The Function and Legal Status of Interim Measures Indicated by Various Human Rights Bodies and the International Court of Justice

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Abstract

This paper analyzes the function of interim or provisional measures (the terms are used interchangeably) and the position adopted by various human rights bodies and the International Court of Justice (ICJ) concerning their nature as legally binding or not. The analysis includes the practice of UN human rights treaty bodies (UNTBs), with a focus on the practice of the UN Human Rights Committee (HRCttee), and the regional human rights mechanisms. First, the paper looks at the practice of the HRCttee and then turns to the practice of other UNTBs and the regional human rights mechanisms. Lastly, the practice of the ICJ is included. Most human rights mechanisms have concluded that their interim or provisional measures are legally binding, although there are still some lingering controversies concerning their legal nature and potential consequences in instances of non-compliance by States.

Keywords

Interim measures; provisional measures; UN human rights treaty bodies; regional human rights courts; International Court of Justice.

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Introduction

This paper analyzes the position adopted by various human rights bodies and the International Court of Justice (ICJ or Court) concerning the legal nature of interim or provisional measures (the terms are used interchangeably), outlining first their legal basis and then the position taken by these quasi-judicial or judicial mechanisms in their practice. The analysis includes the practice of UN human rights treaty bodies (UNTBs), with a focus on the practice of the UN Human Rights Committee (HRCttee or Committee), and the regional human rights mechanisms. First, the paper looks at the practice of the HRCttee in the context of the implementation of the Optional Protocol (OP1), before turning to the practice of the other UN treaty bodies (UNTBs). Then, the practice of the three regional human rights mechanisms (one-tier or two-tier system) is presented. Finally, the paper discusses the practice of the ICJ, given the court's position as the principal judicial organ of the UN, and its important findings especially in the context of consular and diplomatic protection cases. Most of the judicial bodies, including the ICJ, have concluded that their interim measures are legally binding. Quasi-judicial bodies, including the HRCttee, have reached a similar conclusion based on a functional approach and teleological interpretation of their founding treaties or related protocols.

The Function of Interim Measures Adopted by International and Regional Human Rights Mechanisms

Individual access to various human rights mechanisms at the international and regional level has increased over time, as States have become a party to various international and regional human rights treaties. With the increase of these judicial or quasi-judicial fora, the need for these protection mechanisms to respond to urgent requests for protection by individuals has resulted in these mechanisms adopting so-called interim or provisional measures. The main aim of these measures, adopted as part of incidental proceedings, is to protect the life and physical integrity of individuals that are at risk of serious or irreparable harm. Their function is two-fold, first to protect the complainants from serious or irreparable harm, and second, to ensure that the legal proceedings retain their legal relevance by preserving their integrity.

The UN Human Rights Committee

As established under the Optional Protocol (OP1) to the International Covenant on Civil and Political Rights (ICCPR), the individual complaints procedure of the Committee does not provide for interim measures. Rule 94 of the HRCttee's Rules of Procedure, however, vests the Committee with the power to grant interim relief by requesting that the State concerned adopts all such measures deemed necessary 'to avoid possible actions which could have irreparable consequences

for the rights invoked by the author'[1] and that could lead to 'rendering nugatory any final decision taken by the [HRCttee] on the admissibility and the merits of the communication.'[2]

Interim measures may be requested by an author or decided by the Committee on its own initiative.[3] As amended at the 124th session of the HRCttee, the Rules of Procedure entrust the Special Rapporteur on New Communications and Interim Measures (SR) the task of dealing with requests for interim relief,[4] which are usually submitted alongside new communications.[5] Moreover, the mandate of the SR provides that interim measures are granted or refused 'based on the nature of the violation alleged and the risk of [detrimental] actions by the State'[6] and can require a State to either refrain from certain conduct[7] or to perform specific actions (e.g., to take steps to protect a person).[8]

Thus, common interim measures involve those aimed at preventing violations of articles 6 (right to life) and article 7 (the prohibition of torture or cruel, inhuman or degrading treatment) of the ICCPR,[9] such as the imposition of the death penalty[10] or deportation of the author of a communication.[11] However, interim measures have also been requested in the context of imminent

[1] Rules of Procedure of the Human Rights Committee (2021) UN Doc CCPR/C/3/Rev.12 (previously Rule 92); Roisin Pillay, 'The Politics of Interim Measures in International Human Rights Law' in Eva Rieter and Karin Zwaan (eds), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (TMC Asser Press 2021) 68-69.

[2] Office of the United Nations High Commissioner for Human Rights, 'Informal Guidance Note by the Secretariat for the States Parties on Procedures for the Submission and Consideration by Treaty Bodies of Individual Communications' (2017) <https://www.ohchr.org/Documents/HRBodies/TB/NoteStatesParties.pdf> accessed 15 February 2022, para 7.

[3] HRCttee, 'General Comment No 33: Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights' (25 June 2009) UN Doc CCPR/C/GC/33, para 19; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 24.

[4] Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.11 (2019), Rule 107; The mandate of the Special Rapporteur on New Communications and Interim Measures is established in UN Doc CCPR/C/110/3 (2014).

[5] CCPR/C/110/3, para 7.

[6] ibid para 9.

[7] *Zhaslan Suleimenov v Kazakhstan* [2017] (Views, Communication No 2146/2012) UN Doc CCPR/C/119/D/2146/2012, para 5.1, fn 15.

[8] Joseph and Castan (n 3).

[9] ibid; OHCHR (n 2); CCPR/C/GC/33; See also Joseph and Castan (n 3) 24.

[10] See, for instance, *Glenn Ashby v Trinidad and Tobago* [2002] (Views, Communication No 580/1994) UN Doc CCPR/C/74/D/580/1994, para 3.4, *Shafaq Baharuddin v Hungary* [2019] (Views, Communication No 2923/2016) UN Doc CCPR/C/125/D/2923/2016, para 1.2, and *Oleg Grishkovtsov v Belarus* [2015] (Views, Communication No 2013/2010) UN Doc CCPR/C/113/D/2013/2010, paras 1.1-1.3.

[11] See, for instance, *IK v Denmark* [2019] (Views, Communication No 2373/2014) UN Doc CCPR/C/125/D/2373/2014, paras 1.1-1.2.

violations of rights under article 17 (right to privacy),[12] article 18 (freedom of religion or belief),[13] article 19 (freedom of expression)[14] and article 27 (the rights of minorities)[15] of the ICCPR.[16]

Interim measures are to be distinguished from measures of protection. As described in the mandate of the SR, the purpose of the latter 'is not to prevent irreparable damage affecting the object of the communication itself, but simply to protect those who might suffer adverse consequences for having submitted the communication'.[17] This distinction is also made by Rule 95 of the Committee's Rules of Procedure, which establishes that such measures can be extended for the protection of 'the author(s), his or her counsel and family members, who might suffer acts of intimidation or reprisals as a result of the submission of the communication or cooperation with the Committee.'[18]

In its General Comment 33, the Committee explained that the implementation of interim measures is closely linked to States' obligation 'to respect in good faith the procedure of individual communication established under the Optional Protocol.'[19] In asserting the existence of such a link, the HRCtte followed the same reasoning it used in the case of *Dante Piandiong et al. v. Philippines*, where it held that a State party is considered to gravely violate its obligations under OP1 'if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.'[20] Since 2021, this approach has also been reflected in the Rules

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[12] See, for instance, *Gunaratna v Sri Lanka* [2009] (Views, Communication No 1432/2005) UN Doc CCPR/C/95/D/1432/2005, para 1.2.

[13] See, for instance, *Ch HO v Canada* [2016] (Inadmissibility decision, Communication No 2195/2012) UN Doc CCPR/C/118/D/2195/2012, paras 1.1-1.2.

[14] See, for instance, *Lydia Cacho Ribeiro v Mexico* [2018] (Views, Communication No 2767/2016) UN Doc CCPR/C/123/D/2767/2016, paras 1.1.-1.2.

[15] See, for instance, *Jouni Länsman et al v Finland* [1996] (Views, Communication No 671/95) UN Doc CCPR/C/58/D/671/1995, paras 1, 3.1-3.2.

[16] CCPR/C/110/3, para 9; Joseph and Castan (n 3).

[17] CCPR/C/110/3 para 12; OHCHR (n 2) para 12; See also Eva Rieter 'Autonomy of Provisional Measures' in Fulvio Palombino and others (eds) *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 58.

[18] CCPR/C/3/Rev.12, Rule 95; CCPR/C/110/3 para 11; Rieter (n 17); Eva Rieter 'Conclusion: The Protective Potential and Legitimate Use of Interim Measures in Human Rights Cases' in Eva Rieter and Karin Zwaan (eds), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (TMC Asser Press 2021) 252.

[19] CCPR/C/GC/33, para 19; See, for a recent iteration of the obligation to respect the procedure 'in good faith', HRCttee, *FM v Canada* [2015] (Views, Communication No 2284/2013) UN Doc CCPR/C/115/D/2284/2013, para 7; See also 'Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights' (2021) 1(c) <https://www.ru.nl/law/ster/research/nijmegen-principles-and-guidelines-on-interim/read-the-nijmegen-principles-2021/> accessed 15 February 2022.

[20] *Dante Piandiong et al v Philippines* [2000] (Communication No 869/1999) UN Doc CCPR/C/70/D/869/1999, para 5.2. The rationale of *Piandiong* has been subsequently followed in cases such as *Nazriev v Uzbekistan* (1044/2002), *Sholam Weiss v Austria* (1086/2002), *Tolipkhuzhaev v Uzbekistan* (1280/2004), *Uteev v Uzbekistan* (1150/2003), *Saidov v Tajikistan* (964/2001), and *Grishkovtsov v Belarus* (2013/2010); See also Joseph and Castan (n 3) 25; Manfred Nowak *Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel Publisher 2005) 849-850.

of Procedure of the HRCttee, which explicitly provide that 'failure to implement [interim] measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol.'[21] Similarly, through its concluding observations, the HRCttee has affirmed that States' refusal to cooperate with its requests for interim measures may also amount to a breach of their obligations under the ICCPR itself 'in accordance with the principle of *pacta sunt servanda*.'[22] Thus, even if the HRCttee has never used the term 'binding' to describe the nature of its interim measures, it has consistently attributed an obligatory character to them in its practice.[23]

The consequences for noncompliance have not been as clearly established, however, and the HRCttee has usually recurred to finding a breach of the OP1 'apart from any other violation of the [ICCPR]'[24] when deciding on the merits of a case.[25] States generally abide by the HRCttee's requests for interim measures, with only a few usual exceptions.[26] The circumstances in those particular cases have merited the use of diplomatic resources and public censure to encourage compliance.[27] Examples of this practice can be found in the form of press releases where the HRCttee has expressed its dismay at the continuous disregard of its interim measures by a State.[28] Even though there is always room for improvement in terms of rates of compliance, States generally seem to abide by requests for interim measures and the implications of a more stringent approach to their enforcement may potentially give rise to undue resistance or other counterproductive circumstances.

Other UN Human Rights Treaty Bodies

Together with the HRCttee, the Committee against Torture (CmAT) has one of the longest traditions of providing interim relief in its quasi-judicial procedures. Like in the individual complaints proceedings before the HRCttee, interim measures are 'requested' rather than imposed

[21] CCPR/C/3/Rev.12, Rule 94(2).

[22] See HRCttee, 'Concluding Observations with respect to Uzbekistan' (31 March 2005) UN Doc CCPR/ CO/83/UZB, para 6; For a more recent take on the same reasoning, see 'Concluding Observations on the Fifth Periodic Report of Belarus' (22 November 2018) UN Doc CCPR/C/BLR/CO/5, paras 7-8, where the HRCttee affirmed that disregarding its orders for interim measures 'compromises the protection of Covenant rights and constitutes a serious violation of the Optional Protocol'; See also Helen Keller and Cedric Marti, (2013) 'Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights' (2013) 73 ZaöRV 325, 344-355.

[23] ibid.

[24] *Piandiong et al v Philippines* (n 20) para 5.2; See, more recently, HRCttee, *Yakovitsky et al v Belarus* [2020] (Views, Communication No 2789/2016) UN Doc CCPR/C/128/D/2789/2016 para 6.4.

[25] Keller and Marti (n 22) 364.

[26] ibid 362.

[27] ibid 369.

[28] For instance, in 2011, the HRCttee issued a press release condemning Belarus' dismissal of its requests not to carry out the execution of death row inmates. UNGA, Annual Report of the Human Rights Committee 100th session (11–29 October 2010) 101st session (14 March–1 April 2011) 102nd session (11–29 July 2011) UN Doc A/66/40 (Vol I) paras 50-51.

by the CmAT under its Rules of Procedure.[29] However, the interpretative guidance issued by CmAT does differ from that of HRCttee in terms of specificity. Indeed, while CmAT's General Comment No. 4 does not offer an exhaustive list of what constitutes an appropriate interim measure, it does limit their adoption to situations arising from violations of article 3 (non-*refoulement*) of the Convention Against Torture.[30]

In contrast to the practice of HRCttee and CmAT, which regulate interim measures through Rules of Procedure, more recently concluded Conventions and Optional Protocols have included explicit provisions on interim relief.[31] Indeed, references to interim measures can be found in the International Convention for the Protection of All Persons from Enforced Disappearance (CED),[32] as well as in the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[33] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[34] the Convention on the Rights of the Child (CRC),[35] and the Convention on the Rights of Persons with Disabilities (CRPD).[36]

All of these legal instruments, together with the Rules of Procedure of the HRCttee, share an almost identical language in their provisions dealing with interim measures, which consists of two main parts: 1) an explanation that interim measures may be requested 'at any time after the receipt of a communication and before a determination on the merits has been reached',[37] and 2) a specification that the exercise of such discretion by the relevant body 'does not imply a determination on admissibility or on the merits of the communication.'[38]

[29] cf CCPR/C/3/Rev.12, Rule 95 and Rules of Procedure of the Committee Against Torture (2014) UN Doc CAT/C/3/Rev.6, Rule 114; See also Pillay (n 1) 69.

[30] CmAT, 'General Comment No 4 on the Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) UN Doc CAT/C/GC/4 para 36. Examples of cases brought before CmAT concerning the extradition of individuals include, among others, *Cecilia Rosana Núñez Chipana v Venezuela* [1998] (Views, Communication No 110/1998) UN Doc CAT/C/21/D/110/1998) and *TPS v Canada* [2000] (Views, Communication No 99/1997) UN Doc CAT/C/24/D/99/1997.

[31] Pillay (n 1) 69-70. Rieter (n 17) 59.

[32] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/RES/61/177, art 31(4).

[33] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/435, art 5.

[34] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4, art 5.

[35] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN Doc A/RES/66/138, art 6.

[36] Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/RES/61/106, art 4.

[37] cf. CCPR/C/3/Rev.12, Rule 94.1, A/RES/61/177, art 31.4, A/RES/63/435, art. 5.1, A/RES/54/4, art. 5.1, A/RES/66/138, art. 6.1, and A/RES/61/106, art. 4.1.

[38] cf. CCPR/C/3/Rev.12, Rule 94.2, A/RES/61/177, art 31.4, A/RES/63/435, art. 5.2, A/RES/54/4, art. 5.2, A/RES/66/138, art. 6.2, and A/RES/61/106, art. 4.2.

Likewise, requests for the adoption of interim measures can be made provisional or not by the relevant treaty body (through its special rapporteur or working group, as the case may be).[39] Interim measures can thus be conditioned to new information as revealed by subsequent submissions from the author of the communication or from the State concerned.[40] Regardless of this, the State in question can petition the treaty body to lift the request for interim measures at any stage in the proceedings, which is decided on a case-by-case basis and in light of all the information submitted by the parties.[41]

Nevertheless, all of the above instruments are silent on what concerns the binding force of their requests for interim measures. The task of upholding such force, therefore, has been left to the interpretative efforts of the relevant treaty body. Indeed, like the HRCttee,[42] CmAT has implicitly upheld the binding nature of its requests through a general comment and linked it to the 'good faith' cooperation obligation of States that have accepted the right of individual petition under Article 22 of the Convention Against Torture.[43] Similarly, the Committee on the Rights of the Child (CmRC) has issued dedicated guidelines on interim measures, which explain that interim measures 'impose an international legal obligation on State parties to comply'.[44]

However, where there is no specific pronouncement on the force of requests for interim measures, their binding nature can be inferred by analogy with the jurisprudential developments of other treaty bodies.[45] In a series of recent cases against Spain, for instance, the CmRC has held that States parties' obligation to comply with its interim measures can be deduced from the act of ratifying the relevant instrument and has the purpose of ensuring 'the effectiveness of the individual communications procedure'.[46] Moreover, following the practice of the HRCttee, the CmRC has also used its Views to address violations of States' duty to cooperate by adopting interim measures.[47] While no sufficient jurisprudence has been developed in this regard, it seems likely that a similar approach to noncompliance will be followed by the rest of the treaty bodies. With the optional protocols on the ICESCR and on the CRC coming into force, interim measures have expanded to cover economic, social and cultural rights such as access to education and preventing or stopping evictions. While this subject-matter expansion will most likely continue, its effects on States' willingness to comply with such measures remain to be seen.

[39] OHCHR (n 2) para 8.
[40] ibid para 8.
[41] ibid paras 9-10.
[42] See CCPR/C/GC/33, para 19.
[43] CAT/C/GC/4 paras 36-37; See also Pillay (n 1) fn 19.
[44] CRC, 'Guidelines for Interim Measures Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' (2019), para 9.
[45] Pillay (n 1).
[46] CRC, *NBF v Spain* [2019] (Views, Communication No 11/2017) UN Doc CRC/C/79/D/11/2017, para 12.11; See also, CRC, *AL v Spain* [2019] (Views, Communication No 16/2017) UN Doc CRC/C/81/D/16/2017, para 12.12, and, more recently, *COC v Spain* [2021] (Views, Communication No 63/2018) UN Doc CRC/C/86/D/63/2018, para 8.12.
[47] *NBF v Spain* (n 48) paras 12.11-12.12; *AL v Spain* (n 48) paras 12.12-12.13; *COC v Spain* (n 48) paras 8.16-9.

The European System of Human Rights Protection

Like the HRCttee and CmAT, the European Court of Human Rights' (ECtHR) power to grant interim relief is not treaty-based. Indeed, neither the European Convention on Human Rights (ECHR), nor its protocols contain any provisions allowing the ECHR to resort to interim measures.[48] The source of this authority is instead found in Rule 39 of the ECtHR's Rules of Court, which provide for the adoption of any necessary interim measures 'in the interests of the parties or of the proper conduct of the proceedings.'[49] The Rules of Court further specify that such measures can be indicated by the Chamber of the ECtHR, the President of the Section, or a duty judge – of their own motion or at the request of the party concerned.[50] Similarly, the Rules do not prevent the ECtHR from indicating interim measures to applicants, but most of the times they are directed towards a respondent Government.[51]

As explained by the ECtHR itself, interim measures under Rule 39 are indicated only in restricted circumstances, following the practice of the European Commission of Human Rights prior to the entry into force of Protocol No. 11 to the ECHR in 1998.[52] Moreover, the grounds on which interim measures may be requested are found in the ECtHR's case-law (i.e., not listed in the Rules of Court) and are not limited to the protection of a specific right.[53] Thus, Rule 39 is applied in cases where there is 'an imminent risk of irreparable damage', which usually concern deportation and extradition proceedings.[54] Interim protection has also been commonly sought against potential violations of Articles 2 (the right to life), 3 (the prohibition of torture and inhuman treatment), and 8 (the right to privacy and family life) of the ECHR.[55]

More recently, however, there has been a proliferation of interim measures requested for procedural purposes,[56] or to use the language of Rule 39, for the 'proper conduct of the proceedings.'[57] Thus, this kind of interim relief is aimed at securing the full observance of

[48] Andrea Saccucci, 'Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges' in Fulvio Palombino and others (eds) *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 215-216.

[49] Rules of Court (adopted 4 November 1998, latest edition entered into force on 18 October 2021), as amended by the ECtHR on 4 July 2005, 16 January 2012, 14 January 2013.

[50] ibid, Rule 39.

[51] See, notably, ECtHR, *Ilaşcu and Others v Moldova and Russia* [2004] (Judgment) Application 48787/99, paras 11-12.

[52] ECtHR, *Mamatkulov and Askarov v Turkey* [2005] (Judgment) Applications 46827/99 and 46951/99, paras 103-104. The most noteworthy case concerning interim measures in the former system is *Soering v. the United Kingdom* [1989] Application 14038/88, in which the non-permanent Court indicated interim measures to prevent the British Government from extraditing the applicant to the United States while proceedings were pending. In doing so, the judgment gave precedence to the State Party's Convention obligations over an extradition treaty with a third-party State.

[53] ibid.

[54] ibid.

[55] ibid 105.

[56] Saccucci (n 48) 229-230.

[57] Rules of Court, Rule 39(1).

Contracting States' obligation to allow unhindered access to the ECtHR by prospective applicants (as laid down in Article 34 of the ECHR),[58] and to cooperate in good faith with the ECtHR throughout the proceedings (Article 38 ECHR).[59] Likewise, interim measures for procedural purposes may also be used for the preservation of evidence or, pursuant to Article 43 of the ECHR, to allow the applicant to prepare a referral of the case to the Grand Chamber of the ECtHR.[60]

The ECtHR's system of interim relief has evolved throughout the years and has been shaped, to a great extent, by the practice of human rights quasi-judicial bodies and international tribunals.[61] Like some of the UN treaty bodies, the ECtHR has opted for a jurisprudential approach in determining the binding nature of its interim measures.[62] In its earlier jurisprudence, for instance, the ECtHR decided against the binding character of its interim measures, holding that such force could not be derived from either Article 25 (current Article 34) or other sources.[63] Subsequently, however, the case of *Mamatkulov and Askarov v. Turkey* brought a departure from the ECtHR's ruling in *Cruz Varas and others v. Sweden*[64] by recognising that 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.'[65] Thus, drawing largely from the jurisprudence of the HRCttee, CmAT and the International Court of Justice (ICJ),[66] the ECtHR has established an obligation to comply with its interim measures orders by linking it to States' duty not to hinder the effective exercise of the right of individual application found in Article 34 ECHR.[67]

One of the direct consequences of the ECtHR's ruling in the case of *Mamatkulov and Askarov* was a steady increase in the number of requests for interim protection under Rule 39 that were submitted in the years immediately after. Indeed, between 2006 and 2010, the ECtHR reported an 'alarming' rise in such kind of requests by 4,000%,[68] positioning it as an essential

[58] See ECtHR, *DB v Turkey* [2010] (Judgment) Application 33526/08, para 5, where interim measures were indicated in order to preserve the applicant's right to be represented before the ECtHR. The ECtHR has also requested States to grant applicants sufficient time to prepare their cases. See, for instance, ECtHR, *Shtukaturov v Russia* [2009] (Judgment) Application 44009/05, paras 31-40; ECtHR, *Shamayev and others v Georgia and Russia* [2005] (Judgment) Application 36378/02, para 24.

[59] ECtHR, *Suleymanov v Russia* [2013] (Judgment) Application 32501/11, paras 98–102, where interim measures were indicated to allow investigators' access to the premises where the violations allegedly took place; See also Saccucci (n 48) 231.

[60] See, for instance, *Paposhvili v Belgium* [2016] (Grand Chamber), Application No 41738/10; Saccucci (n 48) 231.

[61] Saccucci (n 48) 216.

[62] *Mamatkulov and Askarov v Turkey* (n 54), paras 114-115, 124; See also Saccucci (n 48) 216-217.

[63] See ECtHR, *Cruz Varas and Others v Sweden* [1991] (Judgment) Application 15576/89, paras 98-102, effectively reaffirmed in *Čonka v Belgium* (decision of 13 March 2001) Application 51564/99; See also ibid 243.

[64] *Mamatkulov and Askarov v Turkey* (n 54) (Concurring Opinion of Judge Cabral Barreto).

[65] ibid para 125.

[66] ibid para 113.

[67] ibid paras 124-126; Saccucci (n 48) 243.

[68] The UN Refugee Agency, 'Toolkit on How to Request Interim Measures Under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection' (2012) 4.

component of the right to individual application within the European system of human rights protection.[69] Even though the number of requests has fluctuated from year to year in the subsequent decade, it has remained high. In 2021, for instance, the ECtHR received a total of 1,920 requests under Rule 39, which represented a decrease of 5% compared with 2020 (2,028), but an increase of 18% from those received in 2019 (1,570).[70]

While the ECtHR's power to indicate binding interim measures is widely recognised by Contracting States,[71] debate prevails in what relates to the scope and legal consequences of their application.[72] Moreover, there are significant areas of improvement in terms of procedural and substantive efficiency, particularly in what relates to the lack of reasons provided by the Court in deciding on interim relief requests, the non-adversarial nature of the proceedings, and the staggering amount of requests that are rejected for being outside the scope of Rule 39.[73] Nevertheless, any efforts to address such limitations would inevitably have to strike a balance between the challenges of the ECtHR's overwhelming work-load and the need for a more efficient application of Rule 39.

The Inter-American System of Human Rights Protection

Both the Inter-American Commission (IACHR) and Court of Human Rights (IACtHR) have the power to grant interim measures in situations of extreme gravity and urgency, where there is a risk of irreparable damage to the rights of individuals. The IACHR may provide interim relief in the form of 'precautionary measures', while the IACtHR may order 'provisional measures' to safeguard the rights of certain persons who are in imminent danger.[74] Although its original Rules of Procedure did not contain any provision on interim relief of any sort, the IACHR had historically engaged in the practice of requiring states to urgently adopt certain actions to avoid irreparable harm.[75] The 1980 Rules of Procedure (then called Regulations) of the IACHR formally established precautionary measures as a prerogative of the Commission,[76] coexisting alongside the IACtHR's

[69] Saccucci (n 48) 217.

[70] ECtHR, 'Analysis of Statistics 2021' (2022) 5.

[71] See High Level Conference on the Future of the European Court of Human Rights, 'Follow-up Plan to the Izmir Declaration' (26-27 April 2011) para A. 3, where Member States in recognized the requirement to comply with interim measures.

[72] Saccucci (n 48) 217; Keller and Marti (n 22) 364-370.

[73] Saccucci (n 48) 251.

[74] The denomination of either of these types of measures may vary depending on the source. See Felipe González, 'Las Medidas Urgentes en el Sistema Interamericano de Derechos Humanos' (2017) 7(13) Sur - Revista Internacional de Derechos Humanos 7, 51; See also Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human* Rights (2nd edn, Cambridge University Press 2012) 251-252.

[75] González (n 74) 52; Dinah Shelton, 'Urgency and Human Rights: The Necessary and Legitimate Role of Regional Human Rights Tribunals' in Eva Rieter and Karin Zwaan (eds), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (TMC Asser Press 2021) 24.

[76] Rules of Procedure of the Inter-American Commission of Human Rights (Approved on 8 April 1980) OEA/Ser.L/V/II.49 doc 6 rev 4, art 26.

power 'to adopt such provisional measures as it deems pertinent' under the American Convention on Human Rights (Pact of San José).[77]

The IACtHR can only adopt provisional measures when a State Party to the Pact of San José is concerned, while the IACHR can provide precautionary measures with respect to any of the Members of the Organization of American States (OAS).[78] Given that not all Members of the OAS are parties to the Pact of San José and that it is not possible to submit complaints directly to the IACtHR, the IACHR is the first body to examine new requests for interim measures.[79] When a case is before the IACtHR, it may, at the request of a party or on its own motion, order the defendant to take protective action.[80] An innovative aspect of the Inter-American system is that the IACHR has the power to refer requests for interim protection to the IACtHR even in relation to cases that have not yet been brought before it.[81] Indeed, in 'cases of extreme gravity and urgency' the Pact of San José authorizes the IACHR to request that the IACtHR immediately adopt provisional measures.[82] The possibility of a grave and urgent violation must be demonstrated *prima facie*[83] and the IACtHR has stated that there must be 'at least a possibility that the matter that leads to the request of provisional measures may be submitted to the Court in its contentious competence.'[84]

Even though precautionary and provisional measures coexist in the Inter-American system, there are no specific criteria governing the circumstances under which the IACHR should decide whether to order precautionary measures or to request provisional measures from the IACtHR.[85] Following the same reasoning used when referring contentious cases to the IACtHR, the IACHR will often present a request for provisional measures when it is likely that the State concerned will

[77] American Convention on Human Rights (adopted on 22 November 1969, entered into force 18 July 1978) OASTS No 36, art 63; See also ibid art 69.

[78] American Convention on Human Rights, arts 44, 61-62; Héctor Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y Procesales* (3rd edn, Instituto Interamericano de Derechos Humanos 2004) 516.

[79] This also implies that the number of requests for precautionary measures received by the IACHR is considerably higher as compared to the number of requests for provisional measures referred to the IACtHR. During 2020, for instance, the IACHR received 1,170 requests for precautionary measures, while only 24 provisional measures where active before the IACtHR by the end of the same year. For more information, see Inter-American Commission on Human Rights, 'Annual Report 2020' §307 and §420, and Inter-American Court of Human Rights, 'Annual Report 2020' 99; See also Isabela Piacentini de Andrade, 'Protective Measures in the Inter-American Human Rights System' (2012) Lawyers' Rights Watch Canada 2.

[80] Pasqualucci (n 74) 251.

[81] Antônio Augusto Cançado Trindade, 'Informe: Bases para un Proyecto de Protocolo a la Convención Americana Sobre Derechos Humanos, para Fortalecer su Mecanismo de Protección' (2001) IACtHR 115; Bernal Arias Ramírez, 'Las Medidas Provisionales y Cautelares en los Sistemas Universal y Regionales de Protección de los Derechos Humanos' (2006) 43 Revista IIDH 79, 83; Rieter (n 17) 64.

[82] American Convention on Human Rights, art 63(2); Shelton (n 75) 25.

[83] Pasqualucci (n 74) 255.

[84] IACtHR, *Matter of Alvarado Reyes Et al v Mexico* (Order of the Court for Provisional Measures) [2010] para 7 of Considerations.

[85] González (n 74) 58-59.

not or has failed to comply with a precautionary measure.[86] Moreover, a decision by the IACHR to grant precautionary measures is not definitive and it may subsequently choose to request provisional measures from the IACtHR instead.[87]

The implications of this unique configuration were particular sources of controversy following the entry into force of the Pact of San José, as the IACHR's power to issue binding precautionary measures was called into question by those who argued that the IACtHR is the sole body with a mandate to request urgent action.[88] Nevertheless, the legitimacy of the IACHR to issue requests for interim protection has been affirmed through States' acquiescence and resolutions by the OAS.[89] In practice, however, the non-conventional legal basis of precautionary measures has made them less effective when compared to provisional measures requested by the IACtHR, whose binding nature is widely accepted.[90] Such force is grounded on the text of the Pact of San José,[91] but has also been upheld by the IACtHR in its jurisprudence. In the *Constitutional Court Case*, for instance, the IACtHR held that the obligation to comply with its substantive and procedural decisions corresponds to 'a basic principle of the law of international state responsibility (…), according to which States must fulfil their conventional international obligations in good faith (*pacta sunt servanda*).'[92]

Likewise, the IACtHR has affirmed that provisional measures are characterised by a dual nature consisting of preventive and protective aspects.[93] Indeed, in an order for provisional measures issued in the context of the *La Nación* case, the IACtHR explained that 'provisional measures are not only precautionary, in the sense of preserving a juridical situation; they are also safeguards inasmuch as they protect human rights.'[94] The protective role of provisional measures, in particular, has been used to depart from the previous requirement that a matter must have been filed with the IACHR before the IACtHR adopt provisional measures, allowing for the possibility 'to exceptionally order them even when there is not a contentious case as such within the Inter-American System.'[95]

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[86] ibid 59; Faúndez Ledesma (n 78).

[87] See, for instance, *Case of Wong Ho Wing v Peru* (Provisional Measures) [2014] paras 4-12 of Considerations.

[88] Shelton (n 75) 25.

[89] OAS, AG/RES. 2227 (XXXVI-O/06): Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights (6 June 2006); See also ibid.

[90] Piacentini de Andrade (n 79) 1.

[91] American Convention on Human Rights, art 68(1); Pasqualucci (n 74) 291-292; Antônio Augusto Cançado Trindade, 'The Evolution of Provisional Measures Under the Case-Law of the Inter-American Court of Human Rights (1987-2002)' (2003) 24(5-8) Human Rights Law Journal 162, 164.

[92] IACtHR, *Case of the Constitutional Court v Peru* (Order of the Court for Provisional Measures) [2000] para 14 of Considerations; The same reasoning was subsequently followed in the case of *Gustavo Adolfo Cesti Hurtado v Peru* (Monitoring Compliance with Judgment) [2010] (Ser C) No 86, para 5 of Considerations.

[93] Pasqualucci (n 74) 252; Rieter (n 17) 64.

[94] IACtHR, *Case of Herrera Ulloa v Costa Rica ("La Nación" case)* (Order of the Court for Provisional Measures) [2001] para 4 of Considerations.

[95] IACtHR, Matter of Natera Balboa (Order of the Court for Provisional Measures) [2010] para 8 of Considerations.

The African System of Human Rights Protection

Since its inception, the African system of human rights protection has been confronted with situations requiring urgent intervention. Initially, the task of supervising compliance with the African Charter on Human and Peoples' Rights (African Charter) and providing interim relief fell on the African Commission on Human and Peoples' Rights (ACHPR) alone.[96] As is the case with some of the UN human rights treaty bodies, the ACHPR's power to indicate provisional measures is non-conventional, meaning that it emanates from its own Rules of Procedure. In its original text from 1988, Rule 109 of the Rules of Procedure (Rule 100 in their most recent revision) provided that the ACHPR may inform a State on the appropriateness of adopting provisional measures in order to avoid irreparable danger against the victim of an alleged violation.[97] During the first stages following its inauguration in 1987, the general perception was that the ACHPR was incapable of responding adequately to violations of human rights in the continent.[98]

Despite the ACHPR's best efforts, the need for enhanced efficiency in urgent matters that require interim relief helped consolidate the cause for the establishment of an African human rights court.[99] Thus, the African Court on Human and Peoples' Rights (ACtHPR) was envisioned as a means to improve the African system's response to urgent violations of human rights within its sphere of competence. Pursuant to Article 27(2) of the Protocol to the Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the ACtHPR may adopt 'such provisional measures as it deems necessary.'[100] Additional elements to those included in Article 27(2), namely the adoption of provisional measures 'in the interest of justice'[101] and to avoid 'prejudice to the substantive matter before the Court',[102] have been introduced by way of the ACtHPR's Rules of Court and jurisprudence.

As seen in scholarly debates and in the practice of other regional human rights systems, the binding nature of provisional measures is more likely to be contested where the power to indicate

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[96] Solomon T Ebobrah, 'Provisional Measures in the African Human Rights System: Lingering Questions of Legitimacy' in Eva Rieter and Karin Zwaan (eds), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (TMC Asser Press 2021) 88.

[97] Rules of Procedure of the African Commission on Human and Peoples Rights (adopted during the 2nd Ordinary Session held in Dakar from 2 to 13 February 1988). Revised in 1995, 2010 and 2020.

[98] Ebobrah (n 96).

[99] ibid.

[100] Protocol to the Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) art 27(2); See also ACtHPR, *African Commission on Human and Peoples' Rights v Libya* (Order of 25 March 2011) Application No 004/2011, para 10, where the court ascertained its power to order provisional measures on its own initiative.

[101] This element was included in Rule 51 (now 59) of the Rules of Court adopted on 2 June 2010, which provided that the ACtHPR may prescribe to the parties 'any interim measure which it deems necessary to adopt in the interest of the parties or of justice.' Such wording is, however, absent from the latest version of the Rules, which entered into force on 25 September 2020.

[102] ACtHPR, *African Commission on Human and Peoples' Rights v Kenya* (Order of 15 March 2013) Application No 006/2012, para 22.

them is self-conferred (i.e., through a mechanism's own rules of procedure).[103] While Article 27 of the African Court Protocol does not describe the legal force of provisional measures, the ACtHPR's competence to provide interim relief has the advantage of a treaty-based legal foundation, unlike that of the ACHPR. Additionally, the ACtHPR powers on provisional measures are supplemented by its own Rules of Court, which expand the scope and reinforce the provisions of the African Court Protocol in some areas.[104] Notwithstanding this particular approach, the ACtHPR has also asserted the binding character of its provisional measures by way of its case-law. Indeed, in a second request for provisional measures issued in the context of the *African Commission on Human and Peoples' Rights v. Libya* (*Saïf al-Islam Kadhafi* case), the ACtHPR held that its orders for provisional measures have the same binding force as its judgments.[105]

Ultimately, Libya failed to adopt provisional measures and the ACtHPR avoided dealing with such lack of compliance as a separate breach to the violations initially alleged.[106] Such precedent serves to demonstrate that, even though the binding force of provisional measures has been clearly affirmed by the ACtHPR and no State under its jurisdiction has openly protested against it, the protective power of such measures is undermined by recurring lack of compliance.[107] Indeed, as of 2020, the ACtHPR reported a total of 27 cases in which States have not complied with the its orders for provisional measures.[108] In 17 of such cases, the States concerned stated that they could not comply with the Court's order, while the rest have not reacted at all.[109]

Moreover, the issue of non-compliance has also been aggravated by clear reluctance from States, as demonstrated by the recent precedent of *Léon Mugesera v. Rwanda*, where the State sent a notice to the Registrar of the ACtHPR expressing its intention not to implement any provisional measure potentially ordered.[110] It is unclear, however, what the consequences for noncompliance with provisional measures may be in practice beyond public censure through the Annual Report

[103] Ebobrah (n 96) 91.

[104] For instance, Rule 59(1) of the ACtHPR's Rules of Court complement Article 27(2) of the African Court Protocol by specifying who may request provisional measures. Likewise, in the latest version of the Rules of Court (2020), Rule 59(6) explicitly establishes that '[o]rders for Provisional Measures shall be binding on the parties concerned.'

[105] ACtHPR, *African Commission on Human and Peoples' Rights v Libya* (Order of 10 August 2015) Application No 002/2013, para 10; See also Giuseppe Pascale, 'Provisional Measures Under the African Human Rights System' in Fulvio Palombino and others (eds) *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 262.

[106] ACtHPR, *African Commission on Human and Peoples' Rights v Libya* (Judgment of 3 June 2016) Application No 002/2013.

[107] See, for instance, ACtHPR, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (Order of 25 March 2011) Application No 004/2011, where Libya neither complied with the provisional measures ordered by the ACtHPR nor provided any report on their implementation; See also ACtHPR, *Lohé Issa Konaté v Burkina Faso* (Judgment of 5 December 2014) Application No 004/2013, where no information is to be found on the State's compliance with the ACtHPR's order of 4 October 2013.

[108] ACtHPR, 'Activity Report of the African Court on Human and Peoples' Rights' (03-04 February 2021) EX.CL/1258(XXXVIII) 30-32.

[109] ibid.

[110] ACtHPR, *Léon Mugesera v Rwanda* (Order of 28 September 2017) Application No 012/2017, paras 13-15.

of the ACtHPR.[111] Notably, recent, although unsuccessful, efforts have been made to persuade the ACtHPR into awarding compensation for damages resulting from States' failure to comply with provisional measures.[112] Nevertheless, it is unlikely that the ACtHPR will follow such a path, while the overall rates of compliance with its orders and decisions remain at its current levels.

The International Court of Justice

The International Court of Justice's (ICJ) ample and discretionary powers to impose provisional measures are established in Article 41 of its Statute,[113] while their procedural framework is provided by Articles 73-76 of the Rules of the Court.[114] The purpose of interim measures, as explained by the ICJ itself, is 'to preserve rights which are the subject of dispute in judicial proceedings'[115] and to ensure 'that no irreparable damage is caused to persons or property (…) pending the delivery of [the Court's] Judgment.'[116] Thus, interim measures encompass such actions related to the preservation of evidence and the protection from acts that may jeopardize the effectiveness of the ICJ's decisions.[117] However, in its practice, the ICJ has also granted provisional measures aimed at fostering international peace and security by preventing the aggravation of conflict.[118]

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[111] Rules of Procedure of the ACtHPR, Rule 59(6).

[112] ACtHPR, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin* [2021] (Judgment) Application No 065/2019, paras 130, 141, 185vii.

[113] Statute of the International Court of Justice (18 April 1946) art 41.

[114] Rules of Court (Adopted 14 April 1978, entered into force 1 July 1978) arts 73-76, as amended.

[115] ICJ, *Passage Through the Great Belt (Finland v Denmark)* (Order of 29 July 1991) ICJ Rep 1991, para 22, citing the case of *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Order of 15 December 1979) para 13.

[116] ICJ, Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the *Temple of Preah Vihear (Cambodia v Thailand)* (Oder of 18 July 2011) ICJ Rep 537, para 61; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Order of 8 April 1993) ICJ Rep 3, para 34; See also Karin Oellers-Frahm, 'Article 41' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 1145, and, among others, Péter Kovács, 'Interim Measures in the Practice of the International Court of Justice and the International Criminal Court' in Fulvio Palombino and others (eds) *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 150.

[117] See, among others, *United States of America v Iran* (n 115) para 12; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Order of 10 May 1984) ICJ Rep 169, paras 27, 32, 39-41; *Bosnia and Herzegovina v Serbia and Montenegro* (n 116) paras 34, 50-2; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Order of 1 July 2000) ICJ Rep 111, paras 39, 44-47; See also Registrar of the International Court of Justice, *The International Court of Justice: Handbook* (ICJ Publications 2004) 63.

[118] See, notably, ICJ, *Frontier Dispute (Burkina Faso/Republic of Mali)* (Order of 10 January 1986) ICJ Rep 3, para 18, and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Order of 15 March 1996) ICJ Rep 13, para 41; For a discussion on provisional measures beyond those aimed solely at the protection of substantive and procedural rights, see Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent Aggravation of a Dispute' (2008) 21 Leiden Journal of International Law 623.

Therefore, provisional measures are closely linked to the necessity of speedy protection and, as held by the ICJ, 'are only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before [a] final decision is given.'[119] The notions of necessity and urgency were also pivotal considerations for the ICJ in upholding the binding force of its provisional measures. In its *LaGrand Case*, based on a contextual reading of its Statute, the ICJ ruled that its power to indicate provisional measures should be considered binding, since it is based 'on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.'[120] Moreover, following the reasoning of the Vienna Convention on the Law of Treaties,[121] which provides that treaties must be interpreted in the light of their object and purpose, the *LaGrand Case* affirmed that contesting the binding force of provisional measures indicated under Article 41 of the ICJ Statute 'would be contrary to the object and purpose of that Article.'[122]

The requirement that orders on provisional measures should not amount to an interim judgment on the merits of the case *pendente lite*[123] has also been a particular subject of controversy,[124] motivated no least by instances in which the requested relief has coincided with the substance of the main submissions.[125] However, the ICJ has affirmed its position that provisional measures are conservatory and not anticipatory in nature, aiming at preserving the substantive rights in dispute and not prejudging the merits of the case in question.[126] This very nature implies, as argued by Oellers-Frahm, that there must be 'at least a *prima facie* basis for substantive jurisdiction [and] some prospect of success on the merits of the case, for otherwise there not be any necessity to indicate provisional measures.'[127] Thus, once the ICJ has established

[119] *Great Belt* (n 115) para 23; *Bosnia and Herzegovina v Serbia and Montenegro* (n 116) para 34; (n 111) para 46; *United States of America v Iran* (n 115) para 36; *Democratic Republic of the Congo v Uganda* (n 112) para 39; For a more recent, although almost identical iteration, see *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Order of 7 December 2016) ICJ Rep 1148, paras 82-83; See also Oellers-Frahm (n 116) 1163-1165.

[120] ICJ, *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 para 102; See also Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations' (2010) 23 Leiden Journal of International Law 571, 575.

[121] Vienna Convention on the Law of Treaties (Adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1);

[122] *LaGrand Case* (n 120).

[123] Statute of the ICJ art 41; Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) (Germany v Poland)* (Order of 21 November 1927) PCIJ Series A, No 12, at p 10; Oellers-Frahm (n 116) 1149-1150.

[124] *United States of America v Iran* (n 115) paras 28-29; Hugh Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' in Rudolf Bernhardt (ed), Interim Measures indicated by International Courts (Springer 1994) 27.

[125] See, for instance, *Bosnia and Herzegovina v Serbia and Montenegro* (n 116), *LaGrand Case* (n 120), and the *Jadhav Case (India v Pakistan)* (Order of 18 May 2017) ICJ Rep 231; See also Oellers-Frahm (n 116) 1149-1150.

[126] *LaGrand Case* (n 120) (Order of 3 March 1999) para 27, and *India v Pakistan* (n 108) para 60.

[127] Oellers-Frahm (n 116) 1156.

its *prima facie* jurisdiction over a case,[128] it must determine whether the rights for which protection is sought are plausible.[129] To do so, in the *Obligation to Prosecute or Extradite* case, the ICJ introduced the standard of plausibility of success as a distinct criterion in examining requests for provisional measures.[130] Since then, the 'plausibility test' has not found a formally consistent articulation in the jurisprudence of the ICJ,[131] with no clear parameters and an uneven application.[132]

As for most judicial and quasi-judicial bodies operating in the international legal order, the issue of non-compliance is a continuing challenge for the ICJ.[133] Given that the ICJ has unequivocally asserted the binding nature of its orders for provisional measures in the *LaGrand Case*, non-compliance implies a breach of an international obligation.[134] The ICJ has found explicitly that a State has violated its obligations under international law for failing to comply with its provisional measures.[135] That said, the consequences for not abiding by an order for provisional measures are, however, less clear. Reparation for non-compliance (in the form of material or symbolic compensation) can only be granted if the non-breaching party brings a claim for indemnification before the ICJ, since a different course of action would be against the *non ultra*

[128] For an example of the contemporary practice of the ICJ on this matter, see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Order of 3 October 2018) para 24, where the Court held that it may indicate provisional measures 'only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded'; See also, the *Jadhav Case* (n 108) para 15.

[129] Tom Sparks and Mark Somos, 'The Humanisation of Provisional Measures?—Plausibility and the Interim Protection of Rights Before the ICJ' in Fulvio Palombino and others (eds) *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021) 81-82; Oellers-Frahm (n 116) 1156-1158.

[130] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Order of 28 May 2009) ICJ Rep 139, paras 56-61. The roots of this standard can be traced to the Separate Opinion by Judge Shahabuddeen in the *Great Belt* case (n 115) paras 31-35, where he explained that a similar assessment was an occasional occurrence in the practice of the ICJ and that 'that enough material should be presented to demonstrate the possibility of existence of the right sought to be protected'; See also Sparks and Somos (n 129) 82-85.

[131] cf *Obligation to Prosecute or Extradite* (n 125), *Cambodia v Thailand* (n 116), *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Order of 8 March 2011) ICJ Rep 6, and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Order of 13 December 2013) ICJ Rep 398; Sparks and Somos (n 129) 87-93.

[132] For recent examples of this irregular application, see ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Order of 14 June 2019) ICJ Rep 361, *Islamic Republic of Iran v United States of America* (n 128), and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order of 23 January 2020) ICJ Rep 3; See also Cameron Miles, 'Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice' (2018) The British Yearbook of International Law 44-46.

[133] Charlotte Ku 'International Court of Justice' in Thomas G Weiss and Sam Daws (eds) *The Oxford Handbook on the United Nations* (2nd edn, OUP 2018) 196-197.

[134] Oellers-Frahm (n 116) 1188-1189.

[135] *LaGrand Case* (n 120) para 128(5); *Bosnia and Herzegovina v Serbia and Montenegro* (Judgment of 26 February 2007) para 471(7) and (9).

petita rule.[136] While the issue of non-compliance may be also be raised *proprio motu* by the ICJ, it is disputed if such inherent power entails the imposition of sanctions or merely confirms the existence of a breach.[137] Most likely, the ICJ will continue to use a declaratory approach in the form of satisfaction, acknowledging the existence of a breach for such a violation, while leaving matters of compensation to be assessed in the context of the merits of the case and the reparations stage.

Concluding Remarks

The function and legal nature of provisional or interim measures adopted by judicial and quasi-judicial mechanisms has attracted significant scholarly attention,[138] which testifies to their importance in legal practice. This paper has shown that various human rights mechanisms, especially UNTBs, hold the position that their interim or provisional measures engender an obligation of compliance, without necessarily using the phrase "legally binding". Their rationale is based on a functional approach, since these measures are aimed at protecting important interests, often individuals at risk of serious or irreparable harm, as well as safeguarding the integrity of the proceedings before these mechanisms. Given their twofold function, interim measures should be seen as an important tool for human rights mechanisms to fulfil their protection mandate.

Human rights bodies share their position on the good faith obligation to comply with their interim measures, independent of whether the power to indicate them is based on a treaty or optional protocol, or own rules of procedure, the latter being the case for most human rights mechanisms. The ICJ has confirmed the legally binding nature of its provisional measures in the landmark *LaGrand* case (2001), but does not seem to have put in place an elaborate system of monitoring State compliance with them. While the ICJ has found that a State had violated its obligations under international law for failing to comply with its provisional measures orders, besides providing some form of satisfaction to the injured State, the legal consequences of such noncompliance remain unclear.

Human rights mechanisms should continue to assess carefully the received requests for interim measures, or engage in a *proprio motu* assessment of their need when circumstances so require, ensuring that their indication is indeed warranted. The expansion of interim measures from the domain of civil and political rights to that of economic, social and cultural rights, might be a sign that the human rights system is maturing. That said, it remains to be seen what will be the response of States to this expansion in terms of compliance.

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[136] *LaGrand Case* (n 120) paras 33, 116; Oellers-Frahm (n 116) 1189-1190.

[137] *Costa Rica v Nicaragua* (n 131) (Judgment) para 144; Oellers-Frahm (n 116) 1190.

[138] See among others 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 2005); Eva R. Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Intersentia 2010); Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Intersentia 2010); Cameron A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017); Palombino and others (n 17); Rieter and Zwaan (n1); Ewa Sałkiewicz-Munnerlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* (T.M.C. Asser Press 2021).