Rules did not bring any significant changes to the procedural framework for indicating interim relief.¹⁰⁷

⁹⁹ PCIJ, ‘Preparation of the Rules of Court: Minutes of Meetings held during the Preliminary Session of the Court, with Annexes’ (30 January–24 March 1922) PCIJ Ser D No 2, 77 para 109.

¹⁰⁰ PCIJ ‘Preparation of the Rules of Court: Minutes of Meetings held during the Preliminary Session of the Court, with Annexes’ (30 January–24 March 1922) PCIJ Ser D No 2 (n 99) 68 para 95.

¹⁰¹ PCIJ ‘Preparation of the Rules of Court: Minutes of Meetings held during the Preliminary Session of the Court, with Annexes’ (30 January–24 March 1922) PCIJ Ser D No 2 (n 99) 8 para 16.

¹⁰² Rules of the Permanent Court of International Justice (adopted 24 March 1922) PCIJ Ser D No 1 art 57.

¹⁰³ The President delivered two orders in that case, see *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v China)* (Interim Measures of Protection) (1927) PCIJ Series A No 8; *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v China)* (Revocation of Interim Measures of Protection) (1927) PCIJ Series A No 8.

¹⁰⁴ PCIJ ‘1931 Rules Modification’ (n 58) 192 (Negulesco).

¹⁰⁵ PCIJ ‘1931 Rules Modification’ (n 58) 193 (Schücking). On the one hand, Miles rather incorrectly claims that Judge Schücking sided with the second concept presented by Judge Negulesco; it was actually the first one. Miles (n 2) 58. On the other hand, Dumbauld surprisingly argued that both Judges Negulesco and Schücking had ‘indicated their acceptance of the broader view of the Court’s power’. Dumbauld, ‘Relief *Pendente Lite* in the Permanent Court of International Justice’ (n 26) 393 n 13.

¹⁰⁶ ‘1931 Rules Modification’ (n 58) 196 (van Eysinga).

¹⁰⁷ *Contra* Hudson (n 67) 290–2 para 320. Cf PCIJ, ‘Elaboration of the Rules of Court’ (11 March 1936) PCIJ Ser D Third Addendum to No 2.

Ultimately, the PCIJ did not resolve the issue of the aim of provisional measures in its rules of procedure. As Judge Anzilotti wisely insisted:

To attempt to define the conception of measures of protection in international proceedings would be more likely to complicate the question than to solve it, and the authors of the Statute had acted wisely in leaving the solution of the problem to future jurisprudence: codification could only usefully be undertaken on the basis of such jurisprudence.¹⁰⁸

The PCIJ did not develop a detailed set of conditions for indicating provisional measures. However, in just six decisions, the Court managed to lay down some important elements of the law and practice of interim measures.

First, provisional measures can only protect rights that are the subject of the main dispute.¹⁰⁹ *Sino-Belgian Treaty* was a good example. President Huber affirmed that ‘the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties, pending the decision of the Court’. In that case, the rights at issue included both those of Belgium and those of its national. President Huber further stated that ‘in the event of an infraction ... of certain of the rights, which Belgium or her nationals would possess in China ... such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form’.¹¹⁰ As PCIJ Registrar Hammarskjöld later commented,¹¹¹ ‘il n’est nécessaire de protéger par des mesures conservatoires que les intérêts non susceptibles de comporter, en cas de violation, réparation par le versement d’une indemnité’.¹¹² This suggests that the analysis of the ‘respective rights of the parties’ should go beyond mere monetary compensability and takes into account the broader law on reparations.¹¹³ After all, the following year, the PCIJ delivered its landmark judgment on the law of reparations.¹¹⁴ In *Polish Agrarian Reform*, the dissenting judges also observed that interim relief serves to

¹⁰⁸ PCIJ ‘1931 Rules Modification’ (n 58) 194 (Anzilotti).

¹⁰⁹ *Sino-Belgian Treaty* (n 103) 10. See also Dumbauld, *Interim Measures of Protection* (n 26) 150: ‘only those treaty rights of Belgium in China, violation of which is irreparable by an indemnity in money, fall within the protection of the President’s order’.

¹¹⁰ *Sino-Belgian Treaty* (n 103) 6–7.

¹¹¹ He was writing under the pseudonym ‘Michel de la Grotte’. Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press 2005) 214.

¹¹² Michel de la Grotte, ‘Les affaires traitées par la Cour permanente de Justice internationale pendant la période 1926–1928’ (1929) 56 *Revue de Droit International et de Legislation Comparée* 225, 274.

¹¹³ See eg the position of Norway in *Legal Status of the South-Eastern Territory of Greenland (Norway v Denmark)* (Interim Measures of Protection) (1932) PCIJ Series A/B No 48, 17.

¹¹⁴ See *Factory at Chorzów (Indemnities) (Germany v Poland)* (Merits) (1928) PCIJ Series A No 17, 47.

‘facilitate the *reparation*—so far as may be necessary—of those rights in the form of their preservation, rather than by compensation for their loss’.¹¹⁵

Second, the Court held that provisional measures must not amount to an interim judgment. This principle follows from the famous order in *Factory at Chorzów*.¹¹⁶

Third, the PCIJ also briefly addressed the relationship between protecting the parties; rights and avoiding aggravation of the dispute. In *South-Eastern Greenland*, it stated that indicating provisional measures to protect the rights of the parties or ‘for the sole purpose of preventing regrettable events and unfortunate incidents would ‘*arrive[] at the same results*’.¹¹⁷ In *Electricity Company*, it held that Article 41 reflects the universal principle that parties ‘must ... not allow any step of any kind to be taken which might aggravate or extend the dispute’.¹¹⁸

3.2. Article 41 of the ICJ Statute

When establishing the ICJ, the States sought for it to continue the jurisprudential legacy of the PCIJ.¹¹⁹ The majority of the ICJ Statute is a faithful copy of the PCIJ Statute. This also applies to Article 41. Apart from a typographical correction, it is identical in both statutes.¹²⁰ The drafters of the ICJ Statute ‘considered [Article 41] to be purely procedural, and thus not requiring drastic amendment’.¹²¹ The similarities between the PCIJ and the ICJ also extend to procedural rules.¹²² Rosenne notes that:

¹¹⁵ *Polish Agrarian Reform and the German Minority (Germany v Poland)* (Interim Measures of Protection) (1933) PCIJ Series A/B No 58, 180 (Dissenting Opinion Rolin-Jaequemyns). See also *Polish Agrarian Reform* 187 (Joint Dissenting Opinion Schücking and van Eysinga). See further Chapter III 2.1.3.

¹¹⁶ *Factory at Chorzów (Indemnities) (Germany v Poland)* (Interim Measures of Protection) (1927) PCIJ Series A No 12, 10. The possibility for such interim relief existed before mixed arbitral tribunals. Miles (n 2) 66. See further Chapter III 5.1.

¹¹⁷ *South-Eastern Greenland* (n 113) 20 (emphasis added).

¹¹⁸ *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Interim Measures of Protection) (1939) PCIJ Series A/B No 79, 199. See further Chapter III 2.1.2.

¹¹⁹ ‘Documents of the United Nations Conference on International Organization, San Francisco, 1945’ XIII UNIO, 307.

¹²⁰ The similarities between these two provisions surprise Rosenne. He notes that even during the drafting of the ICJ Statute, the discrepancies between the English and French versions of Article 41 were already being emphasised. Rosenne, *Provisional Measures in International Law* (n 1) 32–3.

¹²¹ Miles (n 2) 86.

¹²² Rules of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978, as amended). On the ICJ Rules, see generally Geneviève Guyomar, *Commentaire du règlement de la Cour internationale de Justice adopté le 10 avril 1973. Interprétation et pratique* (A Pédone 1983); Shabtai Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice* (Brill Nijhoff 1983).

[Article 41] does little more than [empowering the ICJ to indicate provisional measures], and leaves it to the Court to develop the law. The Court has done this in two ways, by regulating the matter in successive versions of the Rules of Court (1922, 1931, 1936, 1946, 1978), and by its judicial pronouncements (see the list in the Appendix). In fact, it can be said that the whole of the substantive law of the International Court on provisional measures of protection and its procedure (virtually inseparable) is judge-made law, with the minimum of outside interference.¹²³

The current 1978 ICJ Rules provides that a party may request provisional measures only in writing, stating the reasons for the request, the potential consequences of its denial, and the sought interim relief. The Court may only indicate provisional measures if the main proceedings have been instituted (Article 73). Under Articles 75 (1) and (2), the ICJ may also grant interim relief acting *proprio motu*,¹²⁴ or in a content different from than requested. The parties may be required to report on the compliance with the indicated provisional measures (Article 78).¹²⁵ Examination of requests have priority over all other judicial activity of the Court (Article 74).¹²⁶ The granted measures may be modified or revoked, even *proprio motu* (Article 76).¹²⁷ Article 75(3) provides that if a request is denied, a new request may be submitted providing that there are new facts. Under Article 77, the UN Secretary-General and the Security Council are informed about the indicated interim relief.

Building on the PCIJ jurisprudence, the ICJ has developed a nuanced set of conditions for granting interim relief.¹²⁸ The purpose is to prevent decisions from appearing arbitrary.¹²⁹ Judge Owada proposed two groups of conditions for indicating provisional

¹²³ Rosenne, *Provisional Measures in International Law* (n 1) 33.

¹²⁴ It was applied only, and partly, once in *LaGrand (Germany v United States of America)* (Provisional Measures) [1999] ICJ Reports 9, 13 [12] and 14 [21]. ‘That procedure can only be justified, if at all in the light of modern communication facilities, by the extreme urgency that the Court saw in the case, one of the capital punishment cases’. Rosenne, *Provisional Measures in International Law* (n 1) 71.

¹²⁵ See generally Hugues Hellio and Solveig Henry, ‘Le suivi par la Cour internationale de Justice de ses ordonnances en indication de mesures conservatoires. Une pratique émergente entre inspiration, discrétion et recherche d’effectivité’ (2020) 124 *Revue générale de droit international public* 225.

¹²⁶ This is called ‘procedural urgency’. See Gapsa, ‘How Urgent Is Urgent?’ (n 17).

¹²⁷ See eg Giorgio Gaja, ‘Requesting the ICJ to Revoke or Modify Provisional Measures’ (2015) 14 *Law & Practice of International Courts and Tribunals* 1; Miłosz Gapsa, ‘Clarifying the Unclear: Requests for Modification, Revocation, and New Provisional Measures’ *Law & Practice of International Courts and Tribunals* (forthcoming).

¹²⁸ Of the many learned studies on this topic, note Thirlway, *The Law and Procedure* (n 28) 929–46, 1770–99; Uchkunova (n 38) 397–415; Quintana (n 28) 623–38, 650–74; Miles (n 2) chs 4, 5 and 6; Oellers-Frahm and Zimmermann (n 28) paras 27–61; Le Floch (n 10).

¹²⁹ See *Nicaragua v Germany* (n 22) 600 [8] (Declaration Tladi). ‘La nécessité de restrictions est encore plus évidente étant donné que [la] partie à l’instance est un État souverain’. Robert Kolb, *La Cour internationale de Justice* (Pedone 2013) 641.

measures. The first, composed of prima facie jurisdiction and plausibility, constitutes what might be called ‘legal requirements’. The second, referred to by the learned judge as the Court’s ‘discretionary power’, includes urgency and a risk of irreparable prejudice.¹³⁰

The ICJ has applied the prima facie test of jurisdiction since *Fisheries Jurisdiction*.¹³¹ This standard requires that jurisdiction in the main proceedings only appear to exist prima facie.¹³² It does not have to be absolutely certain. The Court may revise its view at later stages of the proceedings.¹³³ Diligence requires noting that some scholars have recently questioned whether the ICJ indeed continues to apply the prima facie test of jurisdiction or adopted the so-called ‘granular approach’.¹³⁴ A separate issue is the Court’s jurisdiction to examine requests under Article 41 of the ICJ Statute. This follows directly from that provision. In other words, the fact that a State is a party to the ICJ Statute implies that it has agreed to become a party to interim relief proceedings.¹³⁵

It is unclear whether prima facie admissibility is also one of the conditions for indicating provisional measures.¹³⁶ On the one hand, the ICJ has analysed the applicants’ *locus standi*,¹³⁷ albeit in an inconsistent manner,¹³⁸ in a number of cases concerning

¹³⁰ *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) [2017] ICJ Reports 104, 143–4 [7]–[8] (Separate Opinion Owada). Judge Tladi proposed the similar distinction. See *Nicaragua v Germany* (n 22) 600 [8] (Declaration Tladi).

¹³¹ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Interim Measures of Protection) [1972] ICJ Reports 12, 16 [17]; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Interim Measures of Protection) [1972] ICJ Reports 30, 34 [18].

¹³² See eg *South Africa v Israel* (Provisional Measures January 2024) (n 46) 11 [15].

¹³³ See eg *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Preliminary Objections) [2021] ICJ Reports 71.

¹³⁴ On this point, see Massimo Lando, ‘Provisional Measures and the End of Prima Facie Jurisdiction’ (2025) 74 *International and Comparative Law Quarterly* 319.

¹³⁵ *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Reports 93, 102–3.

¹³⁶ For the judges’ approach, see eg *M/V ‘Louisa’ (Saint Vincent and the Grenadines v Spain)* (Provisional Measures) (2010) 2008–2010 *ITLOS Reports* 58, 74 [8] (Separate Opinion Paik); *Nicaragua v Germany* (n 22) 585 [3] (Separate Opinion Iwasawa). For the scholars’ approach, see eg Kolb, *CIJ* (n 129) 624–5; Miles (n 2) 165–6. For Thirlway, it would be ‘logical’. Thirlway, *The Law and Procedure* (n 28) 935. However, Punzhin, ‘Vremennye mery (chast– 1)’ (n 34) 69–70 who argues that this could only be considered upon request and is, in any case, inadequate at the interim relief stage.

¹³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Reports 3, 17 [42]. See *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] ICJ Reports 587, 603 [51]; *South Africa v Israel* (Provisional Measures January 2024) (n 46) 17 [34].

¹³⁸ The ICJ has kipped prima facie admissibility when hearing requests for modification of provisional measures. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Modification of Provisional Measures March 2024) [2024] ICJ Reports 513, 521 [24]–[27]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Modification of Provisional Measures May 2024) [2024] ICJ Reports 649, 659–60 [31]–[34].

obligations *erga omnes partes*. On the other hand, the Court has so far preferred not to decide whether the *Monetary Gold* principle applies to interim relief proceedings.¹³⁹ It would seem that there are no theoretical reasons against treating admissibility as one of the conditions for addressing interim relief.

In any event, the most controversial condition is that of plausibility or *fumus boni juris*. Although this issue had already been raised in a number of previous cases,¹⁴⁰ it was only in *Belgium v Senegal* that the Court made it explicit.¹⁴¹ Because interim relief can only protect rights that are capable of being the subject of a final decision, the Court must assess, at the provisional measures stage, whether the rights claimed are at least plausible.¹⁴² The standard of plausibility is difficult to determine.¹⁴³ It is also unclear whether it concerns more the plausibility of rights¹⁴⁴ or that of claims.¹⁴⁵ Milanović presents a common-sense view. He argues that plausibility is an entirely judge-made condition without any underlying ‘grand theory’. The ICJ has never fully defined its meaning, and each judge seems to have their own interpretation of it. As a result, orders on interim relief often represent compromises between different approaches to the condition in question.¹⁴⁶

The *raison d’être* of interim relief is to prevent the urgent risk of irreparable prejudice. As Oellers-Frahm and Zimmermann note, ‘if no irreparable prejudice is imminent there is no urgency’.¹⁴⁷ Only urgent risk is relevant in proceedings for provisional

¹³⁹ The ICJ missed the chance to clarify this in *Nicaragua v Germany* (n 22). But see *Nicaragua v Germany* (n 22) 576–7 [12]–[23] (Separate Opinion Sebutinde) and 607–10 [10]–[17] (Dissenting Opinion Al-Khasawneh).

¹⁴⁰ *Polish Agrarian Reform* (n 115) 181 (Dissenting Opinion Anzilotti); *Passage through the Great Belt (Finland v Denmark)* (Provisional Measures) [1991] ICJ Reports 12, 28ff (Separate Opinion Shahabuddeen); *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2006] ICJ Reports 113, 137ff (Separate Opinion Abraham). See generally Tom Sparks and Mark Somos, ‘The Humanisation of Provisional Measures?—Plausibility and the Interim Protection of Rights Before the ICJ’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

¹⁴¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2009] ICJ Reports 139, 151 [57].

¹⁴² For a recent example, see *South Africa v Israel* (Provisional Measures January 2024) (n 46) 17 [35]–[36] (internal citations omitted).

¹⁴³ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 147 [18]–[20] (Separate Opinion Owada).

¹⁴⁴ Joan Donoghue, ‘HARDtalk – Joan Donoghue: Has the ICJ Ruling Changed Anything in Gaza?’ (*BBC World Service*, 26 April 2024) <<https://www.bbc.co.uk/sounds/play/w3ct5stw>>.

¹⁴⁵ Miles (n 41).

¹⁴⁶ Marko Milanović, ‘A Thought Experiment on Plausibility and ICJ Provisional Measures’ (*EJIL:Talk!*, 7 May 2024) <<https://www.ejiltalk.org/a-thought-experiment-on-plausibility-and-icj-provisional-measures/>>.

¹⁴⁷ Oellers-Frahm and Zimmermann (n 28) 1163 para 54.

measures.¹⁴⁸ Yet this condition is not difficult to meet.¹⁴⁹ For example, at Syria's strategic request,¹⁵⁰ the ICJ postponed the oral proceedings in *Canada and the Netherlands v Syria* by 83 days.¹⁵¹ The Court ultimately indicated certain provisional measures. However, it did not even comment on why it allowed the critical situation to be unnecessarily prolonged by almost three months. Therefore, urgency is rather a flexible requirement.

A risk of irreparable prejudice is only relevant if it 'could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences'.¹⁵² A risk is only relevant if it is urgent. It goes without saying that a risk is always assessed on a case-by-case basis.¹⁵³ Thirlway rightly points out that rights as such cannot be extinguished or reduced, even if breached.¹⁵⁴ They could be 'infringed in such a way that the damage suffered cannot be remedied',¹⁵⁵ which makes 'the continued exercise of those rights' impossible.¹⁵⁶ Kolb states that prejudice is irreparable if it cannot be repaired at all or if purely financial reparation would be inadequate.¹⁵⁷ Gautier proposes replacing the word 'irreparable' with 'irremediable'.¹⁵⁸ This combines the idea of indicating provisional measures with the effective possibility of exercising the rights at issue after a decision on the merits.

One should also note that the Court has consistently held that it is not called upon to find that the rights to which the interim measures relate have been infringed.¹⁵⁹ The

¹⁴⁸ Uchkunova (n 38) 415.

¹⁴⁹ Uchkunova (n 38) 414. *Contra* Le Floch (n 10) 46.

¹⁵⁰ *Canada and the Netherlands v Syria* (n 137) 591 [11].

¹⁵¹ Both applicant States objected Syria's request, see *Canada and the Netherlands v Syria* (n 137) 591 [9].

¹⁵² This is the wording since *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Provisional Measures) [2018] ICJ Reports 623, 645 [77]. Cf. the wording from just a few months before in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures) [2018] ICJ Reports 406, 428 [61]. See also Kolb, *CIJ* (n 129) 650.

¹⁵³ See Uchkunova (n 38) 414; Le Floch (n 10) 44.

¹⁵⁴ Thirlway, *The Law and Procedure* (n 28) 940. See Wolfrum, 'Provisional Measures of the International Tribunal for the Law of the Sea' (n 29) 176; Kolb, *CIJ* (n 129) 641. *Contra* '[T]he requirement of "irreparable injury" is fulfilled if the threat against which protection is sought may render the rights claimed useless or is capable of physically destroying them.' Uchkunova (n 38) 413 (emphasis added).

¹⁵⁵ Thirlway, *The Law and Procedure* (n 28) 941.

¹⁵⁶ Thirlway, *The Law and Procedure* (n 28) 1794.

¹⁵⁷ Kolb, *CIJ* (n 129) 648. See also Oellers-Frahm and Zimmermann (n 28) 1160–3 paras 49–52.

¹⁵⁸ Gautier (n 29) 140–1. This term was used by the PCIJ in *South-Eastern Greenland* (n 113) 284; and by ITLOS Judge Cot in *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures) [2003] ITLOS Reports 10, 58 [4]–[5] (Separate Opinion Cot).

¹⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Provisional Measures April 1993) [1993] ICJ Reports 3, 22 [46] (emphasis added); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Reports 353, 395–6 [141]; *Application of the International Convention on the Elimination of All Forms*

condition of a risk relates only to a hypothetical but, at the same time, probable risk to the rights and does not imply an actual prejudice.¹⁶⁰ If the alleged violation occurs before the provisional measures are decided, those measures lose their *raison d'être*.¹⁶¹ No provisional measures should be indicated. Thus, one should reject the view suggesting that the ICJ has indicated provisional measures in certain cases merely because the ongoing violations of law were already 'unendurable'.¹⁶²

The current scholarship also emphasises that the ICJ seems 'more inclined to interpret irreparability as the impossibility of full execution of the final judgment'.¹⁶³ The rights of the parties are preserved when there is a possibility to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.¹⁶⁴ As mentioned in relation to the PCIJ, the issue of a final decision's effectiveness is linked, in particular, to its enforceability and, more generally, to the law of reparation.

3.3. Article 290 of UNCLOS

Article 290 of UNCLOS provides that UNCLOS tribunals 'may prescribe any provisional measures ... to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment'. The wording of this provision may suggest that there are two separate types of interim relief under UNCLOS.

of Racial Discrimination (Armenia v Azerbaijan) (Provisional Measures) [2021] ICJ Reports 361, 385–6 [71]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures) [2021] ICJ Reports 405, 426 [61]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures February 2023) [2023] ICJ Reports 14, 26 [47]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures November 2023) [2023] ICJ Reports 619, 634 [49]; *South Africa v Israel* (Provisional Measures January 2024) (n 46) 25 [62].

¹⁶⁰ See eg *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) [1992] ICJ Reports 114, 84 (Dissenting Opinion Ajibola); *Certain Criminal Proceedings in France (Republic of the Congo v France)* (Provisional Measures) [2003] ICJ Reports 102, 124 (Dissenting Opinion de Cara). See also Quintana (n 28) 670.

¹⁶¹ *Contra eg Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) [2011] ICJ Reports 6, 39 [21] (Separate Opinion Sepúlveda-Amor).

¹⁶² Elkind (n 27) 230. See Miles (n 2) 226; Oellers-Frahm and Zimmermann (n 28) 1163 para 52.

¹⁶³ Le Floch (n 10) 42. See also Callista Harris, 'Arbitral Award of Oct. 3, 1899 (Guy. v. Venez.)' (Provisional Measures) (I.C.J.) (2024) 63 International Legal Materials 967, 968. See generally *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Reports 147, 157–8 [42]; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures) [2016] ICJ Reports 1148, 1169 [90].

¹⁶⁴ *Factory at Chorzów (Merits)* (n 114) 47.

3.3.1. Preservation of the Respective Rights of the Parties

UNCLOS provides for the compulsory settlement of disputes. It leaves States the freedom to choose among different adjudicatory bodies. Article 287 allows them to opt for the ICJ, ITLOS, Annex VII arbitration, or Annex VIII arbitration. If the parties to a dispute choose different adjudicatory bodies or make no choice, the default option is Annex VII arbitration. Nevertheless, Part XV of UNCLOS includes some procedural provisions common to all adjudicatory bodies. One of them is Article 290, which authorises an UNCLOS tribunal to prescribe provisional measures.

When the drafters of UNCLOS agreed to include an article on interim relief, Article 41 of the ICJ Statute served as the starting point for their debate. They discussed not only its wording but also the ICJ's power to act *proprio motu* and to indicate measures other than those requested, as well as the questionable binding force of the Court's provisional measures at that time.¹⁶⁵

Paragraph 1 of the lengthy Article 290 states that an adjudicatory body chosen to decide the dispute on the merits:

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.

If the default body is an arbitral tribunal, paragraph 5 provides that ITLOS may prescribe provisional measures pending its constitution. It is only 'if it considers that, *prima facie*, the tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires'. Under paragraphs 2 and 5, a change in circumstances may justify the modification or revocation of provisional measures. Paragraph 3 excludes the possibility of prescribing measures *proprio motu*. It was from the outset that the drafters excluded the possibility of an UNCLOS tribunal granting interim relief *proprio motu*.¹⁶⁶ Paragraph 6

¹⁶⁵ *Virginia Commentary United Nations Convention on the Law of the Sea 1982: A Commentary*, vol V (Martinus Nijhoff 1985) 53 paras 290.1 and 2.

¹⁶⁶ See eg the sources discussed in *Virginia Commentary* (n 165) 54 para 290.3 and 55 para 290.5.

makes clear that orders on provisional measures are binding.¹⁶⁷ This was a direct response to the uncertainty prevailing at the time before the ICJ.¹⁶⁸

Consequently, Article 290 combines elements of Article 41 of the ICJ Statute with various provisions from the ICJ Rules. Although it directly incorporates the provisions from the ICJ Rules on the modification and revocation of provisional measures, it is surprisingly silent on the possibility of seeking new measures when the previous request was declined. It is difficult to understand the logic behind this decision.

The ITLOS Statute is Annex VI to UNCLOS. Article 25 of the ITLOS Statute does not introduce anything new as to the procedural framework for prescribing provisional measures.¹⁶⁹ Any UNCLOS tribunal details Article 290 of UNCLOS in its own internal rules.¹⁷⁰ As far as ITLOS is concerned, Article 17 of the ITLOS Statute authorises the Tribunal to adopt its own rules of procedure.¹⁷¹ Its aim is to ‘ensure the efficient, cost-effective, and user-friendly administration of justice’.¹⁷² Under Article 89(5), ITLOS may grant interim relief different from what was sought, but must not act *proprio motu*. Parties may request modifications or revocations of provisional measures (Article 93), and they can also submit a new request if ITLOS declines the previous one (Article 92).¹⁷³ In general, the ITLOS Rules almost entirely coincide with those of the ICJ. UNCLOS arbitral tribunals

¹⁶⁷ See generally Mensah (n 29); Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 254–5.

¹⁶⁸ See eg *Virginia Commentary* (n 165) 53 para 290.3 and 55 para 290.5. Tzanakopoulos, who claims that the *LaGrand* decision was motivated by the fear of losing the significance *vis-à-vis* the unambiguous wording of Article 290(6). Tzanakopoulos (n 40) 77.

¹⁶⁹ It provides for the power of the Seabed Disputes Chamber and the Chamber of Summary Procedure to prescribe provisional measures, which falls outside the scope of this study. See further Rosenne, *Provisional Measures in International Law* (n 1) 56–8.

¹⁷⁰ Rules of the International Tribunal for the Law of the Sea (adopted 28 October 1997, as amended).

¹⁷¹ For more on the sources of procedural law before ITLOS, see Niki Aloupi, ‘ITLOS Procedural Rules: Between Change and Stability’ (2019) 61 *Questions of International Law* 21; Kittichaisaree (n 29) ch 2; Konrad Jan Marciniak, ‘Settlement of Disputes before the International Tribunal for the Law of the Sea (ITLOS)’ in Joanna Gomula, Stephan Wittich and Markus Stemeseder (eds), *Research Handbook on International Procedural Law* (Edward Elgar Publishing 2024) 101–3.

¹⁷² ITLOS, ‘Tribunal adopts its Rules of Procedure, Resolution on its internal judicial practice, and Guidelines to assist parties’ (3 November 1997) Press Release 7.

¹⁷³ For a general perspective on the ITLOS Rules on provisional measures, see Rosenne, *Provisional Measures in International Law* (n 1) 74–80; P Chandrasekhara Rao and Philippe Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006) 245–62; Miles (n 2) 101–5.

adopt rules of procedure like those of ITLOS.¹⁷⁴ This is unsurprising given that ITLOS judges often serve as arbitrators in those proceedings.¹⁷⁵

The scholarship has pointed out to the potential problem that may arise when parties choose the ICJ as the dispute settlement body under UNCLOS. If one of the parties requests provisional measures, the question arises whether the ICJ should examine the request under Article 290 of UNCLOS or Article 41 of the ICJ Statute. The prevailing view suggests that the ICJ would likely apply Article 41.¹⁷⁶ This needs to assume complete identity or at least similarities in the law and practice of provisional measures under the ICJ Statute and UNCLOS.

With regard to the conditions for prescribing interim relief, Kittichaisaree notes that despite differences between paragraphs 1 and 5 of Article 290, the practice of examining requests for and drafting orders on provisional measures remains identical.¹⁷⁷ The first requirement is the condition of prima facie jurisdiction. It follows directly from the wording of both paragraph 1¹⁷⁸ and paragraph 5.¹⁷⁹ The only difference between these two provisions is that under paragraph 5, ITLOS examines the prima facie jurisdiction of the arbitral tribunal that is to decide the dispute on the merits, and not its own.

¹⁷⁴ See eg Rules of Procedure of the Arbitral Tribunal Constituted under Annex VII of UNCLOS in the *MOX Plant Arbitration* (25 October 2001); Rules of Procedure of the Arbitral Tribunal Constituted under Annex VII of UNCLOS in the *Enrica Lexie Incident Arbitration* (19 January 2016).

¹⁷⁵ On the nomination of the arbitrators, see Peter Tzeng, 'Appointing Authorities: Self-Appointment, Party Appointment and Non-Appointment' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019).

¹⁷⁶ Rosenne, *Provisional Measures in International Law* (n 1) 47; Wolfrum, 'Provisional Measures of the International Tribunal for the Law of the Sea' (n 29) 174; Mensah (n 29) 45. *Contra Virginia Commentary* (n 165) 58 para 290.7.

¹⁷⁷ Kittichaisaree (n 29) 162.

¹⁷⁸ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Provisional Measures) [1998] ITLOS Reports 24, 37 [29]; *Louisa* (n 136) 27 [39] and 65 [69]; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures) [2015] ITLOS Reports 146, 155 [34]; *'Zheng He' (Luxembourg v Mexico)* (Provisional Measures) ITLOS Case No 33 (27 July 2024) [57]. For the identical but less explicit approach by the Annex VII tribunals, see *MOX Plant Arbitration (Ireland v United Kingdom)* (Order No 3 on Suspension of Proceedings and Further Provisional Measures) PCA Case No 2002-01 (24 June 2003) [14]–[17] and [41]; *Enrica Lexie Arbitration* (n 46) [48] and [52]–[55].

¹⁷⁹ *Three Ukrainian Naval Vessels* (n 46) 293 [36]; *M/T 'San Padre Pio' (Switzerland v Nigeria)* (Provisional Measures) (2019) 2018–2019 ITLOS Reports 375, 387 [45]. Note, however, that the earlier wording was different. *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures) [1999] ITLOS Reports 280, 293 [40]; *MOX Plant (Ireland v United Kingdom)* (Provisional Measures) [2001] ITLOS Reports 95, 104 [35]; *Land Reclamation* (n 158) 18 [30]; *ARA Libertad* (n 48) 340 [37]; *'Arctic Sunrise' (Netherlands v Russian Federation)* (Provisional Measures) [2013] ITLOS Reports 230, 243 [58]; *'Enrica Lexie' Incident (Italy v India)* (Provisional Measures) [2015] ITLOS Reports 182, 192 [52].

Since *Ghana/Côte d'Ivoire*, ITLOS has required the existence of *fumus boni juris*.¹⁸⁰ The fact that the Tribunal explicitly referred to the plausibility in that case is attributed to the presence of ICJ Judge Abraham as a judge *ad hoc*.¹⁸¹ However, a careful analysis reveals that some ITLOS judges had already argued in favour of the condition in question in previous cases.¹⁸²

Although not explicitly stated in paragraph 1, 'urgency is required in order to exercise the power to prescribe provisional measures'¹⁸³ because 'a showing of urgency in some form is *inherent* in provisional measures proceedings'.¹⁸⁴ On the other hand, paragraph 5 limits urgency to 'the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures"'.¹⁸⁵ The drafters of UNCLOS were concerned that the Tribunal might 'assert[] its allegedly superior authority over other tribunals'.¹⁸⁶ In practice, however, orders issued under paragraph 5 are often rightly criticised precisely because ITLOS has alleged disregarded this restricted condition of urgency.¹⁸⁷

Unlike *prima facie* jurisdiction or urgency, neither paragraph 1 nor 5 mentions the condition of a risk of irreparable prejudice.¹⁸⁸ However, as ITLOS rightly ruled in *Enrica Lexie*:

¹⁸⁰ For cases examined under paragraph 1, see *Ghana/Côte d'Ivoire* (n 178) 158 [57]–[58]; *Zheng He* (n 178) [107]. This criterion was only very implicitly required in *Enrica Lexie Arbitration* (n 46) [89]. For cases examined under paragraph 5, see *Enrica Lexie* (n 179) 197 [83]–[84]; *Three Ukrainian Naval Vessels* (n 46) 305 [91]; *San Padre Pio* (n 179) 393 [77].

¹⁸¹ Le Floch (n 10) 31 n 73. See also 'the Tribunal has incorporated an additional condition, which was introduced in the jurisprudence of the ICJ in 2009'. Chandrasekhara Rao and Gautier (n 29) 130 para 3.145.

¹⁸² See *Land Reclamation* (n 158) 62–3 [13] (Separate Opinion Lucky); *Louisa* (n 136) 73–4 [7] (Separate Opinion Paik) and 84 [26] (Dissenting Opinion Wolfrum); *ARA Libertad* (n 48) 372 [35] (Joint Separate Opinion Wolfrum and Cot); *Arctic Sunrise* (n 179) 259 [9] (Joint Separate Opinion Wolfrum and Kelly).

¹⁸³ *Ghana/Côte d'Ivoire* (n 178) 156 [42]; citing *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) [2013] ICJ Report 398, 405 [25]. See also *Zheng He* (n 178) [126].

¹⁸⁴ *Enrica Lexie Arbitration* (n 46) [89] (emphasis added). See also *Southern Bluefin Tuna* (n 179) 316 [3]–[4] (Separate Opinion Treves); *Louisa* (n 136) 76 [17] (Separate Opinion Paik); *San Padre Pio* (n 179) 480 [13] (Dissenting Opinion Kateka). However, note *Saiga (No 2)* (n 178) 60–1 [25]–[26] (Separate Opinion Laing).

¹⁸⁵ *Land Reclamation* (n 158) 22 [68]–[69].

¹⁸⁶ Nordquist, Rosenne and Sohn (n 165) 56 para 290.5.

¹⁸⁷ See esp *Enrica Lexie* (n 179) 235–7 [19]–[26] (Dissenting Opinion Bouguetaia), 240–3 [2]–[17] (Dissenting Opinion Chandrasekhara Rao), 259–67 [27]–[36] (Dissenting Opinion Ndiaye), 283–5 [56]–[65] (Dissenting Opinion Lucky) and 287–91 [3]–[16] (Dissenting Opinion Heidar).

¹⁸⁸ See also Pimenova, *Obespechitel'nye mery* (n 2) 67: 'Обращает на себя внимание отсутствие в тексте ст. 290 Конвенции 1982 г. упоминания риска непоправимого ущерба как одного из необходимых критериев, разработанных Международным судом для принятия обеспечительных мер'.

[Article 290 of UNCLOS] stipulates *inter alia* that the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which *implies* that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute.¹⁸⁹

The Tribunal's practice points out that provisional measures may protect various and unusual rights of the parties, like the right to cooperation and consultations.¹⁹⁰ As Wolfrum emphasises, 'a reading of the term "preservation of rights" as "infringement of rights" would widen the application of provisional measures *in an unacceptable way*. In particular, it would make *it nearly impossible* that a provisional measure *would not anticipate the final decision of the court*'.¹⁹¹ Both ITLOS¹⁹² and its members¹⁹³ understand irreparability as the inability to be fully financially compensated. As a result, when evaluating a risk of irreparable prejudice, judges consider whether the final decision will be enforceable. If not, they prescribe interim relief.¹⁹⁴

To summarise, apart from the explicit prohibition of acting *proprio motu*, and the special power under Article 290(5),¹⁹⁵ the ICJ and ITLOS do not differ in terms of their powers to order provisional measures. Both the ICJ and UNCLOS tribunals, in particular ITLOS, apply identical conditions for granting provisional measures. This effectively dispels concerns that the Tribunal could compete with the Court, which could lead to fragmentation of international law.¹⁹⁶ The similarities can also be explained in practical terms: ITLOS judges are often judges *ad hoc* at the ICJ, and the same lawyers appear before both international courts.

¹⁸⁹ *Enrica Lexie* (n 179) 197 [87] (second emphasis added); referring to *Louisa* (n 136) 69 [72]. See also *Three Ukrainian Naval Vessels* (n 46) 307 [100]. For the position of the Annex VII tribunal, see *MOX Plant Arbitration* (n 178) [58]. But see *Southern Bluefin Tuna* (n 179) 306 [4] (Separate Opinion Laing): '[i]nstead of irreparability, the key to UNCLOS provisional measures is ... the preservation of the *status quo pendente lite* and the maintenance of peace and good order'.

¹⁹⁰ *MOX Plant* (n 179) 122 (Separate Opinion Mensah) and 139 [7] (Separate Opinion Treves). See Gautier (n 29) 139; Chandrasekhara Rao and Gautier (n 29) 133 para 3.153.

¹⁹¹ Wolfrum, 'Provisional Measures of the International Tribunal for the Law of the Sea' (n 29) 176 (emphasis added).

¹⁹² See *Ghana/Côte d'Ivoire* (n 178) 163 [89]–[90]; *San Padre Pio* (n 179) 404 [128].

¹⁹³ See eg *MOX Plant* (n 179) 123 (Separate Opinion Mensah); *ARA Libertad* (n 48) 353–4 [5] (Declaration Paik); *Arctic Sunrise* (n 179) 292 [5] (Dissenting Opinion Kulyk); *San Padre Pio* (n 179) 419 [9] (Declaration Kolodkin), 481 [16] (Dissenting Opinion Kateka) and 495 [68] (Dissenting Opinion Gao).

¹⁹⁴ Chandrasekhara Rao and Gautier (n 29) 131 para 3.148.

¹⁹⁵ Rosanne only listed the latter as the 'main difference'. Rosanne, *Provisional Measures in International Law* (n 1) 79. According to Mensah, the main differences lies in paragraph 6, the specific aim of preserving the marine environment, and the procedure outlined in paragraph 5. Mensah (n 29) 44–8.

¹⁹⁶ Pimenova, *Obespechitel'nye mery* (n 2) 68.

3.3.2. Prevention of Serious Harm to the Marine Environment

In addition to provisional measures to ‘preserve the respective rights of the parties to the dispute’, Article 290 of UNCLOS states that that UNCLOS tribunals may prescribe interim relief to ‘prevent serious harm to the marine environment’. To understand the meaning of this phrase, it is necessary to briefly examine the drafting history of UNCLOS.

During the UNCLOS negotiations, the first draft of the Informal Working Group on the Settlement of Disputes already addressed the issue of provisional measures. It stated that interim relief should be granted ‘consistent with the main purposes and basic principles of this Convention ... for the preservation of the respective rights of the parties and for minimizing damage to any party pending final adjudication’.¹⁹⁷ Unfortunately, the draft did not clarify the difference between protecting rights and ‘minimizing damage’.

President Amersinghe’s draft was the first to propose Article 290(1) in its current wording.¹⁹⁸ Contrary to what the *Virginia Commentary* suggests,¹⁹⁹ this proposal already distinguished between preserving the rights of the parties and preventing serious harm to the marine environment. Once again, it is unclear why a distinction has been made between protecting the rights of parties and preventing environmental harm.

According to Virzo, the possibility of prescribing provisional measures to ‘prevent serious damage to the marine environment’ constitutes an ‘remarkable innovation’²⁰⁰ and ‘disposition novatrice’.²⁰¹ Wolfrum argues that it emphasises the importance of Part XII of UNCLOS, entitled *Protection and Preservation of the Marine Environment*.²⁰² The conjunction ‘or’ is said to indicate that ‘the protection of the marine environment in the context of the dispute of which the court or tribunal is seized, and is distinct from the protection of the rights of the parties’.²⁰³ In a single decision, an UNCLOS tribunal may

¹⁹⁷ Informal Working Group on Settlement of Disputes ‘Chapter __ Settlement of Disputes’ (1 May 1975) SD.Gp/2nd Session/No.1/Rev.5, art 12(1).

¹⁹⁸ ‘Informal single negotiating text (part IV)’ (21 July 1975) A/CONF.62/WP.9 art 12(1).

¹⁹⁹ *Virginia Commentary* (n 165) 54 para 290.4.

²⁰⁰ Roberto Virzo, ‘La finalité des mesures conservatoires du Tribunal international du droit de la mer’ in Guillaume Le Floch and François Alabrune (eds), *Les vingt ans du Tribunal international du droit de la mer: actes du colloque des 2-3 juin 2016, Université de Rennes 1, Institut du droit public et de la science politique* (Pedone 2018) 147.

²⁰¹ Virzo, ‘La finalité des mesures conservatoires du TIDM’ (n 200) 150.

²⁰² Wolfrum, ‘Provisional Measures of the International Tribunal for the Law of the Sea’ (n 29) 176.

²⁰³ Rosenne, *Provisional Measures in International Law* (n 1) 47.

prescribe interim relief for both types of interim relief,²⁰⁴ and this ‘provision could be used to protect the marine environment beyond areas under national jurisdiction’.²⁰⁵ Furthermore, the risk of harm is understood as a less demanding criterion, as the risk must be serious but not necessarily irreparable.²⁰⁶ However, predicting the extent to which certain environmental harm is reparable in the long term is scientifically challenging.²⁰⁷

It is unclear whether UNCLOS tribunals have ever prescribed provisional measures to ‘prevent serious harm to the marine environment’. On the one hand, many requests for interim relief have been made in cases concerning weighty environmental issues. For example, Ireland argued in *MOX Plant* that a nuclear fuel production plant could pollute the Irish Sea. Australia and New Zealand challenged Japan’s experimental fishing activities in *Southern Bluefin Tuna*. In *Land Reclamation*, Malaysia contested land reclamation works carried out by Singapore in and around the Straits of Johor. Finally, in *Ghana/Côte d’Ivoire*, Côte d’Ivoire argued that Ghana’s oil drilling activities posed a risk to the marine environment. On the other hand, in none of these cases did ITLOS find that provisional relief should be prescribed to prevent serious harm to the marine environment. Moreover, in some of them, the Tribunal explicitly stated that no such risk existed.²⁰⁸ On the other hand, Virzo claims that ITLOS granted provisional measures for environmental protection in all four cases.²⁰⁹ Judge Kittichaisaree, writing extrajudicially, considers that this was only the case in *MOX Plant* and *Land Reclamation*.²¹⁰ Another ITLOS judge, Chandrasekhara Rao, and ITLOS Registrar, Gautier, argue that interim relief in those decisions served only to protect the procedural rights of the parties, not the marine environment.²¹¹ However, Gautier’s earlier study seems to suggest otherwise.²¹²

²⁰⁴ Peter Tomka and Gleider I Hernández, ‘Provisional Measures in the International Tribunal for the Law of the Sea’ in Holger P Hestermeyer and others, *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill Nijhoff 2012) 1782.

²⁰⁵ Chandrasekhara Rao and Gautier (n 29) 132 para 3.151.

²⁰⁶ Chandrasekhara Rao and Gautier (n 29) 132 para 3.151.

²⁰⁷ See also Tanaka, *The Peaceful Settlement of International Disputes* (n 167) 259.

²⁰⁸ *Ghana/Côte d’Ivoire* (n 178) 159 [67].

²⁰⁹ Virzo, ‘La finalité des mesures conservatoires du TIDM’ (n 200) 152–3. However, in an earlier article, he seems to admit that in the *MOX Plant* and *Land Reclamation* cases, the prescribed interim relief was intended to preserve the parties’ procedural rights. See Roberto Virzo, ‘In tema di misure cautelari comportanti obblighi di cooperazione per la protezione dell’ambiente marino’ (2005) 88 *Rivista di diritto internazionale* 383, 408–12.

²¹⁰ Kittichaisaree (n 29) 159–60.

²¹¹ Chandrasekhara Rao and Gautier (n 29) 133 para 3.153.

²¹² Gautier (n 29) 136–7.

Tomka and Hernández argue that it ‘remains an open question’ whether an UNCLOS tribunal can prescribe interim relief *proprio motu* to protect the marine environment.²¹³ In fact, such a proposal was made during the UNCLOS negotiations.²¹⁴ Virzo²¹⁵ and Pimenova²¹⁶ even suggest that ITLOS did so in *MOX Plant*. However, this view is contrary to the literal wording of UNCLOS. Paragraph 3 of Article 290 expressly prohibits the granting of provisional measures *ex officio*. This applies to all ‘types’ of interim relief.

Only a party may submit a request for interim measures to ‘prevent serious harm to the marine environment’. Its beneficiaries may vary. For Judges Paik and Wolfrum, it is the international community.²¹⁷ It may equally well be the requesting party itself. As Judge Treves pointed out in *Southern Bluefin Tuna*:

it seems reasonable to hold that the prevention of serious harm to the southern bluefin tuna stock is the appropriate standard for prescribing measures in the present case. This standard can apply to measures for the preservation of the rights of the parties because *these rights concern the conservation of that very stock*.²¹⁸

Requesting measures to protect the marine environment in *Land Reclamation*, Malaysia sought to protect its own rights in relation to the environmental situation in the Straits of Johor.²¹⁹ The diversity of beneficiaries is particularly telling. Nothing seems to oblige a party to seek interim relief to preserve the marine environment in order to protect its own rights. As Le Floch rightly points out, the protection of the marine environment is ‘un intérêt public qu’il appartient à toute partie à un différend de défendre. En un sens, il instaure une forme d’*actio popularis* dans le domaine du contentieux international’.²²⁰ This, in turn, suggests that interim relief to ‘prevent serious harm to the marine environment’ protect the rights *erga omnes partes*.

In its *Climate Change* advisory opinion, the ICJ held that ‘all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas’. Moreover, the Court noted that obligations under environmental treaties are of

²¹³ Tomka and Hernández (n 204) 1784.

²¹⁴ *Virginia Commentary* (n 165) 55 para 290.5.

²¹⁵ Virzo, ‘La finalité des mesures conservatoires du TIDM’ (n 200) 152.

²¹⁶ Pimenova, *Obespechitel’nye mery* (n 2) 71.

²¹⁷ *Louisa* (n 136) 75 [12] (Separate Opinion Paik) and 77–8 [4] (Dissenting Opinion Wolfrum).

²¹⁸ *Southern Bluefin Tuna* (n 179) 317 [6] (Separate Opinion Treves) (emphasis added).

²¹⁹ *Land Reclamation* (n 158) 25–6 [89]–[99].

²²⁰ Guillaume Le Floch, *L’urgence devant les juridictions internationales* (Pedone 2008) 52.

erga omnes partes character.²²¹ Accordingly, all parties to UNCLOS share a common legal interest in protecting the marine environment.²²²

Interim relief aimed at ‘protecting the rights of the parties’ and ‘preventing serious harm to the marine environment’ are not separate. The latter merely constitute an explicit possibility to initiate proceedings in cases concerning *actio popularis*. Even if States were to initiate proceedings concerning the marine environment, they would seek to protect their own rights *erga omnes partes*.

3.4. Article 279 of the TFEU

Article 13(1) of the Treaty on European Union (TEU)²²³ provides that the CJEU is one of the institutions of the European Union (EU). Under Article 19(1) of the TEU, its role is to ‘ensure that in the interpretation and application of the Treaties, the law is observed’. The CJEU consists of two judicial organs, which vary in their competences. They are the Court of Justice and the General Court.

Inter-State cases are one of two types of infringement proceedings available before the CJEU. Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the European Commission can bring an action against a Member State if it believes that there has been a breach of EU law. This is the default procedure against Member States, as the European Commission is the ‘guardian of the Treaties’, responsible for ensuring the consistency of EU law and acting in its interest (Article 17(1) of the TEU).²²⁴ The Treaties also establish a procedure for inter-State cases. Under Article 259, any Member State can bring an action against another Member State if it claims there has been a breach of EU law. Before seizing the CJEU, the matter must be referred to the European Commission, which has three months to issue a reasoned opinion. The Commission may then take over the case²²⁵ and proceed following Article 258. If the

²²¹ *Obligations of States in respect of Climate Change* (Advisory Opinion) ICJ General List No 187 (23 July 2025) [440].

²²² *Per analogiam* with *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Reports 15, 23 : the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention’. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Reports 422, 449 [68].

²²³ Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

²²⁴ See also Case C-537/19 *Commission v Austria (Location d'un bâtiment non encore construit)* ECLI:EU:C:2021:319 [56].

²²⁵ *Lenaerts and others* (n 30) 197 para 5.34.

Commission does not support the complaint, considers it justified but chooses not to bring an action under Article 258, or fails to deliver an opinion, the Member State may then refer the case to the CJEU.

Article 259 has remained unchanged since the Treaty of Rome.²²⁶ Interestingly, inter-State proceedings were not included in the very first Treaty of Paris.²²⁷ Be that as it may, due to the subordinate nature of Article 259 in relation to Article 258, inter-State cases are rare in infringement proceedings.²²⁸ To date, only 12 such cases have been initiated.²²⁹

As far as inter-State cases are concerned, Article 344 of the TFEU is of particular importance. Under this provision, the CJEU has exclusive competence to adjudicate disputes concerning EU law. Member States must not submit such disputes to other international judicial mechanisms. Otherwise, the CJEU finds an infringement of EU law.²³⁰

It is the Court of Justice that examines inter-State disputes.²³¹ There are no differences in procedural rules between contentious and non-contentious cases, or between cases brought by Member States and other entities. This means that inter-State cases are heard the same manner as non-inter-State proceedings. By default, a Chamber of three or five judges examines an inter-State dispute.²³² At a State's request, a Chamber refers a case to the Grand Chamber comprising 15 judges.²³³

²²⁶ Treaty Establishing the European Economic Community (signed 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 art 171.

²²⁷ Cf Treaty Establishing the European Coal and Steel Community (signed 18 April 1951, entered into force 23 July 1952) 261 UNTS 140.

²²⁸ 'It is often considered that the lack of such actions is due to political sensitivities and/or to the availability of intervention by which a Member State can submit its observations during infringement proceedings brought by the Commission. That being said, it appears that Member States have become less reticent in recent years.' *Lenaerts and others* (n 30) 198 n 133.

²²⁹ Case 58/77 *Ireland v France* (withdrawn); Case 141/78 *France v United Kingdom* ECLI:EU:C:1979:225; Case C-349/92 *Spain v United Kingdom* (withdrawn); Case C-388/95 *Belgium v Spain* ECLI:EU:C:2000:244; Case C-145/04 *Spain v United Kingdom* ECLI:EU:C:2006:543; Case C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630; Case C-648/15 *Austria v Germany* ECLI:EU:C:2017:664; Case C-591/17 *Austria v Germany* ECLI:EU:C:2019:504; Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65; Case C-121/21 *Czech Republic v Poland (Turów Mine)* (withdrawn); Case C-822/21 *Latvia v Sweden (Systèmes de garantie des dépôts)* ECLI:EU:C:2024:373; C-730/23 *Poland v Germany* (pending).

²³⁰ See eg Case C-459/03 *Commission v Ireland (MOX Plant)* ECLI:EU:C:2006:345.

²³¹ *A contrario* to Article 256 of the TFEU.

²³² Consolidated version of Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union (as amended) [2010] OJ C 83/210 art 16(1); Rules of Procedure of the Court of Justice (as amended) [2012] OJ L 265/1 art 60(1).

²³³ CJEU Statute art 16(3).

As far as provisional measures are concerned, the EU Treaties has provided for two types of interim relief since the Treaty of Paris.²³⁴ Article 278 of the TFEU states that although no action has a suspensory effect, the CJEU may, ‘if it considers that circumstances so require, order that application of the contested act be suspended’. Article 279 TFEU is broader in scope. It reads that ‘[the CJEU] may in any cases before it prescribe any necessary interim measures’.²³⁵ This is the equivalent of the right to grant interim relief known from the law and practice of other international courts. Both provisions are available in all direct actions before the CJEU,²³⁶ but only the latter is relevant in infringement proceedings, in general, and in inter-State cases, in particular. *Turów Mine* was the first and only inter-State case in which provisional measures were both requested and granted.²³⁷

Judgments delivered under Articles 258 and 259 are merely declaratory in nature.²³⁸ There is a clear obligation to comply with them (Article 260 of the TFEU), yet the Court of Justice can only suggest,²³⁹ and not order²⁴⁰ the manner of compliance. Accordingly, Kawczyńska raises reasonable doubts as to whether provisional measures should be admissible at all in proceedings under Articles 258 or 259.²⁴¹ Poland also argued this point in *Turów Mine*. As the Vice-President of the Court of Justice explained that prescribing provisional measures in such cases ‘is to guarantee the full effectiveness of the subsequent decision in the main action to which the interim proceedings are an adjunct’. Accepting Poland’s argument, Vice-President Silva de Lapuerta argued, ‘would deprive of all substance the procedure for interim relief in the context of an action for failure to fulfil obligations under Article 259 TFEU’.²⁴²

²³⁴ Treaty of Paris art 39.

²³⁵ For some general analysis of these two provisions, see Orzan (n 30) 200–1.

²³⁶ *Lenaerts and others* (n 30) 538 para 13.07.

²³⁷ See Case C-121/21 R *Czech Republic v Poland (Turów Mine)* (Order of the Vice-President of the Court of 21 May 2021) ECLI:EU:C:2021:420; Case C-121/21 R *Czech Republic v Poland (Turów Mine)* (Order of the Vice-President of the Court of 20 September 2021) ECLI:EU:C:2021:752.

²³⁸ *Lenaerts and others* (n 30) 539 para 13.08.

²³⁹ *Lenaerts and others* (n 30) 223 para 5.75. *Contra* Case C-60/21 *Commission v Belgium (Déduction des rentes alimentaires)* ECLI:EU:C:2022:172 [38]: ‘il n’incombe pas à la Cour de formuler, dans le cadre d’une procédure en manquement, des opinions consultatives sur des aspects de la mise en conformité de la législation d’un État membre avec le droit de l’Union, de tels aspects dépassant l’objet du litige tel que défini par la Commission dans sa requête’.

²⁴⁰ *Turów Mine* (Order of 21 May 2021) (n 237) [30].

²⁴¹ Monika Kawczyńska, ‘Spór o kopalnię Turów, czyli stosowanie i efektywność środków tymczasowych w postępowaniach dotyczących naruszenia prawa unijnego’ (2021) 194 *Europejski Przegląd Sądowy* 24, 28.

²⁴² *Turów Mine* (Order of 21 May 2021) (n 237) [27]–[30] (internal citations omitted).

Article 160(3) of the Rules of the Court of Justice sets out the conditions for prescribing interim relief. It requires that a request ‘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’.²⁴³ With regard to a *prima facie* case or *fumus boni juris*, ICJ Judge Abraham referred precisely to the CJEU’s practice when he argued for the need to introduce the condition of plausibility before the ICJ.²⁴⁴ At the CJEU, urgency covers both urgency *sensu stricto* and the risk of irreversible prejudice.²⁴⁵ Only in exceptional circumstances can financial damage be considered irreversible.²⁴⁶ If a requesting party has already suffered prejudice, its request for interim relief would be deemed inadmissible.²⁴⁷ It is worth noting that the CJEU does not conduct a *prima facie* analysis of its jurisdiction. As Le Floch explains, this is because the parties do not dispute it.²⁴⁸ Demonstrating a legal interest is also considered to be a condition for the admissibility of a request for provisional measures.²⁴⁹ In general, the CJEU’s conditions for prescribing provisional measures are like those applied by the ICJ, but adapted to the specific nature of EU law.

As regards the procedure, requests for provisional measures under Article 279 of the TFEU are heard by a single judge. Article 39 of the CJEU Statute allows the President or Vice-President of the Court of Justice to examine such requests in lieu of a multi-member bench. In practice, it is the Vice-President that typically decides on interim relief. This procedural approach also applies to requests in inter-State cases, meaning that one judge can prescribe provisional measures even in this type of proceeding. Such a practice has been rightly argued to contradict consistent and well-established international practice, where the same bench decides a given phase of the case and hears any request for interim relief.²⁵⁰

²⁴³ See generally Orzan (n 30) 207–9.

²⁴⁴ See *Pulp Mills* (Provisional Measures 2006) (n 140) 140 [9] (Separate Opinion Abraham).

²⁴⁵ In other words, a party must establish that it ‘cannot wait for the outcome of the main action without suffering such harm’. *Turów Mine* (Order of 21 May 2021) (n 237) [53].

²⁴⁶ Case C-541/20 R *Lithuania v Parliament and Council* (Order of the Vice-President of the Court of 13 April 2021) ECLI:EU:C:2021:264 [29].

²⁴⁷ See eg Case T-274/15 R *Alcogroup and Alcoldis v Commission* (Order of the President of the General Court of 16 June 2015) ECLI:EU:T:2015:389 [16].

²⁴⁸ Le Floch (n 10) 24.

²⁴⁹ Lenaerts and others (n 30) 543 para 3.17; referring to Case T-431/04 R *Italy v Commission* (Order of the President of the Court of First Instance of 18 June 2007) ECLI:EU:T:2007:183 [25]–[35].

²⁵⁰ Oktawian Kuc and Miłosz Gapsa, ‘“Two Heads Are Better Than One”: The Turów Mine Case and Inter-State Interim Measures Before the CJEU’ [2025] *Journal of International Dispute Settlement* (forthcoming).

3.5. Rule 39 of the ECtHR

Established under Article 19 of the European Convention on Human Rights (ECHR), the ECtHR is a permanent regional court of human rights.²⁵¹ Its role is to ‘ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’. Only with the entry into force of Protocol 11 did the ECtHR gain full functionality. The Protocol granted the ECtHR compulsory jurisdiction and reformed the general supervisory mechanism of the ECHR.²⁵²

The ECtHR has two types of contentious jurisdiction. It can hear individual applications from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation of the ECHR. Under Article 34 of the ECHR, ‘[t]he High Contracting Parties undertake not to hinder in any way the effective exercise of this right’. On the other hand, the ECtHR can settle inter-State disputes. Under Article 33 of the ECHR, a State may challenge an alleged breach of the ECHR by another State. In practice, the ECtHR examines almost exclusively individual applications, as they are ‘essential to the effectiveness of the Convention system’.²⁵³ There has been around three dozen inter-State proceedings, which seems to be a rather modest number.²⁵⁴

While the purpose of individual applications under Article 34 is clear, the purpose of inter-State cases is a matter of scholarly debate. Leach categorises the latter proceedings into three different types. The first of them involves the applicant State representing or being closely related to the affected individuals. The second type involves a State claiming recourse on behalf of the individual. The third type involves ‘a more general “policing”

²⁵¹ On the establishment of the ECtHR, see William Schabas, ‘Article 19’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 631–9; Marek Antoni Nowicki, *Wokół Konwencji Europejskiej. Komentarz Do Europejskiej Konwencji Praw Człowieka* (8th edn, Wolters Kluwer 2021) 19–22.

²⁵² Since then, the ECtHR has been said to be a ‘new Court’, see further Schabas, ‘Article 19’ (n 251) 639–42; Nowicki (n 251) 37–42. On the ECtHR, see generally Philip Leach, *Taking a Case to the European Court of Human Rights* (4th edn, Oxford University Press 2017) 11–9 paras 1.37–58.

²⁵³ *Loizidou v Turkey* (Preliminary Objections) App no 15318/89 (ECtHR [GC], 23 March 1995) [70].

²⁵⁴ Schabas notes that it was this reluctance towards inter-State proceedings that motivated the negotiators of the Rome Statute to grant the Prosecutor of the International Criminal Court autonomous power to initiate an investigation: William Schabas, ‘Article 33’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 723.

role'.²⁵⁵ This essentially refers to *actio popularis* aimed at upholding obligations *erga omnes partes*.²⁵⁶

Risini, the author of the only monograph on inter-State disputes at the ECtHR, concludes that their aim is 'unclear'.²⁵⁷ Her analysis assumes that the settlement of disputes between States is both or either 'a private function, driven by the claim of the applicant' and the collective enforcement of human rights (public function).²⁵⁸ Nowicki proposes a similar dichotomy. He believes that the first category of cases concerns the maintenance of public order in Europe, while the second related to human rights violations against one or more clearly identified individuals. Nowicki sees this second group of cases as like individual complaints made under diplomatic protection.²⁵⁹

Schabas pragmatically avoids providing any strict categorisation. He cites the view of Judge Pinto de Albuquerque that one inter-State case can be composed of different elements, each of which falls into a different category.²⁶⁰ This approach is probably the most appropriate. Similarly, inter-State cases heard by other international courts may also fall into one or more categories.²⁶¹

As Article 344 of the TFEU in relation to EU law, Article 55 of the ECHR prohibits the submission of disputes concerning the ECHR to any external dispute settlement mechanism. In addition, under Article 35(2)(b), an individual application is inadmissible if the subject matter is substantially the same as one already 'submitted to another procedure of international investigation or settlement'. The purpose of this restriction is:

to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same, that is, a situation which would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases.²⁶²

²⁵⁵ Leach (n 252) 14–6 paras 1.43–5.

²⁵⁶ The admissibility of such proceedings under the ECHR already in the 1960s is cited as an argument against the 'erroneous' ICJ's *South West Africa* decisions. See Andrea Gattini, 'Actio Popularis', *Max Planck Encyclopedia of Public International Law online* (2019) para 5.

²⁵⁷ Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018) 169.

²⁵⁸ Risini (n 257) 5.

²⁵⁹ Nowicki (n 251) 61.

²⁶⁰ *Cyprus v Turkey* (Just Satisfaction) App no 25781/94 (ECtHR [GC], 12 May 2014) [4] (Concurring Opinion Pinto de Albuquerque, Joined Vučinić); Schabas, 'Article 33' (n 254) 727.

²⁶¹ For a comparison between the ICJ and the ECtHR, see Risini (n 257) ch 3.

²⁶² *Radomilja and Others v Croatia* App nos 37685/10 and 22768/12 (ECtHR [GC], 20 March 2018) [119].

This limitation does not apply to inter-State proceedings. In *Georgia v Russia (II)*, Russia argued that Georgia's application was inadmissible because the dispute concerning the situation in Abkhazia and South Ossetia had already been submitted to the ICJ.²⁶³ The ECtHR ruled that 'it is clear from the explicit wording of Article 35 § 2 of the Convention that it applies only to individual applications'.²⁶⁴

In practice, States usually seize both the ECtHR and other international courts over the same situation. Typically, they also ask both to grant provisional measures. To date, neither the ECtHR nor any other international court has declined to grant interim relief only because the other had already prescribed provisional measures.²⁶⁵ At least as regards the ECtHR, this is probably because this international court prescribes interim relief more quickly than other international courts.

The ECHR does not explicitly authorise the ECtHR to indicate interim relief. The ECtHR authorised itself to do so in its rules of procedure.²⁶⁶ Rule 39 serves as the legal basis for provisional measures in both individual and inter-State proceedings. Paragraph 1 currently states that:

The Court may, in exceptional circumstances, whether 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. Such measures, applicable in cases of imminent risk of irreparable harm to a Convention right, which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings.

For the first time, the right to grant interim relief was provided for in the 1959 Rules of the ECtHR. The then Rule 34 read that the ECtHR might 'bring to the attention of the Parties any interim measure the adoption of which seems desirable'.²⁶⁷ This provision was just as general as the analogous provision before the CJEU, while at the same time differing significantly from Article 41 of the ICJ Statute. This is particularly thought-provoking, as the ICJ Statute was the primary source of inspiration for the procedural rules of the

²⁶³ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Reports 70.

²⁶⁴ *Georgia v Russia (II)* (dec) App no 38263/08 (ECtHR, 13 December 2011) [79].

²⁶⁵ See eg *Three Ukrainian Naval Vessels* (n 46) 308–9 [108]–[109]. See also *Three Ukrainian Naval Vessels* (n 46) 327 [32] (Declaration Kittichaisaree): 'In my view, the proceeding before the European Court of Human Rights is entirely different from this proceeding before this Tribunal'.

²⁶⁶ Rules of the European Court of Human Rights, Rules of Court (as entered into force 28 March 2024).

²⁶⁷ See Rules of the European Court of Human Rights, Rules of Court (adopted on 18 September 1959). For the later renumbering of this Rule, see Saccucci (n 31) 216 n 4.

ECHR.²⁶⁸ Furthermore, the wording ‘bring to the attention’ meant that provisional measures were, at that time, non-binding.

Because Rule 39 is judge-made law, the *principle eius est interpretari leges, cuius est condere* applies to it fully.²⁶⁹ Consequently, the ECtHR has exclusive competence to interpret it. Since the ECtHR adjudicates almost exclusively in individual-State cases, its jurisprudence on interim relief likewise focuses on this type of proceeding.

As is well-known, the ECtHR declared in *Mamatkulov and Askarov v Turkey* that its interim relief in individual-State proceedings is binding. The binding nature of provisional measures (or, more precisely, the obligation to comply with them) is distinct from, yet often confused with, the *raison d’être* of indicating interim relief.²⁷⁰ In the case under discussion, the ECtHR clarified and linked both concepts:

the obligation set out in Article 34 *in fine* requires the Contracting States to refrain not only from exerting pressure on applicants, but also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure.²⁷¹

It then followed that:

under the Convention system, 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, in these conditions 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 Convention.²⁷²

In other words, interim relief is binding because failure to comply with it always results in a breach of Article 34 of the ECHR.²⁷³ Subsequent jurisprudence further developed this point. The ECtHR held that ‘[i]t is precisely for the purpose of preserving the Court’s ability to render [a judgment on the merits] after an effective examination of the complaint that

²⁶⁸ See eg Schabas, ‘Article 19’ (n 251) 635.

²⁶⁹ On this principle, see *Jaworzina* (Advisory Opinion) (1923) PCIJ Series B No 8, 37.

²⁷⁰ But see Brown, *A Common Law* (n 2) 43–52; Saccucci (n 31) 217 n 9.

²⁷¹ *Mamatkulov* (n 16) [102]. See William Schabas, ‘Article 34’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 746.

²⁷² *Mamatkulov* (n 16) [125].

²⁷³ Leach (n 252) 37 para 2.61.

such measures are indicated’.²⁷⁴ As regards ‘the imminent risk of irreparable harm to an ECHR right’, the ECtHR also clarified that ‘an ECHR right’ is the right to an effective application.²⁷⁵ The aim of provisional measures in individual-State cases is to ensure the effectiveness of the final judgement, as this is the reason for filing an individual application.

Identical to the CJEU, decisions on provisional measures in inter-State and individual-State cases are not taken by multi-member benches. Rules 39(2) and (5) provide that this power is to be exercised by the Vice-Presidents of Chambers. Only when appropriate may it be performed by the President of the Chamber, the Chamber itself, the President of the Grand Chamber, the Grand Chamber, or the ECtHR President. One should also note that the plenary ECtHR never decides cases,²⁷⁶ which by extension means that there is never a decision on provisional measures issued by the full ECtHR.

In contrast to other international courts, the ECtHR does not issue decisions on provisional measures in the form of formal written orders. Instead, the Registry sends letters to States informing them of the interim relief being indicated. As far as individual applications are concerned, the Registry also informs States that non-compliance with interim relief breaches Article 34 of the ECHR.²⁷⁷

The letters in question lack formal reasoning.²⁷⁸ While Article 45(1) of the ECHR requires reasoning in judgments and decisions, this does not apply to communications on provisional measures. Scholars rightly claim that the practice in question could negatively impact the perception of the binding authority of provisional measures and their effectiveness.²⁷⁹ Press releases are the only public source of information about the interim relief, but they do not constitute official documents.

Although States questioned this approach, the ECtHR showed no willingness to change it. In its view, this would slow down the examination of request.²⁸⁰ The current practice rightly leads commentators to argue that the entire process lacks transparency.²⁸¹

²⁷⁴ *Paladi v Moldova* App no 39806/05 (ECtHR [GC], 10 March 2009) [89].

²⁷⁵ *Olaechea Cahuas v Spain* App no 24668/03 (ECtHR, 11 December 2006) [75]–[83].

²⁷⁶ ECHR art 25.

²⁷⁷ It is recalled that the ECtHR has yet to determine whether its inter-State provisional measures are binding. Regrettably, the ECtHR missed an opportunity to clarify this in *Ukraine and the Netherlands v Russia* (Merits) App nos 8019/16, 43800/14, 28525/20 and 11055/22 (ECtHR [GC], 9 July 2025).

²⁷⁸ Saccucci (n 31) 243.

²⁷⁹ Saccucci (n 31) 249.

²⁸⁰ ECtHR, ‘The Interlaken Process and the Court (2016 Report)’ (1 September 2016) 5–6 para 20.

²⁸¹ Marti (n 31) paras 36–9.

At least in inter-State proceedings, reasons for indicating provisional measures should be given.²⁸² Given the nature of the parties to such cases and the fact that most cases are ultimately referred to the Grand Chamber, a brief statement of reasons would not seem to be either too difficult or too time-consuming.

Since no public justification for granting interim relief is available, it is difficult (if not impossible) to deduce the conditions for its indication from the press releases alone.²⁸³ However, the ECtHR is understood to grant interim relief ‘only in truly exceptional cases and on the basis of a rigorous examination of all the relevant circumstances’.²⁸⁴ Given that the protection concerns the risk of prejudice, which, according to Rule 39, ‘would not be susceptible to reparation, restoration, or adequate compensation’, provisional measures are not granted if the alleged prejudice could be financially compensated.²⁸⁵

3.6. Article 26 of the Rules of Procedure of the UN Tribunal in Libya

As a result of losing World War II, Italy concluded a Peace Treaty with the Allied Powers.²⁸⁶ Article 23(1) of the Treaty read that ‘Italy renounce[ed] all right and title to the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland’. Following the decision to entrust the final disposal of the colony to the UN, the General Assembly adopted Resolution 388(V) on 15 December 1950.²⁸⁷ Its substantive part focused on the transfer of property from Italy to the newly established Libyan State.

The brief Article X provided for the creation of a special UN Tribunal in Libya. At the request of the United States, the Union of Soviet Socialist Republics, the United Kingdom, France, Libya, or Italy, the Tribunal could issue instructions on how to implement the resolution in question (Article X(1)(a)). It could also resolve disputes concerning the interpretation and application of the resolution between the said parties (Article X(1)(b)). All decisions were final and binding (Article X(3)). They were to be

²⁸² Saccucci proposes this for all provisional measures. Saccucci (n 31) 251.

²⁸³ But Leach lists ‘a threat of irreparable harm of a very serious nature’, which ‘must be imminent and irremediable’, and ‘there must be an arguable (prima facie) case’. Leach (n 252) 31 para 2.43. This would suggest that the conditions before the ECtHR are the same as those before, *inter alia*, the ICJ and ITLOS.

²⁸⁴ *Kasymakhunov v Russia* App no 29604/12 (ECtHR, 14 November 2013) [181].

²⁸⁵ Saccucci (n 31) 219.

²⁸⁶ Treaty of Paris between Italy and the Allied Powers (signed 19 February 1947, entered into force 15 September 1947) 49 UNTS 3, 3.

²⁸⁷ UNGA Res 388 (V) ‘Economic and financial provisions relating to Libya’ (15 December 1950) UN Doc A/RES/388(V).

based on law, which, as explained, involved applying the resolution ‘in the light of the principles of international law and the rules for the interpretation of international texts’.²⁸⁸ Under Article X(3), the Tribunal had the right to determine its own rules of procedure.

The first case examined by the Tribunal shows that it authorised itself to order provisional measures (Article 26 of the Rules of Procedure).²⁸⁹ Unfortunately, the text of this provision is not available. Its content can only be inferred from its interpretation provided by the Tribunal. In *Italy v United Kingdom and Libya*, Italy’s request for interim relief was for the temporary transfer of the administration of the properties to a government not involved in the case.²⁹⁰ The Tribunal declined to grant provisional measures, but observed that:

[Article 26 of the Rules of Procedure was] adopted in order to empower the Tribunal to protect jeopardized rights of the parties. The Tribunal’s thoughts on the subject were that a possibility existed that the parties would legitimately fear that, unless certain of their rights were afforded judicial protection within a reasonably short period of time, *the ultimate recognition by the Tribunal of such rights would lose, in practice, part if not all of its value*. Interim measures, therefore, will be taken only in those cases in which the Tribunal is convinced that a right not as yet established by it, but susceptible of being so established, is actually in jeopardy.²⁹¹

The subsequent decision on the merits did not further address the issue of provisional measures.²⁹² Nor was it raised in *Italy v Libya*,²⁹³ the second and final case examined by the Tribunal.

Nevertheless, the passage in question requires a few comments. First, the only legal basis of the UN Tribunal in Libya’s provisional measures is its own rules of procedure. Second, its interim relief was binding under Article X(3) of Resolution 388(V). Third, the

²⁸⁸ UNGA ‘Report of the *Ad Hoc* Political Committee on Economic and Financial Provisions Relating to Libya’ (14 December 1950) UN Doc A/1726, 10.

²⁸⁹ *Administration of Certain Properties of the State in Libya (Italy v United Kingdom and Libya)* (Interim Measures) (1952) XII RIAA 359, 360 [2].

²⁹⁰ *Italy v United Kingdom and Libya* (n 289) 360 [2].

²⁹¹ *Italy v United Kingdom and Libya* (n 289) 360 [3] (emphasis added).

²⁹² See *Administration of Certain Properties of the State in Libya (Italy v United Kingdom and Libya)* (Merits) (1953) XII RIAA 263.

²⁹³ See *Institutions, Societies, and Associations covered by Article 5 of the Agreement concluded on 28 June 1951 between the British and Italian Governments concerning the Disposition of Certain Italian Assets in Libya (Italy v Libya)* (Partial Award) (1954) XII RIAA 375; *Institutions, Societies, and Associations covered by Article 5 of the Agreement concluded on 28 June 1951 between the British and Italian Governments concerning the Disposition of Certain Italian Assets in Libya (Italy v Libya)* (Final Award) (1955) XII RIAA 385.

source of inspiration for Article 26 is unclear. It is however worth mentioning that the Tribunal referred to the protection of parties' rights in order that they do not lose 'part, if not all, of their value'. More importantly, the UN Tribunal in Libya's interpretation of Article 26 suggests that interim relief was considered to ensure the enforceability of the final judgment. This is consistent with the already mentioned approaches of other international courts.

3.7. Article 20(1) of the Rules of Procedure of the Eritrea-Ethiopia Boundary Commission

Outside the UNCLOS system, *Eritrea/Ethiopia* is widely regarded as the first example of a request for interim relief in an *ad hoc* inter-State arbitration.²⁹⁴ The Eritrea-Ethiopia Boundary Commission was established under an agreement that ended the armed conflict between the two States. Its task was to resolve the dispute over the exact course of the land boundary between Eritrea and Ethiopia. Article 20(1) of the Rules of Procedure stated that, '[u]nless the Parties otherwise agree, the Commission may, at the request of either Party, prescribe any interim measures it deems necessary to preserve the respective rights of either Party'.²⁹⁵ This provision was therefore analogous to Article 41 of the ICJ Statute.

The boundary delimitation was to be carried out in two phases: first, the determination of the borderlines,²⁹⁶ and second, the proper demarcation.²⁹⁷ Following the first stage, Eritrea accused Ethiopia of settling its citizens in territory that, according to the initial decision, fell within Eritrean sovereignty. Eritrea therefore requested the Boundary Commission to order provisional measures. Declining Eritrea's request,²⁹⁸ the Commission observed that:

²⁹⁴ Rosenne, *Provisional Measures in International Law* (n 1) 17. Interestingly, this case is completely overlooked by Yoshifumi Tanaka, 'Reflections on Provisional Measures in Inter-State Arbitration' in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

²⁹⁵ Eritrea-Ethiopia Boundary Commission Rules of Procedure (11 April 2002).

²⁹⁶ *Eritrea-Ethiopia Boundary Commission (Eritrea/Ethiopia)* (Decision regarding delimitation of the border between Eritrea and Ethiopia) (2002) XXV RIAA 83.

²⁹⁷ *Eritrea-Ethiopia Boundary Commission (Eritrea/Ethiopia)* (Statement regarding Demarcation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia) (2006) XXVI RIAA 771.

²⁹⁸ *Eritrea-Ethiopia Boundary Commission (Eritrea/Ethiopia)* (Order of the Commission made pursuant to Article 20 and Article 27(1) of the Commission's Rules of Procedure) (2002) XXV RIAA 199, 202 [A]. Nevertheless, the Commission decided that Ethiopia should not settle or allow the resettlement of its citizens in the territory considered to belong to Eritrea and should submit compliance reports. Both parties were directed to ensure that no further population resettlement occurred across the delimitation line

it would not be in accordance with the obligations of the Parties for either of them to take, or permit to be taken, any actions that prejudice, or might prejudice, the fulfilment of the Commission's Decision of 13 April 2002. ... It followed that both Parties should assist the Commission in the performance of its task and that neither Party should do anything to prevent or hinder the demarcation process or act in a manner contrary to the rights of the other. The Commission was also mindful of the duty of the Parties to do nothing that would aggravate the dispute. Neither Party should do anything to prevent or hinder the demarcation process or act in a manner contrary to the rights of the other, or otherwise aggravate the dispute.²⁹⁹

According to Rosenne, this passage expresses 'the concept of provisional measures to protect the decision in the first phase, so as to enable the arbitration to proceed to the second'.³⁰⁰ Otherwise, the entire process of demarcation would become pointless. Once again, the judicial interpretation of a provision on provisional measures underscores its role in safeguarding the effectiveness of the final decision and, consequently, the meaningfulness of the proceedings themselves.

3.8. Paragraph 28 of Annexure G of the Indus Waters Treaty

The final provision on interim relief to be examined is Paragraph 28 of Annexure G of the Indus Waters Treaty, which governs the status of the Indus River system.³⁰¹ It reads that:

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.

Indus Waters Kishenganga was an *ad hoc* arbitration concerning a dispute between Pakistan and India over India's construction of a hydroelectric power plant on a river covered by the Indus Waters Treaty. Pakistan and India were in dispute as to whether the condition of the

established by the first decision. See *Eritrea/Ethiopia* 202–3 [B]–[D]. Because provisional measures could only be granted upon request under Article 20(1) of the Rules of Procedure, and Eritrea's request was rejected, these 'obligations' are not interim relief but a kind of 'recommendation', as in *Saiga (No 2)* before ITLOS.

²⁹⁹ *Eritrea/Ethiopia* (n 298) 202 [18].

³⁰⁰ See Rosenne, *Provisional Measures in International Law* (n 1) 17.

³⁰¹ Indus Waters Treaty between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development (19 September 1960) 419 UNTS 215.

urgent risk of irreparable prejudice was required to grant provisional measures under the Indus Waters Treaty. The Court of Arbitration held that:

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.³⁰²

The Court of Arbitration focussed its analysis on the term ‘necessary’ and held that Paragraph 28 provided for three types of provisional measures: to safeguard the interests of the requesting Party in relation to the matter in dispute; to avoid prejudice to the final solution of the dispute; or to avoid aggravation or extension of the dispute. The Court of Arbitration further determined that these categories of interim relief are disjunctive. Accordingly, the condition of the urgent risk of irreparable prejudice was not deemed necessary to order provisional measures aimed at preventing prejudice to the final decision.³⁰³ The Court of Arbitration’s interpretation is at best questionable.

First, it conflated the *aim* of provisional measures with the *conditions* for granting them. For example, while Article 41 of the ICJ Statute provides for provisional measures to protect the rights of the parties, no one argues that this is the sole condition that must be satisfied. It is surprising given that three members of the Court of Arbitration were ICJ judges.³⁰⁴

Second, it is hardly convincing that a mere difference in wording between Paragraph 28 and Article 41 of the ICJ Statute necessarily entails a difference in applicable conditions. Article 41 of the ICJ Statute differs in wording from Article 290 of UNCLOS, yet both the ICJ and ITLOS apply identical criteria for granting interim relief. As Tanaka rightly

³⁰² *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Interim Measures) (2011) XXXI RIAA 6, 44–5 [130].

³⁰³ *Indus Waters Kishenganga Arbitration* (n 302) 45 [131].

³⁰⁴ It concerned Judges Schwebel, Simma and Tomka.

observes, it is doubtful that ‘the *lex specialis* nature of that paragraph of the Treaty automatically excludes elements which are not explicitly embodied in the Treaty’.³⁰⁵

Third, the decision is internally inconsistent. On the one hand, the Court of Arbitration excluded the condition of urgency; on the other hand, it required that Pakistan’s claimed rights be at least plausible before granting interim relief.³⁰⁶ Paragraph 28, however, contains no explicit condition of plausibility, just as it contains no explicit condition of urgency. By selectively applying certain conditions while disregarding others, the Court of Arbitration appears to have engaged in a ‘cherry-picking’ approach to justify a predetermined outcome.

Paragraph 28, as interpreted by the Court of Arbitration, is inconsistent with all other provisions on provisional measures. While the other provisions are more or less similar, Paragraph 28 departs from the requirement of the urgent risk of irreparable prejudice to plausible rights, which appears to be a common characteristic of interim relief in international law. The only reassuring factor is the Court of Arbitration’s emphasis on ensuring the enforceability of the final decision, which is consistent with the practice of other international courts.

4. Legal Basis of Granting Provisional Measures Other Than Those Requested

No provision on provisional measures in any constitutive instrument expressly authorises an international court to grant measures other than those requested. Yet such a practice needs to be grounded in law.

4.1. Three Explanations Adopted by International Courts

International courts have advanced various explanations for this possibility. There are three different approaches in this regard.

The first approach is to regulate this issue in the rules of procedure. This is the case with the ICJ, ITLOS, and the *Enrica Lexie* arbitral tribunal. Article 75(2) of the ICJ Rules reads that ‘[w]hen a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested’. It also provides

³⁰⁵ Tanaka, ‘Reflections on Provisional Measures in Inter-State Arbitration’ (n 294) 567.

³⁰⁶ See *Indus Waters Kishenganga Arbitration* (n 302) 46 [135].

that the ICJ may address interim relief to the party that made the request itself. Inspired by the ICJ Rules, Article 89(5) of the ITLOS Rules adopts the same approach. In *Enrica Lexie Arbitration*, the arbitral tribunal justified the possibility under consideration by directly citing its own procedural rules. They provide that it ‘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’.³⁰⁷

The second approach applies when an international court does not present any legal basis for granting provisional measures other than those requested. This is the case with the CJEU. In *Turów Mine*, the Vice-President of the Court of Justice found it sufficient to simply state that the amount of the periodic penalty payment proposed by the Czech Republic ‘cannot bind the judge hearing the application for interim measures’.³⁰⁸ Neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure of the Court of Justice explicitly provides for the possibility in question.

The third approach concerns situations when an international court refers to the procedural rules of other international courts in order to justify its own possibility to grant provisional measures other than those requested. This was the case with the *MOX Plant* arbitral tribunal. First, it noted that both the ICJ and ITLOS enjoy the possibility in question. Second, it observed that neither party commented on this issue. Then, the arbitral tribunal concluded that ‘it is also competent to prescribe provisional measures other than those sought by any Party’.³⁰⁹ This approach may even suggest the existence of inherent power of the international tribunal in this regard. To prove this, a more detailed justification should be expected from the international court.

4.2. Judicial Development of the Concept

The issue of granting provisional measures other than those requested dates to the law and practice of the PCIJ. In *South-Eastern Greenland*, the Court heard Norway’s request for interim relief. It observed that:

the Court is 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*; but as the Norwegian request

³⁰⁷ *Enrica Lexie Arbitration* (n 46) [120]; citing Rules of Procedure of the Arbitral Tribunal Constituted under Annex VII of UNCLOS in the *Enrica Lexie Incident Arbitration* (19 January 2016) art 11(3).

³⁰⁸ *Turów Mine* (Order of 20 September 2021) (n 237) [50].

³⁰⁹ *MOX Plant Arbitration* (n 178) [43].

for interim measures of protection must first be examined, leaving the question whether measures should if necessary be indicated *proprio motu* to be determined subsequently.³¹⁰

Ultimately, the PCIJ found no need either to accede to the request or to act *proprio motu*. In the operative part of the order, the PCIJ first dismissed Norway's request and then 'reserve[d] its right to consider whether circumstances ha[d] arisen requiring the indication of provisional measures in accordance with Article 41 of the Statute'.³¹¹ The 1936 Rules acknowledged this jurisprudence. The then-new paragraph 6 of Article 61 authorised the PCIJ to grant interim relief *proprio motu*, without any request from a party to the case. This provision is now reflected in Article 75(1) of the ICJ Rules. Similarly, the then-new paragraph 4 of Article 61 authorised the PCIJ to indicate interim relief other than that requested. Its wording was identical to that of the current Article 75(2) of the ICJ Rules.³¹²

Sztucki rightly argues that the *South-Eastern Greenland* decision 'reveals a lack of clear distinction between the concept of the indication of provisional measures *proprio motu*, and the concept of the indication of interim measures other than requested'.³¹³ It may erroneously suggest that any interim relief other than that requested is, by definition, *proprio motu*. Rosenne claims that the later Court's jurisprudence has also failed to 'clarify the relationship between paragraphs 1 and 2 of Article 75'.³¹⁴ This is not only a judicial problem, as many commentators confuse the two procedures. To give but an example, Hudson argues that 'Paragraph 4 seems a logical consequence of the provisions in paragraph 6 that the Court may proceed *proprio motu* to indicate interim measures'.³¹⁵ They are, however, conceptually different and require being distinguished.³¹⁶ Granting provisional measures *proprio motu* refers to situations when an international court grants

³¹⁰ *South-Eastern Greenland* (n 113) 284.

³¹¹ *South-Eastern Greenland* (n 113) 289; Sztucki (n 3) 157; Rosenne, *Provisional Measures in International Law* (n 1) 174.

³¹² Guyomar (n 122) 486; Sztucki (n 3) 157–8; Rosenne, *Provisional Measures in International Law* (n 1) 175.

³¹³ Sztucki (n 3) 157–8.

³¹⁴ Rosenne, *Provisional Measures in International Law* (n 1) 176.

³¹⁵ Hudson (n 67) 291 para 320. See Kolb, *CIJ* (n 129) 657–8; Thirlway, *The Law and Procedure* (n 28) 953 and 1805–6; Malcolm N Shaw, *Rosenne's Law and Practice of the International Court 1920-2015* (5th edn, Brill Nijhoff 2016) 1432; Acconciamezza (n 31) 429–30. See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures) [1992] ICJ Reports 3, 48 [31] (Dissenting Opinion Bedjaoui); *Lockerbie (USA)* (n 160) 158 [31] (Dissenting Opinion Bedjaoui).

³¹⁶ For an example of confusion, see *Southern Bluefin Tuna* (n 179) 329 (Separate Opinion Shearer): 'If article 89, paragraph 5, of the Rules of the Tribunal truly purports to give a power to the Tribunal to act beyond the bounds of what has been requested (*ultra petita*), then in my opinion that rule is not authorised by the Convention (*ultra vires*) and is thus invalid'.

interim relief even though neither party has requested it. Granting provisional measures other than those requested refers to situations where the interim relief granted differs in any respect from the interim relief requested.

Sztucki explains that when the PCIJ judges drafted the 1936 Rules, they held the view that the power to grant interim relief that differs from what was sought followed from the possibility to act *proprio motu*. *Qui maius potest, minus potest*.³¹⁷ The scholarship generally accepts this explanation.³¹⁸

Guyomar convincingly argues that the ICJ may act *proprio motu* because Article 41 of the ICJ Statute ‘n’oblige nullement à ce que la Cour soit saisie de la question par l’une ou l’autre des parties’.³¹⁹ According to Brown, all international courts may grant interim relief *proprio motu*, ‘unless to do so would be inconsistent with their constitutive instruments’.³²⁰ This is the case with UNCLOS tribunals, because Article 290(3) of UNCLOS explicitly prohibits them from prescribing interim relief *proprio motu*.³²¹ Accordingly, explaining the granting of provisional measures other than those requested solely as an exercise of a court’s *proprio motu* powers is not entirely unsatisfactory.

4.3. Provisions Authorising the Granting of Provisional Measures

The scope of international courts’ decisions is not discretionary. It is governed by two principles: *ne infra petita* and *ne ultra petita*. The *ne ultra petita* implies that ‘an adjudicative body may not decide on issues other than those submitted to it’.³²² However, this does not apply to questions of jurisdiction and admissibility. International courts possess the *compétence de la compétence* or *Kompetenz-Kompetenz* to examine *ex officio*

³¹⁷ Sztucki (n 3) 158.

³¹⁸ Guyomar (n 122) 488; Kolb, *CIJ* (n 129) 657; Oellers-Frahm and Zimmermann (n 28) 1177 para 83.

³¹⁹ Guyomar (n 122) 487. Oellers-Frahm and Zimmermann only observe that ‘the wording of Article 41 did not pose an obstacle to the *proprio motu* action of the Court’. Oellers-Frahm and Zimmermann (n 28) 1169 para 67.

³²⁰ Brown, *A Common Law* (n 2) 151.

³²¹ Thus, one cannot agree with Wolfrum that Article 89(5) of the ITLOS Rules is ‘of a purely technical nature’. Rüdiger Wolfrum, ‘Article 89’ in P Chandrasekhara Rao and Philippe Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006) 248. See also Massimo Lando, ‘Provisional Measures and the Link Requirement’ (2020) 19 *Law & Practice of International Courts and Tribunals* 177, 193: ‘However, ITLOS’s Rules do not provide for the Tribunal’s power to indicate provisional measures *proprio motu*, which might raise doubts as to the rationale of Article 89(5). Presumably, Article 89(5) provides a legal basis for ITLOS’s power to consider the respondent State’s views on the provisional measures to be prescribed’.

³²² Attila Tanzi, ‘Ultra Petita’, *Max Planck Encyclopedia of Public International Law online* (2019) para 1.

whether they can hear a case.³²³ As far as the *ne infra petita* principle is concerned, it requires that an international court's decision cannot 'not decide on one or several of the claims raised by the parties to a case'.³²⁴ Forlati even argues that the ICJ implicitly regards an *infra petita* decision as invalid.³²⁵

The possibility of granting provisional measures other than those requested means that the principles of *ne ultra petita* nor *ne infra petita* do not apply.³²⁶ Yet their inapplicability cannot be taken for granted. As Sztucki rightly observes, 'it is arguable that the *ne ultra petita* principle is implicit in [the article on provisional measures], just as it is in judicial proceedings as a whole'.³²⁷ On the one hand, Brown argues that the granting of interim relief different from that requested is an inherent power. He contends that the *ne ultra petita* principle limits only the issues submitted for adjudication, not the way they are examined. Relying on Cheng's studies, Brown also invokes the *jura novit curia* principle as a second explanation.³²⁸ On the other hand, a number of commentators simply acknowledge that the possibility in question is a long-standing and uncontroversial practice.³²⁹

The international courts' rules of procedure are only judge-made law.³³⁰ International courts adopt them by virtue of the provisions in their constituent instruments which provide for this.³³¹ These rules aim to 'ensure the efficient, cost-effective, and user-

³²³ *Nottebohm (Liechtenstein v Guatemala)* (Preliminary Objection) [1953] ICJ Reports 111, 119; Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff 1993) 14–6. Note, however, that Tanaka, *The Peaceful Settlement of International Disputes* (n 167) 187 claims that *ne ultra petita* does not apply to all incidental proceedings.

³²⁴ Serena Forlati, 'Infra Petita', *Max Planck Encyclopedia of Public International Law online* (2019) para 1.

³²⁵ Forlati (n 324) para 15; citing *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Reports 53, 67 [41].

³²⁶ See eg Rosenne, *A Commentary on the 1978 Rules* (n 122) 154; Wolfrum, 'Interim (Provisional) Measures of Protection' (n 32) para 41; Kolb, *CIJ* (n 129) 657.

³²⁷ Sztucki (n 3) 156.

³²⁸ See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 299–301; Brown, *A Common Law* (n 2) 150.

³²⁹ See eg Rosenne, *A Commentary on the 1978 Rules* (n 122) 154; Géraldine Giraudeau, 'À propos de l'affaire des *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie)* : quand la Cour internationale de Justice protège les droits d'un État partie à une autre instance' (2015) 61 *Annuaire français de droit international* 239, 251.

³³⁰ The CJEU Statute provides a notable exception, as it requires the Council's approval. CJEU Statute art 64(2).

³³¹ For example, Article 30 of the ICJ Statute and Article 16 of the ITLOS Statute. See generally Hugh Thirlway, 'Article 30' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 590–1 para 4.

friendly administration of justice’.³³² Parties to a given case are bound to comply with them. Nevertheless, the rules of procedure are always subordinate to a constitutive instrument.³³³ They are null and void if they contradict the constitutive instrument,³³⁴ regulate matters beyond its scope,³³⁵ or are not procedural in nature.³³⁶ Accordingly, the rules of procedure alone cannot justify granting interim relief that differs from what was requested.

None of the approaches adopted by international courts to justify the possibility of granting provisional measures other than those requested seems to be convincing in itself. It is therefore necessary to return to the most fundamental source of their procedural competence, namely their constitutive instruments. In this context, there are three observations: first, all provisions on provisional measures describe the granting of interim relief as a right, not an obligation, of an international court. They use language such as ‘shall have the power’,³³⁷ ‘may’,³³⁸ ‘peut’,³³⁹ or ‘a le pouvoir’.³⁴⁰ Second, apart from Paragraph 28 of Annexure G of the International Waters Treaty,³⁴¹ none of the provisions require a requesting party to propose a content of provisional measures it seeks. The reasons why parties do this and why international courts expect this are separate issues. Third, the provisions on provisional measures use the terms ‘any’,³⁴² ‘toutes’,³⁴³ and ‘nécessaires’³⁴⁴ to describe the scope of interim relief that can be granted. Taken together with the previous observations, this emphasises the broad discretion that the drafters of constitutive instruments afforded to international courts.

³³² ITLOS ‘Tribunal adopts its Rules of Procedure, Resolution on its internal judicial practice, and Guidelines to assist parties’ (3 November 1997) Press Release 7 (n 172).

³³³ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Reports 351, 581 [371]. See also *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (Advisory Opinion) (1925) PCIJ Series B No 12, 31; Kolb, *CIJ* (n 129) 116.

³³⁴ Thirlway, *The Law and Procedure* (n 28) 878. See also Kolb, *CIJ* (n 129) 94, 118ff.

³³⁵ Thirlway, ‘Article 30’ (n 331) 591–2 para 6.

³³⁶ Thirlway, ‘Article 30’ (n 331) 591–2 para 6. See Kolb, *CIJ* (n 129) 113, 118ff.

³³⁷ ICJ Statute art 41(1).

³³⁸ UNCLOS art 290(1); TFEU art 279.

³³⁹ UNCLOS art 290(1); TFEU art 279.

³⁴⁰ ICJ Statute art 41(1).

³⁴¹ It reads that ‘[e]ither Party may request the Court ... 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’.

³⁴² ICJ Statute art 41(1); UNCLOS art 290(1); TFEU art 279.

³⁴³ UNCLOS art 290(1).

³⁴⁴ TFEU art 279.

It is precisely the wording of the provisions on provisional measures that authorises international courts to grant interim relief other than that requested.³⁴⁵ This is evident from their interpretation. Any provision in the rules of procedure that allows for this merely confirms the general principle. Moreover, it is submitted that if international courts did not have this possibility and were strictly bound by the principles of *ne ultra petita* and *ne infra petita*, the entire system of proceedings on provisional measures would become untenable. International courts that have authorised themselves to order provisional measures may likewise grant measures other than those requested. The latter is a logical consequence of the former.

In any event, Judge Warioba rightly argued that an international court should not grant interim relief other than that requested simply because it has the power to do so. In his view, ‘it is not a discretion which should be used at a whim but one which should be exercised when there are compelling reasons borne out by fact’.³⁴⁶ Similarly, Judge Kateka observed that ‘[i]t cannot be a matter of routine, especially when the prescription of provisional measures puts a restraint on the liberty of action of a State’.³⁴⁷ Judicial expertise and balance are essential in order to select the content of an provisional measure that responds to the urgent risk of irreparable prejudice.

4.4. Link Requirement

Although the ICJ, as any other international court, may indicate interim relief other than that requested, it refuses to grant provisional measures if a party seeks interim relief unrelated to the plausible rights on the merits. This is the so-called link requirement, which the Court considers to be one of the conditions for ordering provisional measures.

The origins of the link requirement can be traced back to *Polish Agrarian Reform*. In that case, the PCIJ declined to indicate provisional measures sought by Germany, arguing that the request was too broad. That is, although Germany challenged the Polish agricultural reform in relation to certain Polish citizens of German origin, it demanded a complete suspension of the reform.³⁴⁸ Between 1936 and 1978, the PCIJ and ICJ Rules required a

³⁴⁵ For a similar explanation under Article 290 of the UNCLOS, see Chester Brown, ‘Provisional Measures before the ITLOS: The Mox Plant Case’ (2002) 17 International Journal of Marine and Coastal Law 267, 281–2.

³⁴⁶ *Saiga (No 2)* (n 178) 45 (Declaration Warioba).

³⁴⁷ *Enrica Lexie* (n 179) 208–9 [4] (Declaration Kateka).

³⁴⁸ *Polish Agrarian Reform* (n 115) 178–9.

requesting party to directly submit the content of the provisional measures it was seeking. Sztucki notes that this allowed the Court to directly assess their link to the subject matter of the dispute.³⁴⁹

The ICJ mentioned the link requirement in *Pulp Mills*³⁵⁰ and introduced it as a new condition for indicating provisional measures explicitly in *Avena (Interpretation)*.³⁵¹ Unfortunately, Lando argues that the Court simultaneously ‘obfuscated’ its meaning.³⁵² In *Avena (Interpretation)* and *Georgia v Russia*, the ICJ required the link between the rights protected by the requested measures and the subject matter of the main proceedings.³⁵³ Under *Belgium v Senegal* and *Certain Activities*, however, the required standard was the link between the measures themselves and the asserted rights in the main case.³⁵⁴ Lando argues that both approaches amount to the same thing, but the used wording should not be overlooked.³⁵⁵ The difference is in fact significant. The first situation concerns the convergence of rights at the stage of interim relief and the merits of the case. The second situation concerns the compatibility of provisional measures with the rights asserted in the merits of the case. Indeed, the first scenario does not concern the content of interim measures.

However, there are serious arguments that the link requirement is, in fact, pointless. First, other conditions already fulfil its purpose.³⁵⁶ Second, its assessment is ‘an inconsequential “box to tick”’³⁵⁷ that is ‘merely performative’ in nature.³⁵⁸ It is argued that if the ICJ had rigorously applied the link requirement, it would have had to decline interim relief in a number of cases like *Breard*, *LaGrand*, or *Avena*.³⁵⁹ Third, treating the link requirement as a condition for indicating interim relief is absurd. The link requirement

³⁴⁹ See Sztucki (n 3) 89–92.

³⁵⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2007] ICJ Reports 3, 10 [27]; Matei Alexianu, ‘Effectiveness Beyond Compliance: Examining the Goal-Based Impact of the International Court of Justice’s Provisional Measures’ (2025) 38 Hague Yearbook of International Law (forthcoming).

³⁵¹ Quintana (n 28) 655; Lando, ‘Link Requirement’ (n 321) 178.

³⁵² Lando, ‘Link Requirement’ (n 321) 182.

³⁵³ *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) [2008] ICJ Reports 311, 327 [58]. See *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 389 [118].

³⁵⁴ *Belgium v Senegal* (n 141) 151 [56]; *Certain Activities* (Provisional Measures 2011) (n 161) 8 [54].

³⁵⁵ Lando, ‘Link Requirement’ (n 321) 183.

³⁵⁶ Lando, ‘Link Requirement’ (n 321) 194–5.

³⁵⁷ Lando, ‘Link Requirement’ (n 321) 196.

³⁵⁸ Lando, ‘Link Requirement’ (n 321) 199.

³⁵⁹ See Kolb, *CIJ* (n 129) 647.

implies the Court must refuse to indicate provisional measures only because a party has proposed (for whatever reason) inappropriate interim relief. This would even apply in a situation where there was a serious and urgent risk of irreparable prejudice. The ICJ would become a ‘prisoner’ of one party’s request, as if the principles of *ne ultra* and *ne infra petita* applied. Accordingly, the link requirement undermines the possibility for the ICJ to indicate provisional measures other than those requested.³⁶⁰ It is worth noting that Judge Owada did not mention the link requirement when he classified the conditions for granting provisional measures.³⁶¹ It is submitted that the ICJ should cease treating the link requirement as a condition for ordering interim relief and abandon its analysis altogether.

5. Concluding Remarks

The concept of provisional measures in international law has developed independently of any analogous procedure at the municipal level. The CACJ was the first international court that could grant them. Its interim relief was used to stay contested actions. The Bryan Treaties and mixed tribunals further developed the concept in question. Its historical development culminated with the adoption of the PCIJ Statute with Article 41.

While the statutes of the PCIJ and the ICJ served as models for the constitutive instruments of other international courts,³⁶² the wording of the provisions on provisional measures varies. They differ not only in the verbs used to describe the act of granting interim relief but also in the precision with which the conditions and *raison d’être* of provisional measures are defined. However, a common feature of all provisions is their open-ended nature, which has given international courts broad discretion in their interpretation.

Perhaps surprisingly, the practice of applying the relevant provision goes beyond the differences in wording. The standard is to require three conditions to grant provisional measures: the plausibility of the rights being claimed, urgency, and the risk of irreparable prejudice. The damage is irreparable if there is no possibility of effective remedy, provided

³⁶⁰ See also Lando, ‘Link Requirement’ (n 321) 194–5.

³⁶¹ See Chapter I 3.2.

³⁶² Brown, *A Common Law* (n 2) 226–8. See also Oellers-Frahm and Zimmermann (n 28) 1197 para 125; Pimenova, *Obespechitel’nye mery* (n 2) 13–4. See also Sergey M Punzhin, ‘Procedural Normative System of the International Court of Justice’ (2017) 30 *Leiden Journal of International Law* 661, 664.

that the final decision is favourable to the party seeking interim relief. This emphasises the need for the final decision to be meaningful.

All international court may grant interim relief other than that requested, which is different from ordering a provisional measure *proprio motu*. Proceedings for provisional measures would become absurd if international courts did not have discretion in determining their content. For reasons that remain unclear, international courts have not explained the source of this discretion. This chapter argues that it follows directly from the provisions on interim relief contained in their constitutive instruments.

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Chapter II

Practice of Selecting the Content of Provisional Measures

*Nic dwa razy się nie zdarza
I nie zdarzy, z tej przyczyny
Zrodziliśmy się bez wprawy
I pomrzemy bez rutyny*

– Wisława Szymborska³⁶³

1. Introductory Remarks

International courts have granted provisional measures at least once in around 60 cases. This chapter examines whether there are patterns in ordering similar interim relief in comparable cases. To that end, it categorises all decisions according to their general subject matter and the nature of the urgent risk of irreparable prejudice.³⁶⁴ It further classifies the content of interim relief into five groups proposed by Tanaka: (1) positive measures requiring action, (2) negative measures prohibiting certain actions, (3) non-aggravation measures preventing escalation of a dispute, (4) compliance-reporting measures,³⁶⁵ and (5) evidence-protection measures.³⁶⁶

2. The Law of Treaties

The subject matter of many cases concerned the law of treaties *sensu stricto*. Parties sought provisional measures, alleging violations of both substantive and procedural treaty obligations.

³⁶³ Wisława Szymborska, 'Nic dwa razy', *Wolanie do Yeti* (Wydawnictwo Literackie 1957).

³⁶⁴ For a different categorisation, see eg *Saiga (No 2)* (n 178) 56–7 [21] (Separate Opinion Laing).

³⁶⁵ Cf Yoshifumi Tanaka, 'Note on the Interim Measures in the *Indus Waters Kishenganga* Arbitration' (2012) 11 *Law & Practice of International Courts and Tribunals* 555, 566–7.

³⁶⁶ Cf Yoshifumi Tanaka, 'A New Phase of the *Temple of Preah Vihear* Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011' (2012) 11 *Chinese Journal of International Law* 191, 207–12 paras 32–39.

2.1. *Alleged Violations of Substantive Treaty Obligations*

In *Costa Rica v Nicaragua* before the CACJ, Costa Rica challenged a treaty between Nicaragua and the United States for the construction of an interoceanic canal. Costa Rica argued that this treaty violated its own boundary treaty with Nicaragua. As interim relief, the CACJ decided that ‘los Gobiernos de Costa Rica y Nicaragua están en la obligación de mantener el “statu que” que ha existido entre ellas, antes del Tratado que motiva la presente contienda’.³⁶⁷ The interim relief was addressed to both parties but, in practice, concerned only Nicaragua. This negative measure required Nicaragua not to comply with its treaty obligations toward the United States insofar as doing so would lead to a violation of the treaty with Costa Rica. Compliance with this measure would likely have placed Nicaragua in breach of its treaty with the United States, thereby committing an internationally wrongful act. Surprisingly, the CACJ did not address this issue

Sino-Belgian Treaty was a case concerning China’s alleged unilateral termination of the treaty granting Belgian citizens in China a number of rights. Belgium argued that China’s actions following the alleged termination of the treaty could prejudice its rights and those of its citizens. It requested the PCIJ to indicate that the treaty remain in force insofar as Belgian citizens were being treated less favourably than citizens of other States.³⁶⁸ The Court granted three provisional measures. Repeating the wording of two provisions of the treaty, the first two measures required China to preserve certain rights of Belgian citizens and refrain from sequestration of their property. The third interim relief granted Belgian citizens access to ‘modern courts’ in China.³⁶⁹

In *Anglo-Iranian Oil Co.*, the United Kingdom exercised diplomatic protection over its company operating in Iran. Arguing that Iran’s laws nationalising the oil industry violated the concession agreement, the United Kingdom requested the ICJ to allow the company to continue operating and for Iran to stop actions prejudicing British rights and aggravating the dispute.³⁷⁰ The Court partially accepted the request. It addressed a non-aggravation measure to both parties and granted an unprecedented positive measure that the company in question could continue operating under the control of a Supervisory Board,

³⁶⁷ *Costa Rica v Nicaragua* (n 76) 89.

³⁶⁸ PCIJ, ‘Denunciation of the Treaty of 2 November 1865 between China and Belgium’ PCIJ Ser C No 16–1, 24; Sztucki (n 3) 35–6.

³⁶⁹ *Sino-Belgian Treaty* (n 103) 7–8.

³⁷⁰ *Anglo-Iranian Oil Co* (n 37) 90–1.

to be established in accordance with the ICJ's directions.³⁷¹ Yet, it is difficult to determine how the United Kingdom could, or would have wished to, hinder the company's activities; addressing a provisional measure to it is therefore questionable. Moreover, it is unclear what prompted the Court to establish a Supervisory Board, as neither party had requested this. It appears, however, to represent an intermediate solution between Iranian nationalisation and full British ownership of the company.

Indus Waters Kishenganga concerned an alleged violation of the Indus Waters Treaty. Pakistan argued that by constructing the Kishanganga Hydro-Electric Project, India would reduce water flow to Pakistan's hydroelectric installations. As a provisional measure, Pakistan primarily sought an order to stay the construction.³⁷² Due to the adopted interpretation of Paragraph 28, as well as certain undertakings by India,³⁷³ the Court of Arbitration analysed only part of Pakistan's request. It found no need to stay the entire construction, but only certain aspects of it.³⁷⁴ The interim relief specified (7-0) which construction activities were permitted (positive) and which were prohibited (negative).³⁷⁵ The Court of Arbitration further addressed a compliance-reporting measure to both parties, and oblige them to establish a joint inspection mechanism.³⁷⁶ Tanaka argues that the ordered provisional measures were in line with Pakistan's request and generally served not to aggravate the dispute.³⁷⁷ This is acceptable if Pakistan's goal was to stay at least some part of India's construction. However, it seems that the goal was a complete suspension of the project.

1955 Treaty of Amity was a case concerning the imposition of sanctions on Iran by the United States after the latter had withdrawn from the so-called nuclear agreement. The ICJ found that the most-favoured-nation clause, invoked by the United States, did not *prima facie* apply to sanction concerning goods required to meet humanitarian needs.³⁷⁸ The Court ordered a non-aggravation measure (15-0) and negative relief requiring the United States not to impede or restrict the transfer of humanitarian goods to Iran (15-0).³⁷⁹ Notably, the

³⁷¹ *Anglo-Iranian Oil Co* (n 37) 93–4.

³⁷² *Indus Waters Kishenganga Arbitration* (n 302) 22 [52].

³⁷³ *Indus Waters Kishenganga Arbitration* (n 302) 42–3 [122]–[124].

³⁷⁴ *Indus Waters Kishenganga Arbitration* (n 302) 48–52 [140]–[151].

³⁷⁵ *Indus Waters Kishenganga Arbitration* (n 302) 52 [152].

³⁷⁶ Mara Tignino, 'Le fleuve Indus et ses usages : l'arbitrage relatif aux eaux du fleuve Kishenganga' (2014) 60 *Annuaire français de droit international* 519, 533. *Contra* Tanaka, '*Indus Waters Kishenganga*' (n 365) 575–6.

³⁷⁷ Tanaka, '*Indus Waters Kishenganga*' (n 365) 567.

³⁷⁸ *1955 Treaty of Amity* (n 152) 641–4 [65]–[70].

³⁷⁹ *1955 Treaty of Amity* (n 152) 652 [102].

ICJ did not even address the part of Iran's request concerning its obsolete aircraft.³⁸⁰ Unfortunately, the court did not even explain its decision not to do so. Apart from Judge *ad hoc* Momtaz's regret that the provisional measures were not broad enough,³⁸¹ the content of interim relief in the case at hand did not raise any doubts.

The most notable request for provisional measures alleging violations of substantive treaty obligations arose in *Ukraine v Russia (Genocide Convention)*. Ukraine did not accuse Russia of committing genocide. It argued that Russia could not invoke the Genocide Convention³⁸² to justify launching a 'special military operation' to prevent an allegedly non-existent genocide in Luhansk and Donetsk. The ICJ ordered negative measures requiring Russia, as well as the groups it may direct or support, to cease military operations throughout the entirety of Ukraine (13-2). The Court also addressed non-aggravation relief to both parties (15-0).³⁸³

Scholars disagree³⁸⁴ on the extent to which the indicated provisional measures align with Ukraine's request.³⁸⁵ However, a number of differences are apparent. First, Ukraine had requested that the 'special military operation' be stayed in Luhansk and Donetsk, whereas the Court ordered that it cease across the entire territory of Ukraine. Second, contrary to Ukraine's request, the non-aggravation measure was addressed to both parties. While some judges disagreed with this decision,³⁸⁶ it likely served to secure a unanimous vote on at least this part of the *dispositif*.³⁸⁷ Kranz argues that '[t]his Solomon requirement actually means that Russia can at any time plead violation of it by Ukraine, which will

³⁸⁰ For Iran's request, see *1955 Treaty of Amity* (n 152) 627–8 [14].

³⁸¹ See eg *1955 Treaty of Amity* (n 152) 684 [2]–[3] (Declaration Momtaz).

³⁸² Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

³⁸³ *Ukraine v Russia (Genocide Convention)* (n 23) 230–1 [86].

³⁸⁴ On close resemblance, see Asier Garrido Muñoz, 'Al filo de su competencia ratione materiae: la providencia de la Corte Internacional de Justicia en el asunto *Alegaciones de genocidio en virtud de la Convención para la prevención y la sanción del crimen de genocidio (Ucrania c. Federación Rusa)*' (2022) 74 *Revista española de derecho internacional* 77, 84. On partial correspondence, see Benjamin Samson, 'Compétence de la CIJ et indication de mesures conservatoires: réflexions à partir de l'ordonnance en indication de mesures conservatoires du 16 mars 2022 dans l'affaire relative aux *Allégations de génocide au titre de la Convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie)*' (2022) 68 *Annuaire français de droit international* 371, 373. On prejudging the merits, see Pierre d'Argent, 'Le génocide comme prétexte de guerre devant la Cour internationale de justice' (2022) 38 *Journal des tribunaux* 767, 769 para 12; Wyzozumska (n 24) 12–3.

³⁸⁵ For Ukraine's request, see *Ukraine v Russia (Genocide Convention)* (n 23) 213–4 [5].

³⁸⁶ *Ukraine v Russia (Genocide Convention)* (n 23) 253 [33] (Separate Opinion Robinson) and 256–7 (Declaration Daudet).

³⁸⁷ Andrew Sanger, 'False Claims of Genocide Have Real Effects: ICJ Indicates Provisional Measures in Ukraine's Proceedings Against Russia' (2022) 81 *Cambridge Law Journal* 217, 219. Cf Tamada (n 24) 49–50.

justify its further military action'.³⁸⁸ This, however, seems to be somewhat exaggerated; Russia's continuation of military operations would still constitute a breach of two positive provisional measures. Third, the Court declined to grant compliance-reporting relief. Unfortunately, the ICJ decided not to explain this decision at all. It only noted that '[i]n the circumstances of the present case, however, the Court declines to indicate this measure'.³⁸⁹

In the analysed cases, international courts typically grant negative measures and non-aggravation relief. The former usually takes the form of suspending the contested action. The circumstances of each case determine whether such suspension should be total or only partial. *Sino-Belgian Treaty* also illustrates that, depending on the parties' arguments in the main case, they may perceive the same provisional measure as either positive (China) or negative (Belgium).

2.2. Alleged Violations of Procedural Treaty Obligations

In *MOX Plant*, Ireland challenged the British construction of a plant to make mixed oxide fuel from plutonium and uranium oxides.³⁹⁰ ITLOS found no need to protect Ireland's substantive rights.³⁹¹ However, the Tribunal noted that UNCLOS obliged the parties to cooperate, which was not the case between Ireland and the United Kingdom. It prescribed positive relief that parties cooperate and enter into consultations (21-0) and granted a compliance-reporting measure (21-0).³⁹² Unfortunately, the order is so obscurely worded that only the individual opinion of the judges suggest that ITLOS ordered the measures to protect Ireland's procedural rights.³⁹³

³⁸⁸ Jerzy Kranz, 'Russian aggression in Ukraine: Demons in the War for "Peace" or Crime without Punishment?' (2022) 60 *Archiv des Völkerrechts* 243, 259.

³⁸⁹ *Ukraine v Russia (Genocide Convention)* (n 23) 230 [83].

³⁹⁰ For Ireland's request, see *MOX Plant* (n 179) 102–3 [29].

³⁹¹ *MOX Plant* (n 179) esp 109–10 [78]–[81].

³⁹² *MOX Plant* (n 179) 110–1 [89(1) and (2)].

³⁹³ See *MOX Plant* (n 179) 139 [7] (Separate Opinion Treves). But see *MOX Plant* (n 179) 123 (Separate Opinion Mensah) and 125 (Separate Opinion Anderson). Brown argues that the Tribunal prescribed interim relief, even though its conditions were not met. Brown, 'Provisional Measures before the ITLOS: The Mox Plant Case' (n 345) eg 281. Churchill and Scott claim that ITLOS rejected Ireland's request and granted provisional measures on its own. Unfortunately, they fail to reconcile this with paragraph 3 of Article 290 of the UNCLOS, which prohibits the Tribunal from acting proprio motu. Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) 53 *International and Comparative Law Quarterly* 643, 648. For similar ambiguities, see Philippe Weckel, 'Ordonnance du 2 décembre 2001 (mesures conservatoires) Affaire de l'usine Mox (Irlande c. Royaume-Uni)' (2002) 106(4) *Revue générale de droit international public* 196, 204.

The subsequent order on provisional measures in *Land Reclamation* was, unfortunately, equally unclear.³⁹⁴ That case concerned Singapore's land reclamation activities in the Straits of Johor.³⁹⁵ The Tribunal found no need to protect Malaysia's territorial sovereignty,³⁹⁶ nor did it identify any risk as regards the western part of the strait.³⁹⁷ However, raising some concerns about actions in the eastern part, and noting weak cooperation between the parties,³⁹⁸ ITLOS ordered a positive measure that the parties create a group of independent experts (23-0) and compliance-reporting relief (23-0). It also granted a conditional negative measure that Singapore must suspend its land reclamation works if they were likely to prejudice Malaysia's rights or harm the marine environment (23-0).³⁹⁹ Koh and Lin describe this decision as a 'brilliant move',⁴⁰⁰ but a more restrained assessment is warranted due to unclear and confusing reasoning and doubts as to the urgency of the case.

In contrast to cases involving an alleged breach of substantive treaty obligations, if a party alleges a breach of procedural treaty obligations, international courts have preferred to order the parties to cooperate. International courts do not grant non-aggravation relief because the primary measure achieves the same result.⁴⁰¹ Nevertheless, it is reasonable to doubt whether *MOX Plant* and *Land Reclamation* seriously required interim relief to be prescribed. In particular, there seems to be no urgent risk of irreparable prejudice. Brown's view that there was no need to order provisional measures at all is persuasive. He argues that the Tribunal could simply have reminded the parties of their duty to cooperate.⁴⁰² This observation is all the more compelling given that the Court decided both cases under Article 290(5) of UNCLOS.

³⁹⁴ See Robin Churchill, 'The International Tribunal for the Law of the Sea: Survey for 2003' (2004) 19 *International Journal of Marine and Coastal Law* 369, 378–9. Judge Chandrasekhara Rao argued that interim relief should be granted to preserve the procedural rights of the parties. *Land Reclamation* (n 158) 46–7 [38] (Separate Opinion Chandrasekhara Rao). See also Virzo, 'In tema di misure cautelari comportanti obblighi di cooperazione per la protezione dell'ambiente marino' (n 209) 407–8.

³⁹⁵ For the request, see *Land Reclamation* (n 158) 16–7 [23].

³⁹⁶ *Land Reclamation* (n 158) 22 [71].

³⁹⁷ *Land Reclamation* (n 158) 22 [72].

³⁹⁸ *Land Reclamation* (n 158) 23 [76]–[81] and 24–6 [85]–[99].

³⁹⁹ *Land Reclamation* (n 158) 27–8 [106(1)–(3)].

⁴⁰⁰ Tommy Koh and Jolene Lin, 'The Land Reclamation Case: Thoughts and Reflections' (2006) 10 *Singapore Year Book of International Law* 1, 4.

⁴⁰¹ See *MOX Plant* (n 179) 140 [10] (Separate Opinion Treves).

⁴⁰² Brown, 'Provisional Measures before the ITLOS: The Mox Plant Case' (n 345) 283.

3. States' Jurisdiction and Sovereignty

In many proceedings, requests for interim relief sought to stay the allegedly fraudulent exercise of jurisdiction. These requests concerned actions against foreign legal and natural persons and property, measures taken on disputed territory, or alleged violations of environment-related obligations.

3.1. The Exercise of Jurisdiction over Foreign Legal and Natural Persons and Property

With regard to the contested exercise of jurisdiction over foreign legal and natural persons and property, requesting parties challenged, *inter alia*, the conduct of municipal judicial and administrative proceedings, the execution of capital punishment, and alleged violations of immunities.

3.1.1. Municipal Judicial and Administrative Proceedings

In *Electricity Company*, Belgium questioned Bulgaria's municipal judicial proceedings against a Belgian electricity company. When Bulgaria suspended those proceedings, Belgium withdrew its first request for provisional measures.⁴⁰³ However, after Bulgaria initiated new proceedings, Belgium renewed its request for interim relief, asking the PCIJ to suspend Bulgaria's actions.⁴⁰⁴ The Court ordered Bulgaria not to prejudice Belgium's rights or aggravate the dispute.⁴⁰⁵ Miles argues that the granting of a non-aggravation measure resulted from the Court's concerns over the ongoing Second World War, which could have prolonged the duration of the proceedings.⁴⁰⁶ However, it seems rather that the *raison d'être* of that measure was the fact that Belgium had to reapply for interim relief. The PCIJ sought to indicate a measure that would prevent such a situation from recurring.

⁴⁰³ For Belgium's reasoning behind the withdrawal of the first request, see *Electricity Company* (n 118) 196.

⁴⁰⁴ *Electricity Company* (n 118) 196. Note Elkind (n 27) 209 who claims that the Bulgarian legal proceedings would be to the detriment of Belgium, but there is no indication that this would be irreparable damage.

⁴⁰⁵ *Electricity Company* (n 118) 199.

⁴⁰⁶ Sztucki (n 3) 83; Miles (n 2) 75–6 (including internal citations).

In *Saiga*, ITLOS ordered prompt release of the *Saiga*, a vessel flying the flag of Saint Vincent and the Grenadines.⁴⁰⁷ Not only did Guinea decline to comply but also initiated proceedings against the master of the *Saiga*. Saint Vincent and the Grenadines introduced another case before the Tribunal, named *Saiga (No 2)*, and sought a number of provisional measures. The most important was the release of the *Saiga* and its crew, as well as the suspension and non-enforcement of any judicial or administrative measures.⁴⁰⁸ After the oral phase, Guinea released the *Saiga* and its crew. For this reason, ITLOS decided that this part of the request had become moot.⁴⁰⁹ The Tribunal prescribed a negative measure requiring Guinea to refrain from taking or enforcing any measures against the *Saiga* and its crew (21-0).⁴¹⁰ ITLOS also granted compliance-reporting relief (21-0) and ‘recommended’ in the *dispositif* a non-aggravation measure (21-0).⁴¹¹

Similarly, the Tribunal ordered the suspension of municipal proceedings in *Enrica Lexie*. That case concerned an incident between the Italian oil tanker *Enrica Lexie* and the Indian vessel *St. Anthony*, which resulted in the deaths of two Indian nationals. Italy challenged India’s municipal judicial proceedings related to the incident and requested that ITLOS order India to ‘refrain from taking or enforcing any judicial or administrative measures’ against the marines. Italy also sought permission for the marines to return to, and/or remain in, Italy during the arbitral proceedings.⁴¹² Despite many judges rightly arguing that the case was neither urgent nor posed any risk of irreparable prejudice,⁴¹³ the Tribunal prescribed negative relief that India must suspend existing proceedings (15-6). Moreover, it addressed compliance-reporting (15-6) and non-aggravation measures to both parties, requiring them not to initiate any new proceedings that could aggravate the dispute or prejudice the forthcoming arbitration (15-6).⁴¹⁴ Importantly, the Tribunal declined to grant

⁴⁰⁷ See *M/V ‘Saiga’ (Saint Vincent and the Grenadines v Guinea)* (Prompt Release) [1997] ITLOS Reports 16.

⁴⁰⁸ *Saiga (No 2)* (n 178) 35–6 [23].

⁴⁰⁹ *Saiga (No 2)* (n 178) 38 [36]–[40].

⁴¹⁰ For the reasoning behind this decision, see *Saiga (No 2)* (n 178) 38 [41]. Judge Warioba questioned the majority’s reasoning. In his view, there was no evidence that Guinea intended to take any actions at all. *Saiga (No 2)* (n 178) 44 (Declaration Warioba).

⁴¹¹ *Saiga (No 2)* (n 178) 39–40 [52].

⁴¹² *Enrica Lexie* (n 179) 188–9 [29].

⁴¹³ *Enrica Lexie* (n 179) 208ff (Declaration Kateka), 232ff (Dissenting Opinion Bouguetaia), 240ff (Dissenting Opinion Chandrasekhara Rao), 246ff (Dissenting Opinion Ndiaye), 268ff (Dissenting Opinion Lucky) and 287ff (Dissenting Opinion Heidar).

⁴¹⁴ *Enrica Lexie* (n 179) 205–6 [141].

the positive measure sought by Italy,⁴¹⁵ holding that it would not ensure the balance between the parties.⁴¹⁶ Unfortunately, it did not elaborate further on this issue.

As far as municipal judicial and administrative proceedings against foreign individuals and property are concerned, provisional measures either directly or indirectly require the suspension of a contested action. Notably, these measures call only for suspension and not a formal and final discontinuation of the action.⁴¹⁷ While the primary measure prohibits a very specific action that gives rise to the urgent risk of irreparable prejudice, non-aggravation relief prohibits any similar act from being taken in the future.

3.1.2. Execution of Capital Punishment

All Court's decisions in *Breard*, *LaGrand*, *Avena*, and *Jadhav* concerned the exercise of diplomatic protection over individuals sentenced to death in municipal proceedings that allegedly involved violations of consular law.⁴¹⁸ In each case, the Vienna Convention on Consular Relations served as the legal basis.⁴¹⁹ The requesting parties consistently asked the ICJ to stay the execution,⁴²⁰ and the Court always granted such negative relief, as well as a compliance-reporting measure.⁴²¹ All decisions in question were unanimous, even when some judges believed it to be unjustified.⁴²²

The circumstances of *Avena* (*Interpretation*) differed from the previous cases. In *Medellín v Texas*, the US Supreme Court refused to give direct effect to the *Avena* judgment

⁴¹⁵ A number of judges disagreed with this decision. See *Enrica Lexie* (n 179) 216ff (Declaration Kelly), 218ff (Declaration Francioni) and 226ff (Separate Opinion Jesus).

⁴¹⁶ *Enrica Lexie* (n 179) 203 [126].

⁴¹⁷ See *Enrica Lexie* (n 179) 212 [4] (Declaration Paik). See also Andrea Cannone, 'L'ordinanza del Tribunale internazionale del diritto del mare sulla vicenda della *Enrica Lexie*' (2015) 98 Rivista di diritto internazionale 1144, 1151–2.

⁴¹⁸ See also *Jadhav* (*India v Pakistan*) (Provisional Measures) [2017] ICJ Reports 231, 276–7 [36] (Declaration Bhandari); Pemmaraju Sreenivasa Rao, 'The Jadhav Case (2017): India and Pakistan before the International Court of Justice' (2016) 56 Indian Journal of International Law 379, 393–4.

⁴¹⁹ Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

⁴²⁰ *Vienna Convention on Consular Relations* (*Paraguay v United States of America*) (Provisional Measures) [1998] ICJ Reports 248, 251–2 [9]; *LaGrand* (Provisional Measures) (n 124) 12 [9]; *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Provisional Measures) [2003] ICJ Reports 77, 82 [18]; *Jadhav* (n 418) 234–5 [11].

⁴²¹ *Breard* (Provisional Measures) (n 420) 258 [41]; *LaGrand* (Provisional Measures) (n 124) 16 [29(I)(a)]; *Avena* (n 420) 91–2 [59(I)]; *Jadhav* (n 418) 246 [61(I)].

⁴²² See *Breard* (Provisional Measures) (n 420) 260ff (Declaration Oda); *LaGrand* (Provisional Measures) (n 124) 18ff (Declaration Oda). Cf *Breard* (Provisional Measures) (n 420) 259 (Declaration Schwebel); *LaGrand* (Provisional Measures) (n 124) 21ff (Separate Opinion Schwebel).

(6-3),⁴²³ which found that the United States had violated consular law.⁴²⁴ Mexico, however, claimed a dispute over the interpretation of the *Avena* judgment and sought the ICJ's interpretation. Given the potential execution of individuals covered by the *Avena* judgment, Mexico requested provisional measures to halt their execution, compel the United States to inform the Court of any actions taken, and refrain from any actions that could prejudice Mexico or its nationals.⁴²⁵ The ICJ indicated a negative measure, ordering the United States not to execute the individuals in question unless the formal requirements set out in the *Avena* judgment were met (7-5). The Court also addressed to the United States a compliance-reporting measure (11-1).⁴²⁶ Not only was *Avena (Interpretation)* a proceeding for the interpretation of a judgment, but the negative relief was this time only conditional. The conditionality is precisely a consequence of the fact that the case concerned the interpretation of a judgment.

If one party claims that another party has violated certain international obligations toward a citizen of the former, and intends to carry out the death penalty against that citizen, the Court grant a provisional measure to stay such action. It is difficult to imagine any other form of interim relief that would be suitable in these circumstances. The compliance-reporting measure appears to be granted to ensure that the negative measure is complied with.

3.1.3. Alleged Violations of Immunities

Following the Islamic Revolution in Iran, demonstrators protesting against the United States stormed the US Embassy in Tehran, taking all those present hostage. In *Tehran Hostages*, initiated under the Vienna Convention on Diplomatic Relations (VCDR),⁴²⁷ one of the measures sought by the United States was the release of the hostages.⁴²⁸ The ICJ granted this and ordered that the diplomatic and consular premises be restored to the control of the United States, and that personnel be granted all appropriate immunities relief (15-0).

⁴²³ See *Medellín v Texas* (2008) 552 United States Reports 491.

⁴²⁴ See *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Reports 12.

⁴²⁵ *Avena (Interpretation)* (n 353) 317 [23].

⁴²⁶ *Avena (Interpretation)* (n 353) 331 [80(II)].

⁴²⁷ Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

⁴²⁸ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Provisional Measures) [1979] ICJ Reports 7, 8–9 [2].

It further indicated the non-aggravation measure (15-0).⁴²⁹ Yet, as Sztucki notes, the indicated interim relief was ‘rearranged and reworded’ compared with the US request.⁴³⁰ One should note the positive nature of the provisional measures; an approach that was not common at the time.⁴³¹ The non-aggravation relief probably resulted from the ever-worsening relations between the parties.

What gave rise to *Certain Documents and Data* was that Australian authorities raided Timor-Leste’s legal adviser’s business in the Australian Capital Territory and seized documents used in *Timor Sea Treaty Conciliation* against Australia.⁴³² Timor-Leste asked the ICJ to order Australia to inform which documents were seized, seal and deliver them to the Court, destroy copies, and provide assurances.⁴³³ The Attorney-General of Australia made a number of undertakings during the oral proceedings, but did not exclude using the documents for security purposes.⁴³⁴ Not unanimously,⁴³⁵ the ICJ indicated provisional measures addressing the part of the case that was not covered by Australia’s assurances.⁴³⁶ The Court ordered Australia to keep the documents sealed (12-4), ensure that they were not used against Timor-Leste (12-4), and refrain from interfering with Timor-Leste’s communications with its legal advisers (15-1).⁴³⁷ The provisional measures were therefore a sophisticated mix of negative and positive relief.

In *Immunities and Criminal Proceedings*, Equatorial Guinea and France disagreed over whether the building located at 42 Avenue Foch in Paris had acquired the status of a diplomatic premise of Equatorial Guinea. French police searched the building and seized some items. As interim relief, Equatorial Guinea sought to secure the inviolability of the

⁴²⁹ *Tehran Hostages* (n 428) 20–1 [47(A)].

⁴³⁰ Sztucki (n 3) 57. See also Leo Gross, ‘The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures’ (1980) 74 *American Journal of International Law* 395, 409.

⁴³¹ Vincent Coussirat-Coustère, ‘Indication de mesures conservatoires dans l’affaire du *personnel diplomatique et consulaire des Etats-Unis à Téhéran* (Etats-Unis d’Amérique c. Iran)’ (1979) 25 *Annuaire français de droit international* 297, 309–10.

⁴³² See *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia)* PCA No 2015-42. This case was later discontinued.

⁴³³ *Certain Documents and Data* (n 163) 149 [5].

⁴³⁴ *Certain Documents and Data* (n 163) 157–9 [42]–[48].

⁴³⁵ For many judges, the Attorney-General of Australia’s undertakings removed the entire urgent risk of irreparable prejudice. *Certain Documents and Data* (n 163) 163–6 (Dissenting Opinion Keith), 197–206 [8]–[27] (Dissenting Opinion Greenwood), 209–13 [6]–[21] (Separate Opinion Donoghue) and 222–4 [29]–[33] (Dissenting Opinion Callinan).

⁴³⁶ Cecily Rose, ‘The Protection of Communications between States and Their Counsel in International Dispute Settlement’ (2014) 73 *Cambridge Law Journal* 231, 233. See also *Certain Documents and Data* (n 163) 207 [30] (Dissenting Opinion Greenwood).

⁴³⁷ *Certain Documents and Data* (n 163) 160–1 [55].

building and all its items, as well as to prevent the aggravation of the dispute.⁴³⁸ The ICJ indicated only a positive measure that the building should ‘enjoy treatment equivalent to that required by Article 22 of the VCDR in order to ensure their inviolability’ (16-0).⁴³⁹ Judge *ad hoc* Kateka disagreed, arguing that the used wording provided weaker protection, as it did not oblige France to prevent all intrusions into the building.⁴⁴⁰ One may explain the fact the ICJ did not indicate a non-aggravation relief to deliberately avoid suggesting that such a measure would extend to aspects of the dispute over which it found no *prima facie* jurisdiction.⁴⁴¹ What was left undecided was the status of the seized documents. French authorities were argued to be given broad discretion in this regard.⁴⁴² Notably, the operative part does not reproduce paragraph 95, stating that ‘the execution of any measure of confiscation is to be stayed until the Court takes its decision’.⁴⁴³

The immunity of a warship was at the heart of *ARA Libertad*. Ghanaian authorities authorized the *ARA Libertad*, a frigate used by the Argentine navy to train cadets, to enter the port of Tema, and later detained it in execution of a US court judgment. ITLOS prescribed the positive measure sought by Argentina (20-0).⁴⁴⁴ This was the unconditional release of the vessel and its resupply. The Tribunal also granted compliance-reporting relief (20-0).⁴⁴⁵ The decision to resupply it seem to be the logical consequence of the first measure. Interestingly, neither Argentina nor ITLOS directly challenged Ghana’s judicial proceedings against the *ARA Libertad*.

The Tribunal reapplied the *ARA Libertad* approach in *Three Ukrainian Naval Vessels*. Following the detention of Ukrainian naval and auxiliary vessels in the Kerch Strait, Russian authorities initiated criminal proceedings against Ukrainian servicemen. Ukraine asked ITLOS to order the release of the vessels and their crews, as well as the suspension of the domestic proceedings.⁴⁴⁶ Finding it plausible that warship immunity covered the military vessels,⁴⁴⁷ the Tribunal prescribed positive (19-1), compliance-

⁴³⁸ *Immunities and Criminal Proceedings* (n 163) 1152 [17].

⁴³⁹ *Immunities and Criminal Proceedings* (n 163) 1171 [99(I)].

⁴⁴⁰ *Immunities and Criminal Proceedings* (n 163) 1187 [30] (Separate Opinion Kateka).

⁴⁴¹ Cf *Immunities and Criminal Proceedings* (n 163) 1160 [50].

⁴⁴² Hélène de Pooter, ‘La Cour internationale de Justice face à la question des biens mal acquis : à propos de l’ordonnance du 7 décembre 2016 rendue dans l’affaire des *Immunités et procédures pénales (Guinée Équatoriale c. France)*’ (2016) 62 *Annuaire français de droit international* 53, 69–70.

⁴⁴³ *Immunities and Criminal Proceedings* (n 163) 1170 [95].

⁴⁴⁴ *ARA Libertad* (n 48) 338 [28].

⁴⁴⁵ *ARA Libertad* (n 48) 350 [108(1)]–[108(2)].

⁴⁴⁶ *Three Ukrainian Naval Vessels* (n 46) 289 [24(1)].

⁴⁴⁷ *Three Ukrainian Naval Vessels* (n 46) 306–7 [96]–[99].

reporting (19-1) and non-aggravation measures (19-1). The former concerned the release of the vessels and their crews.⁴⁴⁸ Unfortunately, ITLOS failed to explain why immunity of warships extended also to the servicemen. This point is far from being obvious.⁴⁴⁹ Nor did the Tribunal clarify the reason why it declined to order the suspension of the criminal proceedings.⁴⁵⁰ On the other hand, it can be questioned whether this was not already covered by a non-aggravation measure, as it was in *Electricity Company*.

As far as cases concerning alleged violations of immunities are concerned, provisional measures intend to create a situation in which the immunities invoked will be respected. In practice, they are positive in nature, obliging a party to release persons or objects concerned. *Certain Documents and Data* was exceptional, as it concerned documents. Inevitably, actions against documents differ in nature from those against persons, buildings, or vessels.

It is logical to order non-aggravation measures in cases of the category under consideration. It may come as a surprise that the Court did not decide to address a non-aggravation measure in *Certain Documents and Data*, be it to one or both parties. While the circumstances of *Immunities and Criminal Proceedings* explain the decision not to grant non-aggravation relief, it is difficult to understand why ITLOS did not prescribe this measure in *ARA Libertad*, yet did so in the similar case *Three Ukrainian Naval Vessels*.

3.2. The Exercise of Jurisdiction over the Disputed Territory

El Salvador v Nicaragua before the CACJ concerned a treaty between Nicaragua and the United States, under which Nicaragua leased part of the Gulf of Fonseca to the United States for 99 years for the construction of a military base. El Salvador argued that this arrangement violated its rights in the Gulf. At El Salvador's request, the CACJ ruled that 'el estado en que deben permanecer las Altas Partes hasta el momento en que se pronuncie sentencia definitiva, en la misma situación que mantenían en el Golfo de Fonseca antes de la celebración del Tratado que motiva la demanda'.⁴⁵¹ This relief froze the situation

⁴⁴⁸ *Three Ukrainian Naval Vessels* (n 46) 311–2 [124].

⁴⁴⁹ *Three Ukrainian Naval Vessels* (n 46) 322 [21] (Declaration Kittichaisaree).

⁴⁵⁰ *Three Ukrainian Naval Vessels* (n 46) 327 [33] (Declaration Kittichaisaree).

⁴⁵¹ *El Salvador v Nicaragua* (Interlocutory Decree) (n 77) 230–1.

between the parties and allowed El Salvador to continue exercising the rights it claimed to have in the Gulf.

In *Fisheries Jurisdiction*, the United Kingdom and the Federal Republic of Germany (FRG) challenged Iceland's regulations extending its exclusive fisheries jurisdiction from 12 to 50 nautical miles. They claimed to have traditionally fished in that zone. Their request for provisional measures asked that Iceland refrain from enforcing its regulations or taking any actions against British and German fishing vessels. It also requested that the ICJ indicate that the applicant States be granted a specific fishing quota in the disputed zone, and that all parties abstain from aggravating the dispute or prejudging each other's rights.⁴⁵²

The Court granted virtually identical interim relief (14-1). It only added compliance-reporting measures and adjusted the proposed fishing quotas.⁴⁵³ With regard to the latter, the ICJ based its decision on statistical data concerning the fishing activities of the requesting States in the disputed area⁴⁵⁴ and set the quotas at the average level of the previous five years.⁴⁵⁵ As Favoreu observes, the indicated interim relief effectively froze the dispute before it had formally begun.⁴⁵⁶ Like in *El Salvador v Nicaragua*, provisional measures enabled both parties to exercise the rights they each claimed to possess.

Certain Activities was a case concerning a territorial dispute between Costa Rica and Nicaragua. Nicaragua began constructing an artificial canal (*caño*) to connect the San Juan River (under Nicaraguan sovereignty) with the Los Portillos Lagoon (also under Nicaraguan sovereignty), allegedly through Costa Rican territory. Costa Rica requested the ICJ to order Nicaragua to withdraw all troops and other personnel from the disputed area, cease construction of the *caño*, stop felling trees, and refrain from aggravating the dispute.⁴⁵⁷ During the proceedings, construction of the *caño* was completed, rendering that part of the request moot.⁴⁵⁸

⁴⁵² *Fisheries Jurisdiction (UK)* (n 131) 13–4 [1]. See *Fisheries Jurisdiction (FRG)* (n 131) 31 [1].

⁴⁵³ *Fisheries Jurisdiction (UK)* (n 131) 17–8 [(1)]; *Fisheries Jurisdiction (FRG)* (n 131) 35 [(1)].

⁴⁵⁴ *Fisheries Jurisdiction (UK)* (n 131) 17 [25]; *Fisheries Jurisdiction (FRG)* (n 131) 34 [26].

⁴⁵⁵ *Fisheries Jurisdiction (UK)* (n 131) 17 [26]; *Fisheries Jurisdiction (FRG)* (n 131) 34–5 [27].

⁴⁵⁶ Louis Favoreu, 'Les ordonnances des 17 et 18 août 1972 dans les affaires relatives à la compétence en matière de pêcheries - Contribution au droit procédural de la Cour en matière de mesures conservatoires, exceptions préliminaires et compétence en cas de défaut (Royaume-Uni c. Islande et République fédérale d'Allemagne c. Islande).' (1972) 18 *Annuaire français de droit international* 291, 302–3.

⁴⁵⁷ *Certain Activities* (Provisional Measures 2011) (n 161) 16–7 [45].

⁴⁵⁸ *Certain Activities* (Provisional Measures 2011) (n 161) 24 [73]–[75].

To protect probable territorial rights,⁴⁵⁹ the Court indicated four provisional measures. In addition to non-aggravation (17-0) and compliance-reporting relief (17-0), the negative relief obliged both parties to refrain from sending or maintaining personnel in the disputed area (17-0).⁴⁶⁰ The positive relief allowed Costa Rica to send civilian personnel to protect the international wetland area located in the disputed territory (13-4).⁴⁶¹ This measure was also a pure judicial innovation, as neither party had raised the issue of protecting the wetland area.⁴⁶² Fleury argues that the ICJ established a special status for the wetlands.⁴⁶³ In fact, it was the entire disputed territory that was granted special status, in line with the approach taken in previous cases.

Subsequently, Costa Rica submitted new request for provisional measures, because Nicaragua was constructing two new *caños* and a trench in the disputed area.⁴⁶⁴ The ICJ reaffirmed the earlier interim relief and addressed a compliance-reporting measure to both parties (16-0). In addition, the Court ordered the negative measure requiring Nicaragua to stay all construction activities and withdraw any personnel from the area (16-0). The positive measure authorised Costa Rica to take appropriate environmental remediation actions (15-1).⁴⁶⁵ Another positive measure instructed Nicaragua to fill the trench within two weeks and, within one week, submit a detailed report to the ICJ with photographic evidence (16-0).⁴⁶⁶ Fuentes and Durney rightly described this precise and tailored relief as ‘quite remarkable’.⁴⁶⁷ In this instance, the provisional measures were not intended to

⁴⁵⁹ *Certain Activities* (Provisional Measures 2011) (n 161) 19–20 [55]–[59].

⁴⁶⁰ But Judge *ad hoc* Dugard argued that only Nicaragua should have been required to withdraw its personnel. See *Certain Activities* (Provisional Measures 2011) (n 161) 67 [22] (Separate Opinion Dugard).

⁴⁶¹ *Certain Activities* (Provisional Measures 2011) (n 161) 27–8 [86].

⁴⁶² See *Certain Activities* (Provisional Measures 2011) (n 161) 44 [11] (Declaration Skotnikov). See also *Certain Activities* (Provisional Measures 2011) (n 161) 41 [33] (Separate Opinion Sepúlveda-Amor).

⁴⁶³ He also refers to *Temple (Interpretation)*. See Thibaut Charles Fleury, ‘L’ordonnance de la CIJ dans l’affaire *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* (mesures conservatoires)’ (2011) 57 *Annuaire français de droit international* 165, 176–9.

⁴⁶⁴ For Nicaragua’s request, see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Provisional Measures) [2013] ICJ Report 354, 357–8 [15].

⁴⁶⁵ Judge *ad hoc* Dugard claimed that ICJ should have granted Costa Rica broader access to the contested *caños*. See *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 392–3 [5]–[7] (Declaration Dugard).

⁴⁶⁶ *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 369–70 [59].

⁴⁶⁷ Ximena Fuentes and Mariana Durney, ‘Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), 2011 and Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), 2010’ in Paula Wojcikiewicz Almeida and Jean-Marc Sorel (eds), *Latin America and the International Court of Justice: contributions to international law* (Routledge 2017) 296.

establish a special regime over the disputed territory, but rather constituted a direct response to Nicaragua's actions in contravention of the prior order.

Ghana/Côte d'Ivoire was a case concerning a maritime delimitation dispute submitted to a Special Chamber of ITLOS. Côte d'Ivoire sought provisional measures, challenging Ghana's oil drilling activities in the disputed area.⁴⁶⁸ The Special Chamber decided that Côte d'Ivoire's rights required protection.⁴⁶⁹ It prescribed negative measures, ordering Ghana not to conduct new oil drilling (5-0) and not to use any collected information to Côte d'Ivoire's detriment (5-0). Positive measures required both parties to cooperate (5-0) and preserve the continental shelf (5-0). The Special Chamber additionally addressed non-aggravation (5-0) and compliance-reporting relief to both parties (5-0).⁴⁷⁰ First, contrary to Côte d'Ivoire's request, only new drilling was to be suspended. The Special Chamber explained that a total suspension would place an undue burden on Ghana and potentially harm the marine environment.⁴⁷¹ Second, the Special Chamber prescribed provisional measures relating to the marine environment despite explicitly finding no risk in this regard.⁴⁷²

The final case in this category is *Guyana v Venezuela*. The parties disputed the validity of a 19th-century arbitral award that granted the oil-rich Essequibo region to Guyana. Venezuela announced a referendum concerning, *inter alia*, the creation of a 'Guyana-Essequibo State' within Venezuelan territory.⁴⁷³ As provisional measures, Guyana requested that the ICJ order Venezuela not to proceed with the referendum, particularly with respect to the proposed questions, not to take any actions aimed at preparing for or enabling 'the exercise of sovereignty or de facto control' over the Essequibo region, and to refrain from aggravating the dispute.⁴⁷⁴ The Court found that the measure regarding 'the exercise of sovereignty or de facto control' was sufficiently linked to Guyana's plausible territorial right.⁴⁷⁵ Consequently, the ICJ indicated the negative relief that Venezuela must refrain from taking any action that could alter the current situation in the Essequibo region, over which Guyana 'administers and exercises control' (15-0). The Court also addresses

⁴⁶⁸ *Ghana/Côte d'Ivoire* (n 178) 152–3 [25].

⁴⁶⁹ *Ghana/Côte d'Ivoire* (n 178) 158–9 [59]–[62].

⁴⁷⁰ *Ghana/Côte d'Ivoire* (n 178) 166 [108].

⁴⁷¹ *Ghana/Côte d'Ivoire* (n 178) 164–5 [99]–[101]. See Chapter III 4.1.

⁴⁷² *Ghana/Côte d'Ivoire* (n 178) 159 [67]. See Chapter III 4.2.

⁴⁷³ *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Provisional Measures) [2023] ICJ Reports 655, 661–2 [15].

⁴⁷⁴ *Guyana v Venezuela* (Provisional Measures) (n 473) 659–60 [11].

⁴⁷⁵ *Guyana v Venezuela* (Provisional Measures) (n 473) 663–4 [23]–[25].

the non-aggravation relief to both parties (15-0).⁴⁷⁶ Accordingly, the provisional measures did not target the referendum itself, but rather its potential consequences.⁴⁷⁷

Guyana reapplied for provisional measures when Venezuela planned to organise election in the Essequibo region.⁴⁷⁸ The Court decided to modify its previous order. It reaffirmed the existing provisional measures (15-0) and further directed Venezuela not to prepare or conduct elections in the territory over which Guyana ‘administers and exercises control’ (12-3).⁴⁷⁹ The latter point raised procedural concerns. It seems that this negative measure was already included in the previous negative relief.⁴⁸⁰ It calls into question the need for the ICJ to modify the provisional measures.⁴⁸¹

When the challenged exercise of jurisdiction over a disputed territory gives rise to an urgent risk of irreparable prejudice, international courts typically grant negative relief prohibiting the disputed actions. If both parties seek to exercise certain rights over the territory, international courts may establish a special statute for the territory so that each party can exercise those rights to some extent. If a party merely undermines the status of the disputed territory, the provisional measure is purely negative, as in *Guyana v Venezuela*. *Certain Activities* was an exception to these general rules, as only Costa Rica was permitted to send its personnel to protect the wetland in the disputed territory. This decision could be justified by noting that Costa Rica bore international responsibility for the wetland,⁴⁸² and it could be argued that the ICJ merely allowed Costa Rica to fulfil its international obligations. Yet it is submitted that both parties should have been allowed to send their personnel to protect the wetland.⁴⁸³

In the cases under consideration, international courts also granted non-aggravation and compliance-reporting measures. The latter seem to be motivated by the importance of

⁴⁷⁶ *Guyana v Venezuela* (Provisional Measures) (n 473) 668 [45].

⁴⁷⁷ Cf Harris (n 163) 968. But see *Guyana v Venezuela* (Provisional Measures) (n 473) 688–9 [33]–[34] (Separate Opinion Couvreur).

⁴⁷⁸ For Guyana’s request, see *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Modification of Provisional Measures) ICJ General List No 171 (1 May 2025) [13].

⁴⁷⁹ *Guyana v Venezuela* (Modification of Provisional Measures) (n 478) [46].

⁴⁸⁰ *Guyana v Venezuela* (Modification of Provisional Measures) (n 478) [10]–[12] (Joint Dissenting Opinion Xue, Bhandari and Nolte).

⁴⁸¹ See further Gapsa, ‘Clarifying the Unclear: Requests for Modification, Revocation, and New Provisional Measures’ (n 127).

⁴⁸² *Certain Activities* (Provisional Measures 2011) (n 161) 25–6 [80].

⁴⁸³ See also *Certain Activities* (Provisional Measures 2011) (n 161) 41 [34] (Separate Opinion Sepúlveda-Amor), 51 [15] (Declaration Greenwood) and 57–9 [18]–[21] (Declaration Guillaume). See also *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 389–90 [8]–[9] (Declaration Guillaume).

the dispute's subject matter, which concerns territorial sovereignty, and this also appears to justify the former.

3.3. The Exercise of Jurisdiction in Alleged Violation of Environment-Related Obligations

In *Nuclear Tests*, Australia and New Zealand contested France's atmospheric nuclear tests in the Pacific. Like the relief sought on the merits, they asked the ICJ to order a stay to all tests,⁴⁸⁴ or at least those giving rise to radioactive fallout.⁴⁸⁵ The Court indicated (8-6) that:

Australia [or New Zealand] and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian [and New Zealand's] territory.⁴⁸⁶

It follows that France was merely required to refrain from tests that could give rise to radioactive fallout. Such a measure seems to be conditioned by the Court's decision that there was an urgent risk of irreparable prejudice only with respect to the applicant States' right to protection from the deposit of radioactive fallout on their territory.⁴⁸⁷ It is conceptually interesting that the ICJ considered the suspension of atmospheric nuclear tests only as a specific form of a non-aggravation measure.

The suspension of the contested measure was also the essence of the Tribunal's decision in *Southern Bluefin Tuna*. Australia and New Zealand challenged Japan's fishing activities concerning the southern bluefin tuna. They requested ITLOS to prescribe that Japan immediately cease its experimental fishing, reduce its catches of southern bluefin tuna, and that the parties neither aggravate the dispute nor prejudice each other's rights.⁴⁸⁸ Unfortunately, the Tribunal did not explain precisely which rights required protection

⁴⁸⁴ *Nuclear Tests (Australia v France)* (Interim Measures of Protection) [1973] ICJ Reports 99, 100 [1].

⁴⁸⁵ *Nuclear Tests (New Zealand v France)* (Interim Measures of Protection) [1973] ICJ Reports 135, 136 [1].

⁴⁸⁶ See *Nuclear Tests (Australia)* (n 484) 106; *Nuclear Tests (New Zealand)* (n 485) 142.

⁴⁸⁷ *Nuclear Tests (Australia)* (n 484) 105 [29]–[31]; *Nuclear Tests (New Zealand)* (n 485) 141 [30]–[32].

⁴⁸⁸ *Southern Bluefin Tuna* (n 179) 291 [34].

against which specific urgent risk of irreparable prejudice. As Evans observes, ‘the more one probes the Order, the less satisfactory the reasoning behind the award appears to be’.⁴⁸⁹

Unlike the requests, the Tribunal addressed all provisional measures to both parties. The negative relief required the parties to reduce their annual catches (18-4) and suspend the experimental fishing program (20-2). The positive relief required the parties to resume negotiations (21-1) and make efforts to convince other States to protect the southern bluefin tuna (20-2). ITLOS also prescribed non-aggravation (20-2) and compliance-reporting relief (21-1).⁴⁹⁰ In many respects, the order resembles that of the ICJ in *Fisheries Jurisdiction*. Yet the Tribunal did not explain how it calculated the fishing quotas.

The negative measure ordering Poland to cease the mining activities in Turów was the only provisional measure prescribed in *Turów Mine*. The Czech Republic had challenged Poland’s extension of the concession for the lignite mine in Turów, arguing that the mine’s operations had lowered groundwater levels on the Czech side of the border. The Czech Republic requested an order requiring Poland to cease mining activities. The CJEU granted the request.⁴⁹¹ Justifying the choice of interim relief, the CJEU Vice-President rejected Poland’s claims that halting mining would jeopardise energy security, cause economic losses, or negatively affect the local community.⁴⁹²

When Poland declined to comply, the Czech Republic requested an additional interim measure, seeking a penalty payment of €5,000,000.⁴⁹³ To ensure the effectiveness of its initial ruling, the CJEU ordered Poland to pay €500,000 per day until it complied with the first decision. In adopting this measure, the Court relied on its earlier jurisprudence from *Białowieża Forest*.⁴⁹⁴ Regrettably, the Vice-President failed to explain the basis for the amount imposed or the rationale for setting the penalty on a *per diem* basis.⁴⁹⁵ Never has any international court ordered such a measure. It is lamentable that this landmark

⁴⁸⁹ Malcolm D Evans, ‘The *Southern Bluefin Tuna* Dispute: Provisional Thinking on Provisional Measures?’ (1999) 10 Yearbook of International Environmental Law 7, 7.

⁴⁹⁰ *Southern Bluefin Tuna* (n 179) 297–300 [90(1) and (2)].

⁴⁹¹ *Turów Mine* (Order of 21 May 2021) (n 237) [1].

⁴⁹² *Turów Mine* (Order of 20 September 2021) (n 237) [92]–[93].

⁴⁹³ *Turów Mine* (Order of 20 September 2021) (n 237) [1].

⁴⁹⁴ Case C-441/17 R *Commission v Poland (Białowieża Forest)* (Order of the Court (Grand Chamber) of 20 November 2017) ECLI:EU:C:2017:877 [104].

⁴⁹⁵ Cf *Turów Mine* (Order of 20 September 2021) (n 237) [50].

decision was not rendered by a multi-member bench, which would have enhanced its legitimacy.⁴⁹⁶

Although granted by different international courts, the interim relief in the analysed cases was consistent: it was negative, ordering parties to suspend contested actions. This approach mirrors that adopted in cases concerning the exercise of jurisdiction over disputed territory. In both categories, the negative measures were precise and unambiguous. Given the circumstances, there was no need for international courts to grant other forms of interim relief. Suspension of the contested action de-escalates the dispute. Compliance with interim relief is self-evident and does not require the submission of any reports. One should also note that Bendel's view that if an international court decides to grant interim relief to indirectly protect the environment, it can choose from various forms, such as unilateral acts by the responding State, strengthening cooperation between the parties, or establishing a specific territorial regime.⁴⁹⁷ The above analysis confirmed some of her suggestions.

4. The Threat or Use of Force

Only in a few cases have parties been able to directly challenge the threat or actual use of force. These proceedings involved alleged violations of the principle of non-intervention, alleged acts of armed aggression, and hostilities over contested territory

4.1. Alleged Violations of the Principle of Non-Intervention

In *Honduras v El Salvador and Guatemala*, Honduras alleged that El Salvador and Guatemala sponsored revolutionaries in Honduras. As interim relief, the CACJ 'fix[ed] the status' of the respondents, ordering them to cease their military and related activities.⁴⁹⁸

In *Military and Paramilitary Activities*, Nicaragua accused the United States of interfering in its internal affairs by, *inter alia*, supporting rebel groups and mining ports. Similarly to the relief sought on the merits, Nicaragua sought the ICJ to order the United States to stop supporting rebel groups, refrain from actions against it, and not aggravate the

⁴⁹⁶ On this point, see Kuc and Gapsa (n 250).

⁴⁹⁷ See Justine Bendel, 'The Provisional Measures Orders in International Environmental Disputes: A Case for International Courts and Tribunals' (2019) 88 *Nordic Journal of International Law* 489, 516–23.

⁴⁹⁸ *Honduras v El Salvador and Guatemala* (Interlocutory Decree) (n 36) 839.

dispute.⁴⁹⁹ The Court indicated that the United States should neither block nor mine Nicaraguan ports (15-0) and respect Nicaragua's sovereignty and independence (14-1). The ICJ also addressed non-aggravation relief to both parties (15-0).⁵⁰⁰ The measure concerning the Nicaraguan ports was the only concrete interim relief ordered.⁵⁰¹ Interestingly, the Court indicated it although Nicaragua had not sought it. On the other hand, the ICJ did not explicitly prohibit support for rebel groups. Contrary to some views,⁵⁰² this prohibition appears to be encompassed by the measure protecting Nicaragua's sovereignty and independence. Yet the Court's failure to make this requirement explicit is telling.

Precision of wording should characterise the interim relief in the cases in question. This seems necessary given the subject matter of the dispute, in general, and the source of the urgent risk of irreparable prejudice, in particular. From this perspective, *Military and Paramilitary Activities* could have been clearer. In particular, the measure concerning Nicaragua's sovereignty is thought-provoking. It is neither a positive nor a negative relief.

4.2. Alleged Acts of Armed Aggression

The Democratic Republic of the Congo (DRC) invited Ugandan armed forces to help stabilise the situation in eastern Congo. In *DRC v Uganda*, the DRC challenged Uganda's refusal to withdraw its troops. Accusing Uganda of armed aggression and of committing crimes against the population of eastern Congo, the DRC asked the ICJ to order Uganda to cease its military activities, stop committing crimes, and withdraw from the DRC. The DRC also requested that Uganda stop suppressing the human rights of local populations, cease all illegal exploitation of the DRC's natural resources, and respect its sovereignty, political independence, and territorial integrity.⁵⁰³

The Court addressed all provisional measures to both parties. It indicated that they were to respect the human rights of local populations (14-0), comply with international law, especially the binding Security Council Resolution demanding the withdrawal of troops

⁴⁹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Provisional Measures) [1984] ICJ Reports 169, 173 [8].

⁵⁰⁰ *Military and Paramilitary Activities* (n 499) 186–7 [41(B)].

⁵⁰¹ Monroe Leigh, 'Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). 1984 ICJ Reports 169' (1984) 78 *American Journal of International Law* 894, 897.

⁵⁰² *Contra Leigh* (n 501) 897.

⁵⁰³ *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Provisional Measures) [2000] ICJ Reports 111, 115–6 [13].

(14-0),⁵⁰⁴ and refrain from prejudicing their rights or aggravating the dispute, including through armed activities (14-0).⁵⁰⁵ Consequently, the first two measures were positive, while the third one was negative.

The ICJ is said to avoid contradicting the actions of the Security Council.⁵⁰⁶ Instead, it decided to add its authoritative voice to the political efforts aimed at resolving the dispute.⁵⁰⁷ The Court seems to reason that the withdrawal of troops would resolve other issues, such as the exploitation of natural resources.⁵⁰⁸

Uganda's clashes with neighbouring States in eastern Congo were undeniable, as were violations of international humanitarian law and human rights. However, this does not seem to justify the application of all provisional measures against both parties.⁵⁰⁹ It is equally unclear why the issue of armed action was only limited to non-aggravation relief. It is therefore impossible to agree with Judge Owada that the measures in question are such that 'few would disagree'.⁵¹⁰

One cannot deduce from *DRC v Uganda* a typical approach in cases concerning alleged armed attacks. The circumstances of that case were unique due to the binding Security Council Resolution issued before the ICJ's decision on provisional measures. However, it is reasonable to assume that interim relief would compel the accused party to cease its actions. This should be an independent negative measure, not part of non-aggravation relief, directed at only one party.

4.3. Hostilities Over Contested Territory

In *Frontier Dispute*, a Chamber of the ICJ was tasked with resolving a territorial dispute between Burkina Faso and Mali. During the proceedings, armed hostilities broke out over the disputed area, rich in natural resources. Despite the conclusion of a ceasefire agreement, the troops were not withdrawn. Both parties sought interim relief. In essence, the requested

⁵⁰⁴ UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304 (2000).

⁵⁰⁵ *DRC v Uganda* (n 503) 129 [47].

⁵⁰⁶ See Emmanuel Paillard, 'Affaire des activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda) demande en indication de mesures conservatoires, ordonnance du 1er juillet 2000' (2000) 46 *Annuaire français de droit international* 242, 253; Dino Kritsiotis, 'Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): Provisional Measures' (2001) 50 *International and Comparative Law Quarterly* 662, 669.

⁵⁰⁷ Kritsiotis (n 506) 668.

⁵⁰⁸ Cf *DRC v Uganda* (n 503) 128 [43].

⁵⁰⁹ Cf Kritsiotis (n 506) 668.

⁵¹⁰ *DRC v Uganda* (n 503) 131 [1] (Declaration Owada); Kritsiotis (n 506) 668.

measures concerned the non-aggravation of the dispute, the preservation of evidence, the withdrawal of troops, and refraining from any acts of territorial administration beyond the line proposed as the frontier in 1975.⁵¹¹

The Chamber addressed five provisional measures to both parties.⁵¹² The first was non-aggravation relief (5-0). The second was evidence-protection relief (5-0). Importantly, this referred to the main dispute, not to the armed clashes. The third relief was positive, requiring the parties to observe the ceasefire agreement (5-0), reaffirming an obligation that already existed.⁵¹³ The fourth measure was also positive. It gave the parties 20 days to reach an agreement regarding the line for troop withdrawal (5-0). The parties were therefore given the freedom to determine the extent of the withdrawal of troops. The final measure was negative. It provided that the situation in the disputed area should not be altered from what it was prior to the outbreak of hostilities (5-0). Using this wording, the Chamber avoided any reference to the 1975 line.⁵¹⁴ To some extent, this measure repeated or rather reformulated non-aggravation relief.

The order in *Land and Maritime Boundary* provides another example of a decision concerning a territorial dispute involving armed clashes. Accusing Nigeria of an armed attack, Cameroon requested three provisional measures. That is, the withdrawal of troops to their positions prior to the Nigerian alleged armed attack of 3 February 1996; abstention from all military activity along the contested boundary; and the non-interference with the gathering of evidence.⁵¹⁵ Although Nigeria did not request interim relief, it contested Cameroon's plans to organise a referendum in the disputed area.⁵¹⁶

The ICJ indicated five provisional measures.⁵¹⁷ The first concerned the non-aggravation of the dispute and the non-prejudice of the parties' rights (17-0). This relief appears to indirectly address Cameroon's proposed referendum, contrary to what Bekong argues.⁵¹⁸ The second relief was positive and required the parties to observe their ceasefire

⁵¹¹ *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures) [1986] ICJ Reports 3, 7–8 [8]. See also *Frontier Dispute* 6 [6].

⁵¹² *Frontier Dispute* (n 511) 11–2 [31].

⁵¹³ Cf *Frontier Dispute* (n 511) 10–1 [27].

⁵¹⁴ *Frontier Dispute* (n 511) 11 [28]–[29].

⁵¹⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Provisional Measures) [1996] ICJ Report 13, 18 [20].

⁵¹⁶ *Land and Maritime Boundary* (n 515) 19 [23].

⁵¹⁷ *Land and Maritime Boundary* (n 515) 24–5 [49].

⁵¹⁸ Contra Njinkeng Julius Bekong, 'International Dispute Settlement: Land and Maritime Boundary between Cameroon and Nigeria - Origin of the Dispute and Provisional Measures' (1997) 9 *African Journal of International and Comparative Law* 287, 309.

agreement (16-0). This merely reiterated commitments already in place. The third measure was positive and provided that armed forces were not to extend beyond the positions they held prior to 3 February 1996 (12-5). The fourth measure was evidence-protection relief (16-1). This obligation was broader than that in *Frontier Dispute*, which only required the parties not to impede the collection of evidence. The fifth and final measure was positive. It required the parties to cooperate with UN fact-finding missions (16-1). Interestingly, neither party claimed that this would have been necessary or required.⁵¹⁹ In general, the measures indicated by the Court were practically identical to those in *Frontier Dispute*.⁵²⁰

The last case in this category is *Temple (Interpretation)*. Like *Avena (Interpretation)*, it involved a request for provisional measures in proceedings aimed at interpreting a previous judgment of the Court. In the 1962 *Temple* judgment, the ICJ declared that the Temple of Preah Vihear was located on territory under the sovereignty of Cambodia.⁵²¹ Thailand withdrew its forces and erected a barbed-wire fence separating the ruins from the rest of the Preah Vihear mountain. Cambodia argued that this area should also fall under its control. Following a number of armed incidents, Cambodia requested an interpretation of the 1962 Judgment and sought provisional measures. These concerned the immediate and unconditional withdrawal of all Thai forces, a ban on their activities in the Temple area, and a general obligation not to interfere with Cambodia's rights or aggravate the dispute.⁵²²

The ICJ indicated five provisional measures, four of which were addressed to both parties. Some were uncontroversial, such as non-aggravation (15-1) and compliance-reporting relief (15-1) or the positive measure requiring Thailand not to interfere with Cambodia's supply of food and water to non-military personnel at the Temple (15-1). Others were, at best, unusual. One positive measure obliged the parties to withdraw their military personnel from the provisional demilitarised zone established by the Court (11-5).

⁵¹⁹ *Land and Maritime Boundary* (n 515) 23–4 [46].

⁵²⁰ See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1998] ICJ Reports 304, 32 (Declaration Mbaye); John G Merrills, 'The Land and Maritime Boundary Case (*Cameroon v. Nigeria*), Order of 15 March 1996' (1997) 46 *International and Comparative Law Quarterly* 676, 680.

⁵²¹ See *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Reports 6.

⁵²² *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) [2011] ICJ Reports 537, 541 [17].

Another required them to cooperate within the Association of South-East Asian Nations and to allow observers access to the provisional demilitarised zone (15-1).⁵²³

First, the four corners of the demilitarised zone did not correspond to any specific topographical data.⁵²⁴ Judge *ad hoc* Cot even wryly remarked that the ICJ had established the provisional demilitarised zone through an ‘armchair strategy.’⁵²⁵ Second, the obligation to allow observers applied to the entire provisional demilitarised zone, including areas not in dispute before the Court.⁵²⁶ Contrary to previous cases, the ICJ, for unknown reasons, decided neither to allow the parties to determine the troop withdrawal line themselves nor to simply refrain from military activity.

It is difficult to assess the orders in question. On the one hand, Judge *ad hoc* Mbaye was correct in stating that the ICJ had developed in *Frontier Dispute* and *Land and Maritime Boundary* a set of measures that should be granted in situations involving hostilities over contested territory.⁵²⁷ Commentators point out that these measures were intended to coordinate judicial and extrajudicial actions in order to alleviate tensions.⁵²⁸ On the other hand, *Temple (Interpretation)* disrupted this framework. Tanaka rightly observes that it is doubtful whether it sets a ‘good precedent’.⁵²⁹

In each case, the Court adopted a different approach to the withdrawal of the parties’ troops. In *Frontier Dispute*, it left it to the parties to determine the line of withdrawal. In *Land and Maritime Boundary*, it determined the line itself. In *Temple (Interpretation)*, instead of setting a line, the ICJ established a provisional demilitarised zone. This suggests that the Court is still searching for the optimal solution to this issue. As a result, requesting parties remain uncertain about the content of provisional measures.

The discussed cases initiate a trend of evidence-protection measures. They also take the form of fact-finding missions. The involvement of independent bodies may suggest the need for the Court to have access to evidence that is independent of the propaganda of either

⁵²³ *Temple (Interpretation)* (n 522) 555–6 [69(B)].

⁵²⁴ Pierre d’Argent, ‘Juge ou policier : les mesures conservatoires dans l’affaire du *Temple de Preah Vihear*’ (2011) 57 *Annuaire français de droit international* 147, 157.

⁵²⁵ *Temple (Interpretation)* (n 522) 631–2 [22] (Dissenting Opinion Cot).

⁵²⁶ See Tanaka, ‘*Temple of Preah Vihear*’ (n 366) 218 para 49. See Chapter III 4.2.

⁵²⁷ See also *Land and Maritime Boundary* (n 520) 33–4 (Declaration Mbaye).

⁵²⁸ Merrills (n 520) 680–1.

⁵²⁹ Tanaka, ‘*Temple of Preah Vihear*’ (n 366) 218 para 49.

side. Interestingly, the ICJ indicate compliance-reporting relief only once, in *Temple (Interpretation)*. Such relief would seem useful in the circumstances of the three cases.

5. Human Rights Law

International courts have granted a number of provisional measures in proceedings initiated under various human rights treaties. In some cases, the requesting parties exercised diplomatic protection. In others, they challenged policies and practices allegedly violating human rights, alleged violations committed during armed conflicts, or alleged breaches of the Genocide Convention.

5.1. Diplomatic Protection

In *Ukraine v Russia (III)*, Ukraine challenged the detention and criminal proceedings by the Russian authorities against a Ukrainian Crimean Tatar, Mr Dzhemilov. The ECtHR ordered both parties to respect Mr Dzhemilov's rights under the ECHR. In particular, this concerned his right to security of person and access to legal assistance.⁵³⁰ It is unclear whether Ukraine requested provisional measures or whether the ECHR acted *proprio motu*. Interestingly, the ECtHR did not refer to any specific provision of the ECHR; instead, it cited the Convention as a whole and listed some of the relevant rights. One may wonder how Ukraine was expected to provide legal aid to Mr Dzhemilov, given that it was Russia exercising control over Crimea.

Ukraine v Russia (VIII) before the ECtHR concerned the Kerch Strait incident. Ukraine requested that Russia provide the 24 servicemen detained with urgent medical assistance, inform them of their health status, location of detention, and all medical treatment they received. Additionally, Ukraine asked that the sailors be treated as prisoners of war under international humanitarian law and be immediately repatriated to Ukraine.⁵³¹ According to a press release, the ECtHR only obliged Russia to provide the necessary medical care.⁵³² In this way, the ECtHR limited itself to measures falling within the scope of the ECHR. It did not consider it necessary to supervise the medical assistance provided

⁵³⁰ *Ukraine v Russia (III)* (dec) App no 49537/14 (ECtHR, 1 September 2015).

⁵³¹ ECtHR, 'ECHR Puts Questions to Russian Government After Receiving New Inter-State Case from Ukraine Concerning Events in the Sea of Azov' (30 November 2018) Press Release 2018/412.

⁵³² ECtHR, 'ECHR Grants Interim Measure in New Inter-State Case Brought by Ukraine Against Russia Concerning Events in the Kerch Strait' (4 December 2018) Press Release 2018/421.

by Russia. Nor did it extend provisional measures to claims arising from international humanitarian law.

Part of *Ukraine and the Netherlands v Russia* concerned the alleged abduction of three groups of children and accompanying adults by armed separatists in eastern Ukraine and their transfer to Russia. Ukraine submitted a request regarding the first group of children. Unfortunately, its exact wording is publicly unavailable. That same day, the ECtHR ordered Russia to ‘ensure respect for the Convention rights of the persons concerned and their immediate return to Ukraine’.⁵³³ The granted positive relief was both general, in requiring Russia to comply with its existing obligations, and specific, in mandating the return of the group of children. Yet, once again, the ECtHR chose not to specify which rights under the ECHR were engaged.

Therefore, standard interim relief in cases where a party exercises diplomatic protection over its nationals generally imposes only an obligation to comply with the treaty forming the basis of jurisdiction. The level of precision of such measures varies. In *Ukraine v Russia (III)*, the ECtHR specified which measure was particularly important. In *Ukraine v Russia (VIII)*, it directly indicated which obligation under the Convention had to be complied with. An exception was the precise decision on the return of children in *Ukraine and the Netherlands v Russia*, which did not derive directly from the ECHR. Generally, provisional measures have been rather conservative.

5.2. Policies and Practices Allegedly Violating Human Rights

In *Ukraine v Russia (ICSFT and CERD)*, Ukraine accused Russia of breaching the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁵³⁴ Ukraine challenged Russia’s policies and practices that allegedly discriminated against Crimean Tatars and ethnic Ukrainians in Crimea. It requested the ICJ to order Russia not to aggravate the dispute, to cease all discriminatory practices, to stop suppressing the Crimean Tatars, to suspend the decree banning the Tatar representative body *Mejlis*, and to take steps to address the disappearance of Crimean Tatars and the

⁵³³ *Ukraine and the Netherlands v Russia* (dec) App nos 8019/16, 43800/14 and 28525/20 (ECtHR [GC], 30 November 2022) [4].

⁵³⁴ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

suppression of ethnic Ukrainians, including by lifting restrictions on Ukrainian-language education.⁵³⁵

The Court found only two of Ukraine's rights to be plausible. They related to the *Mejlis* and to Ukrainian-language education.⁵³⁶ Citing Russia's obligations under CERD, the ICJ indicated two positive measures: Russia was required to preserve Tatar representative institutions, including the *Mejlis* (13-3), and to ensure the availability of Ukrainian-language education (16-0). The Court also addressed non-aggravation relief to both parties (16-0).⁵³⁷ Notably, the ICJ chose to grant precise and positive measures, even though some judges questioned whether the *Mejlis* was a peaceful organization covered by CERD,⁵³⁸ or whether CERD guarantees a right to education in one's own language.⁵³⁹ The Court must have considered it necessary to act unambiguously.

The ICJ also opted for precise and positive interim relief in *Qatar v United Arab Emirates (UAE)*. Qatar challenged a series of UAE's measures that allegedly discriminated against Qataris based on their national origin. In particular, the questioned measures involved the expulsion of Qataris and the refusal to allow their entry into the UAE. These actions were alleged to breach rights protected under CERD, including the right to marry, access public health, education, property, work, and to be treated equally.

The ICJ ordered a number of positive measures (8-7): the reunification of Qatari families, the permission for Qatari students to continue their education in the UAE, and access to UAE courts for Qataris affected by UAE's measures. The Court also addressed non-aggravation relief to both parties (11-4).⁵⁴⁰ Simultaneously, the Court declined to indicate other provisional measures requested by Qatar, which included the suspension of collective expulsions, elimination of hate speech, guarantees of freedom of expression, access to medical care, and assurances that the UAE would not prejudice Qatar's rights.⁵⁴¹

⁵³⁵ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 112–3 [14].

⁵³⁶ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 135 [83]. See also *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 135 [86]. The wording of this point prompted Miles to argue that the ICJ shifted its focus from the plausibility of rights to the plausibility of claims. See Miles (n 41).

⁵³⁷ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 140–1 [106].

⁵³⁸ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 222–3 [2] (Separate Opinion Skotnikov).

⁵³⁹ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 223 [3] (Separate Opinion Skotnikov).

⁵⁴⁰ *Qatar v UAE* (Provisional Measures 2018) (n 152) 433–4 [79].

⁵⁴¹ *Qatar v UAE* (Provisional Measures 2018) (n 152) 412–3 [11].

Notably, it ordered that Qataris be granted access to courts, but did not go as far as requiring equal treatment before those courts, as Qatar had pleaded. For unknown reasons, the Court declined to grant the request regarding access to medical care, although it did approve the one related to education. Simultaneously, the ICJ recognised potential mental health impacts of the UAE measures.⁵⁴² Even the dissenting judges did not question the substance of the provisional measures. As Judge Crawford observed, ‘the provisional measures ordered by the Court are not objectionable in themselves’.⁵⁴³ *Qatar v UAE* followed *Ukraine v Russia (ICSFT and CERD)* and favoured concrete measures over broader, more general interim relief.

The third case in the present category was *Azerbaijan v Armenia*. Azerbaijan accused Armenia of violating CERD. The alleged violations included ethnic cleansing, cultural destruction, and inciting hatred targeted at persons of Azerbaijani national or ethnic origin. Azerbaijan requested that the ICJ order Armenia to cease planting landmines and provide information necessary for demining, take all necessary steps to prevent racial hatred, collect and preserve related evidence, refrain from aggravating the dispute, and submit periodic compliance reports.⁵⁴⁴

The Court ruled that plausibility concerned only Azerbaijan’s rights regarding racial hatred.⁵⁴⁵ For this reason, it indicated a positive measure: Armenia must take all necessary steps to prevent the incitement and promotion of racial hatred directed at persons of Azerbaijani national or ethnic origin (15-0). In line with the practice of previous cases, the ICJ also addressed non-aggravation relief to both parties (15-0).⁵⁴⁶ In fact, the positive relief merely reiterated obligations already incumbent upon Armenia, without further concretisation to the circumstances of the case. It seems incoherent to order a measure concerning racial hatred while declining to grant Azerbaijan’s request for evidence-protection relief. In general, *Azerbaijan v Armenia* started an alternative line of jurisprudence. It departed from the practice set in *Ukraine v Russia (ICSFT and CERD)* and *Qatar v UAE*.

The ICJ followed this new approach in *Canada and the Netherlands v Syria*. Canada and the Netherlands alleged that al-Assad’s Syria has repeatedly violated the Convention

⁵⁴² *Qatar v UAE* (Provisional Measures 2018) (n 152) 431 [68]–[70].

⁵⁴³ *Qatar v UAE* (Provisional Measures 2018) (n 152) 480 [18] (Dissenting Opinion Crawford).

⁵⁴⁴ *Azerbaijan v Armenia* (Provisional Measures 2021) (n 159) 410 [11].

⁵⁴⁵ *Azerbaijan v Armenia* (Provisional Measures 2021) (n 159) 426 [47]–[59].

⁵⁴⁶ *Azerbaijan v Armenia* (Provisional Measures 2021) (n 159) 430–1 [76].

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁴⁷ since the 2011 Arab Spring. The ICJ recognised the plausible right of Syria's individuals and the requesting parties to have the Convention upheld.⁵⁴⁸

The Court indicated two provisional measures. The positive relief was that Syria, in accordance with its obligations under the Convention, must take all measures to prevent acts of torture and other cruel, inhuman, or degrading treatment or punishment (13-2). The evidence-protection measure was that Syria must take effective measures to prevent the destruction and ensure the preservation of any evidence relevant to the proceedings (13-2).⁵⁴⁹ In line with *Azerbaijan v Armenia*, the first measure only restated obligations that already existed. For unknown reasons, the Court declined to grant any of the precise provisional measures sought by Canada and the Netherlands. These included ceasing arbitrary and incommunicado detentions, allowing medical and independent missions access to detainees and treating them humanely, as well as safeguarding and disclosing information regarding the causes of death and burial places of detainees.⁵⁵⁰ They appeared to be more tailored to the alleged violations claimed by the requesting States. The second measure indeed established new obligations. It appeared to protect the integrity of proceedings and was justified given the subject matter of the case and the situation in Syria. The ICJ also seems to indirectly acknowledge its mistake in not indicating them in the previous case.

The analysed orders reveal two mutually exclusive lines of jurisprudence. The first, from *Ukraine v Russia (ICSFT and CERD)* and *Qatar v UAE*, involves granting specific positive measures aimed at precisely defined actions. The second, from *Azerbaijan v Armenia* and *Canada and the Netherlands v Syria*, consists of indicating a positive measure that merely repeats the obligations contained in the treaty forming the jurisdictional basis. The ICJ did not explain its departure from the first approach in favour of the second. All four cases concerned equally serious situations. Only seven years passed between the first and last order. Changes in the composition of the Court cannot justify such a sudden shift in jurisprudence.

⁵⁴⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 4 February 1985, entered into force 26 June 1987) 1465 UNTS 85.

⁵⁴⁸ *Canada and the Netherlands v Syria* (n 137) 605 [57] and 608 [71].

⁵⁴⁹ *Canada and the Netherlands v Syria* (n 137) 611–2 [83].

⁵⁵⁰ *Canada and the Netherlands v Syria* (n 137) 592–3 [13].

5.3. *Alleged Violations Committed During Armed Conflicts*

A characteristic feature of the judicial settlement of international disputes is the phenomenon of ‘disaggregation’ of disputes,⁵⁵¹ also known as ‘salami-slicing’.⁵⁵² This refers to situations in which a party cannot bring the entire dispute before an international court because of the lack of a sufficiently broad jurisdictional basis. Instead, the party selects a part of the dispute that falls within the available legal basis. The CERD and the ECtHR have served as such legal bases when a State is unable to directly challenge the use of force.

5.3.1. Cases Brought Under CERD

Georgia v Russia before the ICJ concerned the situation in the Georgia’s separatist regions of South Ossetia and Abkhazia. Georgia accused Russia of violating CERD in connection with military operations carried out in Abkhazia and South Ossetia. In fact, both parties were engaged in an armed conflict, which ended with the conclusion of a ceasefire agreement. The ICJ noted that the situation in South Ossetia and Abkhazia was unstable. There was uncertainty about the lines of authority. The Court also noted that the population living in the area was exposed to danger and vulnerable.⁵⁵³

The first positive-negative measure was limited to South Ossetia, Abkhazia, and adjacent areas in Georgia. It ordered the parties to refrain from and ensure that no acts of racial discrimination were committed, abstain from sponsoring, defending, or supporting racial discrimination, and guarantee security for all populations as well as the protection of the property of displaced persons and refugees (8-7). The second positive-negative measure required the parties to facilitate, and not obstruct, humanitarian assistance in support of the populations’ rights under CERD (8-7). The third measure was non-aggravation (8-7), while the fourth concerned compliance reporting (8-7).⁵⁵⁴

⁵⁵¹ Lawrence Hill-Cawthorne, ‘International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study’ (2019) 68 *International and Comparative Law Quarterly* 779.

⁵⁵² Alan E Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’ (1997) 46 *International and Comparative Law Quarterly* 37.

⁵⁵³ *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 396 [143].

⁵⁵⁴ *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 398–9 [149].

The granted provisional measures were broad. First, although in some places they repeated the obligations of the parties under the CERD,⁵⁵⁵ they concretised those obligations to the circumstances of the case. Second, the measure concerning humanitarian assistance to ensure the enjoyment of the rights of the population under the CERD seems particularly innovative. Third, the ICJ addressed all provisional measures to both parties. This not only contrasted with Georgia's request, but neither party raised the issue of Georgia's responsibility.⁵⁵⁶ Fourth, the provisional measures applied to all local populations, not only those of Georgian ethnicity.⁵⁵⁷

The ICJ continued this trend in *Armenia v Azerbaijan*, in which it indicated provisional measures on three occasions. The first request concerned the 2020 Nagorno-Karabakh conflict between the parties.⁵⁵⁸ The ICJ granted four provisional measures. The first three positive measures were addressed only to Azerbaijan. They required it to (1) protect all persons captured in relation to the 2020 conflict from violence and bodily harm (14-1); (2) take all necessary steps to prevent racial harassment against persons of Armenian national or ethnic origin (15-0); and (3) prevent and punish acts of vandalism affecting Armenian cultural heritage, including places of worship (13-2). Moreover, the Court addressed non-aggravation relief to both parties (15-0).⁵⁵⁹

Arguably, the indicated provisional measures were not as precise as those in *Georgia v Russia*. Nevertheless, the Court clearly specified the areas in which it considered necessary steps should be taken. It concerned especially the first measure. Contrary to Armenia's request, it did not order the release of all persons detained during the conflict. Unlike in *Georgia v Russia*, the ICJ declined to grant evidence-protection relief. Despite the Court's position,⁵⁶⁰ this would have been useful.

Armenia's second request concerned the blockade of the Lachin Corridor. Armenia sought to ensure uninterrupted movement along the corridor, for Azerbaijan to cease

⁵⁵⁵ See *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 405 [24] (Joint Dissenting Opinion Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov). See also Elżbieta Hanna Morawska, 'Środki tymczasowe w stanach nadzwyczajnych. Uwagi na tle sprawy *Gruzja v. Federacja Rosyjska* przed Międzynarodowym Trybunałem Sprawiedliwości' (2019) 9 *Polski Rocznik Praw Człowieka i Prawa Humanitarnego* 181, 199.

⁵⁵⁶ See *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 407 (Declaration Gaja).

⁵⁵⁷ Cf Tobias Thienel, 'Provisional Measures in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*)' (2009) 1 *Goettingen Journal of International Law* 143, 155–6.

⁵⁵⁸ For Armenia's request, see *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 366–7 [11].

⁵⁵⁹ *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 392–3 [98].

⁵⁶⁰ *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 392 [94]–[95].

supporting the blockade, and to restore the supply of natural gas and other public utilities to Nagorno-Karabakh.⁵⁶¹ The ICJ found that only the second of the sought measures was sufficiently linked to the merits of the case.⁵⁶² The Court ordered that Azerbaijan, in accordance with CERD, ‘take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions’ (13-2).⁵⁶³ This positive measure was, on the one hand, precise in indicating what needed to be achieved and, on the other hand, left Azerbaijan free to choose the method.

In 2023, Azerbaijan seized control of the Nagorno-Karabakh region. This led to a mass exodus of its inhabitants to Armenia. Armenia again requested provisional measures. It sought, *inter alia*, an end to the displacement of the Nagorno-Karabakh population, protection of local authorities, withdrawal of Azerbaijani troops, maintenance of public utilities, and the preservation of documents issued by local authorities, as well as commemorative objects related to the 1915 ‘Armenian genocide’.⁵⁶⁴

The ICJ did not specify which of Armenia’s claimed rights were plausible.⁵⁶⁵ Instead, it focused on the vulnerability of the local population.⁵⁶⁶ The Court indicated two positive and compliance-reporting relief to Azerbaijan (13-2).⁵⁶⁷ Firstly, the Court ordered that individuals should be free to return to or leave the Nagorno-Karabakh region and that those who wish to remain should be protected (13-2). Second, the ICJ required Azerbaijan to protect and preserve documents belonging to persons covered by the first measure (13-2). In line with its previous decision, the Court preferred precise provisional measures.

In all decisions, the ICJ has preferred rather precise provisional measures. However, they differed in both number and content from those requested. Nevertheless, *Georgia v Russia* and *Armenia v Azerbaijan* were merely a substitute for directly questioning military actions. For example, Wierczyńska points out that Georgia’s allegations would be more suited to a claim based on humanitarian law, but there was no such legal basis available.⁵⁶⁸

⁵⁶¹ *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 18–9 [19].

⁵⁶² *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 25 [43].

⁵⁶³ *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 30 [67].

⁵⁶⁴ *Armenia v Azerbaijan* (Provisional Measures November 2023) (n 159) 625–6 [21].

⁵⁶⁵ *Armenia v Azerbaijan* (Provisional Measures November 2023) (n 159) 631–3 [40]–[41] and [45].

⁵⁶⁶ *Armenia v Azerbaijan* (Provisional Measures November 2023) (n 159) 635–7 [55]–[60].

⁵⁶⁷ *Armenia v Azerbaijan* (Provisional Measures November 2023) (n 159) 640–1 [74].

⁵⁶⁸ Karolina Wierczyńska, ‘Spór przed Międzynarodowym Trybunałem Sprawiedliwości o zastosowanie konwencji w sprawie likwidacji wszelkich form dyskryminacji rasowej pomiędzy Gruzją a Federacją Rosyjską – kwestie prawnomiędzynarodowe’ in Dariusz R Bugajski (ed), *Konflikt rosyjsko-gruziński w 2008 roku*, vol II (Akademia Marynarki Wojennej, 2011) 143.

Commentators have criticised such use or rather misuse of CERD.⁵⁶⁹ This is also a reason for Judge Yusuf's dissents in *Armenia v Azerbaijan*.⁵⁷⁰

In any event, the Court's provisional measures differ significantly from those in cases directly related to armed conflicts.⁵⁷¹ First, the ICJ has not ordered the parties to comply with ceasefire agreements. Second, no interim relief has directly addressed the presence or withdrawal of troops. On the other hand, the Court has granted provisional measures concerning humanitarian assistance, which may follow from the human rights dimension of these cases.

5.3.2. Cases Brought Under the ECHR

Georgia v Russia (II) before the ECtHR concerned the same events as *Georgia v Russia* before the ICJ. The exact wording of Georgia's request for interim relief is unknown. This was the ECtHR's first-ever decision on provisional measures in an inter-State dispute. Apart from compliance-reporting relief, the ECtHR indicated that both parties must 'honour their commitments under the Convention, particularly in respect of Articles 2 [(the right to life)] and 3 [(the prohibition of torture and other cruel, inhuman, or degrading treatment)] of the Convention'.⁵⁷² First, the provisional measure was unspecific. It only repeated the parties' obligations under the ECHR. Second, it was addressed to both parties, identical to those granted by the ICJ.

Ukraine v Russia (re Crimea), a case concerning the situation in Crimea, and *Ukraine and the Netherlands v Russia*, a case concerning the situation in eastern Ukraine, arise from the same application by Ukraine. That application concerned the armed conflict

⁵⁶⁹ See esp Michał Balcerzak, 'Uses and Underuses of the International Convention on the Elimination of All Forms of Racial Discrimination at the International Court of Justice' (2018) 38 Polish Yearbook of International Law 11. See also Amara Kone, 'La détermination de l'objet du différend et la compétence *ratione materiae* dans le contentieux des mesures conservatoires devant la Cour internationale de Justice' (2022) 59 Canadian Yearbook of International Law 133; Raphaël Maurel, 'La confirmation des évolutions récentes du droit des mesures conservatoires par et devant la Cour internationale de Justice: remarques sur les ordonnances en indication de mesures conservatoires du 7 décembre 2021 dans les affaires relatives à l' *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c Azerbaïdjan et Azerbaïdjan c Arménie)*' (2022) 59 Canadian Yearbook of international Law 365.

⁵⁷⁰ *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 395–400 [1]–[19] (Dissenting Opinion Yusuf); *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 31–2 (Declaration Yusuf).

⁵⁷¹ Cf Paolo Palchetti, 'La controversia tra Georgia e Russia davanti alla Corte internazionale di giustizia: l'ordinanza sulle misure provvisorie del 15 ottobre 2008' (2009) 3 Diritti umani e diritto internazionale 111, 111–5.

⁵⁷² *Georgia v Russia (II)* (dec) App no 38263/08 (ECtHR, 13 December 2011) (n 264) [5]. See also *Georgia v Russia (II)* App no 38263/08 (ECtHR [GC], 21 January 2021) [5]–[6].

in Ukraine that began in February 2014.⁵⁷³ Before dividing the two proceedings, Ukraine requested interim relief. It demanded that, *inter alia*, Russia refrain from actions that might endanger the life and health of people in Ukraine.⁵⁷⁴ According to a press release, the ECtHR granted compliance-reporting relief and called upon both parties:

to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment).⁵⁷⁵

Contrary to Ukraine's request, the interim relief was not specific and was addressed to both parties. It was identical to that in the previous case. However, an important difference was the explicit statement that its implementation might require the suspension of military operations.

The ECtHR granted the same provisional measure in *Armenia v. Azerbaijan (I)*, the first in a series of proceedings concerning the Nagorno-Karabakh conflict.⁵⁷⁶ Yet again, the ECtHR declined to grant the specific interim relief requested by Armenia, such as ordering Azerbaijan to cease military attacks on civilian settlements, halt indiscriminate assaults, and stop targeting civilians, civilian objects, and infrastructure.⁵⁷⁷

The ECtHR developed its approach in *Armenia v. Türkiye*. As a press release shows, it 'call[ed] on all States directly or indirectly involved in the conflict, including Türkiye, to refrain from actions that contribute to breaches of the Convention rights of civilians, and to respect their obligations under the Convention'.⁵⁷⁸ First, this measure was addressed to all ECHR parties.⁵⁷⁹ Second, the ECtHR replaced the explicit reference to military operations

⁵⁷³ For the procedural history, see eg *Ukraine v Russia (re Crimea)* (dec) App nos 20958/14 and 38334/18 (ECtHR [GC], 16 December 2020) [1]–[11].

⁵⁷⁴ ECtHR, 'Interim Measure Granted in Inter-State Case Brought by Ukraine Against Russia' (13 March 2014) Press Release 2014/073.

⁵⁷⁵ ECtHR Press Release 2014/073 (n 574). See *Ukraine v Russia (re Crimea)* (dec) (n 573) [5].

⁵⁷⁶ ECtHR, 'The Court grants an interim measure in the case of *Armenia v. Azerbaijan*' (30 September 2020) Press Release 2020/265.

⁵⁷⁷ ECtHR, 'Request for Interim Measures Lodged by Armenia Against Azerbaijan' (28 September 2020) Press Release 2020/264.

⁵⁷⁸ ECtHR, 'The Court's Decision on the Request for an Interim Measure Lodged by Armenia Against Turkey' (6 October 2020) Press Release 2020/276.

⁵⁷⁹ The ECtHR confirmed this in 'Court's Decision on Turkish Authorities' Request to Lift Interim Measure Indicated in the Case of *Armenia v. Turkey*' (14 October 2020) Press Release 2020/290. See also ECtHR, 'The Court Makes a Statement on Requests for Interim Measures Concerning the Conflict in and around Nagorno-Karabakh' (4 November 2020) Press Release 2020/314. See also 'The Court Decides to Lift the Interim Measure Previously Indicated in the Case of *Armenia v. Turkey*' (2 December 2020) Press Release 2020/349.

with the broader term ‘actions that contribute to breaches of the Convention rights of civilians’. This extended the scope of interim relief.

Armenia v Azerbaijan (IV) was a case concerning the alleged blocking of the Lachin Corridor. The ECtHR ordered Azerbaijan to ‘take all measures that are within their jurisdiction to ensure safe passage through the “Lachin Corridor” of seriously ill persons in need of medical treatment in Armenia and others who were stranded on the road without shelter or means of subsistence’.⁵⁸⁰ This interim relief was precise and required positive action. It was also more precise than the provisional measure granted by the ICJ. The ECtHR focused on the situation of sick and unsheltered persons, while the Court focused on general movement along the Corridor.

In *Ukraine v Russia (X)*, Ukraine contested Russia’s ‘special military operation’. The ECtHR ordered Russia to ‘refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles, and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of medical establishments, personnel, and emergency vehicles within the territory under attack or siege by Russian troops’.⁵⁸¹ Detailed in content, this negative measure directed Russia to unconditionally cease its military operation, regardless of its objectives or whether it would violate the ECHR. The ECtHR later interpreted the measure under consideration as prohibiting attacks on civilians, particularly the use of prohibited weapons.⁵⁸²

As hostilities intensified, Ukraine submitted a number of additional requests for interim relief. These concerned the use of prohibited weapons, the security of Ukraine’s nuclear facilities, actions against Ukraine’s civilian leaders, as well as humanitarian supplies and the situation of refugees.⁵⁸³ The ECtHR confirmed that previous measures already covered the use of prohibited weapons. It also held that they extended to ‘the destruction of civilian objects under the control of Russian forces’.⁵⁸⁴ Instead of referring specifically to nuclear facilities, the ECtHR opted for broader wording. The ECtHR also

⁵⁸⁰ ECtHR, ‘European Court Decides to Indicate Interim Measures in the “Lachin Corridor”’ (21 December 2022) Press Release 2022/401.

⁵⁸¹ ECtHR, ‘The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory’ (1 March 2022) Press Release 2022/068.

⁵⁸² ECtHR, ‘Expansion of Interim Measures in Relation to Russian Military Action in Ukraine’ (1 April 2022) Press Release 2022/116.

⁵⁸³ ECtHR Press Release 2022/116 (n 582).

⁵⁸⁴ ECtHR Press Release 2022/116 (n 582).

confirmed its interim relief in individual cases, requiring that Russia, *inter alia*, ensure unimpeded access to safe evacuation routes, healthcare, food, and other essential supplies for the civilian population. The ECtHR further added that ‘the said evacuation routes should allow civilians to seek refuge in safer regions of Ukraine’.⁵⁸⁵ These new measures were positive, focusing on the conditions that must be provided for Ukrainian refugees.

The ECtHR’s approach to provisional measures in cases of alleged violations committed during armed conflicts has evolved. Initially, the ECtHR indicated general and positive interim relief requiring both parties to comply with their obligations under the ECHR. Over time, it provided increasingly precise guidance on how the parties should fulfil these obligations, often in a negative form by indicating what should be avoided. This approach culminated in *Ukraine v Russia (X)*. The ECtHR departed from broadly framed measures obliging the parties to comply with their obligations. Instead, it granted only clear, specific positive and negative relief. Moreover, these measures were addressed solely to the party whose conduct was at issue. This development suggests that the ECtHR has finally decided to use the full potential of the ECHR, positioning itself as an attractive forum for resolving similar disputes in the future.

5.4. Alleged Violations of the Genocide Convention

The Genocide Convention is one of the most important multilateral human rights treaties, which provides for the jurisdiction of the ICJ. It was on the basis of this Convention that the Court developed the law on reservations to treaties⁵⁸⁶ and the concept of obligations *erga omnes partes*.⁵⁸⁷ It also provided the basis for the ICJ to indicate provisional measures in cases of high political importance.

The Balkan War of the 1990s was a consequence of the break-up of Yugoslavia. In *Bosnia v Yugoslavia*, the newly formed State of Bosnia and Herzegovina accused the remainder of Yugoslavia of breaching the Genocide Convention. As interim relief, Bosnia asked that Yugoslavia cease committing acts of genocide, supporting militias, and engaging in any military and paramilitary activity directed against Bosnia’s people and statehood.

⁵⁸⁵ ECtHR Press Release 2022/116 (n 582). See also *Ukraine and the Netherlands v Russia* (Merits) (n 277) [8]–[13].

⁵⁸⁶ See *Reservations* (n 222) 20–30.

⁵⁸⁷ See *Reservations* (n 222) 23.

Bosnia also sought the Court to indicate that it could seek and receive support and assistance from third States and act in self-defence.⁵⁸⁸

The Court indicated three provisional measures, one of which was non-aggravation relief (14-0). The first positive measure required Yugoslavia to take steps to prevent the commission of genocide (14-0), while the second (13-1) directed Yugoslavia to:

in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Hercegovina or against any other national, ethnical, racial or religious group.⁵⁸⁹

On the one hand, the provisional measures repeated Yugoslavia's obligations under the Genocide Convention.⁵⁹⁰ On the other hand, they did not refer, *inter alia*, to Yugoslavia's obligation to punish prohibited acts.⁵⁹¹ In addition, they specified precisely who was not to commit prohibited acts and against whom. Most importantly, no measure directly ordered Yugoslavia to cease military operations.⁵⁹²

In *The Gambia v Myanmar*, The Gambia alleged that Myanmar's army's actions in Rakhine State, home to the Rohingya Muslim community, constituted genocide. These activities forced approximately 800,000 Rohingya people to flee to Bangladesh. The Gambia requested six provisional measures, three of which mirrored the relief granted in *Bosnia v Yugoslavia*. The other measures concerned the preservation of evidence, reporting compliance with provisional measures, and access for UN fact-finding bodies.⁵⁹³

The ICJ indicated four provisional measures (17-0).⁵⁹⁴ The first two ordered Myanmar not to commit acts prohibited under the Genocide Convention. As in *Bosnia v Yugoslavia*, Myanmar's obligations were repeated, and the focus was solely on prevention

⁵⁸⁸ *Bosnia v Yugoslavia* (Provisional Measures April 1993) (n 159) 7–8 [3].

⁵⁸⁹ *Bosnia v Yugoslavia* (Provisional Measures April 1993) (n 159) 24 [52].

⁵⁹⁰ See also Luigi Daniele, 'La prima ordinanza sulle misure cautelari nell'affare tra Bosnia-Erzegovina e Jugoslavia (Serbia e Montenegro)' (1993) 76 *Rivista di diritto internazionale* 373, 383.

⁵⁹¹ Laurence Boisson de Chazournes, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression des crimes de génocide' (1993) 39 *Annuaire français de droit international* 514, 534.

⁵⁹² Yugoslavia made another unsuccessful attempt to obtain this measure in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Provisional Measures September 1993) [1993] ICJ Reports 325.

⁵⁹³ *The Gambia v Myanmar* (n 137) 7–8 [12].

⁵⁹⁴ *The Gambia v Myanmar* (n 137) 30–1 [86].

rather than punishment. The third measure was evidence-protection relief. The fourth measure was compliance-reporting relief, which appears to be a lesson learned from Yugoslavia's failure to comply with the provisional measures.⁵⁹⁵ For undisclosed reasons, the Court decided not to indicate non-aggravation relief and to grant access to UN fact-finding missions.⁵⁹⁶ Nor did the Court adopt the specific measures requested, like, *inter alia*, a prohibition on the burning of villages.⁵⁹⁷ The ICJ followed *Bosnia v Yugoslavia* by granting general and imprecise provisional measures. It is therefore doubtful whether the decision contained 'robust measures of protection unlike any previously ordered by this Court'.⁵⁹⁸

The repetition of the existing obligations also characterised all three decisions on interim relief in *South Africa v Israel*. On 7 October 2023, Hamas, a jihadist organisation controlling the Gaza Strip, launched a series of attacks on a number of Israeli kibbutzim, resulting in the deaths of over 1,200 people and the capture of 251. In response, Israel launched 'a large-scale military operation in Gaza, by land, air and sea, which is causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza'.⁵⁹⁹ South Africa accused Israel of committing genocide in Gaza and sought a number of provisional measures. These measures included calling on Israel to suspend military operations, secure evidence, refrain from escalating the conflict, cease activities prohibited by the Genocide Convention, and report compliance. South Africa also sought an order from the Court requiring both parties to take all reasonable measures to prevent genocide.⁶⁰⁰

The ICJ granted six provisional measures. The positive relief obliged Israel to take all measures to prevent the commission of acts prohibited by the Genocide Convention (15-2), prevent and punish incitement to commit genocide (16-1), and enable urgent

⁵⁹⁵ Michael Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in *The Gambia v Myanmar* at the International Court of Justice' (2020) 21 Melbourne Journal of International Law 428, 446; Marko Milanović, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case' (*EJIL:Talk!*, 23 January 2020) <<https://www.ejiltalk.org/icj-indicates-provisional-measures-in-the-myanmar-genocide-case/>>; Priya Pillai, 'Expanding the Scope of Provisional Measures under the Genocide Convention' (2020) 79 The Cambridge Law Journal 201, 203–4; Alessandra Spadaro, 'The Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar Decision to Authorize Investigation (I.C.C.) and the Gambia V. Myanmar Order for Provisional Measures (I.C.J.)' (2020) 59 International Legal Materials 616, 617.

⁵⁹⁶ See further Milanović, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case' (n 595).

⁵⁹⁷ See Milanović, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case' (n 595).

⁵⁹⁸ Pillai (n 595) 201.

⁵⁹⁹ *South Africa v Israel* (Provisional Measures January 2024) (n 46) 10 [13].

⁶⁰⁰ *South Africa v Israel* (Provisional Measures January 2024) (n 46) 8–10 [11].

humanitarian assistance (16-1).⁶⁰¹ In addition, the Court granted evidence-protection (15-2) and compliance-reporting measures (15-2). The ICJ followed *The Gambia v Myanmar*, as some of the measures merely repeated Israel's obligations.⁶⁰² However, for the first time, a measure referred to the punishment of acts prohibited by the Genocide Convention. As Judge Nolte suggested, this resulted directly from statements made by the Israeli authorities.⁶⁰³ Also for the first time in cases falling into this category, the Court ordered the facilitation of humanitarian aid. Consistent with its practice, however, it refrained from prohibiting the military operation itself, leaving Israel free to assess how to implement the measures. It is worth adding that the scholarship argues that by not granting this measure, the Court undermined its own reasoning, which focuses exclusively on Israel's military operation.⁶⁰⁴ Although it is widely known that South Africa maintained contacts with Hamas, but the Court did not order it to attempt to persuade Hamas to release the hostages.⁶⁰⁵ Achieving this aim would arguably render Israel's military operation baseless and serve to protect the rights under the Genocide Convention.

The Israeli military operation continued, leading to widespread famine and starvation in Gaza. In response, South Africa requested another provisional measure.⁶⁰⁶ The ICJ indicated three provisional measures: compliance-reporting relief (15-1) and two positive measures.⁶⁰⁷ One of the positive measures (16-0) was that Israel cooperate with the UN to provide:

urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the

⁶⁰¹ *South Africa v Israel* (Provisional Measures January 2024) (n 46) 30–2 [86].

⁶⁰² See eg *South Africa v Israel* (Provisional Measures January 2024) (n 46) 48 [29] and 49–50 [33] (Dissenting Opinion Sebutinde) and 74 [43] (Separate Opinion Barak).

⁶⁰³ See Marko Milanović, 'ICJ Indicates Provisional Measures in South Africa v. Israel' (*EJIL:Talk!*, 26 January 2024) <<https://www.ejiltalk.org/icj-indicates-provisional-measures-in-south-africa-v-israel/>>. For the plausible explanation, see *South Africa v Israel* (Provisional Measures January 2024) (n 46) 60 [15] (Declaration Nolte).

⁶⁰⁴ See eg Maurizio Arcari, 'Quali misure cautelari della Corte internazionale di giustizia per il caso *Sud Africa c. Israele*?' (2024) 18 *Diritti umani e diritto internazionale* 147, 157–8; Enzo Cannizzaro, 'When the Reasons Are More Telling than the Ruling: The Order of the ICJ in South Africa v. Israel' (*EJIL:Talk!*, 7 February 2024) <<https://www.ejiltalk.org/when-the-reasons-are-more-telling-than-the-ruling-the-order-of-the-icj-in-south-africa-v-israel/>>; Nico Krisch, 'Speaking the Law, Plausibly: The International Court of Justice on Gaza' (*EJIL:Talk!*, 27 January 2024) <<https://www.ejiltalk.org/speaking-the-law-plausibly-the-international-court-of-justice-on-gaza/>>.

⁶⁰⁵ See *South Africa v Israel* (Provisional Measures January 2024) (n 46) 50–1 [34] (Dissenting Opinion Sebutinde) and 74–5 [45] (Separate Opinion Barak).

⁶⁰⁶ *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 517 [11].

⁶⁰⁷ *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 527–8 [51].

capacity and number of land crossing points and maintaining them open for as long as necessary.

The precision of this measure is remarkable. Another positive measure was that Israel must ensure that its military does not breach the Genocide Convention, including by preventing the delivery of urgently needed humanitarian assistance. Standardly, this measure imprecisely repeated already existing obligations (15-1). Yet the Court attempted to at least slightly concretise it to the circumstances. In any event, Israel was not formally ordered to stop its military operation,⁶⁰⁸ but some judges argued that it could not comply with the provisional measures if the military operation continued.⁶⁰⁹

Because Israel ultimately started the offensive on Rafah, South Africa submitted its third and, to date, final request for interim measures. The request sought four provisional measures: that Israel cease its military operation in Gaza, unblock the Rafah Crossing, allow UN officials access to Gaza, and report on its compliance.⁶¹⁰ The ICJ indicated four provisional measures, the subject matter of which aligned with South Africa's request, though the content differed.⁶¹¹

The negative measure was that Israel must '[i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part' (13-2). The commas before and after the phrase 'and any other action in the Rafah Governorate' raise doubts as to whether all Israeli operations must stop. First, most judges were of the view that the measure concerned only Rafah, not the entire Gaza Strip.⁶¹² Yet this point is far from being unambiguous. Second, the stay was not unconditional; it applied

⁶⁰⁸ *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 545 [1] (Separate Opinion Barak).

⁶⁰⁹ *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 534[10] (Declaration Yusuf), 536 [1] and 537–8 [8] (Joint Declaration Xue, Brant, Gómez Robledo and Tladi) and 542 [7] (Declaration Charlesworth).

⁶¹⁰ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 654–5 [17]. The Court also confirmed its previous provisional measures, ruling that they 'should be immediately and effectively implemented'. Vice-President Sebutinde rightly pointed out that this wording appears to imply Israel's non-compliance with earlier decisions. See *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 676 [20] (Dissenting Opinion Sebutinde).

⁶¹¹ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 665–6 [57].

⁶¹² *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 669 [2] and 676–7 [21] (Dissenting Opinion Sebutinde), 689 [25] (Declaration Nolte) and 702 [1], 707–8 [14] and 711–2 [28] (Dissenting Opinion Barak). *Contra South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 700 [17] (Declaration Tladi).

only to actions potentially causing the total or partial destruction of Palestinians in Gaza.⁶¹³ In line with previous orders in this and other cases, the Court granted Israel considerable discretion in adapting its actions to the interim relief.

The positive measure ordered Israel to ‘[m]aintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance’ (13-2). The ICJ precisely described the purposes for which the crossing must remain open; it was not, *inter alia*, intended for Palestinians seeking to flee Gaza.

With regard to fact-finding missions (13-2), the ICJ ruled that Israel must ‘ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide’. This measure applies not only to Rafah but to the entire Gaza Strip and grants access to potentially unlimited numbers of UN bodies.⁶¹⁴ As such, its scope differs significantly from that of the measure concerning Israel’s military offensive. Vice-President Sebutinde also rightly observed that the Court had never granted such a broad evidence-protection measure in a case under the Genocide Convention or in cases concerning alleged violations of human rights committed during armed conflicts.⁶¹⁵

The fourth measure was compliance-reporting relief (13-2). *South Africa v Israel* marked a historic turning point, as judges openly began expressing doubts about the effectiveness of compliance-reporting measures in each subsequent order modifying provisional measures.⁶¹⁶ Judge *ad hoc* Barak directly stated that submitted reports ‘ha[d] not served a meaningful purpose’.⁶¹⁷ It is regrettable that he did not develop this point further. Consequently, it is difficult to provide substantive comments on it.

⁶¹³ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 669 [2] and 676–7 [21] (Dissenting Opinion Sebutinde), 689 [25] (Declaration Nolte), 692 [4] and 693–4 [6] (Declaration Aurescu), 700 [17] (Declaration Tladi) and 702 [1], 707–8 [14] and 711–2 [28] (Dissenting Opinion Barak).

⁶¹⁴ See eg *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 712–3 [30] (Dissenting Opinion Barak). See also Michael Becker, ‘Crisis in Gaza: *South Africa v Israel* at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)’ (2025) 25 Melbourne Journal of International Law (forthcoming).

⁶¹⁵ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 678–80 [24]–[26] (Dissenting Opinion Sebutinde).

⁶¹⁶ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 680 [27] (Dissenting Opinion Sebutinde).

⁶¹⁷ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 713 [31] (Dissenting Opinion Barak).

In cases brought under the Genocide Convention, the ICJ has traditionally granted positive measures addressed to one party, requiring it to comply with its obligations under the Convention. After *Bosnia v Yugoslavia*, however, the Court has not indicated measures aimed at non-aggravation of the dispute.

The measures requiring parties to comply with the Genocide Convention were usually imprecise regarding how compliance was to be achieved. To borrow Judge Charlesworth's words, their content was 'opaque' or 'elliptical'.⁶¹⁸ The Court slightly altered its approach in *South Africa v Israel* by indicating increasingly precise measures, explicitly stating what actions must be taken. The ICJ's approach in this regard evolved noticeably between the first and third orders in this case.

It is evident from the decisions analysed that the Court's concern lay with potential violations of the Genocide Convention rather than with the specific actions (military operations) that might lead to those violations. This suggests that the Genocide Convention is not a suitable instrument for directly challenging military actions.⁶¹⁹ On the other hand, judges have rightly observed that suspending certain military operations may, at times, be indispensable to ensure compliance with indicated provisional measures, particularly those relating to the provision of humanitarian assistance.⁶²⁰ Nevertheless, this determination is consistently left to the obliged party's discretion.

6. Miscellaneous Cases

Three cases, all decided by UNCLOS tribunals, are infamous for their 'raisonnement[s] laconique[s] et contestable[s]'.⁶²¹ It remains unclear which rights required protection and what posed an urgent risk of irreparable prejudice.

Arctic Sunrise arose when the Russian authorities detained the *Arctic Sunrise*, an icebreaker flying the flag of the Netherlands.⁶²² The vessel was in Russia's Exclusive

⁶¹⁸ *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 542 [1] and 543 [7] (Declaration Charlesworth).

⁶¹⁹ But note that Judge Charlesworth suggested in the *South Africa v Israel* case that the ICJ should have ordered both parties to attempt to reach a humanitarian ceasefire. See *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 542–3 [8] (Declaration Charlesworth).

⁶²⁰ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 677–8 [23] (Dissenting Opinion Sebutinde) and 712 [29] (Dissenting Opinion Barak).

⁶²¹ Isabelle Mouliez, 'L'affaire de l'*Arctic Sunrise* (Pays-Bas c. Russie) devant le Tribunal international du droit de la mer et la Cour permanente d'arbitrage' (2015) 61 *Annuaire français de droit international* 267, 277.

⁶²² For the Netherlands's request, see *Arctic Sunrise* (n 179) 238 [35].

Economic Zone to protest the operation of an offshore oil platform. The Russian authorities charged all 30 people on board, some of whom were Russian nationals, with piracy, later changed to hooliganism.

The Tribunal prescribed compliance-reporting relief (19-2) and two positive measures (19-2). First, Russia had to release the *Arctic Sunrise* along with all detained persons and allow them to leave Russian jurisdiction. Second, the Netherlands was required to pay a bond of €3,600,000.⁶²³ Not only did ITLOS fail to explain the first measure,⁶²⁴ but it also failed to clarify the amount of the bond. One should agree with the scholarly suggestion that the sum reflected the value of the *Arctic Sunrise* and the bail amount for the crew.⁶²⁵ As for the first relief, the Tribunal effectively extended the prompt release procedure prescribed under Article 292 of UNCLOS to an unforeseen type of case.⁶²⁶ Moreover, the first measure was so broad that Russia was required to release all members of the crew, even those of Russian nationality.⁶²⁷ It is even more disappointing that, instead of explaining why ITLOS considered the conditions for prescribing interim relief to be fulfilled, the Tribunal only cited the Netherlands' arguments for why it should be prescribed.⁶²⁸

Regrettably, the Tribunal reapplied this unfortunate approach in *San Padre Pio*. As put by Judge Bouguetaia, the decision was an 'unfortunate fantasy' and a 'pious and naïve vow hitherto alien to the rigour and realism of the Tribunal'.⁶²⁹ That case arose when Nigeria arrested the *San Padre Pio*, a vessel flying the flag of Switzerland, after it conducted a ship-to-ship gas transfer, or 'bunkering', in Nigeria's exclusive economic zone (EEZ). Nigeria alleged that the transfer was carried out without the necessary permits and documentation, and it charged the vessel's Master and three crew members. Switzerland

⁶²³ *Arctic Sunrise* (n 179) 252–3 [105].

⁶²⁴ The entire 'explanation' was one-paragraph long. See *Arctic Sunrise* (n 179) 250 [93].

⁶²⁵ Peter Peters' comment on Naomi Burke, 'Provisional Measures in the Arctic Sunrise Case' (*Cambridge International Law Journal Blog*, 29 November 2013) <<https://cilj.co.uk/2013/11/29/provisional-measures-arctic-sunrise-case/>>; Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2013' (2015) 30 *International Journal of Marine and Coastal Law* 1, 19.

⁶²⁶ See eg *Arctic Sunrise* (n 179) 225–6 [7(b)]–[7(c)] (Separate Opinion Jesus); 296 [14] (Dissenting Opinion Kulyk) and 298–9 [48]–[49] (Dissenting Opinion Golitsyn); Douglas Guilfoyle and Cameron A Miles, 'Provisional Measures and the MV *Arctic Sunrise*' (2014) 108 *American Journal of International Law* 271, 283–4; Churchill, '2013 Survey' (n 625) 20; Moulner (n 621) 276; Nuwan Peiris, 'Arctic Sunrise from ITLOS: The Arctic Surprise and in Search of a Balanced Order' (2015) 29 *Ocean Yearbook Online* 44, 60. See Chapter III 4.1.

⁶²⁷ For the critical view, see *Arctic Sunrise* (n 179) 289 [46] (Dissenting Opinion Golitsyn). For the positive view, see *Arctic Sunrise* (n 179) 256 [1] (Joint Separate Opinion Wolfrum and Kelly).

⁶²⁸ *Arctic Sunrise* (n 179) 248–9 [87]–[89].

⁶²⁹ *San Padre Pio* (n 179) 502–3 [11] (Dissenting Opinion Bouguetaia).

accused Nigeria of violating the freedom of navigation in the EEZ and the exclusive jurisdiction of the flag State. It requested the exact same provisional measures as the Netherlands had in *Arctic Sunrise*.⁶³⁰ ITLOS found it plausible that a flag State has exclusive jurisdiction over bunkering activities in an EEZ,⁶³¹ and expressed humanitarian concerns about piracy in the Gulf of Guinea.⁶³²

Identical to *Arctic Sunrise*, the Tribunal prescribed compliance-reporting relief (19-2) and a negative measure requiring Nigeria to release the vessel and its crew,⁶³³ as well as a positive measure obliging Switzerland to pay a bond of US\$ 14,000,000 (17-4).⁶³⁴ Similarly, the bond's amount was not explained, but Judge *ad hoc* Murphy observed that exceeded the value of the vessel and its cargo.⁶³⁵ There were also two novel measures: a non-aggravation relief (19-2) and a positive relief obliging Switzerland to undertake to return the *San Padre Pio*'s crew in the event of a decision on the merits in Nigeria's favour (17-4). However, the Tribunal did not specify the content of such an undertaking, which a number of judges criticised.⁶³⁶ Another similarity with *Arctic Sunrise* was that ITLOS did not order a suspension of judicial and administrative proceedings, nor did it impose an obligation to refuel the *San Padre Pio*. As one might expect, neither of these decisions was explained.

The order on provisional measures in *Enrica Lexie Arbitration* is the final example of a questionable decision prescribing interim relief. This arbitration was a continuation of *Enrica Lexie* before ITLOS. Although the parties complied with the Tribunal's provisional measures, Italy requested that the arbitral tribunal order new interim relief. Specifically, Italy sought permission for the marine who remained in India to return to Italy for the duration of the proceedings.⁶³⁷ The arbitral tribunal did not define Italy's plausible rights. It focused on the psychological distress suffered by the marine's children because of his detention in India. Although the children occasionally visited him at the Italian ambassador's residence, these visits could not substitute for the family life they enjoyed in Italy. The *Enrica Lexie* arbitral tribunal granted three provisional measures (5-0). First, it

⁶³⁰ *San Padre Pio* (n 179) 382 [28].

⁶³¹ *San Padre Pio* (n 179) 399–400 [106]–[110].

⁶³² *San Padre Pio* (n 179) 404–5 [128]–[131].

⁶³³ For the only criticism of this content of interim relief, see *San Padre Pio* (n 179) 475–7 [4]–[7] (Dissenting Opinion Kateka).

⁶³⁴ *San Padre Pio* (n 179) 409–10 [146].

⁶³⁵ *San Padre Pio* (n 179) 444 [54] (Separate Opinion Murphy).

⁶³⁶ *San Padre Pio* (n 179) 413 [8] (Joint Declaration Cabello and Chadha). See Chapter III 2.2.3.

⁶³⁷ *Enrica Lexie Arbitration* (n 46) [25].

ordered both parties to cooperate to relax the marine's bail conditions. Second, it prescribed a compliance-reporting measure. Third, it confirmed Italy's undertaking to return the marine if the merits decision were to be in India's favour.⁶³⁸

The decisions of the arbitral tribunal seem to be motivated by its belief that there would appear to be no legal interest in Sergeant Girone's physical presence in India'.⁶³⁹ It did not directly order the marine to return to Italy, but only that the parties should cooperate to that end. By acting in this way, the *Enrica Lexie* arbitral tribunal was more of a mediator than an international court.⁶⁴⁰ Furthermore, prescribing such measures was the aim of the arbitral tribunal from the very beginning. Already during the oral proceedings, it asked India what Italy's undertaking would be considered sufficient to enable the marine's return.⁶⁴¹

It seems that UNCLOS tribunals should not have prescribed provisional measures in any of the examined cases. It is unclear what, if anything, posed an urgent risk of irreparable prejudice. Nevertheless, there are certain patterns even in these ill-fated decisions. When UNCLOS tribunals accept a request for the release of a vessel or person, they simultaneously grant positive relief ordering a requesting party to provide an undertaking or post a bond. In this way, UNCLOS tribunals seem to render the granting of measures more acceptable, even in circumstances where such relief was not warranted.

7. Concluding Remarks

There are patterns in granting similar (sometimes identical) provisional measures in comparable cases. This challenges the common belief that interim relief is always precisely tailored to the specific circumstances of each case.

In cases concerning alleged violations of substantive treaty obligations, environmental obligations, the principle of non-interference, the execution of the death penalty, or contested judicial and administrative municipal proceedings, the main provisional measure was negative in nature, ordering the suspension of the contested action.

⁶³⁸ *Enrica Lexie Arbitration* (n 46) [132].

⁶³⁹ *Enrica Lexie Arbitration* (n 46) [107].

⁶⁴⁰ Andrea Cannone, 'The Provisional Measures in The "Enrica Lexie" Incident Case' in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 163.

⁶⁴¹ *Enrica Lexie Arbitration* (n 46) [46]–[47].

By contrast, a positive measure requiring specific action was the primary form of interim relief in cases concerning alleged violations of procedural treaty obligations, immunities, and human rights.

Positive measures vary in their degree of precision: from highly specific one, like in *Anglo-Iranian Oil Co.*, *Certain Activities*, and *Immunities and Criminal Proceedings*, to more general obligations to comply with human rights treaties, like in *Bosnia v Yugoslavia*, *Ukraine v Russia (III)*, and *Canada and the Netherlands v Syria*. However, even these latter measures can be viewed as negative in nature, since compliance with a treaty essentially means not violating it. From this perspective, one can agree with Wolfum that provisional measures are most often prohibitory in effect.⁶⁴²

With the exception of *Electricity Company*,⁶⁴³ international courts always address non-aggravation relief to both parties. Apart from *Electricity Company* and, to some extent, *Nuclear Tests*, non-aggravation relief has never been the only provisional measure ordered.

Compliance-reporting relief is somehow problematic. It is not considered a provisional measure *sensu stricto* before the ECtHR and ITLOS. Their rules of procedure, Rule 39(4)⁶⁴⁴ and Article 95(1) respectively,⁶⁴⁵ provide that the ECtHR and ITLOS may require the parties to report on compliance with provisional measures. Therefore, the obligation to report on compliance is a separate obligation before these international courts, distinct from the obligations arising from provisional measures. On the other hand, compliance-reporting relief is a provisional measure before UNCLOS arbitral tribunals and the ICJ.⁶⁴⁶ These inconsistencies are difficult to explain.

⁶⁴² See also Wolfrum, 'Interim (Provisional) Measures of Protection' (n 32) para 38.

⁶⁴³ Pierre Michel Eisemann, 'Quelques observations sur les mesures conservatoires indiquées par la Cour de La Haye' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (TMC Asser Press 2013) 126.

⁶⁴⁴ It reads that '[a] duty judge appointed pursuant to paragraph 5 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court may request information from the parties on any matter connected with the implementation of any interim measure indicated'.

⁶⁴⁵ It reads 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'.

⁶⁴⁶ Contra Hellio and Henry (n 125) 229–37, who argue that the basis for this obligation is Article 78 of the ICJ Rules. See also Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations' (2010) 23 *Leiden Journal of International Law* 571, 576; Acconciamezza (n 31) 428.

Evidence-protection relief is the most recent form of provisional measure. It originated more or less with *Frontier Dispute*. Its scope has evolved from obliging parties not to destroy evidence to requiring them to allow independent UN fact-finding missions.

There is a view that evidence-protection and compliance-reporting relief are only a form of a non-aggravation measure.⁶⁴⁷ This view is difficult to accept. Each of these measures imposes different (positive or negative) obligations on the parties.

⁶⁴⁷ Eisemann (n 643) 125–6.

Chapter III

Criteria for Selecting the Content of Provisional Measures

[E]n vous demandant de les faire dans une ordonnance en indication de mesures conservatoires, le demandeur met la charrue avant les bœufs ; vous ne sauriez, Mesdames et Messieurs de la Cour, vous accommoder d'un tel attelage !

– Alain Pellet⁶⁴⁸

1. Introductory Remarks

While Judge Sepúlveda-Amor argued that the ICJ can indicate *any* provisional measure,⁶⁴⁹ Judge Xue emphasised that ‘such power is unlimited’. She explained that:

It should be restricted by the factual evidence that the circumstances on the ground require that such measure ought to be taken, otherwise, irreparable prejudice would be caused to the rights of either of the parties which would be adjudicated subsequently in the main proceedings that this was not unlimited.⁶⁵⁰

Thus, even international judges are divided on the extent of their discretion in selecting the content of interim relief. Building on the analysis in the previous chapters, this chapter examines the criteria governing the selection of the content of provisional measures. It considers not only the existing requirements but also explores potential developments in this field.

2. Effectiveness

Jurisprudence does not often use the term ‘effectiveness’ directly. At times, it does employ it when justifying often controversial provisional measures.⁶⁵¹ Indeed, this notion of

⁶⁴⁸ *Certain Activities* (Provisional Measures 2011) (n 161) Verbatim Record CR 2011/2 (11 January 2011), 65 [35] (Pellet).

⁶⁴⁹ *Certain Activities* (Provisional Measures 2011) (n 161) 35 [1] (Separate Opinion Sepúlveda-Amor).

⁶⁵⁰ *Temple (Interpretation)* (n 522) 609 (Dissenting Opinion Xue).

⁶⁵¹ See eg *MOX Plant* (n 179) 113 (Joint Declaration Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus). See also *MOX Plant* (n 179) 149 [25] (Separate Opinion Székely).

‘effectiveness’ seems to shape both theoretical and practical approaches to selecting the content of interim relief.

2.1. Effectiveness in Theory

Effectiveness, being a non-legal concept, necessitates a definition. It also involves defining the aim of granting interim relief. This issue is not without controversy.

2.1.1. ‘Goal-Based Approach’

There is no single universally accepted definition of effectiveness. This notion is often equated with compliance with decisions of international court. In that sense, a decision is effective only if the parties comply with it. If there is non-compliance, decision is, by definition, ineffective.⁶⁵²

Shany presents a different perspective, which he calls the ‘goal-based approach’. He argues that effectiveness is independent of mere compliance with international decisions. According to Shany, international courts are effective when they achieve the goals for which they were established by their mandate providers.⁶⁵³

Scholars such as Alexianu argue for applying Shany’s approach to interim relief.⁶⁵⁴ Provisional measures proceedings are inherently purpose-driven. Under Shany’s approach, compliance with provisional measures is not a *sine qua non* condition for their effectiveness. Even if interim relief is not complied with, it can still be effective. The condition is that its content is aimed at achieving the aim for which it was granted. Because interim relief is ordered only when a specific set of conditions is fulfilled, the ‘goal-based approach’ is suitable to evaluate its effectiveness.

⁶⁵² See eg Joan Donoghue, ‘The Effectiveness of the International Court of Justice’ (2014) 108 Proceedings of the ASIL Annual Meeting 114, 114; Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Brill Nijhoff 2017) 1. Couvreur also argues that ‘[t]he effectiveness of a court is always dependent on its capacity to adapt to the evolving needs and circumstances of the society in which it operates’. Couvreur 3–4.

⁶⁵³ Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) ch I. In addition, Raustiala suggests that ‘[i]f a legal standard is quite demanding, even widespread failure to meet it may still correlate with observable, desired changes in behavior’. Kal Raustiala, ‘Compliance & Effectiveness in International Regulatory Cooperation’ (2000) 32 Case Western Reserve Journal of International Law 387, 394.

⁶⁵⁴ See Alexianu (n 350).

On the other hand, the issue of compliance with provisional measures cannot be entirely disregarded. As Hellio and Henry observe that:

Le respect des décisions juridictionnelles est un facteur essentiel de l'efficacité des juridictions notamment internationales et de leur crédibilité. Le garantir permet de parfaire la protection des droits concernés en remédiant au mieux aux violations constatées et en prohibant autant que possible de nouvelles violations. Le constat s'impose pour les arrêts au fond de la CIJ et plus encore peut-être pour ses ordonnances en indication de mesures conservatoires.⁶⁵⁵

In practice, there is a correlation between compliance and the effectiveness of provisional measures. Even if the international court has chosen the appropriate content of interim relief, its aim will not be achieved if the measure is not complied with. Conceptually, however, compliance and effectiveness are different concepts.

Adopting Shany's approach requires defining the goal of provisional measures. Most provisions describe it as 'protecting the rights of the parties'.⁶⁵⁶ Rosenne explains how this phrase should be interpreted. He notes that the decision on the rights and obligations of the parties made by an international court concerns the situation that existed at the time the proceedings were instituted. Everything that occurs after that moment is not taken into account when determining the rights and obligations of the parties. Rosenne states that 'technically, nothing that either party might do while the judicial proceedings are in progress would bring that party advantage or adversely affect the rights of the other party in relation to the object of the dispute'. Nevertheless, 'it might make it difficult if not impossible for the court or tribunal to render an effective decision'. Rosenne argues that the very instruction of the proceedings constitutes a kind of a provisional measure. From this moment, the requirement not to aggravate the dispute begins to apply, as the PCIJ stated in *Electricity Company*. Rosenne is of the opinion that refraining from actions that may prejudice the international court's effective decision also includes the destruction of evidence in the case.⁶⁵⁷ In other words, Rosenne argues that the aim of provisional measures is to ensure the effectiveness of the final decision in the case.

Understanding the aim of provisional measures as ensuring the effectiveness of the final decision may prima facie appear inconsistent with the express wording of Article 41

⁶⁵⁵ Hellio and Henry (n 125) 226.

⁶⁵⁶ Cf Chapter I 3.

⁶⁵⁷ Rosenne, *Provisional Measures in International Law* (n 1) 3–4.

of the ICJ Statute and Article 290 of UNCLOS. Both these provisions reads that interim relief serves to protect the parties' rights. However, there is no contradiction. As Judge *ad hoc* Verhoeven explains:

The essential *raison d'être* of provisional measures being less to protect the rights of the parties than to safeguard the "effectiveness" of the decision to be rendered by the Court in their regard, non-compliance with those measures is in effect a challenge to the authority of the Court.⁶⁵⁸

Judge *ad hoc* Elias put it even more briefly. In his view, '[t]he purpose of the power to indicate provisional measures under Article 41 of the Statute is to safeguard the meaningfulness of the final judgment'.⁶⁵⁹

In *Aegean Sea*, the ICJ seems to confirm this approach that interim relief serves to protect the future decision on the merits. The Court held that its '*judgment should not be anticipated* by reason of any initiative regarding the matters at issue before the Court'.⁶⁶⁰ As President Jiménez de Aréchaga then stated:

The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*. In cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render.⁶⁶¹

UNCLOS tribunals share the same view. Even though neither party requested provisional measures in *Guyana v Suriname*, the arbitral tribunal nevertheless commented on their aim. The tribunal observed that interim relief concerns the 'obligation to make every effort not

⁶⁵⁸ *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Reports 168, 58 [3] (Declaration Verhoeven).

⁶⁵⁹ *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures) ICJ General List No 197 (12 September 2025) [2] (Dissenting Opinion Elias). [I]n the absence of provisional measures, *the execution of a possible decision* by the Court that Iran was under a duty to submit to arbitration in respect of the property rights claimed by the company could be prejudiced.' *Guinea-Bissau v Senegal* (Provisional Measures) (n 98) 77 (Separate Opinion Shahabuddeen) (emphasis added). The purpose of a request for provisional measures is to preserve as well as to safeguard the rights of the parties that are in dispute, especially when such rights or subject-matter of the dispute could be irretrievably or irreparably destroyed thereby *rendering the Court's decision ineffective or without object*.' *Breard* (Provisional Measures) (n 420) 263 (Declaration Koroma) (emphasis added).

⁶⁶⁰ *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Measures of Protection) [1976] ICJ Reports 3, 9 [25].

⁶⁶¹ *Aegean Sea* (n 660) 15 (Separate Opinion Jiménez de Aréchaga).

to hamper or jeopardise the reaching of a final agreement'.⁶⁶² Despite adopting a problematic interpretation of Paragraph 28 of Annexure G of the Indus Waters Treaty, the *Indus Waters Treaty* Court of Arbitration made the right decision that interim measures must serve to protect the effectiveness of the final decision.⁶⁶³ The same approach to effectiveness was adopted in the Treaty of Corinto and the Swiss-German Treaty of Arbitration and Conciliation,⁶⁶⁴ and was also shared by the UN Tribunal⁶⁶⁵ and the Eritrea-Ethiopia Boundary Commission.⁶⁶⁶

Unlike the extensive jurisprudence on interim relief in individual-State cases, the ECtHR has so far avoided taking a position on the relationship between provisional measures in inter-State proceedings and the effectiveness of an application under Article 33 of the ECHR. This issue was only raised by Judge Keller in *Georgia v Russia (II)*. She argued that the ECtHR cannot perform its judicial function identically in inter-State and non-inter-State proceedings.⁶⁶⁷ Since Article 33 of the ECHR, unlike Article 34, does not contain an obligation to ensure the effectiveness of an application, Judge Keller ruled that failure to comply with interim relief in inter-State cases should not be considered a violation of the ECHR.⁶⁶⁸ However, such an interpretation of interim relief in inter-State cases is illogical, to say the least. It assumes that an inter-State application may be ineffective. It is unclear what its purpose would be, why it would be filed, or why the ECtHR would examine it. Regardless of whether interim relief under Article 33 of the ECHR is legally binding, its aim must be to safeguard the effectiveness of inter-State proceedings. Contrary to the view of some scholars,⁶⁶⁹ it must be argued that interim relief under Articles 33 and 34 of the ECHR should be treated analogously.

As CJEU Advocate General Tesauro stated many years ago that the aim of interim relief is to 'achieve that *fundamental objective of every legal system*, the effectiveness of

⁶⁶² *Maritime Boundary Arbitration (Guyana v Suriname)* (2007) XXX RIAA 1, 133 [470]; Pierre-Emmanuel Dupont and Alexia Solomou, 'Provisional Measures in Maritime Delimitation Cases' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses* (Brill Nijhoff 2017) 322–3.

⁶⁶³ *Indus Waters Kishenganga Arbitration* (n 302) 47 [138]. See also Tanaka, '*Indus Waters Kishenganga*' (n 365) 575.

⁶⁶⁴ See Chapter I 2.

⁶⁶⁵ See Chapter I 3.6.

⁶⁶⁶ See Chapter I 3.8.

⁶⁶⁷ *Georgia v Russia (II)* (ECtHR) (n 572) [9] (Concurring Opinion Keller).

⁶⁶⁸ *Georgia v Russia (II)* (ECtHR) (n 572) [12] (Concurring Opinion Keller).

⁶⁶⁹ See eg Pascale (n 15) 255.

judicial protection’.⁶⁷⁰ Lando argues that when granting provisional measures, an international court is concerned whether a respondent could make reparation for causing the prejudice alleged by a requesting party.⁶⁷¹ If provisional measures had not been introduced, the prejudice caused to the rights of one of the parties could not have been fully remedied.⁶⁷² In other words, interim relief safeguards a requesting party’s rights ‘because the passage of time would undo the benefits of the judgment to be given on the merits’.⁶⁷³

To sum up, since provisional measures are effective when they achieve the aim underlying their granting, they must be regarded as effective if their content—assuming compliance—is capable of ensuring the effectiveness of the final decision on the merits.

2.1.2. Non-Aggravation, Compliance-Reporting, and Evidence-Protection Measures

The practice of granting non-aggravation, compliance-reporting, and evidence-protection measures has given rise to the view that such measures pursue aims distinct from the protection of the parties’ rights.⁶⁷⁴ Some scholars even distinguish between ‘typical’ and ‘atypical’ aims of provisional measures.⁶⁷⁵ If interim relief has different purposes, it can also be effective in many ways.

The above problem is most acute in relation to non-aggravation relief. Only a minority of scholars argue that it serves to protect the rights of the parties, as do ‘standard’ positive and negative measures. This group includes Lord Collins of Mapesbury,⁶⁷⁶ Merrills,⁶⁷⁷ and Rosenne.⁶⁷⁸ The majority view is that non-aggravation relief constitutes an aim in itself. This category includes, *inter alia*, Palchetti,⁶⁷⁹ Oellers-Frahm and

⁶⁷⁰ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* ECLI:EU:C:1990:216 (Opinion of AG Tesaurio) [18]. Lord Collins of Mapesbury argues that the Advocate General simply ‘reminded’ the CJEU of that. Collins (n 32) 19. But see Anna Wyrozumska, ‘System ochrony prawnej UE’ in Jan Barcz, Maciej Górka and Anna Wyrozumska (eds), *Instytucje i prawo Unii Europejskiej: podręcznik dla kierunków prawa, zarządzania i administracji* (7th edn, Wolters Kluwer 2023) 481.

⁶⁷¹ Lando, ‘Provisional Measures and the End of Prima Facie Jurisdiction’ (n 134) 340.

⁶⁷² See Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* (n 670) [18].

⁶⁷³ Lenaerts and others (n 30) 535 para 13.01. See also Białowieża Forest (n 494) [43].

⁶⁷⁴ See Brown, *A Common Law* (n 2) 121–3. See also Sztucki (n 3) 12; Wolfrum, ‘Provisional Measures: International Tribunal for the Law of the Sea (ITLOS)’ (n 29) para 8.

⁶⁷⁵ Roberto Virzo, ‘Introduction’ in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 2.

⁶⁷⁶ Collins (n 32) 215.

⁶⁷⁷ John G Merrills, ‘Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice’ (1995) 44 *International and Comparative Law Quarterly* 90, 100–6.

⁶⁷⁸ Rosenne, *Provisional Measures in International Law* (n 1) 3.

⁶⁷⁹ Paolo Palchetti, ‘The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute’ (2008) 21 *Leiden Journal of International Law* 623.

Zimmerman,⁶⁸⁰ Quintana,⁶⁸¹ ICJ Principal Legal Secretary Punzhin,⁶⁸² or Lord Collins of Mapesbury during the preparation of the Resolution of the *Institut de Droit International*.⁶⁸³ In 2017, the *Institut de Droit International* adopted the *Resolution on Provisional Measures*. Its aim was to provide a comprehensive examination of interim relief in international law. The *Resolution* states that provisional measures have two objectives: to ‘maintain the *status quo* pending determination of disputes or to preserve the ability to grant final effective relief ‘and to ‘prevent[] the aggravation of the dispute’.⁶⁸⁴

The opinions alleging the separate nature of non-aggravation measures date back to *Electricity Company*. In its well-known passage, the Court held that:

[Article 41 of the PCIJ Statute] applies the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.⁶⁸⁵

Writing in 1945, Dumbauld already suggested that the *dictum* supports the view that interim relief pursues dual goals.⁶⁸⁶ The ICJ granted the so-called non-aggravation measures in all decisions between *Anglo-Iranian Oil Co.* and *Military and Paramilitary Activities*.⁶⁸⁷ Neither the ICJ nor individual judges ever commented on this. An authority in the topic, Palchetti, notes that ‘indications of this kind appeared to be standard clauses which merely complemented more specific measures’.⁶⁸⁸

⁶⁸⁰ Oellers-Frahm and Zimmermann (n 28) 1145–7 para 22. However, it seems they view the so-called non-aggravation measures as merely a specific form of interim relief.

⁶⁸¹ Quintana (n 28) 640 but it can be doubted whether the source provided in n 44 explicitly supports this argument.

⁶⁸² Punzhin, ‘Vremennye mery (chast– 1)’ (n 34) 53; Punzhin, ‘Vremennye mery (chast– 2)’ (n 34) 49–52.

⁶⁸³ Cf IDI, ‘Report to the Third Commission on Provisional Measures by Lord Collins of Mapesbury (Rapporteur)’ (23 December 2016) 77(1) *Annuaire de l’Institut de Droit international* 259.

⁶⁸⁴ IDI, ‘Resolution on Provisional Measures’ (8 September 2017) Session de Hyderabad 2017, guiding principles 1 and 4. See also Elisa Ruozzi, ‘La codificazione della funzione cautelare internazionale ad opera dell’Institut de droit international’ (2018) 101 *Rivista di diritto internazionale* 1182. Pascale argues that the Resolution is incomplete, as it fails to take into account the law and practice of the African Court on Human and Peoples’ Rights. Pascale (n 15) 254–6.

⁶⁸⁵ *Electricity Company* (n 118) 199.

⁶⁸⁶ Dumbauld, ‘Relief *Pendente Lite* in the Permanent Court of International Justice’ (n 26) 401; Miles (n 2) 76.

⁶⁸⁷ See *Anglo-Iranian Oil Co* (n 37) 93 [(2)]; *Fisheries Jurisdiction (UK)* (n 131) 17 [(1)(a)]; *Fisheries Jurisdiction (FRG)* (n 131) 35 [(1)(a)]; *Nuclear Tests (Australia)* (n 484) 106; *Nuclear Tests (New Zealand)* (n 485) 142; *Tehran Hostages* (n 428) 21 [47(1)(B)]; *Military and Paramilitary Activities* (n 499) 187 [41(3)].

⁶⁸⁸ Palchetti (n 679) 624.

Everything changed with the decision in *Frontier Dispute*. A Chamber of the ICJ observed that:

independently of the requests submitted by the Parties for the indication of provisional measures, 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.⁶⁸⁹

The full ICJ further confirmed this approach in *Land and Maritime Boundary*, but it slightly changed the wording to emphasise that the Court could grant non-aggravation measures ‘*independently* of the requests for the indication of provisional measures submitted by the Parties *to preserve specific rights*’.⁶⁹⁰ There are different interpretations of this phrase. Some argue, like Gautron⁶⁹¹ and Quintana,⁶⁹² that the ICJ can grant non-aggravation measures even when not explicitly asked in the request. In contrast, Judge Bedjaoui, who presided over *Frontier Dispute*, asserted that the Court could grant non-aggravation relief even when no relief to protect the rights of the parties is indicated.⁶⁹³ For years, scholars have engaged in debates about whether these two ‘types’ of provisional measures have distinct aims.⁶⁹⁴

In *Pulp Mills*, the ICJ rejected Judge Bedjaoui’s view. First, the Court observed that it had always granted non-aggravation relief in conjunction with other measures. Second, it found no need to indicate the provisional measures requested by Uruguay. Thus, the ICJ declined to grant non-aggravation relief.⁶⁹⁵ In other words, *Pulp Mills* argues that the Court will order non-aggravation relief only in conjunction with the ‘standard’ provisional measures. For Le Floch, ‘[t]he debate is now closed’.⁶⁹⁶ However, some judges still advocate the need to return to the pre-*Pulp Mills* approach.⁶⁹⁷

⁶⁸⁹ See *Frontier Dispute* (n 511) 9 [18] (emphasis added).

⁶⁹⁰ *Land and Maritime Boundary* (n 515) 22–3 [41] (emphasis added).

⁶⁹¹ Jean-Claude Gautron, ‘Création d’une chambre au sein de la Cour internationale de Justice, mesures et médiation provisoires dans le différend frontalier entre le Burkina-Faso et le Mali’ (1986) 32 *Annuaire français de droit international* 192, 210–1.

⁶⁹² Quintana (n 28) 641.

⁶⁹³ *Lockerbie (UK)* (n 315) 48 [31]–[32] (Dissenting Opinion Bedjaoui); *Lockerbie (USA)* (n 160) 158 [31]–[32] (Dissenting Opinion Bedjaoui).

⁶⁹⁴ This is the question that most scholars ask. See eg Thirlway, *The Law and Procedure* (n 28) 947; Miles (n 2) 209; Oellers-Frahm and Zimmermann (n 28) 1145–7 para 22; Le Floch (n 10) 49–50.

⁶⁹⁵ *Pulp Mills* (Provisional Measures 2007) (n 350) 16 [49]–[51]; Palchetti (n 679) 636–7.

⁶⁹⁶ Le Floch (n 10) 50. See Oellers-Frahm and Zimmermann (n 28) 1127 para 22.

⁶⁹⁷ See eg *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures) [2019] ICJ Reports 361, 373ff (Declaration Xue).

A new phase seems to have begun with the *Ukraine v Russia (ICSFT and CERD)* judgment on the merits. The ICJ acceded to Ukraine's request and declared that Russia violated the non-aggravation measure.⁶⁹⁸ Judge Bennouna dissented, arguing that the non-aggravation relief 'does not have the same binding character of specific measures that are intended to preserve the rights of the parties'.⁶⁹⁹ In Judge Yusuf's view, 'non-aggravation measures never refer to rights to be preserved pending a final judgment nor are they meant to perform such a function'.⁷⁰⁰ For the dissenting judges, non-aggravation relief serves different purposes than the 'standard' provisional measures.

Miles explains that '[m]easures for the protection of rights *pendente lite* and measures for non-aggravation arise from two different traditions of interim relief'.⁷⁰¹ Le Floch points out that the so-called non-aggravation measures are 'dependent or/and supplement[] the existence of the [measures aimed at protecting the parties' rights]'.⁷⁰² Thirlway reluctantly accepts the separateness of the non-aggravation relief. This scholar, known for his conservative approach to procedural rules, states that 'the power of the [ICJ] to indicate measures for that purpose [non-aggravation], even independently of measures for the preservation of rights, appears to be established in practice, even though it does not appear to be contemplated by the Statute'.⁷⁰³ Kolb most picturesquely illustrates the relationship between the two 'aims' of provisional measures. He describes their 'volet objectif' as protecting the judicial process and ensuring 'bonne administration de la justice', which means preventing the dispute from aggravating. The 'volet subjectif' refers to the protection of the rights of each party. Kolb argues that these 'volets' are interrelated, suggesting metaphorically that '[d]'une certaine manière, il existe deux mamelles auxquelles se nourrissent les mesures conservatoires, *mais le lait nourricier est d'une substance similaire, bien que non entièrement identique*'.⁷⁰⁴ Some justify ordering non-aggravation relief as following from inherent powers of an international court⁷⁰⁵ or from

⁶⁹⁸ *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)* (Judgment) [2024] ICJ Reports 78, 210 [397] and 212 [404(6)].

⁶⁹⁹ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 232 [3] (Declaration Bennouna).

⁷⁰⁰ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 236 [5] (Declaration Yusuf). See also Punzhin, 'Vremennyye меры (chast– 2)' (n 34) 50.

⁷⁰¹ Miles (n 2) 212.

⁷⁰² Le Floch (n 10) 50.

⁷⁰³ Thirlway, *The Law and Procedure* (n 28) 940.

⁷⁰⁴ Kolb, *CIJ* (n 129) 635–6 (emphasis added).

⁷⁰⁵ For the exhaustive analysis of the inherent powers of international tribunals, see Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Yearbook of International Law* 195.

‘the pre-existing general obligation of the parties to the dispute, arising from the very purpose of dispute settlement’.⁷⁰⁶

Accepting that non-aggravation measures differ from the ‘standard’ provisional measures set out in Article 41 of the ICJ Statute raises three problems. The first concerns their legal basis. The second is why the ICJ can indicate a provisional measure not provided for in its Statute. The third problem is how to reconcile non-aggravation relief with the limited jurisdiction of international courts. The separateness of non-aggravation relief means that it covers a broader scope of events than those submitted to adjudication. As put by Judge Sebutinde:

the non-aggravation measure contains two aspects, in that it encompasses both conduct that aggravates the dispute between the parties more broadly and conduct that is more precisely directed against hampering the Court’s ability to resolve the dispute with which it is seised in a particular case.⁷⁰⁷

Apart from the ICJ, only UNCLOS tribunals grant non-aggravation measures. In its first-ever decision on provisional measures in *Saiga (No 2)*, the Tribunal only ‘recommended’ that the parties avoid aggravating the dispute.⁷⁰⁸ After ‘prescribing’ such relief in *Southern Bluefin Tuna*,⁷⁰⁹ and refraining from doing so in subsequent cases,⁷¹⁰ ITLOS has resumed prescribing non-aggravation measures in all cases since *Ghana/Côte d’Ivoire*.⁷¹¹ Neither ITLOS nor individual judges have commented on the legal basis or aim of their granting. No one has argued that they are different from interim relief under Article 290 of UNCLOS. It seems that non-aggravation relief under UNCLOS is considered a special form or content of a provisional measure, not a separate type of it. The issue of non-aggravation relief does not arise before the other international courts considered in this study.

In *Guinea-Bissau v Senegal*, Judge *ad hoc* Thierry sought to explain the relationship between non-aggravation, compliance-reporting, and evidence-protection measures, on the one hand, and the protection of the parties’ rights, on the other. In his dissenting opinion,

⁷⁰⁶ Cf *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 283 [36] (Separate Opinion Charlesworth).

⁷⁰⁷ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 250 [34] (Dissenting Opinion Sebutinde).

⁷⁰⁸ *Saiga (No 2)* (n 178) 40 [52(2)]. Judge Vukas rightly criticised the decision to ‘recommend’ and not to ‘prescribe’ was criticised. *Saiga (No 2)* (n 178) 41–2 [3] (Declaration Vukas). See further in Chapter II.

⁷⁰⁹ *Southern Bluefin Tuna* (n 179) 297 [90(1)(a)].

⁷¹⁰ See *MOX Plant* (n 179) 110 [85]; *Land Reclamation* (n 158) 25 [90] and 26 [102]; *ARA Libertad* (n 48) 349 [101]; *Arctic Sunrise* (n 179) 251 [98].

⁷¹¹ See *Ghana/Côte d’Ivoire* (n 178) 166 [108(1)(e)]; *Enrica Lexie* (n 179) 205 [141(1)]; *Three Ukrainian Naval Vessels* (n 46) 312 [124(1)(c)]; *San Padre Pio* (n 179) 410 [146(2)].

he argued that there can be only one aim of provisional measures, namely, as defined in Article 41 of the ICJ Statute: the protection of the rights of the parties. Nevertheless, although there is only one ‘aim’, it is realised through different ‘objects’:

But while the aim of the measures is the protection “*du droit de chacun*”, they can have different objects, as shown by the case-law of the Permanent Court of International Justice and of the present Court, depending on the circumstances of the cases which have been brought before them and on which they have pronounced. The object of the measures may be to prevent the aggravation of the dispute – this is obvious. They may be directed to preventing irreparable damage. Their object may be to preserve the exercise by the Court of its judicial function by preventing the parties from anticipating the subsequent decision of the Court on the merits. The latter concern has often been expressed by the Court. These objectives can be envisaged separately, but they are complementary. Regardless, however, of the immediate object of the measures, their aim is, in any event, the preservation “*du droit de chacun*”.

The specific content of interim relief further clarifies these ‘objects’. In other words, implementing a particular measure achieves a corresponding ‘objects’:

Finally, so far as their nature or substance is concerned, the measures may be diverse and, except for the need that they be suited to the circumstances and for their provisional character, there is no limit to the power of the Court to select the appropriate remedies. The measures may be the ones that the party asking for them requests; but they may be different [in whole] or in part, without it being necessary to rely in this respect on Article 75, paragraph 1, of the Rules of Court, which concerns the case where the Court acts *proprio motu*, that is to say, without having received a request for provisional measures.⁷¹²

Although Judge *ad hoc* Thierry’s analysis concerned only the PCIJ and the ICJ, it would seem to be of general applicability. Provisional measures may vary in content’, and their ‘objects’ may also be different, like non-aggravation, compliance reporting, or evidence protection. However, they always have one ‘aim’, that is, the protection of the parties’ rights. Even if compliance with interim relief may contribute to achieving the broader objectives of international courts,⁷¹³ when deciding on such measures judges must be guided solely by the aim of protecting the parties’ rights.

⁷¹² *Guinea-Bissau v Senegal* (Provisional Measures) (n 98) 79–80 (Dissenting Opinion Thierry). See also Quintana (n 28) 645.

⁷¹³ Cf Alexianu (n 350).

Taking non-aggravation measures as an example, they serve the same aim as the ‘standard’ positive and negative measures, that is, to ensure the effectiveness of the final decision to be given. Already in *Electricity Company*, the PCIJ used the conjunction ‘and’ to link the non-aggravation of the dispute with the non-prejudging of the final decision in the case. Interestingly, the Court did not refer at all to the literal wording of Article 41 of the Statute, which provides for the protection of the rights each party. In *Land and Maritime Boundary*, Judge *ad hoc* Ajibola rightly argued that ‘the issue of non-aggravation and non-extension is not only linked with the protection of the prospective rights of litigants, but it is an integral part of that protection, and provides a basis upon which an indication can be given’.⁷¹⁴ As the Court held in *Ukraine v Russia (ICSFT and CERD)*, Russia’s violation of the non-aggravation measure ‘severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve’.⁷¹⁵ President Donoghue supported this statement, noting that ‘the Russian Federation violated its obligation not to make the dispute more difficult to resolve’.⁷¹⁶ Non-aggravation relief serves to prevent the dispute from escalating to the point where the execution of the final judgment would become impossible.

The only legal basis for indicating non-aggravation measures is and may be Article 41 of the ICJ Statute. In *Electricity Company*, the PCIJ ruled precisely that Article 41 ‘applies the principle’ that the parties must abstain from prejudicing the execution of a decision to be given, ‘and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute’.⁷¹⁷ In other words, Article 41 is an expression of that principle and does not exist in parallel with it. Similarly, the *Frontier Dispute* Chamber ruled that ‘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’.⁷¹⁸ The Chamber thus held that the only legal basis for the non-aggravation relief is Article 41. *Pulp Mills* further confirms this position: measures to prevent the aggravation of the dispute are only indicated if measures to protect the rights of the parties are also indicated. Had non-aggravation relief be separate, the Court could have grant it irrespective of the provisional measures under Article 41 of the ICJ Statute. The ICJ can find a violation

⁷¹⁴ *Land and Maritime Boundary* (n 515) 53 (Separate Opinion Ajibola).

⁷¹⁵ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 210 [397] and 212 [404(6)].

⁷¹⁶ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 224–5 [46] (Separate Opinion Donoghue). But see *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 229–30 [3] (Declaration Abraham).

⁷¹⁷ *Electricity Company* (n 118) 199.

⁷¹⁸ See *Frontier Dispute* (n 511) 9 [18] (emphasis added).

of non-aggravation measures, as they are binding, like all other measures under Article 41. This is because non-aggravation relief is also indicated under Article 41. Thus, non-aggravation relief is a specific form or object of provisional measures. Arguably, the limited jurisdiction of the ICJ as an international court prevents it from ordering a provisional measure whose legal basis lies outside the ICJ Statute.

Overall, logic requires that a provisional measure be effective; otherwise, there would be no point in granting it. The purpose of interim relief is to ensure the effectiveness of the final decision. It would not be effective if a respondent were unable to compensate a requesting party for the prejudice suffered. Provisional measures are granted precisely to avoid such irreparability. This is achieved by means of positive and negative measures, as well as non-aggravation, compliance-reporting and evidence-protection relief. However creative or diverse its content or object—be it non-aggravation, evidence-protection, or compliance-reporting—interim relief may only serve the aim expressly provided in the authorising provision. Anything beyond this would be *ultra vires*. Only when the final decision is effective are the rights of a State protected. It follows that all international courts share this approach. In inter-State proceedings, interim relief, regardless of the forum, serves to ensure the effectiveness of the final decision.

2.2. Effectiveness in Practice

There are many ways in which the content of interim relief can secure their effectiveness. Three of these are that provisional measures must be ordered rather than suggested, capable of being performed, and formulated with precision.

2.2.1. Non-Suggestion

Provisional measures are set out in the operative part, or *dispositif*, of a decision. The *dispositif* contains the international court's final response to the questions before it.⁷¹⁹ With respect to interim relief, the question is whether the circumstances require the granting of provisional measures. Accordingly, interim relief contained in the operative part constitutes

⁷¹⁹ See eg Christian J Tams, 'Article 94 UN Charter' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019) 240 para 11.

the court's definitive statement on what must be done in a given situation to avoid an urgent risk of irreparable prejudice.

Judge Bouguetaia argued that provisional measures in the operative part can only be an authoritative statement of the court. In his words, '[t]he role of the Tribunal is to "order", i.e. to take mandatory decisions; its role is not to issue empty formulae, knowing that such utterances add nothing to the legal reasoning and provide panaceas which are rarely applicable'.⁷²⁰ *A contrario*, interim relief cannot consist merely of a non-binding collection of suggestions or recommendations. It must impose an obligation to act.

A corresponding view is that the provisions on provisional measures prohibit an international tribunal from merely 'recommending' interim relief. Judge Vukas dissented from the Tribunal's decision in *Saiga (No 2)*, which both 'prescribed' a provisional measure⁷²¹ and 'recommended' non-aggravation relief.⁷²² He argued that such a 'recommendation' was contrary to Article 290 of UNCLOS. That provision reads that UNCLOS tribunals 'prescribe' interim relief.⁷²³ Judge Vukas' appears to have general applicability: an international court cannot combine in the *dispositif* provisional measures *sensu stricto* with mere 'suggestions' or 'recommendations'.

A separate issue is the widespread practice whereby international courts express concerns about the situation and include recommendations to the parties in the reasoning. This practice is controversial in light of jurisdictional limitations.⁷²⁴ In any event, such 'recommendations', wherever located, are not provisional measures.⁷²⁵

2.2.2. Performability

Provisional measures are effective only if complied with. Accordingly, their content must be capable of being performed. They must require a State to carry out an action within its legal and factual powers.

⁷²⁰ *San Padre Pio* (n 179) 505 [17] (Dissenting Opinion Bouguetaia).

⁷²¹ *Saiga (No 2)* (n 178) 39–40 [52(1)].

⁷²² *Saiga (No 2)* (n 178) 40 [52(2)].

⁷²³ *Saiga (No 2)* (n 178) 41–2 [3]–[4] (Declaration Vukas). See also Dumbauld, *Interim Measures of Protection* (n 26) 166–7.

⁷²⁴ For the favourable opinion of this practice, see Jean d'Aspremont, 'The Recommendations Made by the International Court of Justice' (2007) 56 *International and Comparative Law Quarterly* 185. For the critical opinion of this practice, see Hugh Thirlway, 'The Recommendations Made by the International Court of Justice: A Sceptical View' (2009) 58 *International and Comparative Law Quarterly* 151.

⁷²⁵ See also *Great Belt* (n 140) 24 (Declaration Tarassov).

Judges raise this point when they criticise the granted interim relief. For example, they question whether a State can be held responsible for events taking place on the territory of another State,⁷²⁶ undertake to return individuals who are not under its jurisdiction,⁷²⁷ or unilaterally ensure passage through a border crossing.⁷²⁸

Such criticism is particularly pertinent in *Armenia v Azerbaijan*. The ICJ obliged Azerbaijan to ‘take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions’.⁷²⁹ Judge *ad hoc* Keith noted, however, that under a trilateral agreement it was Russia that was responsible for supervising movement along the Corridor. Azerbaijan may therefore have had limited possibilities to implement this provisional measure.⁷³⁰ The ECtHR took a different approach. In *Armenia v Azerbaijan (IV)*, it observed that ‘the extent to which the Government of Azerbaijan were currently in control of the situation in the “Lachin Corridor” was disputed’. It therefore ruled that Azerbaijan should ‘take all measures that are within their jurisdiction to ensure safe passage through the “Lachin Corridor”’.⁷³¹ The use of the phrase ‘within their jurisdiction’ is particularly significant. The ECtHR’s approach is preferable, as it avoids unnecessary disputes between the parties about whether a provisional measure could be performed.

Compliance with interim relief often requires appropriate action under municipal law.⁷³² If the content of a provisional measure does not specify how it must be complied

⁷²⁶ *Bosnia v Yugoslavia* (Provisional Measures April 1993) (n 159) 27 (Declaration Tarassov); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures) [2023] ICJ Reports 36, 49 [3] (Declaration Keith). See Chapter II 5.3.1. and 5.4.

⁷²⁷ *San Padre Pio* (n 179) 412–3 [6]–[7] (Joint Declaration Cabello and Chadha) and 504–5 [13]–[16] (Dissenting Opinion Bouguetaia). See Chapter II 6.

⁷²⁸ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 677–8 [23] (Dissenting Opinion Sebutinde) and 712 [29] (Dissenting Opinion Barak). See Chapter II 5.4.

⁷²⁹ See Chapter II 5.3.1.

⁷³⁰ *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 23 [3] and 24 [6]–[7] (Declaration Keith).

⁷³¹ ECtHR Press Release 2022/401 (n 580).

⁷³² See generally *Polish Postal Service in Danzig* (Advisory Opinion) (1925) PCIJ Series B No 11, 29–30; Karin Oellers-Frahm, ‘Article 94’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1960–1 paras 6–7; Christian J Tams, ‘Article 94 UN Charter’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 240 paras 11–2.

with, the parties are free to choose the means of compliance.⁷³³ The only condition is that the obligation must be performed within a reasonable time.⁷³⁴

When ordering provisional measures, international courts do not act as courts of appeal from municipal courts.⁷³⁵ Yet nothing prevents them from making orders on matters previously examined by a municipal court.⁷³⁶ They may also analyse whether rendering a municipal decision constituted a violation of international law.⁷³⁷ Municipal judicial decisions, however, cannot invalidate international judicial decisions.⁷³⁸ Thus, international courts may grant provisional measures directly or indirectly concerning the municipal judicial system.⁷³⁹ As in *Electricity Company, Saiga (No 2)*, and *Enrica Lexie*,⁷⁴⁰ interim relief may require a stay of municipal legal proceedings. As in *Sino-Belgian Treaty*,⁷⁴¹ *Qatar v UAE*,⁷⁴² and *Enrica Lexie Arbitration*,⁷⁴³ provisional measures may require municipal courts to act in a particular manner. Nor can one agree that interim relief becomes incapable of performance merely because it requires a party to disregard its municipal judicial decision.⁷⁴⁴

Since no internal circumstances can justify a party's non-compliance with an international obligation,⁷⁴⁵ all provisional measures are, in theory, performable. However,

⁷³³ See eg *Haya de la Torre (Colombia v Peru)* [1951] ICJ Reports 71, 79.

⁷³⁴ *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*) [2009] ICJ Reports 3, 17 [44]; Kolb, *CIJ* (n 129) 862–3. See also Krzysztof Skubiszewski, 'Wzajemny stosunek i związku pomiędzy prawem międzynarodowym i prawem krajowym' (1986) 48(1) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1, 7.

⁷³⁵ *Breard* (Provisional Measures) (n 420) 257 [38]; *LaGrand* (Provisional Measures) (n 124) 15 [25]; *Avena* (n 420) 89 [48]; *Jadhav* (n 418) 244–5 [56].

⁷³⁶ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 216 [9] (Declaration Crawford).

⁷³⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Reports 62, 88 [63].

⁷³⁸ *Factory at Chorzów* (Merits) (n 114) 33; Shaw (n 315) 219.

⁷³⁹ See also Robert D Sloane, 'Measures Necessary to Ensure: The ICJ's Provisional Measures Order in *Avena and Other Mexican Nationals*' (2004) 17 *Leiden Journal of International Law* 673, 684.

⁷⁴⁰ See Chapter II 3.1.1.

⁷⁴¹ It concerned access to 'modern courts'. See Chapter II 2.1.

⁷⁴² It concerned giving Qataris access to courts in the UAE. See Chapter II 5.3.1.

⁷⁴³ Italy and India were to cooperate in the proceedings before the Supreme Court of India on the issue of whether the Italian marines could be released on bail. See Chapter II 6.

⁷⁴⁴ *Contra Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 150–1 [2]–[4] (Declaration Tomka); *Three Ukrainian Naval Vessels* (n 46) 342–3 [18] (Separate Opinion Lucky); *San Padre Pio* (n 179) 472–3 [77] (Dissenting Opinion Lucky).

⁷⁴⁵ See eg *Alabama Arbitration (United States of America v United Kingdom)* (1872) XXIX RIAA 125, 125; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932) PCIJ Series A/B No 44, 24; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26.

an international court should frame interim relief in such a way that the parties' ability to comply, assuming their willingness to do so, is placed beyond doubt

2.2.3. Precision

Judges emphasise the need for provisional measures to be precise. In Judge Shahabuddeen's words, they must be framed in 'self-executing terms'. That is, 'it should contain all the legal elements required for its interpretation and application'.⁷⁴⁶ As Judge *ad hoc* Couvreur observed, '[u]bi claritas, ibi utilitas'.⁷⁴⁷

However, critics often allege that interim relief is imprecise, which calls its effectiveness into question.⁷⁴⁸ For example, the ICJ did not specify in *South Africa v Israel* which UN bodies must have access to Gaza.⁷⁴⁹ Nor did ITLOS specify the content of the assurances that Switzerland was to give to Nigeria in *San Padre Pio*.⁷⁵⁰ In both cases, this lack of clarity posed a risk to their effectiveness. At times, the Court ordered the respondent States to 'take all necessary measures' to that end; at other times, to 'take all measures at its disposal'. As Sloane explains, the ICJ tends to use the word 'necessary' when there are doubts about the respondent's willingness to comply with provisional measures.⁷⁵¹ In any case, Judge *ad hoc* Keith was correct arguing that the phrase 'all measures at its disposal' is unclear which makes it difficult to assess compliance.⁷⁵²

There are two types of provisional measures often criticised for being unclear: 'repeating' measures and non-aggravation measures. As for the former, the term 'repeating' measures describes interim relief that repeats obligations already incumbent on the parties. This form of relief is common. International courts have used it to repeat parties'

⁷⁴⁶ *Land and Maritime Boundary* (n 515) 28 (Declaration Shahabuddeen). See also *Southern Bluefin Tuna* (n 179) 336 [2] (Dissenting Opinion Eiriksson).

⁷⁴⁷ *Guyana v Venezuela* (Modification of Provisional Measures) (n 478) [5] (Separate Opinion Couvreur).

⁷⁴⁸ See Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in *The Gambia v Myanmar* at the International Court of Justice' (n 595) 442–5; Milanović, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case' (n 595).

⁷⁴⁹ See *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 712–3 [30] (Dissenting Opinion Barak). See also Becker, 'Crisis in Gaza: *South Africa v Israel* at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)' (n 614). See Chapter II 5.4.

⁷⁵⁰ *San Padre Pio* (n 179) 413 [8] (Joint Declaration Cabello and Chadha). See Chapter II 6.

⁷⁵¹ Sloane (n 739) 684. He also refers to *Bosnia v Yugoslavia* (Provisional Measures April 1993) (n 159) 24 [52(a)(1)].

⁷⁵² *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 23 [3] and 24 [6]–[7] (Declaration Keith).

obligations under human rights and other treaties: *MOX Plant*,⁷⁵³ *Bosnia v Yugoslavia*,⁷⁵⁴ *Georgia v Russia*,⁷⁵⁵ *The Gambia v Myanmar*,⁷⁵⁶ *Canada and the Netherlands v Syria*⁷⁵⁷ and *South Africa v Israel*,⁷⁵⁸ ceasefire agreements: *Frontier Dispute*⁷⁵⁹ and *Land and Maritime Boundary*,⁷⁶⁰ international judgments: *Avena (Interpretation)*,⁷⁶¹ binding resolutions of the UN Security Council: *DRC v Uganda*,⁷⁶² or to reflect unilateral undertakings: *Land Reclamation*⁷⁶³ and *Enrica Lexie Arbitration*.⁷⁶⁴

Nevertheless, ‘repeating’ measures create separate obligations.⁷⁶⁵ In *Ukraine v Russia (ICSFT and CERD)*, the ICJ ordered Russia, in accordance with its obligations under CERD, not to suppress the *Mejlis*.⁷⁶⁶ Russia did not comply. At the merits stage, the Court found that, while suppressing the *Mejlis* did not amount to a violation of CERD,⁷⁶⁷ it did constitute a breach of the provisional measure.⁷⁶⁸ This shows that a ‘repeating’ measure is legally distinct from the ‘repeated’ obligation: an international court may find a violation of the former without finding a breach of the latter.

Some scholars praise ‘repeating’ measures precisely for reminding parties of their obligations, which they see as making ‘a useful contribution to promoting the rule of law

⁷⁵³ *MOX Plant* (n 179) 126 (Separate Opinion Anderson). See Chapter II 2.2.

⁷⁵⁴ See Daniele (n 590) 383. See Chapter II 5.4.

⁷⁵⁵ See *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 405 [24] (Joint Dissenting Opinion Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov). See also Morawska (n 555) 199. See Chapter II 5.3.1.

⁷⁵⁶ See Chapter II 5.4.

⁷⁵⁷ See Chapter II 5.2.

⁷⁵⁸ See eg *South Africa v Israel* (Provisional Measures January 2024) (n 46) 48 [29] and 49–50 [33] (Dissenting Opinion Sebutinde) and 74 [43] (Separate Opinion Barak). See Chapter II 5.4.

⁷⁵⁹ Cf *Frontier Dispute* (n 511) 10–1 [27]. See Chapter II 4.3.

⁷⁶⁰ See Chapter II 4.3.

⁷⁶¹ See *Avena (Interpretation)* (n 353) 333–4 [4] (Dissenting Opinion Buergenthal), 343 [10] (Joint Dissenting Opinion Owada, Tomka and Keith) and 351 [10] (Dissenting Opinion Skotnikov). See Chapter 3.1.2.

⁷⁶² See Chapter II 4.2.

⁷⁶³ See *Land Reclamation* (n 158) 30–1 [4]–[6] (Declaration Nelson); 33 [4] (Declaration Anderson); 34 (Joint Declaration Hossain and Oxman) and 46–7 [38] (Separate Opinion Chandrasekhara Rao). See Chapter II 2.2.

⁷⁶⁴ See Chapter II 6.

⁷⁶⁵ See *Avena (Interpretation)* (n 734) 20–1 [61]. See generally ‘ICJ Rejects Mexico’s Request to Interpret Avena but Finds United States Violated Provisional Measures Order’ (2009) 103 *American Journal of International Law* 362.

⁷⁶⁶ See Chapter II 5.2.

⁷⁶⁷ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 212 [404(3)]–[404(4)].

⁷⁶⁸ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 209 [391]–[392] and 212 [404(5)]. *Contra Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 227 [5]–[6] (Declaration Tomka), 288 [4] (Declaration Brant) and 350 [159] (Separate Opinion, Partly Concurring and Partly Dissenting, Tuzmukhamedov). See generally Miłosz Gapsa, ‘On the Importance of Provisional Measures in Ukraine’s Cases against Russia’ (2023) 22 *Baltic Yearbook of International Law* 113, 138–42. See also *Avena (Interpretation)* (n 734) 20–1 [61]. See generally ‘ICJ Rejects Mexico’s Request to Interpret Avena but Finds United States Violated Provisional Measures Order’ (n 765).

in international law'.⁷⁶⁹ Yet, because such measures merely repeat existing obligations, it is doubtful whether they compel parties to alter their conduct.⁷⁷⁰ Assessing compliance with them therefore poses the greatest challenge.

As far as non-aggravation measures are concerned, they are inherently imprecise. Judge Eriksson criticised the practice of ordering interim relief 'binding under international law, with the attendant consequences for its breach, which is of so general a nature that a party cannot be entirely clear, when contemplating any given action, whether or not it falls within its scope'.⁷⁷¹ In *Ukraine v Russia (ICSFT and CERD)*, the ICJ found that Russia had breached non-aggravation relief by launching its 'special military operation'.⁷⁷² A number of judges dissented, however, arguing that the operation, being examined in *Ukraine v Russia (Genocide Convention)*, was unrelated to *Ukraine v Russia (ICSFT and CERD)*.⁷⁷³ This not only confirms Judge Eriksson's concerns but also emphasises the potential future difficulties in assessing compliance with non-aggravation relief.

Analysing the ICJ's practice of granting interim relief up to 2013, Eisemann argues that it has evolved toward an attitude of extreme prudence. Despite the rise in requests, their content has become increasingly cautious. Clear measures such as those in *Anglo-Iranian Oil Co.* would not be possible today. The Court has dared to grant bolder measures only in cases involving the execution of the death penalty. Overall, interim relief has become progressively vaguer and more imprecise, blurring the line between ordering and declining provisional measures.⁷⁷⁴

The jurisdiction of international courts is, in general, not compulsory, nor are there effective mechanisms to enforce their decisions. In contrast with the effectiveness, the legitimacy of international courts depends on the persuasiveness of and compliance with their decisions. As in *Ukraine v Russia (Genocide Convention)*, international courts refrain from ordering interim relief that is unlikely to be complied with.⁷⁷⁵ Arguably, a unanimous

⁷⁶⁹ Zyberi (n 646) 579.

⁷⁷⁰ See Becker, 'Crisis in Gaza: *South Africa v Israel* at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)' (n 614).

⁷⁷¹ *Southern Bluefin Tuna* (n 179) 336 [2] (Dissenting Opinion Eiriksson).

⁷⁷² *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 210 [397] and 212 [404(6)].

⁷⁷³ *Ukraine v Russia (ICSFT and CERD)* (Judgment) (n 698) 229–30 [3] (Declaration Abraham) and 351 [165] (Separate Opinion, Partly Concurring and Partly Dissenting, Tuzmukhamedov). See generally Gapsa, 'On the Importance of Provisional Measures in Ukraine's Cases against Russia' (n 768) 138–42.

⁷⁷⁴ Eisemann (n 643) 133–4.

⁷⁷⁵ Sanger (n 387) 219; Michael Ramsden, 'Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention' (2023) 56 *Vanderbilt Journal of Transnational Law* 181, 198.

or nearly unanimous decision is more persuasive and compliant than one adopted by the President's casting vote. There are many ways of securing a majority. One such way is by adopting more general and imprecise measures. The less concrete the measure, the greater the number of judges willing to accept it, each with their own understanding of how it should be complied with. Judges' individual opinions reveal that, while they often challenged whether interim relief should be ordered at all, they rarely questioned its content. International courts have preferred to sacrifice the clarity of their interim relief—which hinders its effectiveness—in order to secure broader judicial support. The downside of this strategy is that the less clear the measure, the more likely the parties are to enter into a dispute over its interpretation. The controversy over the placement of a comma in the third *South Africa v Israel* decision seems to illustrate this point.

3. Incidental Character

Provisional measures proceedings are incidental to the main case. This determines the date from which interim relief may be requested and its duration.⁷⁷⁶ In terms of content, it also affects which rights are protected and who may be the addressee of provisional measures.

3.1. Protection of Plausible Rights

Provisional measures serve only to protect rights,⁷⁷⁷ and only those that an international court has found to be plausible.⁷⁷⁸ This principle is uncontroversial among judges⁷⁷⁹ and scholars.⁷⁸⁰ As Wolfrum states, 'despite the fact that provisional measures can go beyond the respective request, they have to be related to the application made in the case in general'.⁷⁸¹

International courts have consistently refused to grant provisional measures that do not concern plausible rights. For example, in *Bosnia v Yugoslavia*, the ICJ rejected Bosnia

⁷⁷⁶ See eg Rosenne, *Provisional Measures in International Law* (n 1) ch 6.

⁷⁷⁷ See eg *Polish Agrarian Reform* (n 115) 178; Sztucki (n 3) 91; Quintana (n 28) 653.

⁷⁷⁸ See eg *South-Eastern Greenland* (n 113) 285; Sztucki (n 3) 90; Quintana (n 28) 652–3. See also *Ghana/Côte d'Ivoire* (n 178) 159 [63]; *Turów Mine* (Order of 21 May 2021) (n 237) [30].

⁷⁷⁹ See eg *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objection) [2004] ICJ Reports 279, 172 [8] (Separate Opinion Parra-Aranguren); *Zheng He* (n 178) [23]–[25] (Declaration Kulyk).

⁷⁸⁰ See Dumbauld, *Interim Measures of Protection* (n 26) 166–7; Sztucki (n 3) 89; Kolb, *CIJ* (n 129) 645; Thirlway, *The Law and Procedure* (n 28) 936; Quintana (n 28) 655.

⁷⁸¹ Wolfrum, 'Interim (Provisional) Measures of Protection' (n 32) para 44.

and Herzegovina's argument that the Genocide Convention confers rights relating to the statehood and therefore declined to indicate interim relief in this regard.⁷⁸² In *Azerbaijan v Armenia*, the Court refused to grant provisional measures regarding the landmine planting, finding that the request was not linked to any plausible rights under CERD.⁷⁸³ Similarly, in *Armenia v Azerbaijan*, the ICJ did not order the return of prisoners of war to Armenia, as CERD does not provide for such a right.⁷⁸⁴ In the view of international courts, the provisions on provisional measures directly prohibit the granting of interim relief that does not concern plausible rights.⁷⁸⁵ In other words, such interim relief would be *ultra vires*.

The problem is whether the scope of provisional measures is limited to the rights and obligations arising from an international treaty that constitutes the basis for jurisdiction in each dispute. If so, the measures ordering the delivery of humanitarian aid, *inter alia*, in *Georgia v Russia* and *South Africa v Israel*,⁷⁸⁶ and the order to protect and preserve the documents of the population of Nagorno-Karabakh in the third *Armenia v Azerbaijan* decision, were erroneous. On the other hand, it can be argued that these measures derive indirectly from the CERD and the Genocide Convention.⁷⁸⁷

However, this is not a sound line of reasoning. First, plausibility is a separate concept from *prima facie* jurisdiction. Second, international courts may grant *any* interim relief. Limiting its scope to the content of a given treaty would be contrary to the requirement of effectiveness. Third, it would create a dichotomy. In cases based on a treaty, an international court would be limited to its content, while in cases initiated under an optional clause, the scope of provisional measures would be unlimited. It seems that as long

⁷⁸² *Bosnia v Yugoslavia* (Provisional Measures April 1993) (n 159) 20 [38]; *Bosnia v Yugoslavia* (Provisional Measures September 1993) (n 592) 346 [43]. See also Daniele (n 590) 383; Rafaëlle Maison, 'Les ordonnances de la CIJ dans l'affaire relative à l'application de la Convention sur la prévention et la répression du crime de génocide' (1994) 5 *European Journal of International Law* 381, 394–9.

⁷⁸³ *Azerbaijan v Armenia* (Provisional Measures 2021) (n 159) 426 [47]–[59].

⁷⁸⁴ *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 382–3 [58]–[61]. See also *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 395–9 [1]–[12] (Dissenting Opinion Yusuf).

⁷⁸⁵ *Aegean Sea* (n 660) 11 [34]; Sztucki (n 3) 90.

⁷⁸⁶ On the former case, see Palchetti (n 571) 114–5. On the latter case, see eg *South Africa v Israel* (Provisional Measures January 2024) (n 46) 47–8 [27]–[28] (Dissenting Opinion Sebutinde); *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 546 [6] and 549–50 [20] (Separate Opinion Barak); Arcari (n 604) 161; Peter Hilpold, 'The ICJ's Power to Issue Interim Measures According to Article 41 of the ICJ Statute at the Test: *South Africa v. Israel* before the ICJ' in Andrzej Jakubowski, Krystyna Kowalik-Bańczyk and Karolina Wierczyńska (eds), *Euphony, Harmony and Dissonance in the International Legal Order: Liber Amicorum Władysław Czapliński* (Institute of Law Studies Polish Academy of Sciences 2024) 147.

⁷⁸⁷ Arnaud de Nanteuil, 'La guerre en Ukraine et le droit international public : premières réflexions à la lumière de l'ordonnance de la Cour internationale de Justice du 16 mars 2022' (2022) 149 *Journal du droit international* 721, 944–5.

as a provisional measure protects plausible rights, its content can indeed be any. It is not limited by the rights and obligations arising from the given jurisdictional basis. Only the identification of plausible rights limits the discretion of international courts.

Aligning the content of provisional measures with plausible rights is always a case-by-case exercise.⁷⁸⁸ For example, some argue that the ICJ might have exceeded its competences by ordering Russia to suspend its entire ‘special military operation’ in Ukraine, rather than only actions in Donetsk and Luhansk.⁷⁸⁹ However, this was a legitimate decision, as it upheld Ukraine’s plausible right not to be subjected to a ‘special military operation’.⁷⁹⁰ This plausible right was not territorially limited. Similarly, in *Georgia v Russia*, the ICJ indicated measures ordering the parties not to racially discriminate against the Ossetian and South Abkhazian communities.⁷⁹¹ Contrary to Georgia’s request, this interim relief was not limited to ethnic Georgians. The reason for this was a broad interpretation of plausible rights. The Court recognised as such the general right of individuals to protection against racial discrimination prohibited by CERD.⁷⁹²

It is therefore crucial for an international court to define the plausible rights that require protection. Approaches in this regard vary. Sometimes international courts clearly identify plausible rights,⁷⁹³ while at other times they merely provide examples of rights they consider plausible.⁷⁹⁴ Yet another situation arose in *Arctic Sunrise* and *San Padre Pio*, as well as in *Enrica Lexie Arbitration*, where UNCLOS tribunals did not define plausible rights at all.⁷⁹⁵ The first approach should always be preferred. Without a clear definition of plausible rights, international courts are unable to grant adequate interim relief, and scholars are unable to evaluate their decision.

3.2. Addressees of Provisional Measures

Provisional measures may only protect rights that could be recognised in the final decision, and these are exclusively the rights of the parties to the proceedings. This is why addressing

⁷⁸⁸ See eg Kolb, *CIJ* (n 129) 648; Oellers-Frahm and Zimmermann (n 28) 1159–60 para 47.

⁷⁸⁹ See Chapter II 2.1.

⁷⁹⁰ *Ukraine v Russia (Genocide Convention)* (n 23) 225 [60].

⁷⁹¹ See Chapter II 5.3.1.

⁷⁹² *Georgia v Russia (Provisional Measures)* (ICJ) (n 159) 391–2 [126]. Cf Thienel (n 557) 155–6.

⁷⁹³ *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 135 [83]; *South Africa v Israel* (Provisional Measures January 2024) (n 46) 23 [54].

⁷⁹⁴ See eg *Canada and the Netherlands v Syria* (n 137) 606 [62].

⁷⁹⁵ See Chapter II 7.

provisional measures to a State which is not a party to the proceedings is impossible. Its rights cannot be the subject of a decision on the merits. For this reason, international courts have refused to address interim relief to States non-parties to proceedings in *Costa Rica v Nicaragua*, *Bosnia v Yugoslavia*, and *South Africa v Israel*.⁷⁹⁶

There were two exceptions. First, the CACJ granted measures against El Salvador and Guatemala based on a telegram expressing Nicaragua's intention to initiate proceedings against these States; proceedings which Nicaragua ultimately never initiated.⁷⁹⁷ The CACJ thus addressed interim relief to non-parties to non-existent proceedings. Second, in *Armenia v Türkiye*, the ECtHR ordered provisional measures 'on all States directly or indirectly involved in the conflict, including Turkey'.⁷⁹⁸ This interim relief bound potentially all parties to the ECHR, and not only Armenia and Türkiye. The ECtHR provided no justification for such decision.

Both cases are indefensible. They violate the principle that a decision in each case is binding only on the parties. Moreover, they breach the very wording of the provisions on interim relief. It is worth recalling that Rule 39(1) states that the ECtHR 'may ... indicate to the *parties* any interim measure which it considers should be adopted'. Addressing provisional measures to non-parties to a case is an action *ultra vires*.

It has sometimes been suggested that the optimal provisional measure would be to transfer the seized or detained objects or individuals in dispute between the parties to a third State. For example, Judge *ad hoc* El-Koshi argued in *Lockerbie* that two Libyan nationals be placed under the custody of a neutral State.⁷⁹⁹ Similarly, Judge Bedjaoui claimed that Article 41 of the ICJ Statute 'gives to the Court very broad scope, which, in this case, might even have extended to ordering the Applicant State to place the two presumed authors of the offence under the provisional authority and custody of a third State, of an international or regional organization, or even, why not, under the authority of the Court'.⁸⁰⁰ However,

⁷⁹⁶ *Bosnia v Yugoslavia* (Provisional Measures September 1993) (n 592) 344 [40]; *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 525–6 [44]. See also *Costa Rica v Nicaragua* (n 76) 89 [VII].

⁷⁹⁷ *Nicaragua v El Salvador and Guatemala* (n 73) 840–1.

⁷⁹⁸ ECtHR Press Release 2020/276 (n 578). See also ECtHR Press Release 2020/349 (n 579).

⁷⁹⁹ *Lockerbie (UK)* (n 315) 112 [65] (Dissenting Opinion El-Koshi); *Lockerbie (USA)* (n 160) 217 [65] (Dissenting Opinion El-Koshi).

⁸⁰⁰ *Lockerbie (UK)* (n 315) 40 [15] (Dissenting Opinion Bedjaoui); *Lockerbie (USA)* (n 160) 150 [15] (Dissenting Opinion Bedjaoui).

international courts have never accepted such requests, as doing so would effectively impose obligations on third States.

On the other hand, jurisprudence indicates that international organisations may be indirect addressees of interim relief. In *Land and Maritime Boundary*, the ICJ obliged both parties to ‘lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send to the Bakassi Peninsula’.⁸⁰¹ In *Temple (Interpretation)*, the Court required that the parties ‘allow the observers appointed by [the Association of South-East Asian Nations] to have access to the provisional demilitarized zone’.⁸⁰² Likewise, in *South Africa v Israel*, the ICJ indicated that Israel must ‘ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide’.⁸⁰³ Interestingly, judges have never questioned the very concept of these provisional measures.⁸⁰⁴ As Eisemann observes,

lorsque des entités politiques ou diplomatiques interviennent dans de telles circonstances en vue de contribuer au règlement du conflit, la Cour, non seulement tient compte de leur action, mais s’efforce également de la conforter en indiquant des mesures conservatoires invitant les parties à la faciliter.⁸⁰⁵

However, the granting of such provisional measures seems not to be unproblematic. For example, the question remains unanswered as to what extent a party may deny an international organisation access to its territory because of alleged violations of law by that organisation’s personnel. A similar question is to what extent a party may justify non-compliance with a provisional measure by invoking the inability, unwillingness or bias of an international organisation.

One should also note that Timor-Leste proposed in *Certain Documents and Data* the seized by Australia documents be transferred and kept under seal at the Peace Palace.⁸⁰⁶ The ICJ did not comment on this proposition.⁸⁰⁷ It is submitted that not addressing it was

⁸⁰¹ *Land and Maritime Boundary* (n 515) 25 [49(5)].

⁸⁰² *Temple (Interpretation)* (n 522) 555 [69(B)(3)].

⁸⁰³ *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 666 [57(2)(c)].

⁸⁰⁴ Sometimes they express dissatisfaction when it is not specified precisely which international organisations are meant. See eg *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 712–3 [30] (Dissenting Opinion Barak).

⁸⁰⁵ Eisemann (n 643) 132.

⁸⁰⁶ See *Certain Documents and Data* (n 163).

⁸⁰⁷ But see *Certain Documents and Data* (n 163) 167–8 [1] (Separate Opinion of Judge Cançado Trindade).

correct, as otherwise the Court would have departed from its role as an impartial ‘arbitrator’.

In any event, it should be considered indisputable that international courts cannot address provisional measures to States that are not parties to the proceedings, but may indirectly address them to international organisations. It should also be considered indisputable that international courts may grant interim relief ordering cooperation with States that are not parties to the proceedings⁸⁰⁸ or with international organisations.⁸⁰⁹ In this case, no obligations are imposed on such entities. The effectiveness of such a measure is another issue.

4. Balance and Proportionality

Jurisprudence has required provisional measures to be balanced and proportionate. Balance and proportionality constitute a single criterion, as the two are inseparable.

4.1. Balance

Constitutive instruments of international courts,⁸¹⁰ as well as their rules of procedure,⁸¹¹ require that provisional measures protect the rights of both parties. As Judge Chandrasekhara Rao observed:

the rights to be protected are not only those of the party moving the court or tribunal but also of the opposite party. It is, therefore, *imperative* to ensure that the court or tribunal called upon to prescribe provisional measures takes account of *the interests of both parties* to the case.⁸¹²

⁸⁰⁸ *Southern Bluefin Tuna* (n 179) 299–300 [90(1)(f)]. See also *1955 Treaty of Amity* (n 152) 684 [2]–[3] (Declaration Momtaz).

⁸⁰⁹ *Certain Activities* (Provisional Measures 2011) (n 161) 27 [86(2)]; *Temple (Interpretation)* (n 522) 555 [69(B)(3)]; *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 370 [59(2)(E)]; *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 527 [51(2)(a)].

⁸¹⁰ See eg ICJ Statute art 41(1); UNCLOS art 290(1).

⁸¹¹ See eg Rules of the Court of Justice art 160(3); ECtHR Rules (2024) r 39(1).

⁸¹² *Land Reclamation* (n 158) 40 [16] (Separate Opinion Chandrasekhara Rao) (emphasis added).

The fact that interim relief only protects plausible rights against a specific risk of irreparable prejudice already guarantees the principle in question.⁸¹³ Its application is possible owing to the possibility of ordering provisional measures different from those requested.⁸¹⁴

Anglo-Iranian Oil Co. was the first case to explicitly recognise the need for interim relief to protect the rights of both parties. The ICJ held that that it follows from the very nature of Article 41 of the ICJ Statute that ‘the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong *either to the Applicant or to the Respondent*’.⁸¹⁵

The CJEU considers that the balanced nature of the proposed provisional measure is a condition for granting interim relief.⁸¹⁶ This position is difficult to accept, as it means that if the sought measures are not balanced, the CJEU must reject the entire request. This would be unreasonable, given that the CJEU may grant provisional measures other than those requested. When deciding on interim relief, the CJEU, as any other international court, is not bound by the principles of *ne ultra* and *ne infra petita*.⁸¹⁷

Rarely have international courts directly referred to the principle of protecting the rights of both parties. There were some notable exceptions. In *Enrica Lexie*, ITLOS explicitly observed that prescribing both provisional measures requested by Italy would ‘not equally preserve the respective rights of both Parties’.⁸¹⁸ In *Ghana/Côte d’Ivoire*, Côte d’Ivoire requested a Special Chamber of ITLOS to stay all of Ghana’s oil drilling activities. However, the Special Chamber found that such an order ‘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’.⁸¹⁹ Consequently, it concluded that this ‘would therefore cause prejudice to the rights claimed by Ghana and create an undue burden on it’,⁸²⁰ and ‘could also cause harm

⁸¹³ Michael K Addo, ‘Vienna Convention on Consular Relations (*Paraguay v. United States of America*) (“*Breard*”) and LaGrand (*Germany v. United States of America*), Applications for Provisional Measures’ (1999) 48 *International and Comparative Law Quarterly* 673, 678.

⁸¹⁴ Bekong (n 518) 302.

⁸¹⁵ *Anglo-Iranian Oil Co* (n 37) 93 (emphasis added).

⁸¹⁶ Rules of the Court of Justice art 160(3) reads that ‘[a]n application of a kind referred to in the preceding paragraphs 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’. See eg *Turów Mine* (Order of 21 May 2021) (n 237) [80]–[96].

⁸¹⁷ See Chapter I 4.3.

⁸¹⁸ *Enrica Lexie* (n 179) 203 [126].

⁸¹⁹ *Ghana/Côte d’Ivoire* (n 178) 164 [99].

⁸²⁰ *Ghana/Côte d’Ivoire* (n 178) 164 [100].

to the marine environment'.⁸²¹ While the suspension of oil drilling was a victory for Côte d'Ivoire, its limited scope was a victory for Ghana. Commentators rightly assess this decision as balanced.⁸²² It should even be considered a model solution. Similarly, in *Enrica Lexie Arbitration*, the arbitral tribunal sought to secure the release of the Italian marine from India. To persuade India and preserve the balance between the parties, it decided that even if the marine returned to Italy, he would remain under the jurisdiction of the Supreme Court of India.⁸²³

Judges and scholars who disagree with the granted interim relief usually accuse it of not being balanced. This was a case, *inter alia*, in *Nuclear Tests*,⁸²⁴ *Saiga (No 2)*,⁸²⁵ *Southern Bluefin Tuna*,⁸²⁶ *Certain Activities*,⁸²⁷ *Arctic Sunrise*,⁸²⁸ and *Three Ukrainian Naval Vessels*.⁸²⁹ Interestingly, the same argument is sometimes used to praise an international court for the ordered provisional measures.⁸³⁰ For example, ITLOS Judge

⁸²¹ *Ghana/Côte d'Ivoire* (n 178) 165 [101].

⁸²² Valérie Boré-Eveno, 'Les mesures conservatoires dans l'affaire du *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire*. TIDM (Chambre spéciale), ordonnance du 25 avril 2015' (2015) 61 *Annuaire français de droit international* 699, 715–8. See also Andrés Sarmiento Lamus and Rodrigo González Quintero, 'Request for Provisional Measures in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*' (2016) 31 *International Journal of Marine and Coastal Law* 160, 167; Dupont and Solomou (n 662) 322; Eirini-Erasmia Fasía, 'Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)', *Max Planck Encyclopedia of Public International Law online* (2020) para 42. However, Tanaka argues that all oil drillings should have been stayed. Yoshifumi Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the *Ghana/Côte d'Ivoire* Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46 *Ocean Development & International Law* 315, 326.

⁸²³ *Enrica Lexie Arbitration* (n 46) [105]. See also *Enrica Lexie Arbitration* (n 46) [124]; Baptiste Michel Marie Tranchant, 'Une nouvelle décision en l'affaire de l' "*Enrica Lexie*": l'ordonnance en indication de mesures conservatoires du tribunal arbitral du 29 avril 2016' (2016) 62 *Annuaire français de droit international* 183, 196–7; Roberto Virzo, 'The Dispute Concerning the *Enrica Lexie* Incident and the Role of International Tribunals in Provisional Measure Proceedings Instituted Pursuant to the United Nations Convention on the Law of the Sea' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff 2017) 528.

⁸²⁴ *Nuclear Tests (Australia)* (n 484) 113–4 (Dissenting Opinion Forster). See Chapter II 3.3.

⁸²⁵ Shabtai Rosenne, 'International Tribunal for the Law of the Sea: 1998 Survey' (1999) 14 *The International Journal of Marine and Coastal Law* 453, 464. See Chapter II 3.1.1.

⁸²⁶ *Southern Bluefin Tuna* (n 179) 304 (Joint Separate Opinion Yamamoto and Park). See Chapter II 3.3.

⁸²⁷ *Certain Activities* (Provisional Measures 2011) (n 161) 41 [34] (Separate Opinion Sepúlveda-Amor), 51 [15] (Declaration Greenwood) and 57–9 [18]–[21] (Declaration Guillaume). See also *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 389–90 [8]–[9] (Declaration Guillaume). See also *Certain Activities/Construction of a Road* (Provisional Measures 2013) (n 464) 389–90 [8]–[9] (Declaration Guillaume). See Chapter II 3.2.

⁸²⁸ *Arctic Sunrise* (n 179) 268 [11] (Separate Opinion Jesus) and 289 [47] (Dissenting Opinion Golitsyn); Guilfoyle and Miles (n 626) 282. For a similar view, see *Arctic Sunrise* (n 179) 296–7 [15] (Dissenting Opinion Kulyk). See also Moulrier (n 621) 275.

⁸²⁹ Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2019' (2020) 35 *The International Journal of Marine and Coastal Law* 621, 636–7. See Chapter II 3.1.3.

⁸³⁰ See eg *ARA Libertad* (n 48) 355 [9] (Declaration Paik).

Paik⁸³¹ and Vice-President of the Court of Justice Silva de Lapuerta⁸³² are right in saying that a measure ordering the suspension of an action is a balanced measure. Suspension is not a complete and irreversible termination. The suspended action may be resumed. In any event, the issue of whether interim relief is balanced is, in fact, very subjective.

International courts often address provisional measures to both parties to ensure balance. As Higgins observes, '[t]he technique of addressing the Order to both Parties was to become frequently used by the Court, no doubt to underline its impartiality on all matters relating to the forthcoming litigation'.⁸³³ However, it is not a requirement.⁸³⁴ If a measure is addressed only to one party, it does not *per se* imply that it is unbalanced.⁸³⁵ In other words, it is always the circumstances of the case that dictate whether an international court should order interim relief for both parties.

The unbalanced nature of provisional measures is one of the arguments raised against *Arctic Sunrise*, *San Padre Pio* and *Turów Mine*. In *Arctic Sunrise* and *San Padre Pio*, ITLOS ordered the release of the vessels upon the posting of a bond by the requesting parties. This solution resembled the prompt release procedure provided for in Article 292 of UNCLOS. In *Turów Mine*, the CJEU ordered Poland to pay periodic penalty payments for non-compliance with an earlier provisional measure. This solution was analogous to that in Article 260 of the TFEU, which establishes financial penalties for non-compliance with judgments of the CJEU. In both instances, judges and scholars argued that international courts overstepped their competences by duplicating and extending treaty procedures to situations not foreseen by the treaties.⁸³⁶ Put differently, Article 292 of UNCLOS and Article 260 of the TFEU provide for prompt release and financial penalties

⁸³¹ See *Enrica Lexie* (n 179) 212 [4] (Declaration Paik). See also Cannone (n 417) 1151–2.

⁸³² *Turów Mine* (Order of 21 May 2021) (n 237) [89].

⁸³³ Rosalyn Higgins, 'Interim Measures for the Protection of Human Rights' (1998) 36 *Columbia Journal of Transnational Law* 91, 97 n 30.

⁸³⁴ Jerzy Sztucki, 'Case Analysis: Case Concerning Land and Maritime Boundary (Cameroon v. Nigeria): Provisional Measures, Order of 15 March 1996' (1997) 10 *Leiden Journal of International Law* 341, 346. Cf Kolb, *CIJ* (n 129) 640.

⁸³⁵ *Tehran Hostages* (n 428) 16–7 [29].

⁸³⁶ On *Arctic Sunrise*, see esp *Arctic Sunrise* (n 179) 225–6 [7(b)]–[7(c)] (Separate Opinion Jesus); 296 [14] (Dissenting Opinion Kulyk) and 298–9 [48]–[49] (Dissenting Opinion Golitsyn); Guilfoyle and Miles (n 626) 283–4; Churchill, '2013 Survey' (n 625) 20; Moulner (n 621) 276; Peiris (n 626) 60. On *Turów Mine*, see esp Kawczyńska (n 241); Konrad Zawodziński, 'Nakaz Zaprzestania Wydobywania Węgla Brunatnego w Kopalni Turów Nałożony w Ramach Środków Tymczasowych Zarządzonych w Sprawie C-121/21 R (Postanowienie Wiceprezesa Trybunału Sprawiedliwości z Dnia 21 Maja 2021 r.)' (2021) 10(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 113; Ireneusz C Kamiński, 'Kary zabezpieczające w polskich sprawach (kopalnia Turów, wymiar sprawiedliwości) – wiele wątpliwości' *LEX/el*. 2022.

in strictly defined circumstances, and these circumstances were not met in *Arctic Sunrise*, *San Padre Pio* and *Turów Mine*. By granting provisional measures in these cases, ITLOS and the CJEU circumvented the treaty requirements. This, it may be argued, favours the requesting parties, since they would not have obtained prompt release or financial penalties if they had initiated the appropriate proceedings under Article 292 of UNCLOS or Article 260 of the TFEU.

On the other hand, the provisions on interim relief authorise international courts to grant *any* provisional measure. As the CJEU held in *Białowieża Forest* and *Turów Mine*, this power is subordinate to the need to ensure the effectiveness of the final decision. As long as the chosen form of interim relief ensures effectiveness, it is permissible.⁸³⁷ Arguably, in *Arctic Sunrise*, *San Padre Pio* and *Turów Mine*, international courts considered that a provisional measure duplicating an existing treaty procedure was the most effective option available. If one accepts this view, the fact that such measures overlap with other procedures available before the same court is not *per se* objectionable. From this perspective, *Arctic Sunrise*, *San Padre Pio* and *Turów Mine* were not wrongly decided.

Tanaka points to the risks associated with granting provisional measures that duplicate an existing treaty procedure. Proceedings for provisional measures require less stringent conditions than other proceedings. Parties may be tempted to seek remedies through provisional measures that they would not be able to obtain under ‘standard’ treaty procedures. Indeed, the prompt release procedure has not been invoked before ITLOS for a considerable time.⁸³⁸ The fact that an international tribunal can order provisional measures duplicating other treaty procedures does not mean that it should always do so. As usual, judicial caution is therefore required.

4.2. Proportionality

In *Lotus*, it is recalled, the PCIJ held that States are free to act unless expressly prohibited by international law. Accordingly, any limitations on States’ freedom cannot be

⁸³⁷ *Białowieża Forest* (n 494) [97]–[100]; *Turów Mine* (Order of 20 September 2021) (n 237) [48]–[49].

⁸³⁸ See Yoshifumi Tanaka, ‘Rendezvous between Provisional Measures and Prompt Release in the ITLOS Jurisprudence: Reflections on the M/T “San Padre Pio” and M/T “Heroic Idun” Cases’ in Andrea Gattini and Marco Dimetto (eds), *Time and International Adjudication* (Brill Nijhoff 2024).

presumed.⁸³⁹ Despite criticism,⁸⁴⁰ this principle continues to shape contemporary international law.⁸⁴¹

By their very nature, interim relief limits States' freedom to act. In Judges Winiarski and Badawi Pasha's view, 'they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State'.⁸⁴² Thus, a number of scholars argue that provisional measure must not impose excessive and disproportionate obligations.⁸⁴³ In other words, inter relief must be proportionate to what it seeks to achieve.⁸⁴⁴ Simultaneously, it must be limited to what is strictly necessary to achieve its intended effect.⁸⁴⁵ As Kolb puts it :

Etant donné le fait que la compétence de fond n'est pas encore à ce stade apurée, que les mesures indiquées peuvent significativement limiter la liberté souveraine des Etats, qu'il ne faut pas inutilement inciter ceux-ci à dénoncer des titres de compétence, la Cour est bien conseillée à exercer pleinement ses pouvoirs de préserver l'objet du litige et d'assurer la bonne administration de la justice, mais de ne pas aller significativement au-delà de ce qui sera nécessaire à cette fin.⁸⁴⁶

As with any other criterion, assessing what is excessive and disproportionate is subjective. Sometimes, provisional measures granted have been criticised for this very reason. *Fisheries Jurisdiction*,⁸⁴⁷ *Nicaragua*,⁸⁴⁸ and *Certain Documents and Data*⁸⁴⁹ are just a few examples. However, any criticism must take into account the fact that the provisional measures granted need not be the only measures capable of achieving the desired effect. Usually, there are a number of equally effective, balanced and proportionate measures from which international courts can choose at their discretion.⁸⁵⁰

⁸³⁹ *SS 'Lotus' (France v Turkey)* (Judgment) (1927) PCIJ Series A No 10, 18–9.

⁸⁴⁰ See eg *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 403, 478–9 [3] (Declaration Simma).

⁸⁴¹ See further eg Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 12–20.

⁸⁴² *Anglo-Iranian Oil Co* (n 37) 97 (Dissenting Opinion Winiarski and Badawi Pasha).

⁸⁴³ See eg Dumbauld, *Interim Measures of Protection* (n 26) 35 n 3 and 185; Sztucki (n 3) 89.

⁸⁴⁴ *Temple (Interpretation)* (n 522) 611 (Dissenting Opinion Xue).

⁸⁴⁵ *Temple (Interpretation)* (n 522) 565 (Dissenting Opinion Al-Khasawneh).

⁸⁴⁶ Kolb, *CIJ* (n 129) 639.

⁸⁴⁷ See *Fisheries Jurisdiction (UK)* (n 131) 27–8 (Dissenting Opinion Padilla Nervo); *Fisheries Jurisdiction (FRG)* (n 131) 44 (Dissenting Opinion Padilla Nervo). See also Favoreu (n 456) 302–3. Cf Chapter II 3.2.

⁸⁴⁸ See *Military and Paramilitary Activities* (n 499) 190–9 (Dissenting Opinion Schwebel). Cf Chapter II 4.1.

⁸⁴⁹ See *Certain Documents and Data* (n 163) 206 [28] (Dissenting Opinion Greenwood). Cf Chapter II 3.1.3.

⁸⁵⁰ See Alexandra C Traviss, 'Temple of Preah Vihear: Lessons on Provisional Measures' (2012) 13 *Chicago Journal of International Law* 317, 334.

Yet some decisions raise serious concerns. In *Southern Bluefin Tuna*, ITLOS ordered both Australia and New Zealand, on the one hand, and Japan, on the other, to suspend experimental fishing, even though Australia and New Zealand were not engaged in this activity.⁸⁵¹ In *Temple (Interpretation)*,⁸⁵² the ICJ established a provisional demilitarised zone that extended over areas where sovereignty was undisputed.⁸⁵³ In doing so, the Court restricted the territorial sovereignty of the parties.⁸⁵⁴ It also obliged the parties to allow observers into areas where sovereignty was undisputed.⁸⁵⁵ *Ghana/Côte d'Ivoire* provides another example. Although the Special Chamber found no risk to the marine environment, it nevertheless prescribed interim relief requiring both parties to protect it.⁸⁵⁶ In all cases, the provisional measures created arguably undue burdens. In *Ghana/Côte d'Ivoire*, such measures were not justified by the circumstances.⁸⁵⁷ In *Temple (Interpretation)*, the Court could simply have ordered the parties to refrain from military action⁸⁵⁸ or determined the line of troop withdrawal itself.⁸⁵⁹

Another issue is the question of the so-called 'unduly' granted interim relief. This term describes a situation when an international court grants a provisional measure that imposes a significant burden on a party. Later, an international court finds a lack of jurisdiction or no violation of law at the merits stage. Meanwhile, the party has complied with the measure and suffered prejudice.⁸⁶⁰ Judge Shahabuddeen was the first to raise this problem, observing that 'it is not settled whether the jurisprudence of the Court allows for compensating a party for any injury suffered in complying with an interim measure should the latter be eventually found to have been unjustified'.⁸⁶¹

For now, this matter remains purely hypothetical. Although there were cases when the ICJ granted provisional measures but later found a lack of jurisdiction or no violation

⁸⁵¹ See also Evans (n 489) 13. See Chapter II 3.3.

⁸⁵² See Chapter II 4.3.

⁸⁵³ See *Temple (Interpretation)* (n 522) 609 (Dissenting Opinion Xue).

⁸⁵⁴ See *Temple (Interpretation)* (n 522) 559–60 [9]–[13] (Dissenting Opinion Owada).

⁸⁵⁵ See Tanaka, '*Temple of Preah Vihear*' (n 366) 218 para 49.

⁸⁵⁶ See Chapter II 3.2.

⁸⁵⁷ See Boré-Eveno (n 822) 718–21; Sarmiento Lamus and González Quintero (n 822) 165.

⁸⁵⁸ *Temple (Interpretation)* (n 522) 564 (Dissenting Opinion Al-Khasawneh).

⁸⁵⁹ See *Temple (Interpretation)* (n 522) 611 (Dissenting Opinion Xue) and 632 [24]–[26] (Dissenting Opinion Cot).

⁸⁶⁰ Merlin (n 43) 93–5. See also Thirlway, '*Provisional Measures*' (n 43).

⁸⁶¹ *Great Belt* (n 140) 29 (Separate Opinion Shahabuddeen); Merlin (n 43) 90–1.

of law,⁸⁶² the obliged party did not suffer any prejudice by complying with interim relief (if it complied with it at all).

International courts tend to avoid addressing this issue directly. Instead, they opt to ‘reculer pour mieux sauter’,⁸⁶³ noting that the respondent ‘proceed at own risk’.⁸⁶⁴ Merlin argues that the solution lies in the practice of ITLOS. The Tribunal sometimes grants requested measures while simultaneously requiring the requesting party to post a bond.⁸⁶⁵

Be that as it may, no matter how challenging it may be for the obliged party to comply with certain binding interim relief, they cannot invoke the principle *impossibilium nulla obligatio est* to unilaterally refuse enforcement merely because the measures are onerous.⁸⁶⁶

5. Provisionality

Jurisprudence emphasises the provisional or temporal nature of provisional measures. In practice, this comes down to issues concerning interim judgments and the principle of *res judicata*.

5.1. Provisional Measures and Interim Judgments

In *Factory at Chorzów*, the first decision on provisional measures delivered by the PCIJ sitting in plenary, the Court held that interim relief must not amount to an interim judgment. In *Certain German Interests*, the Court found that Poland had breached its international obligations by taking adverse actions against two German companies in Chorzów.⁸⁶⁷ After negotiations failed, Germany instituted separate proceedings seeking indemnities from Poland. Once the PCIJ affirmed its jurisdiction,⁸⁶⁸ Germany submitted a request for

⁸⁶² *Anglo-Iranian Oil Co* (n 135); *Georgia v Russia* (Preliminary Objections) (ICJ) (n 263); *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Merits) [2020] ICJ Reports 300; *Qatar v UAE* (Preliminary Objections) (n 133); Merlin (n 43) 95–6 n 12–3. The latest example is *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States Intervening)* (Preliminary Objections) [2024] ICJ Reports 360.

⁸⁶³ Emmanuel Decaux, ‘L’affaire du passage dans le Grand-Belt (Finlande c. Danemark). Demande en indication de mesures conservatoires. Ordonnance du 29 juillet 1991’ (1991) 37 *Annuaire français de droit international* 444, 454.

⁸⁶⁴ *Great Belt* (n 140) 18 [33]; *Indus Waters Kishenganga Arbitration* (n 302) 49 [143].

⁸⁶⁵ Merlin (n 43) 107 and 111–2.

⁸⁶⁶ See *Turów Mine* (Order of 20 September 2021) (n 237) [21]–[26] and [47]–[51].

⁸⁶⁷ *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) (1926) PCIJ Series A No 7.

⁸⁶⁸ *Factory at Chorzów (Indemnities) (Germany v Poland)* (Jurisdiction) (1927) PCIJ Series A No 9.

provisional measures. Drawing analogies from German municipal law,⁸⁶⁹ Germany asked the Court to grant part of the compensation already due, arguing that waiting for the final decision would cause irreparable harm to the companies concerned. The PCIJ held 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’.⁸⁷⁰ It ruled that Germany’s request was not covered by Article 41 of the PCIJ Statute and unanimously declined to even examine the request.⁸⁷¹

The Court has never again refused interim relief, referring to the precedent set in *Factory at Chorzów*. What is more, it directly cited this case only in *Tehran Hostages*, in which it distinguished between the two proceedings.⁸⁷² No other international court has ever refused provisional measures based on the *Factory at Chorzów* principle.

There has been much uncertainty surrounding the actual meaning of *Factory at Chorzów*. A particularly problematic issue is whether it applies to situations in which the requested provisional measures overlap with one of the forms of relief sought on the merits. In both *Tehran Hostages* and *ARA Libertad*, particularly the granted interim relief coincided with the applicants’ submissions on the merits.⁸⁷³ According to some judges, the *Factory at Chorzów* principle prohibits granting such relief.⁸⁷⁴ Sztucki interprets *Factory at Chorzów* in the same way, although he acknowledges, with some dissatisfaction, that subsequent jurisprudence has adopted a different understanding of it.⁸⁷⁵

Indeed, *Factory at Chorzów* does not preclude such provisional measures from being granted, as long as their purpose is conservatory rather than anticipatory. In other

⁸⁶⁹ Miles (n 2) 28.

⁸⁷⁰ *Factory at Chorzów* (Interim Measures of Protection) (n 116) 10.

⁸⁷¹ *Factory at Chorzów* (Interim Measures of Protection) (n 116) 10. See generally Chester Brown, ‘*Factory at Chorzów* (*Germany v Poland*) (1927–28)’ in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart Publishing 2017); Miles (n 2) 65–7.

⁸⁷² *Tehran Hostages* (n 428) 16 [28] (emphasis added). Quintana even argues that ‘the present Court has not yet had the occasion to either apply or confirm this precedent and in one case plainly disregarded it’. Quintana (n 28) 646.

⁸⁷³ See Chapter II 3.1.3. A similar situation occurred, *inter alia*, in the *Fisheries Jurisdiction, Nicaragua, Aegean Sea*, and *Great Belt* cases. Cf Collins (n 32) 232.

⁸⁷⁴ See *Nuclear Tests (Australia)* (n 484) 113 (Dissenting Opinion Forster) and 123 (Dissenting Opinion Gros); *Qatar v UAE* (Provisional Measures 2018) (n 152) 487–8 [11] (Dissenting Opinion Cot).

⁸⁷⁵ Sztucki (n 3) 93–7.

words, such relief is permissible if it seeks to protect the rights at issue on the merits, without deciding the case itself.⁸⁷⁶ As put by Judge Shahabuddeen:

The idea of a provisional measure of protection which may have the same effect as the main remedy is conceptually distinct from the idea of an interim judgment. The object of the former is the protection of the right in issue pending the final adjudication of the claim; the object of the latter is to give to the plaintiff interim relief by way of advance payment on account of a liability which is admitted or reasonably clear but not yet precisely quantified.⁸⁷⁷

Sometimes, the way the final decision could be complied with suggests the content of interim relief.⁸⁷⁸ In some cases, granting provisional measures that overlap with the submissions on the merits may render the proceedings moot. Therefore, each situation should be assessed on a case-by-case basis.⁸⁷⁹

Lord Collins of Mapesbury convincingly argues that *Factory at Chorzów* has been misread[] or misunderstood]. In his view, that case decided nothing more than that a provisional payment of compensation is neither provisional nor protective, since Germany was merely seeking to have part of its final judgment paid in advance. There is therefore nothing exceptional about a State seeking, at the interim relief stage, the same remedy it ultimately seeks on the merits. This is particularly when the aim is to preserve the *status quo* pending action or to temporarily undo its sudden or violent alteration.⁸⁸⁰

The practical significance of *Factory at Chorzów* is limited, as its reasoning is largely tied to the case's specific circumstances. First, the compensation owed by Poland to Germany was not in dispute; only the amount was contested. Consequently, awarding part of the future compensation would have amounted to an interim judgment. As the PCIJ ruled, 'the circumstances of [*Tehran Hostages*] were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment *on part*

⁸⁷⁶ Jean-Pierre Cot, 'Affaire des *Essais nucléaires* (Australie c. France et Nouvelle-Zélande c. France). Demandes en indication de mesures conservatoires. Ordonnances du 22 juin 1973' (1973) 19 *Annuaire français de droit international* 252, 268–9; Kolb, *CIJ* (n 129) 659; Quintana (n 28) 648; Oellers-Frahm and Zimmermann (n 28) 1149 para 26.

⁸⁷⁷ *Bosnia v Yugoslavia* (Provisional Measures September 1993) (n 592) 356 (Separate Opinion Shahabuddeen); Quintana (n 28) 646–7.

⁸⁷⁸ *Turów Mine* (Order of 21 May 2021) (n 237) [30]. See also *Great Belt* (n 140) 19 [31]; *Enrica Lexie* (n 179) 212–3 [5] (Declaration Paik).

⁸⁷⁹ Oellers-Frahm and Zimmermann (n 28) 1150 para 26.

⁸⁸⁰ Collins (n 32) 228–32.

of a claim for a sum of money'.⁸⁸¹ Accordingly, *Factory at Chorzów* can even be regarded purely from the perspective of financial claims. Second, it is debatable whether *Factory at Chorzów* should be treated as a matter concerning provisional measures at all. The PCIJ stated that Germany's request was not covered by the Statute or the Rules of Procedure, and that 'effect cannot be given to the request of the German Government'.⁸⁸² Therefore, the problem did not concern the interim relief sought by Germany, but the fact that Germany's request was not a request for provisional measures. It was a request in a procedure, and for relief, not provided for by the Statute and Rules.

Despite the limited significance of *Factory at Chorzów* and the fact that it does not prohibit the granting of provisional measures that overlap with the submission on the merits, restraint on the part of international courts is advisable. Miles makes a good point on this issue. In his view, interim relief ordering the release of persons or vessels in *Tehran Hostages* and *ARA Libertad* is uncontroversial. If the final decision in these cases were in favour of the 'releasing' party, there would be a theoretical possibility that the released persons or vessels could return to its jurisdiction. However, Miles rightly points out that this would be unrealistic in practice. For example, a released vessel may enter the internal waters of a third State, and neither party to the dispute would have jurisdiction over it. For this reason, Miles argues that the granting of interim relief that overlaps with the submissions on the merits should be limited to situations where it is not possible to order any other provisional measure. Paradoxically, however, it is always possible to grant another interim relief. For example, Miles argues that *Tehran Hostages* could have obliged Iran only to ensure certain humanitarian standards for the hostages, rather than ordering their release.⁸⁸³ As with the possibility of granting provisional measures other than those requested, the fact that an international court may order interim relief that overlaps with a submission on the merits does not mean that it should do so automatically.

⁸⁸¹ *Tehran Hostages* (n 428) 16 [28] (emphasis added). Quintana even argues that 'the present Court has not yet had the occasion to either apply or confirm this precedent and in one case plainly disregarded it'. Quintana (n 28) 646.

⁸⁸² *Factory at Chorzów* (Interim Measures of Protection) (n 116) 10–1.

⁸⁸³ Miles (n 2) 309–16. Cf Guilfoyle and Miles (n 626) 284.

5.2. Provisional Measures and the Principle of Res Judicata

As Judge Greenwood noted, the aim of interim relief ‘is not to anticipate a judgment on the merits by the expression of condemnation or approval of what either party has done’.⁸⁸⁴ Since *Prince von Pless*, a case following *Factory at Chorzów*, orders on provisional measures have included a clause that none of the conclusions contained therein prejudice any subsequent decision.⁸⁸⁵ Judge Gross argues that it is not a simple ‘ritual formula’. In his opinion, it is ‘a warranty that the Court is satisfied that Article 41 has been correctly interpreted and applied to a certain case’.⁸⁸⁶ Judge Ranjeva suggests that it is the duty of international courts to assess the real subject matter of a request for provisional measures. If they find that it aims to prejudice a subsequent decision, it should be rejected.⁸⁸⁷

ITLOS has a special responsibility. When prescribing interim relief under Article 290(5) of UNCLOS, it must ensure that its content does not prejudice the decision of the body that is actually to settle the dispute. Otherwise, the Tribunal would ‘usurp the function of the arbitral tribunal’.⁸⁸⁸

The main reason for criticism of the granted provisional is usually the allegation of prejudging the case. It concerned interim relief in cases like *Nuclear Tests*,⁸⁸⁹ *Land and Maritime Boundary*,⁸⁹⁰ *Southern Bluefin Tuna*,⁸⁹¹ *Certain Activities*,⁸⁹² *ARA Libertad*,⁸⁹³

⁸⁸⁴ *Certain Documents and Data* (n 163) 207 [31] (Dissenting Opinion Greenwood).

⁸⁸⁵ *Administration of the Prince von Pless (Germany v Poland)* (Interim Measures of Protection) (1933) PCIJ Series A/B No 54, 153. Kolb incorrectly suggests that this wording only appeared after *Nuclear Tests*. See Kolb, *CIJ* (n 129) 658. For a similar formula before ITLOS, see eg *Zheng He* (n 178) [148].

⁸⁸⁶ *Nuclear Tests (Australia)* (n 484) 123 (Dissenting Opinion Gros). See also Kritsiotis (n 506) 668. But see Coussirat-Coustère (n 431) 307.

⁸⁸⁷ *Pulp Mills* (Provisional Measures 2006) (n 140) 136 (Declaration Ranjeva); Quintana (n 28) 647.

⁸⁸⁸ See *Land Reclamation* (n 158) 61 [10] (Separate Opinion Lucky).

⁸⁸⁹ See *Nuclear Tests (Australia)* (n 484) 113–4 (Dissenting Opinion Forster). See Chapter II 3.3.

⁸⁹⁰ See *Land and Maritime Boundary* (n 515) 48–9 (Separate Opinion Ajibola). See Chapter II 4.3.

⁸⁹¹ See Barbara Kwiatkowska, ‘Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4)’ (2000) 94 *American Journal of International Law* 150, 153 and 155. See Chapter II 3.3.

⁸⁹² See *Certain Activities* (Provisional Measures 2011) (n 161) 41 [33] (Separate Opinion Sepúlveda-Amor), 43 [6] and [9]–[10] (Declaration Skotnikov), 52–3 (Declaration Xue) and 67–8 [22]–[24] (Separate Opinion Dugard). But see *Certain Activities* (Provisional Measures 2011) (n 161) 51 [14] (Declaration Greenwood). See Chapter II 3.2.

⁸⁹³ Interim relief ‘comes close to resolving the merits of the dispute between the parties’. Robin Churchill, ‘Dispute Settlement in the Law of the Sea: Survey for 2012’ (2013) 28 *International Journal of Marine and Coastal Law* 563, 594. In fact, the case ended amicably, see ‘*ARA Libertad*’ *Arbitration (Argentina v Ghana)* (Termination Order) PCA Case No 2013-11 (11 November 2013). See Chapter II 3.1.3.

Three Ukrainian Naval Vessels,⁸⁹⁴ and *San Padre Pio*.⁸⁹⁵ On the other hand, provisional measures are sometimes praised for not prejudging the merits.⁸⁹⁶

The parties usually submit requests for interim relief, the content of which implies the international legal responsibility of the other party. Ordering it in this form would prejudice the merits of the case. In practice, avoiding prejudging the merits of the case comes down to formulating the content of provisional measures in a neutral manner. To this end, international courts use the possibility of granting provisional measures other than those requested and modify their content. *Land and Maritime Boundary* is a good example. One of the measures sought by Cameroon was that ‘the armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian armed attack of 3 February 1996’.⁸⁹⁷ The ICJ avoided referring to a ‘Nigerian armed attack’. Instead, the Court ordered both parties to ‘ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996’.⁸⁹⁸ Other examples include *Military and Paramilitary Activities*⁸⁹⁹ and *DRC v Uganda*.⁹⁰⁰ This approach is to be welcomed: by rewording the requests, international courts are ‘[s]oucieuse[s] de ne pas rendre un jugement provisionnel’.⁹⁰¹

At times, international courts on their own must opt for a more neutral and less clear language to avoid prejudging the merits. A similar situation arises when international courts themselves must choose the content of a provisional measure that is not prejudicial. For example, in *Sino-Belgian Treaty*, the parties were in dispute as to whether China had lawfully terminated the treaty between them. The PCIJ’s interim relief repeated the content of the treaty provisions rather than simply stating which of the provisions in question were to continue to be observed. In this way, the Court avoided prejudging whether the treaty

⁸⁹⁴ See Churchill, ‘2019 Survey’ (n 829) 636–7. See Chapter II 3.1.3.

⁸⁹⁵ See *San Padre Pio* (n 179) 499 [88] (Dissenting Opinion Gao). See Chapter II 6.

⁸⁹⁶ See eg *Temple (Interpretation)* (n 522) 562 [1] (Declaration Koroma).

⁸⁹⁷ *Land and Maritime Boundary* (n 515) 18 [20(1)].

⁸⁹⁸ *Land and Maritime Boundary* (n 515) 24 [49(3)]. See also Bekong (n 518) 304. See also Alioune Sall, ‘Actualité des conflits frontaliers en Afrique: l’ordonnance du 15 mars 1996 rendue par la Cour internationale de Justice dans le différend frontalier entre le Cameroun et le Nigéria’ (1997) 9 *African Journal of International and Comparative Law* 183, 193.

⁸⁹⁹ See Marie-Françoise Labouz, ‘Affaire des activités militaires et para-militaires au Nicaragua et contre celui-ci (Nicaragua contre États-Unis d’Amérique). Ordonnance de la Cour internationale de Justice du 10 mai 1984 en indication de mesures conservatoires’ (1984) 30 *Annuaire français de droit international* 340, 368–9. See Chapter II 4.1.

⁹⁰⁰ See Paillard (n 506) 252–3; L Savadogo, ‘Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): The Court’s Provisional Measures Order of 1 July 2000’ (2002) 72 *British Yearbook of International Law* 357, 357–8. See Chapter II 4.2.

⁹⁰¹ See Gautron (n 691) 213.

was still in force between the parties.⁹⁰² In *Frontier Dispute*, did not specify the withdrawal of armed forces to the alleged border between the parties, as the dispute concerned precisely the border between the parties.⁹⁰³ In *Immunities and Criminal Proceedings*, the Court did not order France to respect diplomatic immunity in relation to the building located at 42 Avenue Foch in Paris. Instead, it ordered that the protection afforded to this building be equivalent to that afforded to diplomatic premises.⁹⁰⁴ The was that the dispute was whether the building located at 42 Avenue Foch in Paris was covered by diplomatic immunity. In *Guyana v Venezuela*, interim relief describes the Essequibo region as the territory over which Guyana ‘administers and exercises control’.⁹⁰⁵ Judges Sebutinde and Robinson would have preferred it to directly state that Guyana exercises full sovereignty over that region.⁹⁰⁶ However, the ICJ’s decision was reasonable, as sovereignty over the region was in dispute between the parties. All these cases required a delicate approach on the part of the international courts.

In some situations, international courts have granted interim relief in conditions of uncertainty. These concerned, *inter alia*, the scope of financial prejudice (*Sino-Belgian Treaty*),⁹⁰⁷ the geography of the disputed territory (*Frontier Dispute*),⁹⁰⁸ the prior positions of the parties’ armies (*Land and Maritime Boundary*),⁹⁰⁹ the recovery capacity of the southern bluefin tuna stock (*Southern Bluefin Tuna*),⁹¹⁰ and the exact data seized (*Certain Documents and Data*).⁹¹¹ In all these cases, international courts sought to frame the interim relief as objectively and neutrally as possible.

There are many valid objections to the judicial practice of selecting the content of provisional measures. However, never have international courts ordered any interim relief

⁹⁰² Dumbauld, *Interim Measures of Protection* (n 26) 149 n 1. See Chapter II 2.1.

⁹⁰³ Gautron (n 691) 213. See Chapter II 4.3.

⁹⁰⁴ See Chapter II 3.1.3.

⁹⁰⁵ See Chapter II 3.2.

⁹⁰⁶ *Guyana v Venezuela* (Provisional Measures) (n 473) 670–1 [6] (Declaration Sebutinde) and 672–3 [1]–[6] (Separate Opinion Robinson).

⁹⁰⁷ Miles (n 2) 63. See also PCIJ Ser C No 16–1 (n 368) 23. See Chapter II 2.1.

⁹⁰⁸ Gautron (n 691) 213. See Chapter II 4.3.

⁹⁰⁹ *Land and Maritime Boundary* (n 515) 28 (Declaration Shahabudeen). See *Land and Maritime Boundary* (n 515) 31 (Joint Declaration Weeramantry, Shi and Vereshchetin). However, Judge Oda argued that the line of troop withdrawal should have been that of 29 March 1994, when Cameroon initiated the proceedings. *Land and Maritime Boundary* (n 515) 26 [1] (Declaration Oda). See Chapter II 4.3.

⁹¹⁰ *Southern Bluefin Tuna* (n 179) 296–7 [79]–[81]. See also *Southern Bluefin Tuna* (n 179) 302 (Joint Declaration Wolfrum, Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson). See Chapter II 3.3.

⁹¹¹ *Certain Documents and Data* (n 163) 198–9 [10] (Dissenting Opinion Greenwood) and 216 [13] (Dissenting Opinion Callinan). See Chapter 3.1.3.

whose content would prejudice the merits of the proceedings. *Turów Mine* is the only case that appears to be problematic.

One of the reasons why Kawczyńska criticises the second decision on interim relief in *Turów Mine* is the fact that a provisional measure in the form of a periodic penalty payment is not irreversible. Once a provisional measure ceases to apply, the legal and factual situation between the parties returns to what it had been before it was granted. However, after the second measure in *Turów Mine* expires, Poland will not recover the money incurred as a periodic penalty payment for non-compliance with the first provisional measure. The measure in question created an irreversible legal and factual situation.⁹¹²

This issue is currently the subject of proceedings before the CJEU. As a result of an extrajudicial agreement between the Czech Republic and Poland, *Turów Mine* was discontinued.⁹¹³ Given the peaceful settlement of the dispute, Poland submitted a request for the return of the money incurred under the second interim measure (€68.5 million). The General Court dismissed this action.⁹¹⁴ The appeal is currently being examined by the Court of Justice. However, Advocate General Kokott has already delivered her opinion, siding with Poland. She argues that due to the amicable agreement between the Czech Republic and Poland, the penalty payment ordered in the proceedings for interim relief should be cancelled retroactively.⁹¹⁵

Kawczyńska's argument seems to be part of a broader problem. It lies in the fact that, at the provisional measures stage in *Turów Mine*, the CJEU appears to have decided the merits.

It is uncontested that an international court cannot make decisions at the interim relief stage that should be reserved for the merits stage.⁹¹⁶ As Wolfrum points out, '[t]he international court or tribunal must avoid taking a decision which, *de facto* or *de iure*, cannot be reversed by the final judgment'.⁹¹⁷ The issue of reversibility of decisions concerns the principle of *res judicata*.

⁹¹² See Kawczyńska (n 241) 26.

⁹¹³ Case C-121/21 R *Czech Republic v Poland (Turów Mine)* (Discontinuance) ECLI:EU:C:2022:82.

⁹¹⁴ Joined Cases T-200/22 and T-314/22 *Poland v Commission* ECLI:EU:T:2024:329.

⁹¹⁵ C-554/24 P *Poland v Commission (Annulation rétroactive de mesures provisoires)* ECLI:EU:C:2025:564 (Opinion of AG Kokott).

⁹¹⁶ See also Sztucki (n 3) 93; Miles (n 2) 302–3.

⁹¹⁷ Wolfrum, 'Interim (Provisional) Measures of Protection' (n 32) para 40.

It is worth recalling that the binding nature of international decisions actually consists of three distinct elements: binding force *sensu stricto*, the obligation to comply, and the principle of *res judicata*.⁹¹⁸ Binding force *sensu stricto* concerns the quality of a decision that concludes a given stage of proceedings. The obligation to comply with such a decision must be provided for in a constitutive treaty of an international court. The principle of *res judicata* means that a decision on a specific issue between specific parties is final, that is, it cannot be reversed or re-evaluated. Judgments of international courts are binding *sensu stricto*; parties are obliged to comply with them, and they have the force of *res judicata*.

On the other hand, orders on provisional measures are only binding *sensu stricto* and parties are under obligation to comply with them (the latter point is unclear as regards inter-State interim relief before the ECtHR). They are reversible at the later stages of the case. It means that the principle of *res judicata* does not cover decisions on interim relief.⁹¹⁹ This applies to both the reasoning behind the decisions and the operative part itself. As a result, international courts may modify and revoke provisional measures.⁹²⁰ They also may reach different conclusions on the preliminary objection or merits stages than when examining the conditions for ordering interim relief.⁹²¹

From the fact that the ICJ found the rights claimed by South Africa to be plausible and identified an urgent risk of irreparable prejudice in *South Africa v Israel*, some scholars concluded that all States were obliged to take certain actions regarding the situation in Gaza. Attributing such significance to the reasoning behind decisions on provisional

⁹¹⁸ See generally Tams (n 719) 239–42 paras 10–16; Santiago Torres Bernárdez and Makane Moïse Mbengue, ‘Article 48’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019) 1352–55 paras 3–13; Chester Brown, ‘Article 59’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019) 1575–7 paras 41–49. See also Thirlway, *The International Court of Justice* (n 44) 121–2.

⁹¹⁹ See eg Kolb, *CIJ* (n 129) 658.

⁹²⁰ On this possibility, see Gapsa, ‘Clarifying the Unclear: Requests for Modification, Revocation, and New Provisional Measures’ (n 127). See also Gaja (n 127).

⁹²¹ Note, however, that the ICJ has developed a practice whereby, when it declines to indicate provisional measures and finds a so-called ‘manifest lack of jurisdiction,’ it orders that the case be removed from the General List. These decisions are not inconsistent with the provisional nature of the provisional measures proceedings. First, no provisional measures are indicated. Second, although the decisions are issued in an order on provisional measures, their legal basis appears to be Article 48 of the ICJ Statute alone, rather than Article 48 in conjunction with Article 41. There appears to be no legal obstacle to deliver an order containing two distinct decisions. See *Legality of Use of Force (Yugoslavia v Spain)* (Provisional Measures) [1999] ICJ Reports 761, 773 [35]; *Legality of Use of Force (Yugoslavia v United States)* (Provisional Measures) [1999] ICJ Reports 916, 925 [29]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates)* (Provisional Measures) ICJ General List No 197 (5 May 2025) [35].

measures is, at the very least, excessive. Every conclusion at the interim relief stage is merely provisional and changeable. It is a mistake to generalise the arguments used by international courts when determining whether the conditions for ordering interim relief have been met.⁹²² The same caution is required with regard to other politically sensitive cases such as *Ukraine v Russia (Genocide Convention)*.⁹²³

It is recalled that the only reason for prescribing the second provisional measure in *Turów Mine* was Poland's failure to comply with the first provisional measure. Poland argued that ceasing mining in Turów would pose a threat to human safety, the environment, and energy security. Poland's failure to comply with the first decision was 'unequivocally clear'.⁹²⁴ Vice-President Silva de Lapuerta ruled that the second measure 'therefore appeared necessary to strengthen the effectiveness of the [first provisional measure]'.⁹²⁵ Even the wording of the *dispositif* stated that the penalty payment was due until Poland complied with the first provisional measure.⁹²⁶

The question of whether an international court may find and penalise non-compliance with provisional measures at the interim relief stage is controversial. In fact, only the ICJ has addressed it. Its judges are sceptical, to say the least. They emphasise that such decisions are not appropriate at the provisional measures stage, which is characterised by the speed of decision-making and the temporary nature of the conclusions.⁹²⁷ The appropriate stage is the decision on the merits,⁹²⁸ or, as d'Argent argues, also in the

⁹²² See Miłosz Gapsa, 'Broadening the Bindingness of the Provisional Measures Order in *South Africa v. Israel* at the ICJ?' (2024) 23 Chinese Journal of International Law 191.

⁹²³ But see Patrycja Grzebyk, 'Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law' (2021) 41 Polish Yearbook of International Law 145, 156.

⁹²⁴ *Turów Mine* (Order of 20 September 2021) (n 237) [48].

⁹²⁵ *Turów Mine* (Order of 20 September 2021) (n 237) [49].

⁹²⁶ See Chapter II 3.3.

⁹²⁷ *Pro eg South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) 540 [3] (Separate Opinion Nolte); *South Africa v Israel* (Modification of Provisional Measures May 2024) (n 138) 683–4 [8]–[11] (Declaration Nolte); *Guyana v Venezuela* (Modification of Provisional Measures) (n 478) [12] (Joint Dissenting Opinion Xue, Bhandari and Nolte). *Contra eg Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Modification of Provisional Measures) [2013] ICJ Reports 230, 257 [39] (Separate Opinion Cançado Trindade). See generally Gapsa, 'Clarifying the Unclear: Requests for Modification, Revocation, and New Provisional Measures' (n 127).

⁹²⁸ *Qatar v UAE* (Provisional Measures 2019) (n 697) 370 [26]; citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Report 665, 713 [126]. See also *Qatar v UAE* (Provisional Measures 2019) (n 697) 384 [28] (Separate Opinion Abraham).

judgment upholding preliminary objections.⁹²⁹ The truth is, however, that if interim relief were complied with, there would often be no need to modify it or request a new one.⁹³⁰

A decision finding non-compliance with provisional measures is neither provisional nor temporary. It holds that a State has committed an internationally wrongful act and engages its international responsibility. If it were temporary, this would lead to the absurd possibility of temporarily engaging a State's responsibility. For this reason, the second decision on interim relief in *Turów Mine* was incorrect. The very possibility of prescribing a provisional measure in the form of a periodic penalty payment is not in doubt, but such an order cannot be based solely on non-compliance with the previous provisional measure. Judge *ad hoc* Wolfrum is correct in saying that failure to comply with previous interim relief does not, in itself, justify ordering further provisional measures, but it may influence the assessment of the conditions for modifying or granting new provisional measures.⁹³¹

6. Possible Emerging Criteria

The content of certain provisional measures seems to be conditioned by 'considerations of humanity' and environmental issues. The question is whether these factors have evolved into criteria for determining the content of interim relief.

6.1. 'Considerations of Humanity'

Human rights are one of the most rapidly expanding branches of international law. Although 'le droit de l'homme' sometimes degenerate into 'le droit-de-l'hommisme',⁹³² their development has influenced the practice of granting provisional measures in inter-State cases. International courts granted interim relief, the ultimate beneficiaries of which were individuals. An obvious example is cases where a provisional measure ordered a stay of execution of the death penalty. It is sometimes argued that such measures were unjustified. According to Judge Oda, interim relief in inter-State cases can only concern the

⁹²⁹ Pierre d'Argent, 'Preliminary Objections and Breaches of Provisional Measures' (2021) 104 *Rivista di diritto internazionale* 115.

⁹³⁰ See *South Africa v Israel* (Modification of Provisional Measures March 2024) (n 138) [5] (Separate Opinion Nolte).

⁹³¹ See *Guyana v Venezuela* (Modification of Provisional Measures) (n 478) [8] (Declaration Wolfrum).

⁹³² See generally Alain Pellet, 'Droits-de-l'hommisme et droit international' (2001) 1 *Droits fondamentaux* 167.

rights of States and not individuals.⁹³³ On the other hand, Saccucci argues that in inter-State cases before the ECtHR, States seek protection of the rights of individuals and not their own.⁹³⁴ Neither view seems to be correct. The jurisprudence of the ECtHR⁹³⁵ and the ICJ recognises that there is a close link between the rights of individuals and those of States. As the Court put it, there is a correlation between respect for individual rights, the obligations of States parties ... and the right of States parties to seek compliance therewith'.⁹³⁶

While States seek to uphold their own rights, it is not contradictory that beneficiaries of provisional measures in those cases are ultimately individuals. As Acconciamezza puts it, 'pur se formalmente oggetto della tutela cautelare sono diritti degli Stati, nei casi qui esaminati i beneficiari ultimi della protezione divengono gli individui le cui posizioni soggettive sono oggetto di discussione nel giudizio principale'.⁹³⁷ The reason is that the protection of individual rights protects the rights of the State.⁹³⁸

In general, the approach of international courts has evolved from focussing on the protection of 'individual rights' to prioritising the protection of 'the rights of the individual'.⁹³⁹ It is also not surprising that international courts refer to the vulnerability of local populations in cases involving military actions.⁹⁴⁰

However, international courts have often mentioned 'considerations of humanity', even though the subject matter of the case did not directly or indirectly concern human

⁹³³ See eg *Land and Maritime Boundary* (n 515) 26–7 [2] (Declaration Oda); *Breard* (Provisional Measures) (n 420) 261 [5] (Declaration Oda); *LaGrand* (Provisional Measures) (n 124) 19 [5] (Declaration Oda). See also *Fisheries Jurisdiction (UK)* (n 131) 23–5 (Dissenting Opinion Padilla Nervo).

⁹³⁴ Saccucci (n 31) 247. The ECtHR applies Rule 39 in inter-State disputes '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'. Saccucci (n 31) 233.

⁹³⁵ *Austria v Italy* (dec) App no 788/60 (ECtHR, 11 January 1961) 18; and *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) [239].

⁹³⁶ *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 391–2 [126]; *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 135 [81]. See also *Armenia v Azerbaijan* (Provisional Measures 2021) (n 159) 368 [57]; *Azerbaijan v Armenia* (Provisional Measures 2021) (n 159) 424 [50]; *Armenia v Azerbaijan* (Provisional Measures February 2023) (n 159) 24 [37]; *Canada and the Netherlands v Syria* (n 137) 605 [57] and 608 [71]; *Armenia v Azerbaijan* (Provisional Measures November 2023) (n 159) 631 [37]; *South Africa v Israel* (Provisional Measures January 2024) (n 46) 19–20 [43]. On the ECHR, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Reports 477, 550 [25] (Declaration Kress).

⁹³⁷ Acconciamezza (n 31) 414.

⁹³⁸ See eg *Jadhav* (n 418) 243 [47].

⁹³⁹ Addo (n 813) 680.

⁹⁴⁰ See eg *Georgia v Russia* (Provisional Measures) (ICJ) (n 159) 396 [143]; *Ukraine v Russia (ICSFT and CERD)* (Provisional Measures) (n 130) 138 [96]; *Ukraine v Russia (Genocide Convention)* (n 23) 228 [75].

rights. Higgins points in particular to *Frontier Dispute* and *Land and Maritime Boundary*. Although these proceedings concerned strictly the delimitation of boundaries, the ICJ expressed concern about the situation, safety and protection of persons in the areas affected by the dispute. Higgins argues that ‘disputes about frontiers are not just about lines on the ground but are about the safety and protection of the peoples who live there’.⁹⁴¹ Judges have emphasised that humanitarian considerations were taken into account when deciding on interim relief.⁹⁴² Even Judge Oda voted a number of times for interim relief ‘solely for humanitarian reasons’.⁹⁴³ ITLOS is ‘particulièrement sensible à cette préoccupation’.⁹⁴⁴ For example, the situation of the crew was an important element in *Arctic Sunrise* and *San Padre Pio*.⁹⁴⁵ In *Enrica Lexie*, Judge Paik noted that ‘in general, risks to human liberty or life are taken seriously in provisional measure proceedings’.⁹⁴⁶ In *Enrica Lexie Arbitration*, the entire order concerned the situation of the marine residing at the residence of the Italian ambassador in New Delhi and his family. In *Three Ukrainian Naval Vessels*, ITLOS failed to explain why the immunity of warships extended *prima facie* to its servicemen. Nevertheless, the Tribunal expressed ‘humanitarian concern’ about their situation,⁹⁴⁷ which might have explained that decision.

The concept of ‘considerations of humanity’ is quite old. The ICJ referred to it for the first time in its 1949 judgment on the merits in *Corfu Channel*. The Court invoked ‘certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war’.⁹⁴⁸ As stated in the *Brownlie’s Principles of Public International Law*, ‘these considerations may relate to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite analogy’.⁹⁴⁹ As regards the UNCLOS system, Article 293(1) of UNCLOS allows for the incorporation of ‘considerations of humanity’ into UNCLOS. It

⁹⁴¹ Higgins (n 833) 107.

⁹⁴² See eg *Land and Maritime Boundary* (n 515) 30 (Declaration Koroma); *DRC v Uganda* (n 503) 134 (Declaration Koroma).

⁹⁴³ *Breard* (Provisional Measures) (n 420) 262 [8] (Declaration Oda); *LaGrand* (Provisional Measures) (n 124) 20 [7] (Declaration Oda).

⁹⁴⁴ Albane Geslin, ‘L’ordonnance du TIDM en prescription de mesures conservatoires dans l’affaire de l’*Incident de l’Enrica Lexie (Italie c. Inde)*, ou de l’art délicat de naviguer entre deux eaux’ (2015) 61 *Annuaire français de droit international* 725, 742.

⁹⁴⁵ See Chapter II 6.

⁹⁴⁶ *Enrica Lexie* (n 179) 211 [1] (Declaration Paik); Geslin (n 944) 741 n 106.

⁹⁴⁷ *Three Ukrainian Naval Vessels* (n 46) 309 [112].

⁹⁴⁸ *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Reports 4, 22.

⁹⁴⁹ James Crawford, *Brownlie’s Principles of Public International Law* (9th ed, Oxford University Press 2019) 43. See Irini Papanicolopulu, ‘Considerations of Humanity in the *Enrica Lexie* Case’ (2015) 22 *Questions of International Law, Zoom-in* 25, 27.

reads that an UNCLOS tribunal ‘shall apply this Convention and other rules of international law not incompatible with this Convention’. As early as in *Saiga (No 2)*, the Tribunal held that ‘considerations of humanity must apply in the law of the sea, as they do in other areas of international law’.⁹⁵⁰ Similarly, in *Louisa*, the Tribunal affirmed that ‘States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances’.⁹⁵¹ ITLOS has invoked ‘considerations of humanity’ even in prompt release cases, which, *prima facie*, have nothing to do with the rights of individuals.⁹⁵² At times, international court have used humanitarian concerns to confirm that all persons involved in the case should be treated humanely.⁹⁵³

The significance of humanitarian considerations is not entirely clear. Higgins argues that *Frontier Dispute* and *Land and Maritime Boundary* ‘would 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’.⁹⁵⁴ Cannone criticises the use of humanitarian considerations in an ‘indistinct’ manner. Sometimes they serve as a ‘true legal criterion’ on which a decision is based; at other times, they merely express ‘judicial empathy’.⁹⁵⁵ This certainly does not contribute to the certainty of jurisprudence.

Judges⁹⁵⁶ and scholars⁹⁵⁷ agree that humanitarian considerations alone do not justify the granting of interim relief. The standard conditions for ordering it must still be met. Therefore, Judge Cançado Trindade’s idea of replacing the standard conditions for granting provisional measures with human ‘vulnerability’ has not been accepted.⁹⁵⁸

⁹⁵⁰ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Reports 10, 62 [155].

⁹⁵¹ *M/V ‘Louisa’ (Saint Vincent and the Grenadines v Spain)* (Judgment) [2013] ITLOS Reports 4, 46 [155].

⁹⁵² *‘Juno Trader’ (Saint Vincent and the Grenadines v Guinea-Bissau)* (Prompt Release) [2004] ITLOS Reports 17, 38–9 [77]; *‘Tomimaru’ (Japan v Russian Federation)* (Prompt Release) (2007) 2005–2007 ITLOS Reports 17, 96 [76]. On this issue, see Geslin (n 944) 742; Papanicopolulu (n 949) 28–30.

⁹⁵³ See Papanicopolulu (n 949) 34.

⁹⁵⁴ Higgins (n 833) 108.

⁹⁵⁵ Cannone (n 640) 164–5.

⁹⁵⁶ See eg *Avena (Interpretation)* (n 353) 341 [1] (Joint Dissenting Opinion Owada, Tomka and Keith).

⁹⁵⁷ See eg Tranchant (n 823) 194; Yoshifumi Tanaka, ‘Dual Provisional Measures Prescribed by ITLOS and Annex VII Arbitral Tribunal: Reflections on the “*Enrica Lexie*” Incident Case’ [2017] Global Community Yearbook of International Law and Jurisprudence 265, 283–4.

⁹⁵⁸ Among his numerous individual opinions, see eg *Jadhav* (n 418) 249–53 [6]–[14] (Separate Opinion Cançado Trindade). See also Anne Peters, ‘“Vulnerability” versus “Plausibility”: Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, *Ukraine v. Russian Federation*, Order of 19 April 2017’ (*EJIL:Talk!*, 5 May 2017). See generally Sparks and Somos (n 140).

‘Considerations of humanity’ influence the way international courts interpret and apply the conditions for granting interim relief. This applies in particular to plausibility and urgent risk of irreparable prejudice. Tanaka explains that ‘the concept of considerations of humanity should be regarded as an element in the interpretation or application of the requirements for prescribing provisional measures’.⁹⁵⁹ For some, like Iwamoto Lee, this may be an inappropriate lowering of the standard for ordering interim relief.⁹⁶⁰ For others, like Acconciamezza, it provides them with the necessary flexibility.⁹⁶¹ It cannot be ruled out that reference to human considerations has a pragmatic significance. It allows different opinions of judges to be reconciled and a majority to be achieved. After all, it is difficult for a judge to vote against respect for the health and life of an individual.

By influencing the assessment of the conditions for ordering provisional measures, ‘considerations of humanity’ help shape the choice of interim relief to be granted. A proper interpretation of the urgent risk of irreparable prejudice allows the human dimension to be taken into account. In practice, international courts usually choose provisional measures that provide individuals with the broadest possible protection within the limits of the States’ plausible rights. It would seem that, as a matter of principle, ‘considerations of humanity’ have become one of the criteria for selecting the content of provisional measures.

6.2. *Environmental Issues*

The recent advisory opinions of ITLOS and the ICJ on climate change⁹⁶² and the ECtHR’s judgment in *KlimaSeniorinnen v Switzerland*⁹⁶³ illustrate the importance of international environmental law. In fact, many cases in general, and requests for provisional measures in particular, have concerned the protection of the environment. *Nuclear Tests*, *Southern Bluefin Tuna* and *MOX Plant* are just three examples.⁹⁶⁴ In *Turów Mine*, the Vice-President of the Court of Justice even held that ‘the purported harm ... resulting from the impossibility of carrying out important projects and investments in the energy field cannot,

⁹⁵⁹ Tanaka, ‘Dual Provisional Measures Prescribed by ITLOS and Annex VII Arbitral Tribunal’ (n 957) 284.

⁹⁶⁰ Yoshiyuki Iwamoto Lee, ‘The Protection of Human Life Through Provisional Measures Indicated by the International Court of Justice’ (2002) 15 *Leiden Journal of International Law* 345, 364–6.

⁹⁶¹ Acconciamezza (n 31) 416–24.

⁹⁶² See *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) [2024] ITLOS Reports 1; *Obligations of States in respect of Climate Change* (n 221).

⁹⁶³ See *Verein KlimaSeniorinnen Schweiz v Switzerland* App no 53600/20 (ECtHR [GC], 9 April 2024).

⁹⁶⁴ See Chapter II 3.3.

in any event, take precedence over considerations relating to the environment and human health'.⁹⁶⁵

Nedeski, Sparks and Hernández argue that provisional measures can be an effective tool in climate change litigation. In support of their thesis, they consider a hypothetical case before the ICJ, brought under the optional clause and alleging a violation of the customary 'no-harm' rule. After analysing the conditions for indicating interim relief, Nedeski, Sparks and Hernández claim that a request for provisional measures in such a case would have a chance of success. Moreover, they believe that other similar requests, submitted on other legal grounds and alleging other violations of international environmental law, also have a chance of success.⁹⁶⁶

As with 'considerations of humanity', the question arises as to whether environmental issues are a determining factor in the choice of provisional measures. In other words, the issue is whether an international court must choose interim relief that protects the environment or at least does not harm it, even if neither the main case nor the application concerns environmental issues. Two cases raised this point.

In *Certain Activities*, the ICJ did not find an urgent risk of irreparable prejudice in relation to the alleged environmental damage to the San Juan River. Neither party raised any other environmental issues. However, the Court, on its own initiative, drew attention to the existence of the wetland in the disputed territory and twice granted Costa Rica special interim relief allowing it to send personnel to preserve this area. Apart from Judge Skotnikov, none of the judges questioned the need for this provisional measure.⁹⁶⁷

Similarly, a Special Chamber of ITLOS rejected in *Ghana/Côte d'Ivoire* the need to prescribe interim relief to preserve the marine environment. The Special Chamber found it necessary only to protect the rights related to the disputed maritime zone in light of Ghana's oil drilling activities. However, it declined to order a complete halt to all drilling operations, arguing that such a measure could itself harm the marine environment. Accordingly, only new drilling activities were prohibited. Moreover, without further explanation, the *Ghana/Côte d'Ivoire* Special Chamber required Ghana to monitor the

⁹⁶⁵ *Turów Mine* (Order of 21 May 2021) (n 237) [92].

⁹⁶⁶ Nataša Nedeski, Tom Sparks and Gleider Hernández, 'The World Is Burning, Urgently and Irreparably – a Plea for Interim Protection against Climatic Change at the ICJ' (2023) 22 *Law & Practice of International Courts and Tribunals* 301, esp 310 and 336–7.

⁹⁶⁷ See Chapter II 3.2.

environmental situation in the disputed area. None of the judges contested the content of interim relief.⁹⁶⁸

It goes without saying that two cases are not statistically significant enough to draw general conclusions. On the other hand, there have been no other cases in which environmental issues, while not central to the proceedings, arose as auxiliary considerations. Thus, international courts have not had the opportunity to further develop the point under consideration.

Moreover, international environmental law is developing even more rapidly than human rights law. For example, the ICJ has recently found that certain environmental destruction may amount to racial discrimination.⁹⁶⁹ In the landmark *Climate Change* advisory opinion, the Court emphasised the complex and global threat posed by climate change and its own role in helping the international community to solve it. As the ICJ put it, '[t]hrough this Opinion, the Court participates in the activities of the United Nations and the international community represented in that body, with the hope that its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis'.⁹⁷⁰ Additionally, the advisory opinion pointed out that 'the full enjoyment of human rights *cannot be ensured* without the protection of the climate system and other parts of the environment'.⁹⁷¹

Overall, it is difficult to take an unambiguous position on whether environmental issues have become one of the criteria for selecting the content of provisional measures. There are strong arguments for and against this argument. Further decisions are needed to clarify this point. It would be particularly valuable if, unlike *Certain Activities and Ghana/Côte d'Ivoire*, they did not concern territorial disputes.

⁹⁶⁸ See Chapter II 3.2.

⁹⁶⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Preliminary Objections) ICJ General List No 181 (12 November 2024) [95].

⁹⁷⁰ *Obligations of States in respect of Climate Change* (n 221) [456].

⁹⁷¹ *Obligations of States in respect of Climate Change* (n 221) [403] (emphasis added).

7. Concluding Remarks

Four criteria condition the selection of the content of provisional measures: effectiveness, incidental character, balance and proportionality, and provisionality. Notably, all of them are not without exceptions.

The effectiveness of interim relief lies in protecting the future final decision in a case, which is the sole purpose of provisional measures. In practice, this requires that they be ordered rather than suggested, performable, and precise. The latter condition is often controversial, particularly in relation to ‘repeating’ and non-aggravation measures. International courts, moreover, sometimes prefer less precise interim relief in order to secure broader judicial support. Interestingly, at least before the ICJ, judges ad hoc have a clearer and more precise approach to the aim of interim relief than its permanent members.

As measures granted in incidental proceedings, provisional measures may only protect the plausible rights of the parties. Yet precision in their identification varies. Interim relief cannot be directed at States not party to the proceedings, but may concern certain actions involving international organisations.

The balance and precision of interim relief require that it protect the rights of both parties by proportionate means, without creating undue burdens or favouring one side. In practice, this concerns selecting the most neutral wording of interim relief possible. The unresolved, though still hypothetical, problem concerns provisional measures indicated ‘unduly’.

Provisional measures are, by definition, temporary: they cannot prejudice the merits of the case, whether through their wording or by seeking to punish non-compliance with previous measures. Because the principle of *res judicata* does not apply to interim relief, scholars should refrain from overestimating or generalising conclusions reached at this stage of the proceedings. Although often cited, *Factory at Chorzów* has had little, if any, impact on the conditions falling into this category.

There are also two emerging criteria: ‘considerations of humanity’ and environmental issues. As regards the former, humanitarian concerns have arguably already become a condition for selecting the content of interim relief. It means that, regardless of the subject matter of the dispute, the content of provisional measures must seek to protect individuals as far as possible within the limits of the States’ plausible rights. As regards the

latter, environmental concerns are likely to develop as an additional criterion, although for the time being they remain informal. The recent *Climate Change* advisory opinion is apt to accelerate this process. However, *Certain Activities* and *Ghana/Côte d'Ivoire* show that environmental issues may already be taken into account, although in these two cases their relation to the States' plausible rights is rather unclear.



Final Conclusions

*Quod scripsi, scripsi*⁹⁷²

Thirlway refers the above quote when criticising the ICJ for not explaining the reasoning behind its decisions.⁹⁷³ In general, it seems to accurately describe the lack of explanation provided by international courts and tribunals regarding the content of provisional measures they select. For unknown reasons, international courts seem to be systematically reluctant to devote significant space in their decisions to this issue. Instead, they prefer to remain silent on this crucial aspect of the decision on provisional measures. This is an analogous situation to when Judge Tomka rightly criticised the Court for its unclear and unexplained *dictum* regarding the continuation of statehood despite the loss of territory in the *Climate Change* advisory opinion.⁹⁷⁴ As the learned judge put it:

Once it had made a decision to address the matter *sua sponte*, the Court should have given ... the courtesy of a thorough, rigorous, and well-reasoned exposition. The Court should have explained exactly what it meant ... even taking additional time, if necessary, to develop its Opinion for this purpose. Instead, we have descended upon the Great Hall of Justice not unlike the high priestess Pythia once did at the Temple of Apollo — uttering a single sentence, the brevity of which belies its astonishing ramifications. The reader is left to ponder our Delphic pronouncement, unaided by any reasoning whatsoever. This bodes poorly. Oracular pronouncements may, by virtue of their conciseness, have helped the Court reach a unanimous Opinion, but this comes at a cost. The authority of the Court is enhanced not by mystique but by reasoned analysis ...⁹⁷⁵

After all, the crux of the decisions in question lies not in whether the conditions for granting interim relief are met, but rather in what interim relief is granted. The only international courts that have provided detailed reasoning for the content of their provisional measures

⁹⁷² St John 19:22.

⁹⁷³ Thirlway, *The Law and Procedure* (n 28) 1082; referring to *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* [2002] ICJ Reports 303, 453 [323]–[324].

⁹⁷⁴ ‘In the view of the Court, once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood’. *Obligations of States in respect of Climate Change* (n 221) [363].

⁹⁷⁵ *Obligations of States in respect of Climate Change* (n 221) [11] (Declaration Tomka).

are the CJEU and the *Indus Waters Kishenganga* Court of Arbitration provide a notable exception. This study aimed to clarify the law and practice of selecting the content of interim relief.

Chapter I analysed the procedural framework for granting provisional measures. It first summarised the historical development of interim relief. Provisional measures are an autonomous concept in international law, although their inspiration derives from municipal legal systems. While the wording of the provisions on interim relief has evolved, the underlying concept has remained the same. A crucial moment was the adoption of the PCIJ Statute, particularly Article 41, which served as a model not only for similar provisions in other international courts but also for subsequent practice. Although the wording of these provisions differs, all are open-ended and require judicial interpretation. Such interpretation is often lacking, for example concerning the possibility of ordering interim relief beyond what was explicitly requested. Chapter I argued that this follows directly from the provisions authorising the granting of provisional measures. For this reason, the so-called ‘link’ requirement before the ICJ is largely redundant, as the Court is not bound by the *ne ultra* and *ne infra petita* principles when indicating provisional measures.

Chapter II critically compared all decisions in which international courts have ordered provisional measures. It argued that international courts have granted similar interim relief in comparable cases, suggesting that the approach to choosing provisional measures is not as idiosyncratic as it may seem. International courts generally prefer negative measures, which require parties to refrain from certain actions. The scope of positive interim relief varies: in some cases, courts required the parties to perform meticulously described activities, while in others, positive relief merely obliged them to comply with their existing international obligations. Non-aggravation relief has become a standard form of provisional measure and is generally addressed to both parties. Evidence-protection measures have evolved: initially, parties were only required not to destroy evidence, whereas today they must permit independent fact-finding missions in the territories concerned. Compliance-reporting measures remain problematic: before some courts, they are considered part of interim relief *sensu stricto*, while in others they are ordered on a separate legal basis.

Chapter III examined the criteria for selecting the content of provisional measures. Based on the jurisprudence of international courts, it identified four criteria: effectiveness,

incidental character, balance and proportionality, and provisionality. Effectiveness requires that the content serve the sole aim of provisional measures: the protection of the parties' rights. International courts often sacrifice the clarity of their interim relief, which hinders its effectiveness, in order to secure majority over a given provisional measure. Incidental character follows from the fact that provisional measures proceedings are subsidiary to the main proceedings; interim relief may protect only the plausible rights of the parties, and only the parties themselves may be addressed. Balance and proportionality require the court to choose a measure that minimally limits the States' freedom to act while preserving the rights of both parties. Technically, this requires that the measure be framed in neutral terms. Provisionality means that provisional measures may not, in theory or in practice, prejudice the merits of the case. They do not constitute an interim judgment, nor can they arise from findings of non-compliance with previous provisional measures. Interim relief may be modified or revoked at any stage of the proceedings. None of the conclusions reached is covered by the *res judicata* principle. Developments in international law have established that 'considerations of humanity' have become a new criterion for selecting the content of interim relief. This requires that the measure chosen maximally protect individuals without exceeding the scope of the States' rights. Environmental issues are emerging as a potential sixth criterion; however, the current state of the law does not yet require courts to select interim relief that preserves the environment.

This study argues that the international courts' discretion in choosing the content of interim relief is not unlimited; it is constrained by legal criteria

Accordingly, the analysis conducted confirms the thesis that international courts' discretion in choosing the content of interim relief is not unlimited. This study has also shown that these limits are legal in nature. Although effectiveness, incidental character, balance and proportionality, provisionality, and 'considerations of humanity' are not explicitly mentioned in the provisions on provisional measures, they can be deduced from the logic of judicial settlement of international disputes, the nature of provisional measures proceedings, and general international law. Nevertheless, taken together, one should conclude that there is a presumption of permissibility of the content of interim relief: international courts may grant any provisional measure unless it would contradict one of the above principles. As Miles argues, 'an international court or tribunal is minimally

constrained in deciding what interim relief to award—absent a *lex specialis* to the contrary’.⁹⁷⁶

In view of the foregoing, three proposals *de lege ferenda* may be cautiously suggested:

First, international courts must begin to explain their choice of interim relief. This part of their decisions is typically the shortest and merely descriptive, leaving the parties without adequate justification. The need is particularly acute for the ECtHR, which at present provides no reasoning at all; simply communicating the measures ordered is insufficient. Explaining the choice of content requires, above all, precision regarding the plausible rights at issue. Decisions that fail to identify such rights, or that merely provide an illustrative example without analysis, fall short of the required standard. Moreover, international courts should clarify why they may order interim relief different from that requested. Reliance on judge-made procedural rules, the jurisprudence of other courts, or—worse still—no reasoning at all is unsatisfactory. Providing meaningful explanations would significantly enhance the legitimacy of decisions.

Second, international courts should reconsider the precision and clarity of the interim relief they grant. Jurisprudence has increasingly shifted toward less precise provisional measures, undermining their effectiveness and, at times, rendering them pointless. Vague interim relief makes it nearly impossible to assess compliance. The problem is particularly acute in the case of non-aggravation and ‘repeating’ measures, whose inherent lack of precision calls into question their utility. International courts are therefore urged to reconsider whether such measures are truly the most effective under the circumstances. Provisional measures should be narrower and tailored to the specific facts of the case. Instead of issuing a number of vague measures, courts should order a smaller number of concrete and specific ones. Above all, international courts must stop prioritising unanimity over clarity. It is preferable to adopt a precise measure, clearly defining the obligations involved, even by a narrow 8-7 or 11-10 majority, than to issue a unanimous order that merely repeats existing obligations or dilutes what must be done. Arguably, precise provisional measures are, if not easier to comply with, at least easier to assess compliance with.

⁹⁷⁶ Miles (n 2) 299.

Third, international courts should reconsider the construction of the operative part of decisions on provisional measures. At present, the *dispositif* only records the interim relief granted, without reflecting judicial positions on the conditions for granting such relief. Greater transparency would be achieved if the operative part also indicated which judges were in favour or against each condition. As Judge Gaja observed, ‘when a large part of an order is devoted to discussing a certain issue, it would be reasonable, in the interest of greater transparency, for the Court to give due emphasis to its decision on that issue and state which judges were in favour and which were against’.⁹⁷⁷ Accordingly, the operative part—at least before the ICJ, ITLOS, and arbitral tribunals—could be modelled on that of advisory opinions, beginning with procedural determinations (conditions for granting relief) before turning to the substantive part (the provisional measures ordered). Furthermore, each provisional measure should be recorded as a separate point in the *dispositif*. Currently, international courts sometimes group multiple measures under a single point. This practice forces judges who disagree with one measure either to vote against the entire point or to compromise their views,⁹⁷⁸ thereby obscuring judicial reasoning. Separate voting on each measure would ensure greater clarity.

While this study sought to contribute to understanding the logic behind the selection of the content of provisional measures, further research is advisable. It would be useful to analyse to what extent ‘repeating’ measures have been effective, and the same applies to non-aggravation relief. One could also examine the extent to which parties refer to the content of interim relief at the merits stage when justifying their non-compliance. It is equally interesting to explore whether the identified criteria for choosing the content of provisional measures also apply to individual-State cases, or whether a different practice exists. A more general question concerns whether international courts that hear both inter-State and non-inter-State requests for provisional measures distinguish their approach between these types of proceedings. In short, this study would seem to only begin the wide research on the content of interim relief.

⁹⁷⁷ *Immunities and Criminal Proceedings* (n 163) 1175 (Declaration Gaja).

⁹⁷⁸ ‘Had the Tribunal crafted its *dispositif* so as to allow judges to vote on individual aspects of the provisional measure, I would have voted against this aspect of the Tribunal’s Order.’ *San Padre Pio* (n 179) 446 [57] (Separate Opinion Murphy).

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