UNIVERSIDADE FEDERAL DE MINAS GERAIS
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THE ROLE OF PROVISIONAL MEASURES BEFORE THE INTERNATIONAL COURT OF JUSTICE:
The evolution of the plausibility test and the procedural obstacles to the protection of rights *pendente lite*

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Thesis submitted in partial fulfillment of the requirement for the Master of Laws (LLM) in Public International Law at Universidade Federal de Minas Gerais' Post-Graduate Program.

Supervisor: Prof. Dr. Lucas Carlos Lima

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“These are the days when skies resume
The old - old sophistries of June -
A blue and gold mistake.

Oh fraud that cannot cheat the Bee -
Almost thy plausibility
Induces my belief.”

- Emily Dickinson, Collected Poems.

RESUMO

As medidas provisórias são um instituto processual que tem como propósito principal a proteção dos direitos das partes enquanto está pendente decisão meritória, com o fim de evitar que o objeto da disputa seja prejudicado e garantir a efetividade de eventual prestação jurisdicional ao final do processo. Considera-se que esse tipo de decisão é um atributo do poder inerente dos tribunais internacionais de garantir que, enquanto uma controvérsia está pendente, nenhuma das partes aja de forma a agravar a disputa. Embora o poder de indicar medidas provisórias seja atualmente reconhecido como um princípio geral do direito e explicitamente posto nos estatutos da maioria dos tribunais internacionais, é certo que o desenvolvimento desse instituto e dos requisitos para sua concessão no direito internacional muito se deve à jurisprudência da Corte Internacional de Justiça (CIJ) e, anteriormente, da Corte Permanente de Justiça Internacional. Mais recentemente, a CIJ introduziu a noção de que somente poderia exercer a prerrogativa de indicar medidas cautelares se estivesse convencida de que os direitos invocados pela parte requerente fossem plausíveis. Em outras palavras, seria necessário demonstrar a existência dos direitos invocados, permitindo à Corte uma avaliação *prima facie* dos méritos do caso. Este chamado teste de plausibilidade foi aplicado em todas as suas decisões de medidas provisórias desde o seu desenvolvimento, mas não sem ser objeto de criticas tanto doutrinárias quanto de alguns dos próprios membros da Corte. Neste contexto, por meio da análise das decisões de medidas provisórias proferidas porestes órgãos jurisdicionais, bem como sobre opiniões separadas e dissidentes dos juízes, a pesquisa busca identificar como a plausibilidade é aplicada e interpretada pela Corte, considerar se este teste é compatível com os objetivos gerais do instituto de proteger direitos pendente lite e evitar o agravamento da disputa, bem como examinar de que forma este requisito é conciliável com as demais circunstâncias examinadas nos procedimentos de medidas provisórias, notadamente a existência de urgência e risco de prejuízo irreparável. Argumenta-se que, muito embora não seja possível identificar incompatibilidade entre a aplicação de um teste de plausibilidade e a proteção de direitos substantivos por meio das medidas provisórias, a Corte não tem interpretado esse requisito de forma consistente, aplicando diferentes parâmetros de revisão em suas decisões sem reconhecer explicitamente a evolução do teste em sua jurisprudência.

Palavras-Chave: medidas provisórias; plausibilidade; Corte Internacional de Justiça; direitos *pendente lite;* adjudicação internacional.

ABSTRACT

Provisional measures are a procedural institute with the main purpose of protecting the respective rights of the parties to a dispute while a final decision on the merits is pending, aiming to avoid prejudice to the object of the dispute and to guarantee the effectiveness of any possible judicial provision at the end of the proceedings. This type of decision is considered an attribute of the inherent power of international tribunals to ensure that, while a dispute is pending, neither of the parties takes any action to aggravate it. Although the power to indicate provisional measures is currently acknowledged as a general principle of law and explicitly addressed in the respective statutes of most international courts and tribunals, it is true that the development of this institute in international law as well as the criteria for its granting is much owed to the jurisprudence of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). More recently, the ICJ introduced the notion that it could only exercise its power to grant provisional measures if it was convinced that the rights invoked by the requesting party were at least plausible. In other words, it would be necessary to demonstrate the existence of the rights invoked, allowing the Court a prima facie assessment of the merits of the case. This so called plausibility test was then applied in every provisional measures order since its development, but not without criticism from both scholars and some of the Court's own members. In view of this, by analysing the provisional measures ordered by these jurisdictional organs, as well as the separate and dissenting opinions of their judges, this research aims to identify how plausibility is applied and interpreted by the Court, to consider whether the test is compatible with the general purposes of provisional measures to protect rights *pendente lite* and avoid the aggravation of the dispute, as well as to examine how this requirement can be reconciled with the other circumstances examined in proceedings for provisional measures, most notably the existence of urgency and the risk of irreparable harm. It is argued that, although no incompatibility can be seen between the application of a plausibility test and the protection of substantive rights by means of provisional measures, the Court has not been interpreting this condition in a consistent manner, given that it applies different standards of review indifferent decisions, without explicitly acknowledging the evolution of the test in its jurisprudence.

Keywords: provisional measures; plausibility; International Court of Justice; rights *pendente lite;* international adjudication.

LIST OF ABBREVIATIONS

ACHPR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CACJ	Central American Court of Justice
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
DRC	Democratic Republic of the Congo
ECHR	European Court of Human Rights
FFM	Independent International Fact-Finding Mission on Myanmar
HRC	United Nations Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICSFT	International Convention for the Suppression of the Financing of Terrorism
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
JCPOA	Joint Comprehensive Plan of Action
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OSCE	Organization on Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
UAE	United Arab Emirates
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights

UNSC	United Nations Security Council
US	United States of America
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

TABLE OF CONTENTS

1. INTRODUCTION

Provisional measures are defined as judicial decisions pursuant to which the parties to a case must do or refrain from doing something in order to preserve the subject matter of the dispute pending resolution.[1] Specifically, provisional measures protect the judicial function itself and the proper administration of justice, since they aim to preserve the subject matter of the controversy and ensure that, at the end of the claim, the judicial provision eventually granted will be effective.[2] As a procedural institute within international adjudication, they are often seen as an inherent function of international courts and tribunals. The development of this institute, as well as the criteria for their indication, is much owed to the Permanent Court of International Justice (PCIJ), and even more to its successor, the International Court of Justice (ICJ).

The Third Commission of the Institut de Droit Internationale has recognised the prerogative of domestic and international courts and tribunals to appoint provisional measures as a general principle of law. It further established that such power could be exercised if the claimant could show that (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable harm will be caused to the rights in dispute before the final judgment; (c) the risk of harm to the plaintiff outweighs the risk of harm to the defendant; and (d) the measures are proportionate to the risks.[3]

Such requirements are not formally mentioned in the Statute or Rules of Procedure of the International Court of Justice, but they were, in line with the Commission's findings, developed throughout its jurisprudence. The ICJ and the PCIJ played a prominent role in the development of the conditions that are now commonly adopted by international courts in the trial of this kind of incidental procedure.[4] For this reason, it is important to note the ICJ's case law on provisional measures, which has a great influence on the practice of the other courts.

One of the most recent developments in the Court's provisional measures case law has been the inclusion of the plausibility test among the conditions that must be met for such

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[1]MILES, Cameron. *Provisional Measures Before International Courts and Tribunals.*Cambridge: Cambridge University Press, 2016; PALCHETTI, Paolo. The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute. *Leiden Journal of International Law*, vol. 21, no. 3, 2008, p. 623.

[2] THIRLWAY, Hugh. *The International Court of Justice.* New York: Oxford University Press, 2016, p. 149.

[3] INSTITUT DE DROIT INTERNATIONALE. Final Resolution of the Third Commission on Provisional Measures. *Annuaire de l'Institute de Droit Internationale – Séssion de Hyderabad 2017*, vol. 78, no. 1, p. 99-130.

[4]MAROTTI, Loris. O diálogo entre a Corte Internacional de Justiça e outros Órgãos Judiciais Internacionais sobre questões processuais. *Revista do Programa de Pós-Graduação em Direito da Unochapecó (RDUno)*, vol. 1, no. 2, 2018.

measures to be indicated. The requirement, which can be described as a *prima facie* assessment of the merits of the case, has been the object of many criticisms, from the risk of prejudgment in a preliminary stage, to the ambiguity of the term, to, lastly, the inadequacy of this examination to protect the rights of individuals.

This thesis seeks to answer the following question: is the plausibility test, adopted in the jurisprudence of the ICJ as a requirement for the indication of provisional measures, compatible with the purposes of preserving rights *pendente lite* and non-aggravation of the dispute of this procedural institute? With this in mind, the study will seek to identify how plausibility is applied and interpreted by the ICJ, as well as examine the relationship between this requirement and the other circumstances that must be met in provisional measures proceedings.

The analysis of the jurisprudence of the International Court of Justice on provisional measures is relevant, first and foremost, because it is an essential procedural mechanism for protecting the substantive rights of the parties while a dispute is pending before a court. Since such measures presuppose a situation of urgency and risk of serious prejudice, their application is recurrent in cases involving the general interests of the international community. Moreover, the jurisdictional scope of the ICJ, whose disputes may involve any question of international law,[5] allows the investigation of possible inconsistencies in the application of plausibility when the court is confronted with various topics, such as human rights, international security, immigration, environmental protection, preservation of evidence essential to the outcome of the controversy, and even the judicial function itself.

In particular, the analysis of the plausibility requirement is justified because it is a criterion that has only recently been recognised in the practice of international courts,[6] hence the necessity to clarify its scope and how it is reconciled with the other requirements for granting provisional measures. Nevertheless, although this criterion has been officially adopted in decisions in the last decade, different standards of merits review have already been defended within the ICJ,[7] so there is a range of decisions that can demonstrate changes in the

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[5]Article 36.2 of the ICJ Statute provides: "*The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.*"

[6]Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Provisional Measures, Order of 28 May 2009, *I. C. J. Reports 2009,* p.151, para. 57.

[7]MILES, Cameron. Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice. *British Yearbook of International Law*, 2018, at 3-7; 12-17.

interpretation of this condition as a result, or as a consequence, of new understandings about the very function of provisional measures.

The research will be based on a legal, jurisprudential and doctrinal search of the development of the criteria for granting provisional measures at the Permanent Court of International Justice and the International Court of Justice, with particular emphasis on the plausibility test and its equivalents. The study thus intends to look at the decisions on provisional measures rendered by these jurisdictional bodies, as well as separate and dissenting opinions of judges that mention some standard of merits review as a condition for the indication of interim relief.

Chapter 1 will examine the origins of provisional measures in international adjudication and the purposes of the institute within the ICJ system, including the purposes of preserving the respective rights of the parties *pendente lite*, of non-aggravation of the dispute, as well as the emerging purpose of protecting general interests of the international community. In Chapter 2, the procedural rules adopted by the ICJ for requests for provisional measures will be considered, through an analysis of its Statute and Rules of Procedure. Within this framework, the requirements necessary for granting provisional measures, developed in the Court's case law, will be identified, by means of an analysis of the doctrine and decisions on provisional measures issued by the PCIJ and the ICJ.

After this general analysis of the institute before the ICJ, in Chapter 3, it will be possible to survey the decisions in which the plausibility test is mentioned or, in general, in which a *prima facie* analysis of the merits of the claim is made as a condition for the indication of provisional measures. The exploration of separate and dissenting opinions of the judges will also be of relevance in defining the historical evolution of the requirement in the jurisprudence of the Court. At this point, the research will be structured into three main points: the analysis of the plausibility test as a verification of the legal basis of the request and as of the factual credibility of the allegations, identifying, as to the latter, the evidentiary threshold required by the courts in this preliminary phase of the proceedings; and lastly, how can plausibility be balanced against the human vulnerability test, proposed by late Judge Cançado Trindade in his separate and dissenting opinions.

Hence, the thesis attempts to draw a general picture of the legal framework of provisional measures before the International Court of Justice and argues that one cannot consider that there is an inherent incompatibility between the plausibility criterion, neither its legal nor its factual aspects, and the protection of substantive rights through provisional measures. On the other hand, this criterion has not been consistently applied in decisions on

provisional measures since its development, as the Court's jurisprudence often lacks precision and is ambiguous when addressing plausibility and the parameters that must be met for this requirement to be considered as fulfilled. This, in turn, can represent difficulties to States parties to a dispute before the Court in preserving their own rights, individual rights and community interests.

2. PURPOSES OF PROVISIONAL MEASURES BEFORE THE ICJ

The International Court of Justice, in its 1999 order on the *Passage Through the Great Belt* case (Finland v. Denmark), has affirmed the principle that "no action taken *pendente lite* by a State engaged in a dispute before the Court with another State 'can have any effect whatever as regards the legal situation which the Court is called upon to define.'"[1] Such an assertion lies at the core of the institute of provisional measures.[2] Although indisputable that the development of this legal mechanism, as it is currently seen in international adjudication forums, started to advance within the jurisprudence of the Permanent Court of International Justice and was further consolidated by the ICJ, it is also clear that such jurisprudence was drawing from a preexisting body of rules and proceedings.

In view of this, this chapter shall address, first, the history of provisional measures in international adjudication (2.1). Then, the main purposes of provisional measures within the PCIJ and ICJ proceedings will be considered: the protection of rights *pendente lite* (2.2), the non-aggravation of the dispute (2.3), and, additionally, the emerging purpose of protection of general interests of the international community (2.4).

2.1 The Origins of Provisional Measures

Municipal law has provided different forms of relief in order to safeguard contested rights *pendente lite* since Antiquity. Scholars pinpoint Roman law as the initial mark of the history of provisional measures since it contained procedural protections for contested rights under dispute in some specific circumstances, mainly through interdicts, i.e. orders requiring the person to whom it was addressed to do or not do a particular thing.[3] Canon law, which significantly influenced the development of

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[1] Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12 at 19, para. 32.

[2] The term "provisional measures" will be used interchangeably with the terms "interim [measures of] protection" and "interim relief."

[3] Although an interdict was usually a form of final relief, it could also have provisional character in disputes relating to contested property. (MILES, Cameron. The Origins of the Law of Provisional Measures before International Courts and Tribunals. *Heidelberg Journal of International Law [ZaöRV]*, vol. 73, 2013, pp. 615-672).

medieval civil law, also included several allusions to interim relief in contested proceedings.[4]

Evolving from ancient and medieval practice, strong doctrines of relief *pendente lite* were also developed in both Civil Law and Common Law traditions, by indicating measures to secure enforcement of claims, grant interim performance or preserve property in dispute *in status quo*, mainly in order to prevent self-help by individuals.[5]

In the common law, this idea was reflected in the institute of the interlocutory injunction, "being an order directed in personam to one of the parties to preserve contested property *in statu quo* pending a further order or the resolution of the dispute."[6] This was governed by some substantive prerequisite: the necessity to establish a *prima facie* case demonstrating the merit of the claim, the consideration that damages may suffice as rendering an injunction unnecessary, and the principle of balancing the convenience of both parties, which would entail considering the potential harm the plaintiff may endure without the injunction against the probable inconvenience or cost to the defendant if granted.[7]

Though civil law developments were necessarily more diverse, during the 19th century, several jurisdictions produced similar interim relief mechanisms. This was mostly through the preliminary seizure and attachment of assets, or sequestration when dealing with moveable or immovable objects, but measures ordering the interim performance of certain obligations and regulating the *status quo* were also common in virtually all civilian systems.[8]

In the context of international adjudication, the initial efforts to consider provisions for the interim protection of rights date to the late nineteenth and early twentieth centuries, in which the *Institut de Droit International*, during the debates ensued by its project of codification of arbitral procedure, adopted an amendment to address the power of arbitral tribunals to render interlocutory or preparatory judgments, which were then interpreted as jurisdiction to prescribe interim measures, such as the sequestration of a disputed territory, or of captured ships and goods when difficulties

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[4]DUMBAULD, Edward. *Interim Measures of Protection in International Controversies.* The Hague: Martinus Nijhoff, 1932, pp. 33-42.
[5]MILES, Cameron. *Provisional Measures Before International Courts and Tribunals.* Cambridge: Cambridge University Press, 2016, pp. 17, 20-21.
[6]Miles, *supra* fn. 5, at 616.
[7]Ibid.
[8]Ibid, at 619-620. For an appraisal of the institutes established in singular jurisdictions, see Dumbauld, *supra* fn. 4, at 42-82.

have arisen during their seising.[9] For their part, neither of the Hague Conferences of 1899 and 1907 made any direct reference to the matter of provisional measures. As one author puts it, in a context in which *ad hoc* arbitration was the only available means of dispute settlement, the need to include a provision for interim measures was scarce since the parties to arbitration had every incentive to act in such a way as to give sense to the procedures that were agreed upon between them.[10]

It makes sense, therefore, that the first time in which an explicit mention of a provisional measures mechanism was made in the 1907 Convention establishing the Central American Court of Justice (CACJ), the first permanent and institutional international tribunal, created with the objective of guaranteeing the rights of the Contracting parties and maintaining peace and harmony in their relations.[11] Earlier in the region, during roughly the same period as the Hague Peace Conferences, Central American States had already developed an early form of provisional measures in the Treaty of Corinto, in the context of attempts at unification by Guatemala.[12] The Treaty, celebrated between Costa Rica, Salvador, Honduras and Nicaragua, provided for compulsory arbitration of disputes and, in its Article XI, determined the obligation of States parties to a dispute not to execute acts of hostilities, preparations for war, or mobilisation of forces, which could impede the pacific settlement of disputes.[13] The treaty, however, was short-lived. A conflict between Honduras and Nicaragua led to the termination of the agreement in 1907 after a decision under Article XI requesting the disarmament and disbandment of forces by both parties was not complied with by Nicaragua.[14]

After the dissolution of the Treaty of Corinto, the reestablishment of peace in the region was attempted at the Central American Peace Conference carried out in Washington, D.C., in late 1907. Delegates were influenced by the Hague Peace Conference of the same year and its project for the creation of a Permanent Court of Arbitral Justice, leading to the Convention for the Establishment of the CACJ. Among the provisions, Article XVIII provided that, at the solicitation of any one of the parties,

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[9]ROSENNE, Shabtai. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*. Oxford: Oxford University Press, 2004, pp. 13.
[10] KOLB, Robert. *The International Court of Justice.* Oxford: Hart Publishing, 2013, pp. 614.
[11] Ibid.
[12]Miles, *supra* fn. 3, SCOTT, James Brown. The Central American Peace Conference of 1907. *The American Journal of International Law*, vol. 2, no. 1, 1908, pp. 121-143.
[13]Miles, *supra* fn. 3, at 624-625.
[14]Dumbauld, *supra* fn. 4, at 94. For a further exploration of this process, see: Scott, *supra* fn. 12; HUDSON, Manley O. The Central American Court of Justice. *The American Journal of International Law*, vol. 26, no. 4, 1932, pp. 759-786.

the Court may fix the situation in which the parties must remain in order that the difficulty may not be aggravated and that things may remain in *status quo* pending the final decision of the case.[15] This mention of non-aggravation, present implicitly in 1902 and explicitly in 1907, represents an innovation in comparison to previous municipal concepts of provisional measures, stemming not from the need to prevent private self-help, but rather from a more immediate aim of preventing the escalation of armed conflicts that had been prevalent in the region.[16]

Though the CACJ ultimately did not succeed, ending its activities in 1918, in the meantime, it still delivered decisions under its Article XVIII on more than one occasion, providing fruitful precedents to interdiction of military activity and preservation of the *status quo* in American dispute settlement practice.[17] Both of these features were present in Treaties for the Advancement of Peace celebrated by the US with a number of other States. The so-called Bryan Treaties, in reference to Secretary of State William Jennings Bryan, who conducted the negotiations, were aimed at "refer[ring] all international disputes between the US and a contracting party to a commission for investigation and report when diplomatic efforts to resolve the dispute had failed and no other method of compulsory arbitration was available."[18] Article 4 of the Treaties concluded with El Salvador, Guatemala, Nicaragua, Panama and Persia included an agreement not to increase their military and naval programs pending the investigation from the commission, which roughly translates the purpose of non-aggravation of the dispute present in the framework of the CACJ.[19] Exceptionally, Article 4 of the Treaties with China, France and Sweden expressly empowered the commission to indicate provisional measures, in the following terms:

> 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.[20]

The language, which would inspire the drafting of Article 41 of the PCIJ Statute,[21] did not clarify whether the measures indicated by the commission would be

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[15]Dumbauld, *supra* fn. 4, at 95.
[16] Miles, *supra* fn. 5, at 35.
[17]Dumbauld, *supra* fn. 4, at 99.
[18]Miles, *supra* fn. 3, at 633.
[19]Dumbauld, *supra* fn. 4, at 99.
[20]FINCH, George A. The Bryan Peace Treaties. *The American Journal of International Law*, vol. 10, no. 4, 1916, pp. 882-890, at 888.
[21] See Section 3.1.

binding to the parties. As the organ was not empowered to deliver binding judgments, only reports, it would seem incongruous that any interim relief awarded would create legal obligations, however, as pointed out by one commentator, the establishment of a consistent dispute settlement system was not the primary purpose of the instruments.[22] Nonetheless, the treaties that contained such provisions did not enter into force, despite representing, in retrospect, a significant development in the law of international adjudication.

From this brief review, it is possible to identify two primary purposes of interim relief mechanisms from different sources: while domestic systems seemed more concerned with the preservation of the object of the dispute and ensuring any remedy eventually awarded in the merits would be effective, the international experiences of the early 20th century centred the maintenance of peace and avoidance of deterioration of disputes into hostilities. Later on, the practice of the Permanent Court of International Justice successfully merged both municipal and international traditions relating to interim relief, by conceptualising as a generally accepted principle the notion 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."[23] It can be extracted from this dictum that the Court's power to indicate provisional measures had the joint purposes of preserving the respective rights of the parties while a final judgment was pending, by maintaining or re-establishing the *status quo*, and avoiding an aggravation of the controversy before it. Some scholars have identified additional aims for the institute in the PCIJ and the ICJ's jurisprudence,[24] such as the preservation of evidence, the prevention of irreparable prejudice to the object of the claim, the non-anticipation of the Court's judgment, however, those seem to be derived from the core goal of preserving the *status quo* and the rights *sub judice*.

2.2 Protection of rights *pendente lite*

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[22]Miles, *supra* fn. 3, at 635.

[23] Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Order of 5 December 1939, *PCIJ (Ser A/B) No 79* at 199.

[24]THIRLWAY, Hugh. The Indication of Provisional Measures by the International Court of Justice. In: BERNHARDT, Rudolf (Ed.). *Interim Measures Indicated by International Courts*. Berlin: Springer, 1994, p. 5-16.

The power to indicate provisional measures was included in the Statute of the Permanent Court of International Justice, in Article 41. This article was kept without significant changes in the 1947 Statute of the International Court of Justice and established that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures *which ought to be taken to preserve the respective rights of either party*."[25] The language of Article 41 is clear in emphasising that the primary purpose of provisional measures in the system is the preservation of rights *pendente lite*.

This is also made clear by the case law. In the *Sino-Belgian Treaty* case (Belgium v. China), the first case judged by the PCIJ in which provisional measures were requested, the Permanent Court observed 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."[26] The case involved the denunciation by the Chinese government of the Treaty of Friendship, Commerce and Navigation concluded in 1865 with Belgium, which opposed the denunciation. Considering that the situation secured by the Treaty to Belgian nationals resident in China had been altered due to the alleged denunciation, the PCIJ indicated provisional measures regarding the protection of the rights of Belgians in the Chinese territory, including the protection of their property from seizure and their right to initiate legal proceedings before Chinese authorities, while a final decision regarding whether the Treaty was still in force was pending.[27]

Similarly, in the *Fisheries Jurisdiction* cases (United Kingdom v. Iceland; Germany v. Iceland), the International Court of Justice reaffirmed its predecessor's position, by noting the following:

> [T]he right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue.[28]

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[25] UNITED NATIONS. *Statute of the International Court of Justice*. Article 41. 18 April 1946, available at: https://www.icj-cij.org/statute.

[26] Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China), Order of 8 January 1927, *PCIJ (Ser A) No 08,* at 6.

[27] Ibid, at 7-8.

[28] Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, *I.C.J. Reports 1972*, p. 12, at 16, para. 21. [hereinafter, "Fisheries Jurisdiction (UK v. Iceland), Interim Protection"]

This pronouncement represents a more comprehensive understanding of the provisional measures institute than that presented in the *Sino-Belgian* case. The *Fisheries* order reaffirms the preservation of rights as the core function of provisional measures, but it also adds layers to it that are easily concealed by the broad wording of the phrase,[29] by pointing out that, other than maintaining or reestablishing the *status quo* during the proceedings, preventing anticipation of the Court's judgment is a part of the primary purpose of interim protection as well.[30] This, however, cannot be seen as separate from the general objective of preservation of rights, since the Court's reasoning for highlighting non-anticipation of its judgment as a premise of its power to grant provisional measures is so that, by anticipating the Court's ruling, the parties could prejudice the rights claimed and affect the possibility of their full restoration in the event of a judgment in their adversary's favour.[31]

Moreover, the preservation of the international judicial function and the administration of justice can be seen as integrating the wide-ranging goal of preserving the rights of the parties *pendente lite*. The Court has previously indicated provisional measures directed at the preservation of evidence, for example, in the *Rohingya Genocide* case (The Gambia v. Myanmar), in which it was ordered that Myanmar "take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of Article II of the Genocide Convention."[32] This again relates to the end goal of guaranteeing the effectiveness of a final decision on the merits, as well as ensuring that the proceeding itself would not be hampered by the destruction or loss of evidence.

Having established what other premises are encompassed in the preservation of rights purpose, another matter is brought forth given the broad language used in both Article 41 of the Statute and the abovementioned case law, which pertains to the definition of rights *pendente lite*. The power of an international court to indicate provisional measures can only be exercised in the context of the dispute before it, and it

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[29]Miles, *supra* fn. 5, at 176.

[30] Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, *I.C.J. Reports 1976*, p. 3 at 9, para. 25. [hereinafter, "Aegean Sea, Interim Protection"]

[31]Fisheries Jurisdiction (UK v. Iceland), Interim Protection, at 16, para. 22.

[32] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, *I.C.J. Reports 2020*, p. 3, at 29, para. 81. The Court has also awarded measures for the preservation of evidence in: Frontier Dispute (Burkina Faso/Mali), Provisional Measures, Order of 10 January 1986, *I.C.J. Reports 1986*, p. 3; Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, *I.C.J. Reports 1996*, p. 13.

does not attribute to the judicial body a right to protect the requesting State's rights at large.[33] It has been argued in scholarly works that the term "right" is not the preferable term in this case, since a right would remain in existence, even if violated. Therefore, the objective is to preserve the subject matter of the right, meaning the factual element which, if destroyed, would make the exercise of the right in question impossible.[34] Nonetheless, in the *Fisheries Jurisdiction* orders, the International Court of Justice made reference to "rights which are the subject of dispute in judicial proceedings,"[35] Generally, they are defined by the assertions made in the application instituting proceedings.

A similar definition was brought in the *Bosnian Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) provisional measures order, in which the Court referred to "rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent."[36] This definition, however, can give rise to questions regarding the possibility of protecting, by means of provisional measures, rights that are said to belong to either a third party not initially involved in the proceedings, a group of States, in cases involving, for example, obligations *erga omnes partes*, or even the international community as a whole.[37]

On the other hand, the decision also established that, in order to be protected by provisional measures, the rights claimed by the parties must be related to the source of the Court's jurisdiction.[38] In the case, the Applicant contended that it sought to protect its rights to self-determination, to be free of the threat or use of force by other States against it, to conduct its domestic affairs without foreign interference, and to be free of genocidal acts against its People, among other considerations. However, the Court only acknowledged the 1948 Genocide Convention as a basis of jurisdiction, and it found that it was "confined to the consideration of such rights under the Genocide Convention as might form the subject matter of a judgment of the Court in the exercise of its

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[33] Miles, *supra* fn. 5, at 176; THIRLWAY, Hugh. *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume II. Oxford: Oxford University Press, 2013, pp. 1779-1780.
[34] OELLERS-FRAHM, Karin. Article 41. *In*: ZIMMERMAN, Andreas *et al* (eds.). *The Statute of The International Court of Justice: A Commentary*. 2. ed. Oxford: Oxford University Press, 2012, pp. 1313.
[35]Fisheries Jurisdiction (UK v. Iceland), Interim Protection, at 16, para. 21
[36] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, p. 3 at 19, para. 34. [hereinafter, "Bosnian Genocide, Provisional Measures (I)"].
[37] For a further discussion on the protection of general interests in provisional measures proceedings, see 1.3. See also: LEE-IWAMOTO, Yoshiyuki. The ICJ as a Guardian of Community Interests? Legal Limitations on the Use of Provisional Measures. In: BYRNES, Andrew; et al (eds). *International Law in the New Age of Globalization*. Leiden: Martinus Nijhoff, 2013, pp. 71-92.
[38] Miles, *supra* fn. 5.

jurisdiction under Article IX of that Convention."[39] It, thus, dismissed measures requested to preserve matters considered to be not covered by the Convention.

As can be observed from Article 41, as well as the language used in the *Bosnian Genocide* order, both the Applicant and the Respondent can request provisional measures in order to protect their respective interests in the dispute. This request can be made along with the respondent's response to the request for provisional measures submitted by the applicant,[40] as well as in the absence of any application for interim protection made by the other party. In the *Pulp Mills* case (Argentina v. Uruguay), regarding the construction of pulp mills near the River Uruguay, the Applicant's request for provisional measures was denied on the basis that no risk of irreparable harm had been identified. Afterwards, Uruguay filed its own request to prevent Argentinean nationals from blocking roads and bridges in protest of the construction of the mills, which the Respondent argued, although it was not covered by the jurisdictional source invoked by Argentina, was "a matter directly, intimately and indissociably related to the subject matter of the case before the Court."[41] While it ultimately did not award provisional measures to the Respondent in the case, the Court found:

> [A]ny right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures; and whereas Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute also has a connection with the subject of the proceedings on the merits initiated by Argentina and may in principle be protected by the indication of provisional measures.[42]

The ICJ meant, in general terms, that, in cases where provisional measures are requested by the respondent in the absence of a counter-claim, the rights claimed by the respondent "are not dependent solely upon the way in which the applicant formulates its application,"[43] but are, rather, a negative image of the applicant's contentions in instituting proceedings.[44] In that sense, the respondent may assert a right to pursue a course of conduct over the objections of the claimant, as long as such a right relates to the main subject of the dispute.

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[39]Bosnian Genocide, Provisional Measures (I), at 20, para. 38.
[40] Ibid.
[41] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, *I.C.J. Reports 2007*, p. 3 at 9, para. 22. [hereinafter, "Pulp Mills, 2007 Provisional Measures"].
[42] Ibid, at 10-11, para. 29.
[43] Ibid, at 10, para. 28.
[44] Miles, *supra* fn. 5, at 179

Given that, in requesting provisional measures, due to the very premise of the institute, the party must establish that the rights it seeks to protect are "rights which are the subject of dispute in judicial proceedings,"[45] the question remains as to the type of connection that must be established between the rights whose protection is sought at the provisional measures stage and the rights the parties seek to ascertain on the merits. Several international courts have adopted a "link" requirement,[46] meaning that the rights to be protected by the imposition of provisional measures must be shown to have a nexus to the substantive rights that are the subject of the final judgment,[47] which is usually assessed on a case-by-case basis.[48]

2.3 Non-aggravation of the dispute

In addition to the object of protecting the parties' rights *pendente lite*, the Court has also made use of its power under Article 41 to indicate measures with the purpose of preventing the aggravation or extension of the dispute.[49] This is another example of the use of provisional measures to ensure the good administration of justice.[50] As the Court's Statute does not explicitly provide for provisional measures to be awarded for this purpose, it is understood that the indication of interim protection aimed at non-aggravation of the dispute represents the use of the Court's power to act *proprio motu* and indicate measures that are in whole or in part other than those requested,[51] provided for in Article 75, para. 2, of the Rules of the Court.

As previously stated, non-aggravation measures have a distinct origin from measures aimed at preserving rights *pendente lite*. While there are examples of the latter in different domestic systems for the course of centuries, the former seemed to have first appeared in Article XVIII of the Convention for the Establishment of the

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[45] Fisheries Jurisdiction (UK v. Iceland), Interim Protection, at 16, para. 21.
[46] The link requirement in provisional measures proceedings before the International Court of Justice is further discussed in Section 3.3.4. For a discussion of this requirement in the proceedings of international courts and tribunals other than the PCIJ/ICJ, see, e.g.: Miles, *supra* fn. 5, at 185-193; LANDO, Massimo. Provisional Measures and the Link Requirement. *The Law and Practice of International Courts and Tribunals*, vol. 19, 2020, pp. 177-199 (specifically about ICJ and ITLOS).
[47] Kolb, *supra* fn. 10, at 625.
[48] Oellers-Frahm, *supra* fn. 34, at 1322. Miles, *supra* fn. 5, at 180.
[49] PALCHETTI, Paolo. The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute**.** *Leiden Journal of International Law*, vol. 21, no. 3, 2008, at 623.
[50] UCHKUNOVA, Inna. Provisional Measures Before the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, vol. 12, no. 1, 2013, pp. 426; Miles, *supra* fn. 5, at 208.
[51] Miles, *supra* fn. 5, at 208.

Central-American Court of Justice, which, at its core, aimed at preserving the good relations among the countries in the region and bringing about permanent peace in those countries.[52] The Permanent Court of International Justice seemed to have drawn from the Central-American experience when, in *Electricity Company* (Belgium v. Bulgaria), it established a principle universally accepted by international courts "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."[53] Without expanding its reasoning as to why it saw fit to award measures of non-aggravation in the case, the PCIJ's assertion on the order acknowledged, in fact, an obligation that could apply to any State taking part in international proceedings, as it determined in the operative clauses that "the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court."[54]

In its first provisional measures decision, the International Court of Justice seemed to uphold the principle recognised by its predecessor when it indicated that both parties "should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court."[55] It did not, however, mention the issue of non-aggravation as a circumstance that justified the award of provisional measures, merely referring to it in the operative part, as a standard clause complementing the more specific measures aimed at preserving rights *pendente lite*.[56] This formula was repeated in several decisions in the Court's early case law.[57]

The issue of whether the Court had the independent power to indicate measures with the object of non-aggravation under Article 41 was first brought by Greece in the *Aegean Sea* case (Greece v. Turkey). Nevertheless, the ICJ considered it unnecessary to

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[52] Ibid, at 34, 209.
[53] Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Order of 5 December 1939, *PCIJ (Ser A/B) No 79* at 199.
[54] Ibid.
[55] Anglo-Iranian Oil Co. (United Kingdom v. Iran), Interim Protection, Order of 5 July 1951, *I.C.J. Reports 1951*, p. 89 at 93.
[56] Palchetti, *supra* fn. 49, at 624.
[57] See: Fisheries Jurisdiction (UK v. Iceland), Interim Protection, at 17; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, *I.C.J. Reports 1972,* p. 30 at 35; Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, p. 99 at 106; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, p. 135 at 142; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7 at 21.

examine the matter, given that the United Nations Security Council had already recalled the need for both parties to the dispute to avoid any conduct which might lead to the aggravation of the situation.[58]

Afterwards, this subject was addressed in the *Frontier Dispute* case (Burkina Faso/Mali), in which the Chamber formed to deal with the dispute considered 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 whenever it considers that circumstances so require", independently of the requests submitted by the Parties for the indication of provisional measures.[59] This statement was endorsed by the Court as a whole in subsequent cases,[60] although it was not clear whether it represented an actual acknowledgement that non-aggravation measures could be granted independently of those awarded for the protection of rights, or whether the Court was merely referring to its power to indicate measures different to those requested.[61] Judge Aréchaga had previously contended, in his *Aegean Sea* separate opinion, that "[t]he Court's specific power under Article 41 of the Statute is directed to the preservation of rights *sub-judice* and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes."[62] On the other hand, Judge Bedjaoui, who was the president of the Chamber in *Frontier Dispute*, defended the independence of non-aggravation measures in his dissent in the *Lockerbie* cases (Libya v. United Kingdom; Libya v. United States). Regarding the *Frontier Dispute* order, he asserted:

> The provisional measure thus taken, in the form of an exhortation [to all the parties not to aggravate or extend the dispute], does not in any way depend upon the indication of other, more specific provisional measures. The exhortation is an independent measure which is not necessarily connected or linked to any others, so that, even though the Court might have been justified, in the present case, in finding that there had been a failure to satisfy a given prerequisite for the indication of certain specific measures, it at least had the option of

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[58] Aegean Sea, Interim Protection, at 12, para. 36-39.
[59] Frontier Dispute (Burkina Faso/Mali), Provisional Measures, Order of 10 January 1986, *I.C.J. Reports 1986*, p. 3 at 9, para. 18. [hereinafter, "Frontier Dispute, Provisional Measures"].
[60] Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, *I.C.J. Reports 1996*, p. 13 at 22-23, para. 41; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I.C.J. Reports 2000*, p. 111 at 128, para. 44; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measures, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102 at 111, para. 39.
[61] Palchetti, *supra* fn. 49, at 626; Miles, *supra* fn. 5, at 211.
[62] Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, Separate Opinion of President Jiménez de Aréchaga, *I.C.J. Reports 1976*, p. 3 at 16.

> indicating a general, independent measure, in the form of an appeal to the Parties to refrain from aggravating or extending the dispute or of an exhortation to them to collaborate in a search for settlement out of court[…].[63]

Nonetheless, the Court settled the matter in a different direction in the *Pulp Mills* case. Although acknowledging that it had previously awarded non-aggravation measures in other cases, it noted that "in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated."[64] In this sense, the Court denied the request for the indication of non-aggravation measures requested by Uruguay, since it had found that the conditions for the indication of the first provisional measure – specifically aimed at ending the interruption of transit, and the blockading of bridges and roads, between Uruguay and Argentina – were not fulfilled. In this sense, the Court indicated, in an apparent contradiction with its earlier case law, that provisional measures for the non-aggravation of a dispute are merely subsidiary to those awarded for the protection of the rights of the parties.[65]

Judge Buergenthal issued a declaration in which he disagreed with the Court's reasoning, by highlighting the two distinct origins of provisional measures for the protection of rights and non-aggravation measures, as well as noting that the wording of Article 41 referred to the power to indicate provisional measures dependent on the "circumstances" that may require it. He added

> These circumstances may involve an imminent threat of irreparable prejudice to the rights in dispute. But, independently thereof, no compelling reason has been advanced by the Court why they may not also apply to situations in which one party to the case resorts to extrajudicial coercive measures, unrelated to the subject-matter in dispute, that aggravate a dispute by seeking to undermine or interfere with the rights of the other party in defending its case before the Court.[66]

Nonetheless, Judge Buergenthal's position was in the minority. So far, the Court has not considered indicating non-aggravation measures under Article 41 in the absence of specific measures for the protection of rights *sub judice*.

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[63] 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, Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui, *I.C.J. Reports 1992*, p. 3 at 48, para. 32.
[64] Pulp Mills, 2007 Provisional Measures, at 16, para. 49.
[65] Palchetti, *supra* fn. 49, at 626; Oellers-Frahm, *supra* fn. 34, at 1314.
[66] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, Declaration of Judge Buergenthal, *I.C.J. Reports 2007*, p. 3 at 24-25, para.11.

In regards to the circumstances that justify the indication of measures for the non-aggravation of the dispute, it appears that those can only be awarded when all the conditions normally considered for the indication of provisional measures are met. That is to say, if the Court lacks *prima facie* jurisdiction, or if the requisites of urgency or risk of irreparable prejudice are not satisfied, there would be no need for the Court to indicate any kind of interim measures.[67] The risk of aggravation or escalation of the dispute, particularly, although not exclusively, in cases involving the threat or use of force, has also been considered as a criterion in previous decisions.[68] However, even when emphasising that factor, the Court maintained that the facts giving rise to the aggravation also created a risk of irreparable damage to the rights of the parties at issue in the case, suggesting, in that sense, that the element of aggravation must in any case be connected to the rights the parties aim to preserve *pendente lite*.[69] On the other hand, the Court has also recently denied a request for non-aggravation measures when it considered them unnecessary, due to the more specific measures it had already awarded for the preservation of rights in dispute.[70]

In view of this, notwithstanding the ancillary role that non-aggravation measures are said to perform, it can be said that measures for this purpose have become a standard part of the provisional measures proceedings. They have historically carried out a catch-all function, as put by one author, "reflecting the realisation […] that the inclusion of very specific measures for the protection of rights may not adequately restrain a party from causing damage not captured by the wording of these measures."[71]

2.4 Provisional measures for the protection of community interests

The concept of community interest was first coined by Bruno Simma, to describe "a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognised and sanctioned by international law as a matter of concern to all States."[72] This idea that there are fundamental values which transcend the interests of individual States and the

[67] Uchkunova, *supra* fn. 37, at 427.
[68] See: Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, at 22, para. 39; Bosnian Genocide, Provisional Measures (I), at 24, para. 52.
[69] Palchetti, *supra* fn. 49, at 633-634.
[70] Rohingya Genocide, Provisional Measures, at 29, para. 83.
[71] Miles, *supra* fn. 5, at 214.
[72] SIMMA, Bruno. From Bilateralism to Community Interest in International Law. In: *Collected Courses of the Hague Academy of International Law*, vol. 250. Leiden: Martinus Hijhoff Publishers, 1994.

logic of bilateral relationships between them has been gaining strength in the last decades,[73] although this hasn't yet resulted in the establishment of institutions for their adequate enforcement.[74] In this sense, there's relevance in assessing the ways in which the proceedings of existing international adjudicatory bodies, particularly the International Court of Justice, as the principal judicial organ of the United Nations, can be utilised in order to protect the general interests of the international community, as opposed to solely the rights of the parties. Considering its primary purpose of preserving rights *pendente lite*, the institute of provisional measures has shown promise as a mechanism for the enforcement of community interests in cases in which they are at stake, despite the essentially bilateral character of international dispute settlement.[75]

The *Legality of the Use of Force* cases (Serbia and Montenegro v. Belgium and others) seem to show an early attempt to make use of provisional measures in order to protect community interests, namely international peace and security. The series of cases brought to the Court by the Federal Republic of Yugoslavia against the members of the North Atlantic Treaty Organization (NATO) pertained to the bombings of both military and civilian targets in the Applicant's territory that occurred in 1999. In its request for provisional measures, Yugoslavia asked the Court to order the respective respondents to cease immediately their acts of use of force and refrain from any further threat or use of force, however the Court found that it lacked jurisdiction prima facie, therefore rejecting the provisional measures request and excluding several of the cases from the List. Nonetheless, it did include in its reasoning a recommendation that the parties take care not to aggravate or extend the dispute.[76] Judge Koroma appended a declaration stating that

> [T]he Court, as the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, *is under a positive obligation to contribute to the*

[73] See, e.g.: GAJA, Giorgio. The Protection of General Interests in the International Community. In: *Collected Courses of the Hague Academy of International Law*, vol. 364. Leiden: Martinus Hijhoff Publishers, 2011; BENZIG, Markus. Community Interests in the Procedure of International Courts and Tribunals. *The Law and Practice of International Courts and Tribunals*, Leiden, vol. 5, no. 1, 2006, p. 369-408; TAMS, Christian J. Individual States as Guardians of Community Interest. In: FASTERATH, Ulrich; et al (eds). *From Bilateralism to Community Interest*. Oxford: Oxford University Press, 2011.

[74] LEE-IWAMOTO, Yoshiyuki. The ICJ as a Guardian of Community Interests? Legal Limitations on the Use of Provisional Measures. In: BYRNES, Andrew; et al (eds). *International Law in the New Age of Globalization*. Leiden: Martinus Nijhoff, 2013, pp. 71-92, at 72.

[75] See, e.g.: Ibid; RIETER, Eva. The International Court of Justice and Provisional Measures Involving the Fate of Persons. In: KADELBACH, Stefan; et al (eds). *Judging International Human Rights*. Cham: Springer International Publishing, 2019, pp. 127-170.

[76] Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, *I.C.J. Reports 1999*, p. 916 at 925, para. 32.

> *maintenance of international peace and security and to provide a judicial framework for the resolution of a legal dispute,* especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life as well as the disintegration of normal society. Given the prevalence of these circumstances in this dispute, the Court has decided, rightly in my view, not to remain silent.[77]

Although the inclusion of this recommendation in the text of the order by no means represents a binding obligation to the parties, as it would if included in the operative clauses, it is recognised that such a call to non-aggravation that became common in provisional measures proceedings, whether in the form of a recommendation or an order, indicates, as one author notes, that the Court is integrating itself into the general peace-keeping functions of the United Nations, in its capacity of the principal judicial body of the organisation.[78]

It is true that merely characterising the rights the requesting party aims to preserve as community interests is not enough for the Court to indicate provisional measures for their protection. Solely arguing that there is a situation of possible violation of interests of great value for the international community as a whole does not exempt the claimant from showing that the conditions necessary to the indication of provisional measures by the Court are satisfied.

Additionally, community interests usually are required to be formulated as individual State's rights under international law in order to be protected by way of provisional measures.[79] One possible exception to this rule can be observed in the *Rohingya Genocide* case, in which The Gambia instituted proceedings against Myanmar, alleging that the latter had been committing violations of the Genocide Convention in regard to the Rohingya ethnic minority, present in the Rakhine region of the Respondent's territory. Although The Gambia could not show that it was especially affected by the alleged genocidal acts committed by Myanmar, it founded its standing before the Court on the fact that the Genocide Convention contained obligations *erga omnes partes*, meaning that all the State parties to the Convention had a common interest in ensuring the fulfilment of the essential values enshrined in it. The argument was upheld by the Court, and the request for provisional measures was accepted.[80] Similar cases were brought by Canada and the Netherlands against Syria, based on

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[77]Ibid, at 930.
[78] Rosenne, *supra* fn. 9, at 214.
[79]Lee-Iwamoto, *supra* fn. 74.
[80]Rohingya Genocide, Provisional Measures.

alleged violations of the Convention Against Torture, and by South Africa against Israel, also under the Genocide Convention.[81]

In the same vein, it is possible to identify a recent tendency to the relaxation of the threshold for such requirements. One example of this can be seen in the Separate Opinion issued by Judge Xue to the *Rohingya Genocide* provisional measures order. Although expressing reservations in regard to the fulfilment of the conditions of admissibility – in particular, the matter of standing of The Gambia – and of the plausibility test, the then Vice-President concurred with the decision to indicate provisional measures, considering that the evidence presented indicated "serious violations of human rights and international humanitarian law against the Rohingya and other ethnic minorities in Rakhine State of Myanmar, particularly during the 'clearance operations' carried out in 2016 and 2017", and that there was a risk that internal armed conflicts in Rakhine State would erupt again.[82]

Similarly, in the *Allegations of Genocide* case (Ukraine v. Russia), Judge Bennouna declared that he was not convinced that the Genocide Convention could serve as a source of jurisdiction to a dispute concerning allegations of genocide made against the Applicant by another State, even if those allegations were to serve as a pretext for an unlawful use of force, but that he had voted in favour of the order "to join the call by the World Court to bring an end to the war."[83]

The abovementioned link test has also been stretched beyond its usual standard of an observable relationship between the rights to be protected and the merits of the dispute, particularly in cases in which the possible consequences of a denial to indicate provisional measures would involve risk to human life, health or liberty.[84] In cases involving consular rights, such as *LaGrand* (Germany v. United States) and *Avena* (Mexico v. United States), the Court awarded measures that were more closely linked to

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[81] 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, Order of 16 November 2023, para. 54. Available at https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf. Accessed 20 March 2024; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, para. 37. Available at: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Accessed 14 February 2024.

[82] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, Separate Opinion of Vice-President Xue, *I.C.J. Reports 2020*, p. 3 at 35, para. 9-10.

[83] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, Declaration of Judge Bennouna, *I.C.J. Reports 2022*, para. 1-2.

[84] Miles, *supra* fn. 5, at 183-184.

the political background of the dispute – namely the possibility that the individuals whose consular rights had been violated would be executed – than to the legal rights that were the subject of the application. Likewise, in *Temple of Preah Vihear (Interpretation)* (Cambodia v. Thailand), the Court was asked to interpret the meaning and scope of the expression "vicinity on Cambodian territory" used in the original judgment, the duration of Thailand's obligation to withdraw from the determined area, and the binding character of the 1907 map in establishing the countries' frontier.[85] However, the provisional measures order went beyond the scope of the application in creating a demilitarised zone, which it considered necessary "to ensure that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation,"[86] due to the recent occurrences of armed clashes in the region.

In this context, it can be said that the ICJ can and has used provisional measures to protect community interests, particularly those pertaining to international peace and security, when the threats to such interests are either associated with the possible aggravation of the rights to be preserved or when the object of the dispute itself constitutes a general interest.[87]

[85] TRAVISS, Alexandra. Temple of Preah Vihear: Lessons on Provisional Measures. *Chicago Journal of International Law*, vol. 13, no. 1, 2012, pp. 327-328.
[86] Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, *I.C.J. Reports 2011*, p. 537 at 539, para. 5.
[87] Lee-Iwamoto, *supra* fn. 74, at 78; Rosenne, *supra* fn. 9, at 214.

3. PROCEDURE FOR THE INDICATION OF PROVISIONAL MEASURES

In the system of the International Court of Justice, the institute of provisional measures is placed in Chapter III of the Statute of the Court, titled "Procedure." Other courts and tribunals adopt a similar placement for provisions regarding interim protection, with some only addressing the matter in their rules of procedure. This supports a formalistic view according to which provisional measures are simply a matter of procedure rather than a matter of jurisdiction.[1] While this analysis may help delay the discussion of complex matters of jurisdiction at an early stage of the proceedings,[2] it does not take into consideration the fact that provisional measures concern the conduct of the parties outside of the proceedings and, therefore, can entail a limitation of the exercise of sovereignty.[3] In this sense, it can be said that the institute of provisional measures, as provided for in Article 41, has a dual character: it constitutes both a matter of procedure and a matter of competence, i.e., a substantive matter.[4]

Given its complex nature, I analyse the institute from both formal and material perspectives. While the previous chapter addressed the substantive aspects of provisional measures—its purposes, as acknowledged by the Court—this chapter shall centre its procedural aspects.

This chapter is divided into three sections: first, it will analyse the provisional measures procedure laid out in Article 41 of the Statute of the Court (3.1) and in the Rules of Court (3.2); then, it will explore the criteria developed in the ICJ's jurisprudence for the indication of interim measures (3.3), examining each requirement separately. Lastly, the Practice Directions regarding provisional measures oral proceedings will be briefly addressed (3.4).

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[1] See, e.g., BERNHARDT, J. Peter A. The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran. Fiat iustitia, pereat curia?. *Virginia Journal of International Law*, vol. 20, no. 3, 1980, pp. 557-616, at 561; COCATRE-ZILGIEN, André. Les Mesures Conservatoires Décidées par le Juge ou par l'Arbitre International. *Revue Générale de Droit International Public*, vol. 70, 1966, pp. 5–48, at 42.

[2] OELLERS-FRAHM, Karin. Article 41. In: ZIMMERMAN, Andreas, et al. (eds). The Statute of the International Court of Justice: A Commentary. 2.ed. Oxford: Oxford University Press, 2012, pp. 1302-1358, at 1312.

[3] LEAGUE OF NATIONS ADVISORY COMMITTEE OF JURISTS. *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with annexes*. The Hague: Van Langenhuysen Brothers, 1920, at 735. Available at https://archive.org/details/procsverbauxof00leaguoft/page/608/mode/2up?ref=ol&view=theater. Accessed 29 November 2023. [hereinafter, Procès-Verbaux]. See, also: OELLERS-FRAHM, Karin. Expanding the Competence Expanding the Competence to Issue Provisional Measures - Strengthening the International Judicial Function. *German Law Journal*, vol. 12, no. 5, May 2011, pp. 1279-1294.

[4] Oellers-Frahm, *supra* fn. 2, at 1312.

3.1 Article 41

As previously seen, the power of the International Court of Justice to indicate provisional measures is acknowledged in Article 41 of the Statute of the Court. This power is not solely vested in the Statute; it also results from the numerous treaties which refer the settlement of disputes to the ICJ.[5] Additionally, some scholars recognise the power to indicate measures to protect the respective rights of the parties while a dispute is pending as a general principle of international law[6] or an implied prerogative of any international tribunal,[7] which would entail that it could be exercised without the existence of an explicit provision to that effect.

Nonetheless, Article 41 is the fundamental starting point for examining the institute of provisional measures in the ICJ from the formal or procedural perspective. This analysis will also identify the gaps that have allowed the Court to develop the institute throughout its jurisprudence.

To further understand the nuances of the provision, this section will be divided into three subsections. The first one will examine the drafting process of the article (3.1.1), while the second shall discuss the debate regarding the binding character of provisional measures orders (3.1.2). At last, similar provisions for interim relief present in the statutes and rules of other international courts and tribunals will be considered in comparison to Article 41 (3.1.3).

3.1.1 The drafting

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[5] Ibid, at 1311.

[6] See, e.g.: Aegean Sea Continental Shelf (Greece v. Turkey). Provisional Measures, Separate Opinion of President Jímenez de Aréchaga, *I. C. J. Reports 1976*, p. 16-17; INSTITUT DE DROIT INTERNATIONALE. Final Resolution of the Third Commission on Provisional Measures. Annuaire de l'Institute de Droit Internationale – Séssion de Hyderabad 2017, vol. 78, no. 1, p. 99-130. See, also: COLLINS, Lawrence. Provisional and Protective Measures in International Litigation. *Recueil des Cours de l'Académie de Droit International*, vol. 234. The Hague: Martinus Nijhoff, 1992; BROWN, Chester. *A Common Law of International Adjudication*. Oxford: Oxford University Press, 2007; McLACHLAN, Campbell. The Continuing Controversy over Provisional Measures in International Disputes. *International Law FORUM du Droit International*, vol. 7, no. 1, April 2005, pp. 5-15; TZANAKOPOULOS, Antonios. Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law. *Revue hellénique de droit international*, vol. 57, pp. 53-84, 2004.

[7] Ibid, at 1312, See, also: DUMBAULD, Edward. Interim Measures of Protection in International Controversies. The Hague: Martinus Nijhoff, 1932, at 184; SZTUCKI, Jerzy. Interim Measures at the Hague Court: An Attempt at a Scrutiny. Boston: Kluwer Law and Taxation Publishers, 1983; Collins, *supra* fn. 6; Brown, *supra* fn. 6.

Article 41 has its origin in the Statute of the Permanent Court of International Justice adopted in 1920 and has suffered only minimal modifications since. The Statute of the PCIJ was drafted by an Advisory Committee of Jurists appointed by the Council of the League of Nations under Article 14 of the Covenant of the League.[8]

The initial draft did not include the power to indicate provisional measures, which was proposed by Brazilian jurist Raul Fernandes in the final days of the Committee's works.[9] Fernandes was concerned about the possible inadequacy of the ordinary procedure drafted by the Committee to solve disputes arising between States regarding *possession*, rather than ownership, of certain rights, employing notions borrowed from Roman Law.[10] In that system, possessory protection was assured by interdicts and his proposed amendment was intended to take the place of this type of procedure.[11]

Fernandes' proposal was inspired by Article 4 of the Bryan Treaties.[12] He adapted the source text to suit a Court with powers to provide binding decisions rather than a Commission and suggested the following wording:

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court.[13]

Mr Fernandes also intended to include in his proposal effective penalties to support the provisional measures orders, allowing the Court to decide on a case-by-case basis the extent to which such penalties should be imposed.[14] This idea was opposed by most Committee members, who considered it "unwise" [15] as the Court had no means to execute its decisions[16] and, therefore, not included in the final draft. In the same vein,

[8] "Article 14. The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." (The Covenant of the League of Nations. League of Nations Official Journal, February 1920, p. 6. Available at https://libraryresources.unog.ch/ld.php?content_id=32971179. Accessed 27 November 2023.).

[9] Oellers-Frahm, *supra* fn.2, p. 1307.

[10] "In their relations with things, States, whether as subjects of private or public property, or in the sphere of territorial sovereignty, exercise *de jure* or *de facto* possession, sometimes over things, sometimes over servitudes and often — outside any conception of property — with regard to the complex of political powers which constitute sovereignty. In international law, these legal relations are based on principles borrowed from Roman Law." (Procès-Verbaux, p. 608.)

[11] Ibid, p. 608.

[12] See Section 2.1.

[13] Procès-Verbaux, p. 609.

[14] Ibid, p. 588.

[15] Ibid, p. 588.

[16] Ibid, p. 735.

the word "order" was substituted by "suggest."[17] This was again modified by the competent Sub-Comission of the Assembly of the League that first received and examined the draft. Instead of "suggest", it opted for the stronger form of "indicate", which was also closer to the French version of the text ("*indiquer*"). The passage "measures which *should be* taken" became "measures which *ought to be* taken" for similar reasons. The final version of the Article, which then became number 41 of the Statute, also suppressed the phrase "acts already committed or about to be committed" in order to encompass all possible situations, including acts of omission which might endanger the respective rights of the parties *pendente lite*.[18]

The Statute of the PCIJ was amended in 1929, however, no change was made to Article 41 on that occasion. It was proposed to include in the provision the text of Article 57 of the Rules of Court,[19] expressing the power of the President to indicate provisional measures whenever the Court was not sitting. However, the Committee considered that Article 41 was closely bound up with existing treaties, which would be affected by any amendment to it. Moreover, experience had not shown that any amendment was necessary since, in the practice of the Permanent Court, no difficulty had yet arisen in the application of this provision.[20] It was then decided to leave the matter of the powers of the President, pertaining to provisional measures, to be addressed solely by the Rules of the Court.

In 1945, with the establishment of the United Nations and the succession of the PCIJ by the new International Court of Justice, an advisory committee composed of representatives from 44 States was formed to elaborate a draft Statute for the new Court. The former Statute was largely maintained, particularly in matters of procedure (articles

[17]The provision, then Article 39, was submitted in the Draft to the Assembly of the League as follows: "If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council." (Ibid, at 736)

[18] Oellers-Frahm, *supra* fn. 2, at 1308.

[19] This was a point insisted upon by Greek diplomat Nicolas Politis, who "had in mind a case in which provisional measures had actually been taken and he had been asked by his own Government whether it was bound to respect the orders of the President in such cases, in view of the fact that there was no reference to any such obligation in the Statute." (COMMITTEE OF JURISTS ON THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Minutes of the Session held at Geneva, March 11th-19th, 1929. Series of League of Nations Publications, vol. 5, Official No. C.166.M.166, 1929, V, at 63. [hereinafter 1929 Minutes of the Committee of Jurists]) As of 1929, Article 57 of the Rules of Court read as follows: "When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President. Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record." (Statute and Rules of the Court (as amended on July 31st, 1926). 1.ed. *PCIJ Series D*, no. 1. Leiden: A. W. Sijthoff's Publishing Company, 1926.)

[20] 1929 Minutes of the Committee of Jurists, at 63-64.

39-64), which were considered mostly uncontroversial.[21] As to Article 41, it was only modified to correct a printing error in the original English version – which read as "*reserve* the respective rights of either party" rather than the correct form of "preserve" – and to substitute "Council", which referred to the organ of the League of Nations, with "Security Council," as the organ to be notified of the measures indicated by the Court. No further alteration has been made to Article 41 since then, and the current version reads as follows:

> Article 41
> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The drafting of Article 41 was criticised due to its ambiguous language.[22] While calling for a more general revision of the Statute, Sir Hersch Lauterpacht defended either that provisional measures be made explicitly binding or that Article 41 be suppressed from the Statute, since it would be "inappropriate" to include it "as part of the constituent instrument of the highest judicial organ of the United Nations"[23] if the parties were free to disregard the decisions made under it.[24]

Another factor that contributed to the uncertainties in regards to the provision was the lack of harmony between the English and French versions of the text, since the words in English "which ought to be taken", and "measures suggested" do not directly correspond to the French words, "*doivent être prises*," "*ces mesures*."[25] Due to the imprecision in the language of Article 41, there was significant space for judge-made law to expand the institute of provisional measures, which will be further addressed in the following sections.

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[21] Oellers-Frahm, *supra* fn. 2, p. 1308; ROSENNE, Shabtai. *The Law and Practice of the International Court of Justice, 1920-2005.* Volume I - The Court and the United Nations. 4.ed. Leiden: Martinus Nijhoff Publishers, 2006, at 57.

[22] See, e.g. LAUTERPACHT, Sir Hersch. The Revision of the Statute of the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, vol. 1, no. 1, 2002, pp. 55-128, at 94-96.; THE AMERICAN LAW INSTITUTE. *Restatement of the Law Third: Restatement of the Law of the Foreign Relations of the United States, vol. II*. St Paul, Minnesota: American Law Institute Publishers, 1987, at 358.

[23] Lauterpacht, *supra* fn. 22, at 96.

[24] For an examination of the larger discussion regarding the binding character of provisional measures, see Section 3.1.2.

[25] ROSENNE, Shabtai. Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea. Oxford: Oxford University Press, 2005, at 35; LaGrand (Germany v. United States of America). Judgrnent, *I. C. J. Reports 2001*, p. 466 at 502, para. 101.

3.1.2 The binding character of provisional measures

Although the initial proposal for the institute of provisional measures was very clearly binding, and even intended to be accompanied by penalties in the case of non-compliance, the concept that was included in the final version of the Statute had much vaguer language. Whether or not provisional measures orders were binding to the parties was, since the establishment of the Permanent Court of International Justice, the subject of a number of scholarly debates. On the one hand, as seen in the previous section, the literal text of Article 41 was unclear. The majority's opinion at the time was that the use of the verb "indicate", in lieu of "order" or "prescribe" designated that provisional measures were to be seen as recommendations rather than binding judgments.[26] Recommendations to be considered in good faith by the parties, but, nonetheless, devoid of any mandatory character. The fact that the second paragraph of the article refers to the "measures suggested" supported this belief, as well as the verb "ought to", which in English legal usage, is normally the language of a recommendation or exhortation, rather than an obligation.[27]

Notwithstanding the language of the article, other scholars still defended the legally binding character of provisional measures decisions, mostly on the basis that it undermined the authority of the Court for there to be decisions that the parties were at liberty to disregard.[28] Some also considered Article 41 as embodying a general principle of law according to which the parties to a legal dispute are under an obligation not to conduct themselves in a manner as to render the eventual judgment on the merits

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[26] See, e.g. GUGGENHEIM, Paul. Les mesures conservatoires dans la procédure arbitrale et judiciaire. *Recueil des Cours de l'Académie de Droit International*, vol. 40. The Hague: Martinus Nijhoff, 1932; Lauterpacht, *supra* fn. 22; THIRLWAY, H. W. A. The Indication of Provisional Measures by the International Court of Justice. In: BERNHARDT, Rudolf (ed). Interim Measures Indicated by International Courts. Berlin: Springer-Verlag, 1994, pp. 1-36, at 28-33; SZTUCKI, Jerzy. Interim Measures at the Hague Court: An Attempt at a Scrutiny. Boston: Kluwer Law and Taxation Publishers, 1983, at 287-296; Cocatre-Zilgien, supra fn. 1, at 45-46.

[27] Rosenne, *supra* fn. 25, p. 35.

[28] HUDSON, Manley O. *The Permanent Court of International Justice, 1920-1942: A treatise*. New York: The Macmillan Company, 1943, at 424-430. Interestingly, in the first edition of the book, published in 1937, Hudson had argued against the binding character of provisional measures, due to the language of Article 41 (pp. 414-419). See, also: BECKER, André. La Cour Permanente de Justice Internationale en 1930-1931. *Revue de droit international et de législation comparée*, vol. 59, no. 3, 1932, pp. 524-563, at 532-533; HAMBRO, Edvard. The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice. In: SCHÄTZEL, Walter; SCHLOCHAUER, Hans Jürgen (eds). *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag*. Frankfurt: Vittorio Klostermann, 1956, pp. 151-171.

useless or without object.[29] The Permanent Court itself acknowledged the existence of such a principle in the *Electricity Company of Sofia and Bulgaria* case (Belgium v. Bulgaria), although without making the argument that it granted binding force to specific provisional measures.[30]

It could also be argued, under Article 94(1) of the UN Charter, which established the obligation of the States to "comply with the decision of the International Court of Justice in any case to which it is a party", that provisional measures decisions were included in the "decisions" there referenced.[31] Nonetheless, provisional measures are indicated by means of orders (*ordonnances*), meant only to conduct the proceedings,[32] rather than judgments, so that it was doubtful whether they were included within the meaning of the term "decisions".

While during the period of activity of the PCIJ, this debate was simply theoretical, it became of practical importance for the ICJ, with the increase in "unwilling respondents", especially in highly political cases.[33] This was already made clear in the first provisional measures request made before the new Court, in the *Anglo-Iranian Oil Co.* case (United Kingdom v. Iran). The case was initiated in 1951 by the United Kingdom, regarding the Iranian Oil Nationalisation Acts, which the applicant claimed constituted a "unilateral annulment" of the 1933 Agreement between the Imperial Government of Persia and the Anglo-Persian Oil Company. A request for provisional measures was made so that Iran was prevented from implementing the nationalisation process until the merits of the case could be decided.[34] Iran's only

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[29] MANI, V. S. Interim Measures of Protection. Article 41 of the ICJ Statute and Article 94 of the UN Charter. Indian Journal of International Law, vol. 10, 1970, pp. 359-372, at 367.

[30] The Electricity Company of Sofia nd Bulgaria (Belgium v. Bulgaria). Interim Measures of Protection, Order of 5th December 1939, *PCIJ Reports Series A/B* No. 79, p. 194, at 199. (hereinafter, "Electricity Company, Provisional Measures"). Some scholars criticise this argument that attributes the position of general principle of law to the duty to preserve the *status quo* until a final judgment on the dispute can be rendered, as they affirm that Article 41 would be superfluous under this assertion. If a duty to preserve the *status quo* is a general principle of international law, then there would be no need for imposing additional duties on the Parties by means of provisional measures. This would indicate that this general duty has distinct effects from those of interim measures. On this, see: CHENG, Bin. General Principles of Law as Applied by International Courts and Tribunals. Cambridge: Cambridge University Press, 1953, at 267-273. For an opposing view, see: CROCKETT, C. H. The Effects of Interim Measures of Protection in the International Court of Justice. *California Western International Law Journal,* vol. 7, no. 2, 1977, pp. 348-384, at 366.

[31] Mani, supra fn. 29; LANDO, Massimo. Compliance with Provisional Measures Indicated by the International Court of Justice. *Journal of International Dispute Settlement*, vol. 8, no.1, 2017, p. 22-55, at 24.

[32] Article 48 of the Statute.

[33] Rosenne, *supra* fn. 25, p. 34.

[34] PAHUJA, Sundhya; STORR, Cait. Rethinking Iran and International Law: The Anglo-Iranian oil Company Case Revisited. In: CRAWFORD, James *et al* (eds). *The International Legal Order: Current*

response was to reject the Court's jurisdiction in the case, arguing that the "exercise of the right of sovereignty is not subject to complaint."[35] The respondent did not appear before the Court at the provisional measures hearings.[36]

The Court considered that its jurisdiction was sufficiently established for the provisional measures stage since the applicant's claim could not be accepted *a priori* as falling outside the scope of international jurisdiction.[37] It, therefore, indicated a number of measures to preserve the alleged rights of the applicant and to prevent the aggravation of the dispute, including that "the Company's operations in Iran should continue under the direction of its management as it was constituted prior to May 1st, 1951."[38] In keeping with its position that the ICJ had no competence to issue interim orders, the Iranian Government proceeded with the implementation of the Nationalisation Acts.[39]

The United Kingdom resorted to the Security Council, submitting a motion under Article 94(2) of the UN Charter,[40] to call on Iran to comply with the provisional measures prescribed by the Court.[41] The Council voted to place the matter on its agenda, but, as the matter of the Court's jurisdiction was again brought forth by Iran, the members were unable to reach an agreement, and decided to postpone the debate until a judgment on the preliminary objections was delivered.[42] It did not, therefore, use the opportunity to settle the debate regarding the mandatory character of such measures. As the ICJ later ended the proceedings by accepting the respondent's objections to jurisdiction, the provisional measures indicated, already not complied with, were

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Needs and Possible Responses, Essays in Honour of Djamchid Momtaz. Leiden: Brill Nijhoff, 2017, pp. 53-74.

[35] Anglo-Iranian Oil Co. Case (United Kingdom v. Iran). Request for the Indication of Interim Measures of Protection, Order of July 5th, 1951, *I. C. J. Reports 1951*, p. 89, at 92. [hereinafter, "Anglo-Iranian Oil, Provisional Measures"]

[36] Ibid.

[37] Ibid, at 93.

[38] Ibid, at 94.

[39] Pahuja, Storr, supra fn. 34.

[40] Article 94. [...] 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. (UNITED NATIONS. Charter of the United Nations. 26 June 1945. Available at https://www.un.org/en/about-us/un-charter/full-text. Accessed 02 February 2024.

[41] UN Security Council Official Records. Complaint of failure by the Iranian Government to comply with provisional measures indicated by the International Court of Justice in the Anglo-Iranian Oil Company case (S/2357). Sixth Year, 559th Meeting: 1st October 1951.

[42] Pahuja, Storr, supra fn. 34.; BROWN, Brendan F. The Juridicial Implications of the Anglo-Iranian Oil Company Case. Washington University Law Quarterly, vol. 1952, no. 3, June 1952, pp. 384-397.

repealed and any discussion of the matter on the Security Council was rendered without object.[43]

Another less-than-favourable situation to the Court's credibility and effectiveness due to the uncertainty of the parties' obligations deriving from provisional measures arose in the *Tehran Hostages* case (United States of America v. Iran). In November 1979, the United States Embassy in Tehran was occupied by demonstrators, who seised and detained Embassy personnel, including consular and non-American staff, and visitors who were present on the premises at the time.[44] In December of the same year, the United States filed an application before the Court, alleging that the Iranian government had violated its customary and conventional obligations to ensure the inviolability of diplomatic and consular officials and premises, since it had not intervened in the occupation of the Embassy and, instead, had been giving direct support to the demonstrators.[45] In its request for provisional measures, the applicant mainly sought to have Iran release the hostages immediately, facilitate their safe departure from the country and restore the United States' control of the embassy.[46]

Similarly to its conduct in the *Anglo-Iranian Oil* dispute, Iran did not appear before the ICJ but merely directed a letter in which it argued that the Court should not take cognisance of the case.[47] Nonetheless, the provisional measures requested were granted by the Court in December 1979, which also instructed the parties not to aggravate the dispute.[48] Despite the Order and the pressure from other international organs, Iran did not take any measures to ensure the release of the hostages and continued not to take part in the ICJ proceedings.

In the judgment on the merits, rendered in May 1980, the Court reinforced its observations on the Order regarding the essential character of obligations invoked in the case and stated its "deep regret that the situation which occasioned those observations has not been rectified since they were made."[49] Despite not specifically

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[43] SAŁKIEWICZ-MUNNERLYN, Ewa. *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection*. The Hague: T.M.C. Asser Press, 2022, at 80; Pahuja, Storr, supra fn. 34.
[44] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). Request for the Indication of Provisional Measures, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7, at 17, para. 34. [hereinafter, "Tehran Hostages, Provisional Measures"].
[45] JANIS, Mark Weston. The Role of the International Court in the Hostages Crisis. *Connecticut Law Review*, vol. 13, no. 2, 1981, pp. 263-289, at 264.
[46] Tehran Hostages, Provisional Measures, at 12, para. 12.
[47] Ibid, at 10-11, para. 8.
[48] Ibid, at 21, para. 47.1.b.
[49] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3, at 42, para. 92.

addressing the matter of the binding character of the order, the Court also made a point to censure the United States for its military operation in the Iranian territory on April 1980, recalling the non-aggravation measure it had indicated in the provisional measures order.[50]

The role played by the Court in such a highly publicised situation brought more attention to the ineffectiveness of the institute of provisional measures since the lack of compliance with such decisions was hardly an exception.[51] Given that the institute constitutes the main mechanism, if not the only one, which allows the Court to act rapidly and address urgent situations, the lack of tools to support these decisions, both within the Court's procedure and from external organs, cast doubt on its ability to provide any relief during crises.[52] As one scholar pointed out, "One can hardly avoid the conclusion that widespread noncompliance with Court orders is bound to undermine confidence in the credibility of international adjudication."[53]

Afterwards, the Court still attempted to assert the authority of provisional measures orders, without explicitly conferring upon them a binding character, in the *Nicaragua* case (Nicaragua v. United States of America). The famous case initiated in 1984 concerned the responsibility of the United States for military and paramilitary activities directed against Nicaragua, including mining of ports, attacks against oil installations, trespassing Nicaraguan airspace and involvement in the activities of rebel

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[50] Ibid, at 43, para. 93.

[51] At that point, the Court had issued eight other orders of provisional measures, five of which actually granted the requests. None of the five orders, all of which were delivered in cases involving objections to the Court's jurisdiction by the respondents, had been complied with. (Anglo-Iranian Oil Co. (United Kingdom v. Iran). Request for the Indication of Interim Measures of Protection, Order of 5 July 1951, *I. C. J. Reports 1951*, p. 89 (order granting interim measures); Interhandel (Switzerland v. United States), Request for the Indication of Interim Measures of Protection, Order of 24 October, 1957, *I. C. J. Reports 1957*, p. 105 (order denying interim measures); Fisheries Jurisdiction (United Kingdom v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August, 1972, *I. C. J. Reports 1972*, p. 12; Fisheries Jurisdiction (West Germany v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August, 1972, *I. C. J. Reports 1972*, p. 30 (orders granting interim protection); Nuclear Tests (Australia v. France), Request for the Indication of Interim Measures of Protection, Order of 22 June 1973, *I. C. J. Reports 1973*, p. 99; Nuclear Tests (New Zealand v. France), Request for the Indication of Interim Measures of Protection, Order of 22 June 1973, *I. C. J. Reports 1973*, p. 135 (orders granting interim protection); Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India). Request for the Indication of Interim Measures of Protection, Order of 13 July 1973, *I. C. J. Reports 1973*, p. 328 (order denying interim measures); Aegean Sea Continental Shelf Case (Greece v. Turkey). Request for the Indication of Interim Measures of Protection, Order of 11 September 1976, *I. C. J. Reports 1976*, p. 3 (order denying interim protection).)

[52] HAVER, Peter. The Status of Interim Measures of the International Court of Justice After the Iranian-Hostage Crisis. California Western international law Journal, vol. 11, n. 3, 1981, pp. 515-542.

[53] RAFAT, Amir. The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran. *Denver Journal of International Law & Policy*, vol. 10, no. 3, 1981, pp. 425-462, at 436.

groups to overthrow the Sandinista government (the so-called *contras*).[54] Nicaragua requested provisional measures, which were granted by the Court in an order of May 1984, requiring the respondent to cease and refrain from restricting and endangering access to Nicaragua's ports and to respect the applicant's rights to sovereignty and political independence, in particular by refraining from the threat or use of force. Both parties were ordered not to aggravate or extend the dispute or take any action "which might prejudice the rights of the other Party."[55] Amidst a heated debate regarding the Court's jurisdiction, or lack thereof, in the case, which eventually led to the respondent not participating in the merits phase of the proceedings,[56] Nicaragua resorted to other UN organs to call on the United States to comply with the order, as the respondent maintained its total trade embargo on Nicaragua and continued to provide the *contras* with weapons and supplies.[57]

In the final judgment of the case, referring to the measures of non-aggravation of the dispute that it had indicated, the Court affirmed the following:

> When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.[58]

Despite including this *dictum* in the judgment, the Court didn't find it necessary to use the opportunity to impose any penalties on the respondent for not carrying out the measures indicated, nor to make a more assertive statement to answer the question of the mandatory character of provisional measures. It is notable, however, that, in stating the importance of the parties' observance of the measures decided upon by the Court, it

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[54]BORDIN, Fernando Lusa. The Nicaragua v. United States Case: An Overview of the Epochal Judgments. In: OBREGON, E. S.; SAMSON, B. (Orgs.). *Nicaragua Before the International Court of Justice*. Cham: Springer International Publishing, 2018, p. 59-83; KOLB, Robert. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (1984 to 1986). In: BJORGE, Eirik; MILES, Cameron (eds). *Landmark Cases in Public International Law*. Oxford: Hart Publishing, 2017, p. 349-376, at 350.

[55] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Provisional Measures, Order of 10 May 1984, *I.C.J. Reports 1984*, p. 169, at 187, para. 41.B [hereinafter, "Nicaragua, Provisional Measures"].

[56] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. *I.C.J. Reports 1986*, p. 14, at 20, para. 17 [hereinafter, "Nicaragua, Judgment on the Merits"]; See, also: Bordin, *supra* fn. 54; Kolb, *supra* fn. 54.

[57] RAMSDEN, Michael; ZIXIN, Jiang. The Dialogic Function of I.C.J. Provisional Measures Decisions in the U.N. Political Organs: Assessing the Evidence. *American University International Law Review*, vol. 37, no. 3, 2023, pp. 901-944, at 915-919; 928-931.

[58] Nicaragua, Judgment on the Merits, at 144, para. 289.

emphasised that the dispute concerned a situation of armed conflict. The possibility of human lives being lost has been considered, throughout the ICJ's jurisprudence, as a circumstance of great weight for provisional measures to be indicated[59] and, in such a situation, it finds especially grave for such measures to go unobserved by the parties.

Ultimately, it was in a situation of loss of life that the Court settled the matter definitively in the 2001 judgment of the *LaGrand* case (Germany v. United States of America). Walter LaGrand was a German citizen living in the United States, who was arrested and sentenced to the death penalty in the state of Arizona, along with his brother Karl, after an attempted armed robbery in 1982 that resulted in the death of one person and another facing serious injuries.[60] The LaGrand brothers were kept in custody until 1999, and Karl had already been executed when the German government filed an application before the International Court of Justice, on the basis that the brothers were entitled to consular assistance under Article 36 of the Vienna Convention on Consular Relations (VCCR), which the US authorities had failed to provide.[61]

Germany requested provisional measures to halt Walter's execution, which was scheduled to take place the following day. The Court took less than 24 hours to make its decision on the request, dispensing oral submissions from either side and, relying on its power to indicate interim relief *proprio motu*,[62] ordered that "[t]he United States of

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[59] See, e.g. Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). Order of 10 November, 1998, *I. C. J. Reports 1998*, p. 426; LaGrand (Germany v. United States of America). Provisional Measures, Order of 3 March 1999, I. C. J. Reports 1999, p. 9; Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, *I. C. J. Reports 2003*, p. 77; Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 231; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, *I.C.J. Reports 2020*, p. 3; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, *I.C.J. Reports 2022*, p. 211; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Accessed 2 February 2024 (not yet published). For a further discussion of this topic, see, also: ZYBERI, Gentian. Provisional Measures of the International Court of Justice in Armed Conflict Situations. Leiden Journal of International Law, vol. 23, no. 3, 2010, pp 571-584; RIETER, Eva. The International Court of Justice and Provisional Measures Involving the Fate of Persons. In: KADELBACH, Stefan et al (eds). *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts*. Cham: Springer International Publishing, 2019, pp. 127-170.

[60] MILES, Cameron. LaGrand (Germany v. United States of America) (2001). In: BJORGE, Eirik; MILES, Cameron (eds). *Landmark Cases in Public International Law*. Oxford: Hart Publishing, 2017, pp. 509-538, at 509-510.

[61] STEPHENS, Tim. The LaGrand Case (Federal Republic of Germany v. United States of America). The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A right for what purpose?. *Melbourne Journal of International Law*, vol. 3, no. 1, 2002.

[62] The power to indicate measures *proprio motu* is based on Article 75 of the Rules of Court. For a further examination of this provision, see Section 3.2.

America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."[63] Nonetheless, the execution took place, in defiance of the provisional measures, with only 24 hours of delay, since the Governor of Arizona had earlier declared that she would not stay LaGrand's execution unless ordered to do so by the United States Supreme Court. While Germany made an emergency application to the Supreme Court, it declined to intervene.[64] A similar case of Breard, a Paraguayan citizen sentenced to the death penalty in the state of Virginia and executed just a year prior, was invoked as precedent.[65]

The applicant immediately condemned the disregard of the provisional measures by the US authorities and took a course of action in the proceedings, unlike the previous cases of non-compliance, by requesting, in its written and oral statements, that the Court confirm the binding character of the order. Therefore, it intended for the respondent to be held responsible for both the breach of its obligations under the VCCR and the obligation to act in accordance with the interim relief ordered by the Court.[66] In its memorial, Germany addressed the inconsistency between the French and English versions of Article 41 and defended a teleological approach to reconciling both texts, as provided for in Article 33(4) of the Vienna Convention on the Law of Treaties (VCLT). It also stressed the principle of "institutional effectiveness" as conferring mandatory character to provisional measures, since the parties could not be allowed to take action to frustrate an opponent's claim in a pending dispute before an international court.[67]

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[63]LaGrand (Germany v. United States of America). Provisional Measures, Order of 3 March 1999, *I.C.J. Reports* 1999, p. 9, at 16, para. 29. [hereinafter, "LaGrand, Provisional Measures"].

[64] Miles, *supra* fn. 60, at 521-522.

[65] On 3 April 1998, Paraguay filed an Application instituting proceedings against the United States of America concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963. Paraguay based the jurisdiction of the Court on Article I of the Optional Protocol to the VCCR, alleging that, in 1992, the authorities of the Commonwealth of Virginia had arrested a Paraguayan national, Mr. Angel Francisco Breard, charged and convicted him of culpable homicide and sentenced him to death without informing him of his rights as required by Article 36, paragraph 1 (b), of the Convention, including the right to consular assistance. Paraguay also submitted a Request for the indication of provisional measures to ensure that Mr. Breard was not executed pending a decision by the Court, which was granted by the Court on 9 April 1998. Nonetheless, on 14 April 1998, the United States Supreme Court ruled that the Vienna Convention did not clearly provide a foreign nation with a private right of action in U.S. courts and that Breard would not receive a stay of execution or other relief under the Convention. He was executed by the Commonwealth of Virginia that same day. In November 1998, Paraguay requested the discontinuance of the case before the ICJ. (Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). Order of 10 November, 1998, *I. C. J. Reports 1998*, p. 426).

[66] LaGrand (Germany v. United States of America), Judgment, *I.C.J. Reports 2001*, p. 466, at 498-499, para 94-95. [hereinafter, "LaGrand, Judgment"].

[67] LaGrand (Germany v. United States of America), Memorial of the Federal Republic of Germany, 16 September 1999, p. 136-172. Available at https://www.icj-cij.org/sites/default/files/case-related/104/8552.pdf. Accessed 15 December 2023.

On the other hand, the United States countered that both the language of Article 41 and the very terms of the Court's order did not have the connotation of creating legal obligations, which could also not be deduced from the Statute's drafting history. The respondent also invoked the Court's jurisprudence and the practice of States pertaining to provisional measures to refute the German arguments.[68]

The Court began its analysis of the submission by stating that neither itself nor its predecessor had ever been called explicitly to rule on the binding character of decisions under Article 41 of the Statute and that the dispute at hand essentially concerned the interpretation of that provisional. It then turned to Article 31 of the VCLT, as reflective of customary international law, as a basis for its interpretative exercise, according to which "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose."[69] In analysing both authoritative versions of the text, it came to the conclusion that the English and French versions were not "in total harmony",[70] and resorted to Article 33(4) of the VCLT, as invoked in the German submissions, which provided that "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[71] Under this approach, it made the following assertion:

> The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that *the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court*. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[72]

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[68] LaGrand (Germany v. United States of America), Counter-Memorial of the United States of America, 27 March 2000, p. 106-136. Available at https://www.icj-cij.org/sites/default/files/case-related/104/8554.pdf. Accessed 15 December 2023.
[69] LaGrand, Judgment, at 501, para. 99.
[70] Ibid, at 502, para. 101.
[71] UNITED NATIONS. Vienna Convention on the Law of Treaties. *United Nations Treaty Series*, vol. 1155, May 1969, p. 331.
[72] LaGrand, Judgment, at 502-503, para. 102, emphasis added.

The Court also made reference to its own jurisprudence and highlighted the PCIJ's precedent in *Electricity Company of Sofia and Bulgaria* that acknowledged the principle "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."[73] It found it unnecessary to resort to the preparatory works of the Statute, but it did assert that the drafting history of Article 41 did not preclude the conclusion that provisional measures were binding upon the parties, emphasising that the lack of means of execution, as the main reason the drafters decided on the term "indicate" rather than "order", and the lack of binding force are two different matters. The same conclusion was reached in regard to Article 94(1) of the UN Charter, with the Court affirming that whether or not the term "decision" applied to provisional measures would "in no way preclude their being accorded binding force under Article 41 of the Statute."[74]

After definitively declaring the mandatory value of the provisional measures indicated in March 1999, the ICJ went on to analyse whether they were complied with by the United States authorities, reaching the conclusion that the respondent had not, in fact, taken all the measures in its power to ensure the stay of Walter LaGrand's execution.[75] Despite the fact that Germany had not included a claim for reparation, the Court implied that such a claim could have been granted, noting that, had it been the case, it would have to consider the fact that, at the time of the order, there was not a definitive assertion in its case law of the binding character of decisions under Article 41.[76]

The obligatory character of provisional measures orders was also acknowledged in the operative part of the judgment, in which the Court found that "by failing to take all the measures at its disposal to ensure that Walter LaGrand was not executed (…), the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999." Judge Oda, one of two judges to oppose this paragraph, appended a dissenting opinion to the judgment, in which it considered addressing the question of whether or not provisional measures

[73] Electricity Company, at 199.
[74] LaGrand, Judgment, at 506, para. 108.
[75] Ibid, at 506-508, para. 110-115.
[76] Ibid, at 508-509, para. 116.

were binding as "an empty, unnecessary exercise,"[77] pointing out that the matter of responsibility of a party for not complying with an order of provisional measures had never arisen before in the Court's jurisprudence.[78] On the other hand, Judge Parra-Aranguren, who also voted against paragraph 5, did so considering that the Court did not have jurisdiction to decide the matter, since it arose, not from the Vienna Convention on Consular Relations, but from the interpretation of the Court's own Statute.[79]

The reaction to the *LaGrand* judgment was mixed, with most commentators considering the decision as a landmark in the history of the Court,[80] while others were less enthusiastic. Some expressed concerns that such a finding would result in a general reluctance of States to seek provisional measures or weaken the authority of the Court if the interim measures orders remained unobserved.[81] Hugh Thirlway criticised the linguistic analysis adopted by the Court and questioned why had it not taken the opportunity to settle the issue in previous opportunities,[82] while Sir Robert Jennings undermined its practical relevance, as he saw artificiality in the extreme urgency invoked both by the applicant and by the Court to justify the use of its powers to indicate measures *proprio motu*.[83]

Regarding the reaction of the respondent on the case, the United States authorities attributed little value to the Court's assertions regarding the VCCR

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[77] LaGrand (Germany v. United States of America), Judgment, Dissenting Opinion of Judge Oda, *I.C.J. Reports 2001*, p. 525, at 539, para. 34.
[78] Ibid.
[79] LaGrand (Germany v. United States of America), Judgment, Separate Opinion of Judge Parra-Aranguren, *I.C.J. Reports 2001*, p. 544, at 547, para. 15.
[80] See, e.g.: ACEVES, William J. LaGrand (Germany v. United States). *The American Journal of International Law*, vol. 96, no. 1, 2002, pp. 210-218; YANG, Xiaodong. Thou Shalt Not Violate Provisional Measures. *The Cambridge Law Journal*, vol. 60, no. 3, 2001, pp. 441-446; SCHABAS, William A. The ICJ Ruling Against the United States: Is it Really About the Death Penalty?. *The Yale Journal of International Law*, vol. 27, 2002, pp. 445-452; Stephens, *supra* fn. 61; MENNECKE, Martin; TAMS, Christian J. LaGrand case (Germany v. United States of America). International and Comparative Law Quarterly, vol. 51, no. 2, 2002, pp. 449-455; KOLB, Robert. Note on New International case law concerning the Binding Character of Provisional Measures. *Nordic Journal of International Law*, vol. 74, no. 1, 2005, pp. 117-29.
[81] See, e.g.: FITZPATRICK, Joan. The Unreality of International Law in the United States and the LaGrand Case. *Yale Journal of International Law*, vol. 27, no. 2, 2002, pp. 427-434; Aceves, supra fn. 80; MANOUVEL, Mita. Métamorphose de l'article 41 du Statut de la C.I.J. *Revue Générale de Droit International Public*, vol. 106, no. 1, 2002, pp. 103-136; MATRINGE, Jean. L'arrêt de la Cour internationale de Justice dans l'affaire LaGrand (Allemagne c. États-Unis d'Amérique) du 27 juin 2001. *Annuaire français de droit international*, vol. 48, no. 1, 2002. pp. 215-256.
[82] THIRLWAY, Hugh. The Law and Procedure of the International Court of Justice 1960-1989 - Part Twelve. *British Yearbook of International Law*, vol. 72, no. 1, 2002, pp. 37-181, at 111-126.
[83] JENNINGS, Robert. The LaGrand Case. *The Law and Practice of International Courts and Tribunals*, vol.1, n. 1, 2002, pp. 13-54, at 54.

obligations, as past practice had shown would be the case.[84] It is not coincidental, therefore, that the first case in which provisional measures were requested after the *LaGrand* judgment was eerily similar to the former situation, involving 54 Mexican citizens on death row in the United States, who were allegedly deprived of their right to consular assistance at the time of their arrest and trial. The case of *Avena and Other Mexican Nationals* (Mexico v. United States of America) was initiated in January 2003 and accompanied by a request for provisional measures identifying three of the 54 citizens who were to face execution in the six months following. The ICJ, in similar terms to the LaGrand 1999 order, granted the interim relief, this time after hearing oral arguments from both parties regarding the request, ordering the respondent to take all measures in its power to ensure the individuals in question were not executed pending the final decision on the case.[85] While the response from some authorities was not welcoming of the decision,[86] the order was complied with, since both of the states in which the three citizens were incarcerated refrained from setting execution dates pending the final judgment.[87] Nonetheless, after the Court found, on the merits, that all of the Mexican citizens represented in *Avena* were entitled to effective review and reconsideration of their convictions,[88] the US reacted by denouncing the Optional Protocol of the VCCR, thereby depriving the Court of jurisdiction to entertain any case on similar grounds.[89]

The Court consistently reaffirmed the *LaGrand* principle in its subsequent case law. The temporal problems with this finding, specifically regarding still pending cases with provisional measures orders that had taken place before the 2001 judgment, were

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[84] Aceves, *supra* fn. 80, at 218; PAULUS, Andreas L. From Neglect to Defiance? The United States and International Adjudication. *European Journal of International Law*, vol. 15, no. 4, 2004, pp. 783-812.

[85] Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, *I.C.J. Reports 2003*, p. 77, at 83, para. 20-25; 91-92, para. 59. [hereinafter, "Avena, Provisional Measures"].

[86] The government of the state of Texas, where two of the three nationals were detained, rejected the authority of the Court, by stating that "according to our reading of the law and the treaty, there is no authority for the federal government or the World Court to prohibit Texas from exercising the laws passed by our legislature." (HINES, Cragg. Consular Rights, Station House Wrongs. Houston Chronicles, 23 February 2003. Available at https://www.chron.com/opinion/article/hines-consular-rights-station-house-wrongs-2130760.php. Accessed 23 January 2024.)

[87] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, *I.C.J. Reports 2004*, p. 12, at 70, para. 152. [hereinafter, "Avena, Judgment"].

[88] Ibid, at 72, para. 153(9).

[89] HOULSHOUSER, Linda. Notice under Article 36: The Vienna Convention Dilemma. *South Carolina Journal of International Law and Business*, v. 3, 2006, pp. 99-126; QUIGLEY, John. The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences. *Duke Journal of Comparative and International Law*, v. 19, 2009, pp. 263-305.

implicitly resolved in the 2005 judgment of the *Armed Activities in the Territory of the Congo* case (Democratic Republic of the Congo v. Uganda). In 2000, the Court granted the DRC's request for provisional measures, ordering both parties to respect their international obligations under the UN Charter, human rights law and humanitarian law, as well as not take any actions that could prejudice the other Parties' rights or aggravate the dispute.[90] Afterwards, during the written and oral proceedings, the applicant submitted that Uganda had violated the order of provisional measures. The Court quoted its pronouncement in *LaGrand* and, as it had found Uganda responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces in the territory of the DRC, that extended throughout the period when Ugandan troops were present in the DRC, including after the date of the order of provisional measures in 2000 until their final withdrawal in 2003, it concluded that the respondent had, in fact, not complied with the provisional measures indicated.[91] It noted, however, that the measures were directed at both parties and that its finding "is without prejudice to the question as to whether the DRC did not also fail to comply."[92]

Similarly, in the *Bosnian Genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro), the Court had indicated provisional measures in April 1993, in which it called on the respondent to take all measures within its power to prevent commission of the crime of genocide, including ensuring that any military or paramilitary groups, irregular armed units, organisations and persons, subject to its control, direction or influence, do not commit any acts of genocide.[93] Those measures were reiterated in a separate Order in September 1993.[94] The final judgment on the case only took place in 2007, in which the Court found that the massacres at Srebrenica in July 1995 constituted a genocide, which the respondent had failed to prevent, in breach of its obligations of the 1948 Genocide Convention. Due to its findings in relation to the applicant's main submissions, the Court had no problem concluding that the respondent had also violated the provisional measures ordered in 1993, by failing to prevent the commission of

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[90]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I.C.J. Reports 2000*, p. 111, at 129, para. 47.
[91]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, *I.C.J. Reports 2005*, p. 168, at 259, para. 264.
[92] Ibid, at 259, para. 265.
[93] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, p. 3, at 24, para. 52.
[94] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, *I.C.J. Reports 1993*, p. 325, at 349-350, para. 61.

genocide by groups under its influence.[95] It went a step further from the *Armed Activities* decision, by stating that, although the binding character of provisional measures had only been definitively asserted years after the provisional measures in the case had been ordered, "this [did] not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset."[96]

In practice, other implications of this recognised legally binding character are still partially uncertain. Although the possibility of international responsibility deriving from the inobservance of interim measures is established,[97] the failure to comply with them does not affect the continuation of the procedure in the same case. An order for provisional measures also does not constitute *res judicata* within the meaning of Articles 59 and 60 of the Statute, since, by its very nature, it cannot be a definitive decision.[98] The possibility to resort to the Security Council, under Article 94(2) of the UN Charter, in case of non-compliance, although had been attempted before, as seen in the *Anglo-Iranian Oil* case, is not entirely ascertained in practice,[99] since, according to

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[95] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, *I.C.J. Reports 2007*, p. 43, at 231, para. 456.

[96] Ibid, at 230, para. 452.

[97] LaGrand, Judgment, at 508, para. 116. See, also: Oellers-Frahm, supra fn. 2, at 1346-1347; LEE-IWAMOTO, Yoshiyuki. The Repercussions of the LaGrand Judgment: Recent ICJ Jurisprudence of Provisional Measures. *Japanese Yearbook of International Law*, vol. 55, 2012, pp. 237-262, at 252; MENDELSON, Maurice. State Responsibility for Breach of Interim Protection Orders of the International Court of Justice. In: FITZMAURICE, Malgosia; SAROOSHI, Dan (eds). *Issues of State Responsibility Before International Judicial Institutions*. Oxford: Hart Publishing, 2004, pp. 35-51.

[98] The principle of res judicata has been construed by the ICJ in the Bosnian Genocide case: "The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose." (Bosnian Genocide, Judgment, at 90, para. 115. Further: KAMMERHOFER, Jörg. Beyond the res judicata doctrine: The nomomechanics of ICJ interpretation judgments. *Leiden Journal of International Law*, vol. 37, no. 1, 2024, pp. 206-227, at 207-208; Cheng, *supra* fn. 30, at 337-349.). Not only are provisional measures orders necessarily provisional, in the sense that they are meant to only have effects until a judgment on the merits of the case can be delivered, they also can be reviewed by the Court if new circumstances arise at any time before the final judgment under Articles 75 and 76 of the Rules of the Court.

[99] Other than the previously explored *Anglo-Iranian Oil Co.* case, access to the United Nations Security Council under Article 94(2) of the Charter for non-compliance with provisional measures was only attempted in the *Bosnian Genocide* case (Bosnia and Herzegovina v. Serbia). After the 1993 order of provisional measures, the applicant wrote a letter to the Council concerning the assaults on the town of Srebrenica by forces under the control of Yugoslavia, requesting the enforcement of the ICJ order. In response, the UNSC passed a resolution, taking note of the provisional measures order in its preamble. (UN Doc S/RES/819(1993) (16 April 1993).). For a further debate on the enforcement of ICJ decisions via Article 94(2), see: LANDO, Massimo, *supra* fn. 31, at 8-10; REISMAN, W. M. The Enforcement of International Judgments. *American Journal of International Law*, vol. 63, 1969, pp. 1-27, at 14; Guillaume, Gilbert. Enforcement of Decisions of the International Court of Justice. In:

the language of the article, it is a possibility reserved for the enforcement of judgments, rather than any type of decision. And, alas, despite great hopes to the contrary,[100] the level of State compliance hardly varied before and after the *LaGrand* judgment.[101]

Nevertheless, the acknowledgement of the binding character of provisional measures was certainly impactful. The explicit recognition that provisional measures created obligations to States drove the Court to develop more steadfast criteria to be considered in the analysis of this type of request. The undeniable evolution of the law of provisional measures that followed *LaGrand* echoed the sentiment, aptly put by one scholar, that "if States are required to treat provisional measures orders as binding, it creates a concomitant obligation on the Court to ensure that its provisional measures hearings and orders adhere to the same standards as its rulings on the merits."[102] The plausibility test itself is at least partially owed to the Court's conclusion in *LaGrand*. This is made clear by the separate opinion given by Judge Abraham in the 2006 provisional measures order on the *Pulp Mills* case (Argentina v. Uruguay):

> [T]he doctrine as to a clear separation of the issues on the merits from those concerning provisional protection, which I have always found to be misguided, might conceivably have been seen as in keeping with the widespread belief, before the *LaGrand* Judgment, that the Court's orders were not binding. With the Judgment of 27 June 2001, that ceased to be the case. It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated — and irreparably so — in the absence of the

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JASENTULIYANA, Nandasiri (ed). Perspectives on International Law. London: Kluwer Law Internationa, 1995, pp. 275-288, at 284.

[100] See, e.g.: SCHULTE, Constanze. *Compliance with the Decisions of the International Court of Justice*. Oxford: Oxford University Press, 2004, at 382; LLAMZON, Aloysius P. Jurisdiction and Compliance in Recent Decisions of the International Court of Justice. *European Journal of International Law*, vol. 18, no. 5, 2007, pp. 815-852, at 821; MENDELSON, Maurice. State Responsibility for Breach of Interim Protection Orders of the International Court of Justice. In: FITZMAURICE, Malgosia; SAROOSHI, Dan (eds). *Issues of State Responsibility Before International Judicial Institutions*. Oxford: Hart Publishing, 2004, pp. 35-51, at 51.

[101] See, e.g., LEONHARDSEN, Erlend M. Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when non-Compliance Is to Be Expected. Journal of International Dispute Settlement, vol. 5, no. 2, pp. 306–343. In the 15 decisions made by the Court granting provisional measures requests since the 2001 *LaGrand* judgment, as of November 2023, only in 5 can it be said that the measures were entirely complied with by the parties. (ALEXIANU, Matei. Provisional, but Not (Always) Pointless. EJIL: Talk!, November 3, 2023. Available at: https://www.ejiltalk.org/provisional-but-not-always-pointless-compliance-with-icj-provisional-measures/. Accessed 15 January 2024).

[102] Aceves, supra fn. 80, at 218.

> provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.[103]

In this instance, the French judge argued that the complete separation between the provisional measures stage and the merits was merely artificial. With the increased gravity of the interim relief proceedings, given its now recognised binding character, the Court could not simply order either party to take any measures to preserve the other's rights, in that way infringing upon State sovereignty, if it did not, first, ascertain whether those rights existed, at least *prima facie*, and were endangered. Judge Abraham supported the formal development of a criterion similar to the existence of *fumus boni iuris*, required by many domestic systems, as well as other international courts,[104] to evaluate whether the rights of the parties had any legal and factual foundation – whether they were *plausible* – before granting the party with a decision which, as temporary as it was, could also entail international responsibility in case of non-compliance. The plausibility test was formally developed and applied by the Court three years later, in the order of provisional measures of the *Obligation to Prosecute or Extradite* case (Belgium v. Senegal). In that sense, it is inextricably linked to the binding character of provisional measures.

3.1.3 Similar provisions in other international courts and tribunals

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[103] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, *I.C.J. Reports 2006*, p. 113 at 140, para. 8. (hereinafter, "Pulp Mills, 2006 Provisional Measures, Separate Opinion of Judge Abraham").

[104] Ibid. The Judge specifically references the Court of Justice of the European Communities (currently, the Court of Justice of the European Union - CJEU). In an Order of the President of the Court from 19 July 1995 in the case of Commission v. Atlantic Container Line AB and Others, the requisite of establishing a "*prima facie* case" for the purpose of ordering provisional measures was construed in the following terms: "[The applicant] argues that paragraph 49 of the order [...] transforms the test of '*fumus boni juris*' into a test of '*fumus non mali juris*', thus weakening the requirement, since an applicant need no longer demonstrate that the allegations in the main action are, prima facie, well-founded but merely that the case must not be obviously unfounded. In that regard, it must be noted that a number of different forms of wording have been used in the case law to define the condition relating to the establishment of a prima facie case, depending on the individual circumstances. *The wording of the order under appeal, referring to pleas in law which are not, prima facie, entirely ungrounded, is identical or similar to that used on a number of occasions by this Court or its President* [...]. *Such a form of wording shows that, in the opinion of the judge hearing the application, the arguments put forward by the applicant cannot be dismissed at that stage in the procedure without a more detailed examination.* It is clear from the case law cited above that the judge hearing an application may consider that, in the light of the circumstances of the case, such pleas in law provide prima facie justification for ordering suspension of the application of an act under Article 185 or interim measures under Article 186." (Order of the President of the Court of 19 July 1995, *Commission v. Atlantic Container Line AB and Others*, C-149/95, EU:C:1995:257, paragraphs 25-27, emphasis added).

Article 41 of the Statute of the PCIJ, as well as its practice, served as a model for a number of similar provisions in the respective constitutional instruments or rules of procedure of dispute settlement bodies established after World War II.[105] The 1948 Pact of Bogotá founded the Commission of Investigation and Conciliation, conferring upon the parties to a controversy the obligation to refrain from any act that might make conciliation more difficult after a request to convoke the Commission is received. Pending its convocation, the Council of the Organization of American States may make appropriate recommendations to the parties, at their request.[106] Within the framework of the Organization for Security and Co-operation in Europe (OSCE), the Convention on Conciliation and Arbitration also determines parties to a dispute shall refrain from conducts which may aggravate the situation or prevent the settlement of the dispute[107] and empowers Arbitral Tribunals constituted under it to "*indicate interim measures that ought to be taken by the parties to the dispute* to avoid an aggravation of the dispute, greater difficulty in reaching a solution, or the possibility of a future award of the Tribunal becoming unenforceable owing to the conduct of one or more of the parties to the dispute."[108] Here, the purposes of non-aggravation and preservation of the administration of justice are explicit in the text of the documents instituting the organs in question.

Even closer to the language of Article 41 is Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), which allows Investor-State Arbitral Tribunals to, "if it considers that the circumstances so require, *recommend* any provisional measures which *should* be taken to preserve the respective rights of either party."[109] Similarly to the drafting history of the PCIJ/ICJ provision, early versions of Article 47 included much stronger wording, clearly establishing a binding character for provisional measures and including sanctions for non-compliance, but the adopted text seemed rather straightforward in that

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[105] Oellers-Frahm, *supra* fn. 2, at 1312.
[106] Organization of American States (OAS). *American Treaty on Pacific Settlement ("Pact of Bogotá")*, Article XVI. OAS Treaty Series, No. 17 and 61, 30 April 1948.
[107] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE). *Convention on Conciliation and Arbitration within the CSCE*. Article 16. Adopted by the CSCE Council at Stockholm, on 15 December 1992. Available at https://www.osce.org/files/f/documents/a/0/111409_2.pdf. Accessed 17 January 2024.
[108] Ibid, Article 26.4, emphasis added.
[109] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID). *Convention on the Settlement of Investment Disputes between States and Nationals of Other States.* Article 47. Washington, 18 March 1965. Available at https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf. Accessed 17 January 2024 (emphasis added).

provisional measures were not binding upon the parties.[110] Nonetheless, ICSID tribunals started to controversially deliver binding provisional measures "recommendations",[111] leaving Article 47, in practice, with the same ambiguity as Article 41.[112] Currently, commentators understand there is virtually "universal acceptance that provisional measures under Art. 47 of the Convention have binding force."[113]

Article 41 also served as a starting point for delegates establishing the dispute settlement system for the UN Convention on the Law of the Sea (UNCLOS). The Convention was concluded when the ICJ had already been functioning for over 35 years, and, as such, was and continues to be influenced not only by its statutory provisions but also by its practice.[114] At that point, diplomatic practice showed impatience with the lack of binding force of provisional measures and this position was consolidated in the UNCLOS provisions.[115] Article 290 not only used the stronger verb "prescribe" to refer to the provisional measures under the system, it also determined in paragraph 6 that "[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article."[116] In that sense, it established explicitly that such measures were to be binding upon the parties, in contrast with the practice of the ICJ which was still 20 years away from reaching the same conclusion. Sensibly, Article 290(5) also determined that the court or tribunal seised of a dispute under UNCLOS must establish its jurisdiction on a *prima facie* basis prior to the granting of provisional measures[117] and that the situation was urgent as to require such measures to be ordered.

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[110] MILES, Cameron. The influence of the International Court of Justice in the law of provisional measures. In. ANDENAS, Mads; BJORGE, Eirik. *A Farewell to Fragmentation: Reassertion and Convergence in International Law*. Cambridge: Cambridge University Press, 2015, pp. 218-271, at 227.

[111] See, e.g.: Maffezini v Spain, *ICSID Case No. ARB/97/7*, Decision on Provisional Measures (28 October 1999) para 9; Pey Casado v Chile, *ICSID Case No. ARB/98/2*, Decision on Provisional Measures (25 September 2001) paras 17–26. See, also: SCHILL, Stephen W. et al (eds). Schreuer's Commentary on the ICSID Convention. 3.ed. Cambridge: Cambridge University Press, 2022, pp. 1060-1063; DAUTAJ, Ylli; GUSTAFSSON, Bruno. The Binding Nature of Provisional Measures "Recommendations" in ICSID Arbitrations. Kluwer Arbitration Blog, 27 June 2018. Available at https://arbitrationblog.kluwerarbitration.com/2018/06/27/binding-nature-provisional-recommendations-icsid-arbitration/. Accessed 2 February 2024.

[112] Miles, *supra* fn. 110.

[113] Schill, *supra* fn. 111, at 1063.

[114] Miles, *supra* fn. 110, at 224-225.

[115] Rosenne, *supra* fn. 25.

[116] United Nations Convention on the Law of the Sea (UNCLOS). Art. 290(6). Montego Bay, 10 December 1982. *United Nations Treaty Series,* vol. 1833, p. 3.

[117] Ibid, Art. 290(5). Article 41 of the Statute of the ICJ does not explicitly mention this condition and the matter of provisional measures indicated in cases of contested jurisdiction had generated some controversy, particularly in the *Anglo-Iranian Oil Co. case* (United Kingdom v. Iran). For a further discussion of *prima facie* jurisdiction in the context of the International Court of Justice, see Section 3.3.1. See, also: Mendelson, *supra* fn. 97; MILES, Cameron. *Provisional Measures before International Courts and tribunals*. Cambridge: Cambridge University Press, 2017, at 149-154.

Lastly, one interesting element of the provision refers to the purposes of provisional measures under the UNCLOS arrangement. Other than determining, such as Article 41, that the institute is intended to preserve the respective rights of the parties to the dispute, Article 290(1) also adds that provisional measures could be aimed at "prevent[ing] serious harm to the marine environment,"[118] which can be interpreted as showing more openness to the protection of community interests, beyond the specific rights of the parties and the traditional bilateral framework of international adjudication.[119] Although not mentioned explicitly, non-aggravation of the dispute is also understood to be a purpose of provisional measures under UNCLOS, and, despite its omission from the text, it has been "a constant feature of the Hamburg Tribunal's case law on provisional measures."[120]

Moreover, the European Court of Human Rights does not have, in its constituent instrument, an express provision permitting the award of provisional measures, which was suggested, but ignored at the time of drafting.[121] Nonetheless, the Court included such a provision in its procedural rules (current Rule 39), establishing that the Court *may indicate* interim measures that "*should be adopted* in the interests of the parties or of the proper conduct of the proceedings."[122] The verbs used are similar to the text of Article 41 of the ICJ Statute and it suffers from the same fault as to whether these measures are binding. Also similarly to the ICJ, the matter was settled by means of the case law. In the 2004 case of *Mamatkulov and Abdurasulovic v. Turkey*, the ECHR found that "any State Party to the Convention to which interim measures have been indicated [...] must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."[123] The

[118] UNCLOS, Art. 290(1).
[119] MAROTTI, Loris. A "Game of Give and Take": The ITLOS, the ICJ and Provisional Measures. In: PALOMBINO, Fulvio Maria; VIRZO, Roberto; ZARRA, Giovanni (Eds.). *Provisional Measures Issued By International Courts and Tribunals*.Haia: T. M. C. Asser Press, 2021, pp. 131-146, at 138.
[120] VIRZO, Roberto. 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: CRAWFORD, James *et al* (eds). *The International Legal Order: Current Needs and Possible Responses Essays in Honour of Djamchid Momtaz*. Leiden: Brill Nijhoff, 2017, pp. 519-532, at 525. See also: Marotti, *supra* fn. 119; LAING, Edward. A perspective on provisional measures under UNCLOS. *Netherlands Yearbook of International Law*, vol. 29, 1998, pp. 45-70.
[121] See: COUNCIL OF EUROPE. Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights. Volume I: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May-13 July 1949). The Hague: Brill Nijhoff, 1975, at 314.
[122] EUROPEAN COURT ON HUMAN RIGHTS. Rules of Court - Rule 39. Strasbourg, 22 January 2024. Available at https://www.echr.coe.int/documents/d/echr/rules_court_eng. Accessed 2 february 2024. (emphasis added).
[123] *Mamatkulov and Abdurasulovic v. Turkey*, 46827/99; 46951/99, Council of Europe: European Court of Human Rights, 6 February 2003, p. 33, para. 110. Available at https://www.refworld.org/jurisprudence/caselaw/echr/2003/en/31890. Accessed 2 February 2024.

decision made extensive references to the ICJ's jurisprudence and particularly its findings in *LaGrand*.[124]

Additionally in the field of international human rights adjudication, both Inter-American[125] and African Systems of Human Rights[126] have established mechanisms for interim protection, as well as many Committees created for monitoring UN Human Rights Treaties and empowered to hear communications from individuals, such the CCPR's Human Rights Committee,[127] the Committee on Economic Social and Cultural Rights,[128] the Committee Against Torture,[129] the Committee on the Elimination of Racial Discrimination[130] and the Committee on the Elimination of Discrimination Against Women.[131] Interestingly, some of them consider their respective interim

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[124] Ibid, at 15, para. 50-51; 31, para 103.

[125] "Article 63. [...] 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission." (ORGANIZATION OF AMERICAN STATES (OAS). American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969). The power of the Inter-American Commission to indicate precautionary measures is provided for in Article 5 of its rules of procedure (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Rules of Procedure of the Inter-American Commission on Human Rights, entered into force August 1st 2013. Available at https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/rulesiachr.asp. Accessed 2 February 2024).

[126] "Article 27. Findings. [...] 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration." (AFRICAN UNION. Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, entered into force Janury 25th 2004. Available at https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and. Accessed 2 February 2024.); The Commission is permitted to make "decisions on matters of emergency" under Rule 79 of its Rules of Procedure. (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. Rules of Procedure. Banjul, 26th May 2010. Available at https://achpr.au.int/en/rules-procedure. Accessed 2 February 2024.)

[127] Rule 94 of the Rules of procedure of the Human Rights Committee. CCPR/C/3/Rev.12, 04 January 2021, Available at: https://www.ohchr.org/en/treaty-bodies/ccpr/rules-procedure-and-working-methods. Accessed 2 February 2024.

[128] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - Article 5. A/RES/63/117, 10 December 2008. Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-economic-social-and. Accessed 2 February 2024.

[129] Rule 114 of the Rules of Procedure of the Committee Against Torture, Seventh Revised Edition. CAT/C/3/Rev.7, 5 July 2023, available at https://www.ohchr.org/en/treaty-bodies/cat/rules-procedure-and-working-methods. Accessed 2 February 2024.

[130] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Article 5. A/RES/54/4, 6 October 1999, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-elimination-all-forms. Accessed 2 February 2024.

[131] Rule 63 of the Rules of Procedure of the Committee on the Elimination of Discrimination Against Women, HRI/GEN/3/Rev.3 paras. p. 93-126, 28 May 2008. Available at https://www.ohchr.org/en/treaty-bodies/cedaw/rules-procedure-and-working-methods. Accessed 2 February 2024.

decisions as obligatory despite the fact that the final decisions delivered do not have legally binding status.[132]

3.2 The Rules of Court

Under Article 30 of the Statute of the Court, "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."[133] Unlike the Statute, which can only be amended by the same procedure as the UN Charter[134] and, as such, remains virtually unchanged since its adoption in 1945, the Rules are established by the members of the Court themselves and have been reformed in several occasions, to varying degrees.[135]

The Rules, particularly those pertaining to provisional measures, have been amended on the basis of experience.[136] In the 1922 version, the very first interaction of the Permanent Court with Article 41, only included one provision regarding interim measures, Article 57, which addressed the power of the President of the Court to indicate measures when the Court is not in session and provided that "[a]ny refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record."[137] The initial draft of the Rules, prepared by the Secretariat of the League of Nations, addressed provisional measures in its Article

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[132] The Human Rights Committee considers that "[f]ailure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol." (General Comment nº 33. Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights. Human Rights Committee, CCPR/C/GC/33, 25 June 2009.) Similarly, the Committee Against Torture considers that States parties have an obligation to cooperate with it in good faith in following orders of provisional measures, since they are "essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee." (Cecilia Rosana Núñez Chipana v. Venezuela, Communication No. 110/1998, CAT/C/21/D/110/1998, UN Committee Against Torture (CAT), 16 December 1998.) Within the Inter-American System of Human Rights, the Inter-American Commission also considers its precautionary measures to be binding. (Detainees in Guantanamo Bay, Cuba v. United States of America, Request for Precautionary Measures, Decision of Mar. 12, 2002, Inter-American Commission on Human Rights). On this, see: PASQUALUCCI, Jo M. Interim Measures in International Human Rights: Evolution and Harmonization. *Vanderbilt Journal of Transnational Law*, vol. 38, no. 1, 2005, pp. 1-49; KELLER, Helen; MARTI, Cedric. Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights. *Heidelberg Journal of International Law* [ZaöRV], vol. 73, no. 1, 2013, pp. 325-372.

[133] Statute of the International Court of Justice, Article 30.

[134] See Article 69 of the Statute of the International Court of Justice and Articles 108 and 109 of the Charter of the United Nations.

[135] The first Rules of Court were adopted by the PCIJ in 1922, and were modified in 1926, 1931 and 1936. Under the ICJ, Rules were adopted in 1946, 1972 and 1978, the latter being the current version, which has, since, been pointedly amended in 2001, 2005, 2019 and 2020.

[136] Oellers-Frahm, *supra* fn. 2, at 1309.

[137] Rules of Court, adopted by the Court March 24th 1922. *PCIJ Series D*, no. 1. The Hague: Van Langenhuysen Brothers, 1922.

35, detailing the operation of proceedings under Article 41 of the Statute. It asserted the power of the Court to indicate interim measures *proprio motu* or at the request of either party, as well as established the right of the party against which the measures would be directed to a hearing before they were indicated and the right of a third party to request the reconsideration of the suggested relief if they were to affect its legitimate interests.[138] Nonetheless, the Permanent Court's Committee on Procedure opted to exclude this provision, considering that, since the Court lacked means to ensure its "suggestions" would be carried out by the parties, there was no need to establish a special procedure regarding provisional measures. They did note, however, that, in a case in which one of the parties refused to comply with the recommended measures, damages should be awarded in the final judgment.[139] The provisions on interim relief, then, were limited to the aforementioned Article 57, which remained untouched in the 1926 amendments of the Rules. At that point, the Permanent Court had not yet been presented with a request for provisional measures and the changes made to other provisions were mostly a codification of practice accumulated in the first years of the PCIJ's existence.[140]

In 1931, however, another reform of the Rules took place and, following the recommendation of the 1929 Advisory Committee of Jurists,[141] Article 57 was substantially modified. By then, the Court had dealt with provisional measures requests on two occasions[142] and two problems were identified with the provision. First, judges were unsure if the power of the President to indicate interim measures solely was in accordance with Article 41, which only granted this power to the Court itself. Additionally, it was considered that the provision placed a burden on the figure of the President that could have political consequences.[143] Therefore, it was determined that,

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[138] "Article 35. Provisional measures for preserving the respective rights of the parties may be suggested at the request of one Party, or on the initiative of the Court. Before such measures are suggested, the party against whom they are directed should be entitled to a hearing. The measures suggested may be reconsidered at the request of a third par y (*sic*) who asserts that the measures, if carried out, would be harmful to his legitimate interests." (Preparation of the Rules of Court. Minutes of Meetings held during the Preliminary Session of the Court, with Annexes (January 30th to March 24th 1922). *PCIJ Series D*, no. 2. The Hague: A. W Sijthoff's Publishing Co., 1922, p. 262).

[139] Ibid, at 77, para. 109.

[140] PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ). *Ten Years of International Jurisdiction (1922–1932)*. Leiden: AW Sijthoff's Publishing, 1933, at 17–18; Oellers-Frahm, *supra* fn. 2, at 1309.

[141] 1929 Minutes of the Committee of Jurists, at 63-64.

[142] Denunciation of the Treaty of 2 November 1865 between China and Belgium. Interim Measures of Protection, Order of 8th January 1927, *PCIJ Reports Series A* No. 8, p.6; Case Concerning the Factory at Chorzow (Indemnities). Interim Measures of Protection, Order of 21st November 1927, *PCIJ Reports Series A* No. 12, p. 9.

[143] Miles, *supra* fn. 117, at 56.

instead of allowing the President of the Court to alone decide to indicate provisional measures, if the Court was not in session, the President had the duty to immediately reconvene it.[144]

The second issue raised was whether the Court had the power to indicate measures by its own initiative. While the text of Article 41 did not require a request from the parties, the judges feared a crisis of legitimacy.[145] They opted to use ambiguous language, without explicitly mentioning a power to indicate measures *proprio motu*, but rather ensuring that the President could convene the Court to analyse whether the award of interim relief was necessary, even in the absence of a request. To counterbalance this implied power, they added, similarly to the Secretariat's draft to the 1922 Rules, a requirement that the Court was to give the parties an opportunity to make their observations on the matter before it granted any provisional measures.[146]

The 1936 Rules saw an even bigger development of the law of provisional measures. The power of the Court to indicate interim measures by its own initiative was expressly recognised, despite not being entirely uncontroversial amongst the judges, [147] and the possibility that the measures indicated could differ from those requested was also included. The matter of the power of the President to act alone when the Court was not in session came back into the agenda, since the modification made in 1931, requiring the entire Court to be convened if any request for interim relief was made, had the potential to generate frivolous proceedings. [148] The judges adopted a compromise, permitting the President to grant requests for provisional measures – the possibility to award such relief *proprio motu* was not allowed in this situation – if necessary to enable the Court to give an effective decision until it could be reconvened. The right of the parties to make new requests for provisional measures based on new circumstances arising after a request had been rejected was also asserted. Article 57 then became

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[144] Modification of the Rules, 1931. *PCIJ Series D*, Second Addendum to No. 2. Leiden: A. W Sijthoff's Publishing Co., 1922, p. 181-187.
[145] Miles, *supra* fn. 117, at 56.
[146] The new Article 57 then read: "An application made to the Court by one or both of the parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose. If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient. In all cases, the Court shall only indicate measures of protection after giving the parties an opportunity of presenting their observations on the subject." (Statute and Rules of Court and Other Constitutional Documents, Rules or Regulations (With the modifications effected therein up to February 21st, 1931). 2nd edition. *PCIJ Series D*, No. 01. Leiden: AW Sijthoff's Publishing, 1931.).
[147] Miles, *supra* fn. 117, at 57.
[148] Elaboration of the Rules of Court of March 11th 1936. *PCIJ Series D*, Third Addendum to No. 02. Leiden: AW Sijthoff's Publishing, 1936, at 287-288.

Article 61, found under Heading II, regarding Contentious Proceedings, section I, titled "Procedure before the full Court", subsection II, which concerned "Occasional Rules."[149]

The 1936 Rules were the last under the Permanent Court of International Justice, and Article 61 was only applied in the one case before the Court had its activities interrupted by the outbreak of the Second World War in September 1939. In 1946, when the newly established International Court of Justice adopted its first set of Rules, largely based on the 1936 version,[150] Article 61 remained mostly the same, with the sole alteration being the suppression of paragraph 9, regarding the participation of judges *ad hoc* at the provisional measures stage.[151]

In 1967, finding the need to adapt the 1946 Rules to correspond to the requirements of a modern international tribunal,[152] the Court established a Committee for the Revision of the Rules of Court.[153] The works of this Committee resulted in a series of amendments adopted in 1972, to articles regarded as a priority. In that opportunity, there were no changes made to Article 61, which was merely renumbered as Article 66.[154]

The Committee proceeded with the revision process, which came to its conclusion in 1978, resulting in a new set of Rules. The 1978 Rules – still currently in

[149] "Interim Protection. Article 61. 1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed. 2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency. 3. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision. 4. The Court may indicate interim measures of protection other than those proposed in the request. 5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts. 6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures. 7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection. 8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures. 9. When the President has occasion to convene the members of the Court, judges who have been appointed under Article 31 of the Statute of the Court shall be convened if their presence can be assured at the date fixed by the President for hearing the parties." (Statute and Rules of Court. 4th edition (April 1940). *PCIJ Series D*, No. 01. Leiden: AW Sijthoff's Publishing, 1940.).

[150] Rosenne, *supra* fn. 21, at 1032.

[151] VI. The International Court of Justice - Annex I. Rules of Court (adopted on May 6, 1946). Yearbook of the United Nations, 1946-47, pp. 596-608. Available at: https://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC6.pdf. Accessed 10 December 2023.

[152] Rosenne, *supra* fn. 21, at 1033.

[153] In 1979, this became the standing Rules Committee.

[154] Oellers-Frahm, *supra* fn. 2, at 1310.

place – addressed the procedure regarding provisional measures in its Articles 73-78. Some of them merely expanded the equivalent paragraphs from the previous Article 61, while others represented innovations, as a consequence of problems which had arisen in previous cases.[155] The provisions also substituted the terms "interim measures of protection", which were used in the past versions of the Rules, with "provisional measures", in line with the wording adopted in Article 41 of the Statute. The heading of the section was changed to "Incidental proceedings" instead of "Occasional Rules." The new title is in reference to the expression incidental jurisdiction, meaning, as one scholar puts it, jurisdiction exercised "without the specific consent of the parties required for mainline jurisdiction."[156] This implies both that the Court must be duly seised of a case before a request of provisional measures can be granted and that such a request must be connected to the subject matter of the mainline proceedings.[157]

The 1978 Rules managed to articulate in a more detailed manner the capacities of the Court in provisional measures proceedings, based on the experience accumulated during the application of the provisions elaborated in 1936 and maintained in 1946 and 1972. Article 73(1) explicitly determines that the application for interim measures be made in written form, at any point in the proceedings, also acknowledging that provisional measures cannot be requested autonomously, but only in connection with a case. Paragraph (2) establishes the only substantial requirements for the admission of the request, which are that it specifies the reasons for it and the possible consequences if the measures are not granted, as well as the measures requested. This is directly connected to the text of Article 41 which specifies the purpose of the institute as being "to preserve the respective rights of either party." In that sense, the requesting party has the burden to convince the Court that, if the measures it calls for are not ordered, its rights are at risk of being damaged. It also serves to codify a condition developed in the

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[155] Ibid.

[156] Rosenne, *supra* fn. 21, at 1381.

[157] Ibid; Miles, *supra* fn. 117; LE FLOCH, Guillaume. Requirements for the Issuance of Provisional Measures. In: PALOMBINO, Fulvio Maria; VIRZO, Roberto; ZARRA, Giovanni (Eds.). *Provisional Measures Issued By International Courts and Tribunals*.Haia: T. M. C. Asser Press, 2021, pp. 19-54, at 33-36. In direct contrast with this proposition, late Brazilian Judge Cançado Trindade defended that provisional measures were to be seen as an autonomous regime. For this discussion, see, e.g.: TRINDADE, Antônio A. Cançado. The Autonomous Legal Regime of Provisional Measures of Protection. In: TRINDADE, Antônio A. Cançado. *Judge Antônio A. Cançado Trindade. The Construction of a Humanized International Law: A Collection of Individual Opinions (2013-2016), Volume 3.* Leiden: Brill Nijhoff, 2017, pp. 733-764; RIETER, Eva. Autonomy of Provisional Measures. In: PALOMBINO, Fulvio Maria; VIRZO, Roberto; ZARRA, Giovanni (Eds.). *Provisional Measures Issued By International Courts and Tribunals*.Haia: T. M. C. Asser Press, 2021, pp. 55-76. See, also, Section 4.3.

Court's jurisprudence, under which, for provisional measures to be granted, the requesting State must demonstrate a risk of irreparable harm to its rights.[158]

Article 74 establishes the urgent character of provisional measures proceedings, determining its priority over all other cases. Paragraphs (2) and (3) reproduce the text of Article 66 of the previous Rules, with the former indicating that the Court, if not in session, shall be convened with urgency for the proceedings and the latter that a hearing date should be fixed for both parties to make their observations on the application for interim relief. This condition was shown to be dispensable in extreme circumstances,[159] such as the *LaGrand* case, in which the request was made one day before the German national Walter LaGrand was set to be executed in the United States. The Court then dispensed the hearings and made its decision in less than 24 hours, not without ensuing protests from the respondent.[160] Paragraph (4), by its turn, concerns, once again, the power of the President of the Court to grant provisional measures requests when the Court is not in session. This version of the Rules largely follows the structure set up in 1936, with some textual modifications, stating that "[p]ending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."[161] This is an example of how the practice of the Court has shaped its procedural developments since the wording of the provision references the actions of the respective Presidents of the PCIJ and the ICJ in the *Prince von Pless* and the *Anglo-Iranian Oil* cases. The first instance happened while the 1931 Rules were in place, regarding a taxation dispute between Germany, acting on behalf of one of its nationals, and Poland. As two taxation orders issued on 20 April 1933 were to take effect 15 days later, President Adacti, deprived of his power to grant the request when the Court was not sitting by the latest reform of the Rules, wrote to the Polish authorities in a bid to have the time limit extended, which allowed for an emergency session of the Court to be convened for 10 May 1933.[162] In the *Anglo-Iranian Oil* dispute, President Basdevant made reference to its power under Article 61(3) of the 1946 Rules to send a telegram to

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[158] For a further explanation of this condition, see Section 3.3.3 below.
[159] Miles, *supra* fn. 117, at 91.
[160] See LaGrand, Provisional Measures. See, also, Section 3.1.2 above.
[161] INTERNATIONAL COURT OF JUSTICE. Rules of Court, adopted on 14 April 1978 and entered into force on 1 July 1978. Available at https://www.icj-cij.org/index.php/rules. Accessed 23 January 2024. [hereinafter, "1978 Rules of Court"].
[162] Prince von Pless Administration (Germany v. Poland). Correspondence, Le Président de la Cour au Ministre des Aff. Étr. De Pologne (télégramme), 5 May 1933. *PCIJ Series C*, No. 70, 1933, p. 388, at 429-430.

Iran, requesting the government to avoid any measures likely to render impossible or more difficult the execution of the judgment the Court might pronounce, or otherwise aggravate the dispute.[163] Based on both of these cases, Article 74(4), in practice, empowers the President to "correspond with the parties and recommend that measures resembling an official declaration of interim relief be taken pending further judicial action."[164] President Waldock made use of this prerogative in the *Tehran Hostages* case, as well as Acting President Weeramantry, in both *Breard* and *LaGrand*.[165]

Under Article 75 of the 1978 Rules, the Court has the power to indicate provisional measures *proprio motu*, i.e., by its own initiative, even if no request has been made, as well as, when presented with a request, order measures that differ in whole or in part from those requested, including measures directed at the party that made the request. Paragraph (3) of the Article reproduces Article 66(5) of the previous set of Rules, which allowed the parties to make a new request for interim relief based on new facts, after a previous application had been rejected. Similarly, Article 76, based on Article 66(7) of the 1972 Rules, allows for the parties to request the modification or revocation of a previously granted Order on provisional measures if shown that the circumstances that reasoned the request changed. Paragraph (2) determines that such a change in circumstance shall be specified in the application for that purpose. In 2019, an amendment was made to this provision to determine the Court could also revoke or modify interim measures *proprio motu*. It is required, however, that the parties have an opportunity to present their observations on the matter before the Court makes any decision, under Article 76 (3).

Article 77 describes the procedure to be taken under Article 41(2) of the Statute, so that the Security Council of the United Nations is notified, through the Secretary-General, of any provisional measures indicated, modified or revoked by the Court. Lastly, Article 78, an innovation from the 1972 Rules, establishes the Court's power to request information from the parties on any matter connected with the

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[163] Anglo-Iranian Oil Co. (United Kingdom v. Iran). Correspondence, *I.C.J.Pleadings 1951*, p. 707-08, para. 20.
[164] Miles, *supra* fn. 117, at 92.
[165] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Correspondence, *I.C.J. Pleadings 1979*, p. 495-496, para. 6; Vienna Convention on Consular Relations (Paraguay v. United States of America). Provisional Measures, Order of 9 April1998, *I. C. J. Reports 1998*, p. 248, at 252, para. 12; LaGrand, Provisional Measures, at 13, para 11.

implementation of any provisional measures it has indicated. This is another example of codification of procedure first developed in jurisprudence.[166]

3.3 Jurisprudential criteria

As previously seen, the text of Article 41 of the Statute, while empowering the Court to indicate provisional measures for the purpose of preserving the respective rights of either party, leaves significant room for the Court to develop the way in which this prerogative is to be carried out. In that sense, most of the law of provisional measures in the ICJ – both procedural and substantive – is judge-made, with little external interference.[167] The Rules of Court, examined in the previous section, mostly lay out the procedure to be adopted in the case of a request for provisional measures, while the Court has made use of its own jurisprudence to establish substantive criteria that must be met for such a request to actually be granted since Article 41 allows the Court to do so whenever it finds that "the circumstances so require."

For provisional measures, in general, to be indicated by an international court or tribunal, scholars point to two basic conditions: first, the request must relate to the disputed rights of the parties before the court; additionally, such a court must have *prima facie* jurisdiction over the claim.[168] The existence of urgency and risk of harm to the rights of the parties are also relevant conditions considered by the Court since it is implicit in Article 41 that provisional measures are to be ordered in situations in which fast action is necessary to preserve the rights invoked by the parties.

This section will analyse these requirements separately, first examining the condition of *prima facie* jurisdiction (3.3.1), followed by risk of irreparable harm (3.3.2), urgency (3.3.3), and, finally, the link between the rights to be protected and the measures requested (3.3.4). The literature endorses these criteria as the requirements considered by the Court when judging provisional measures requests,[169] and the four

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[166] The Court had already ordered that a party to a dispute were to furnish both the opposing party and the Registry of the Court with all relevant information pertaining to the subject matter of the case before this was formally permitted by the Rules. See: Fisheries Jurisdiction (United Kingdom v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August 1972, *I. C. J. Reports 1972*, p. 12, at 18; Fisheries Jurisdiction (West Germany v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August, 1972, *I. C. J. Reports 1972*, p. 30, at 35.

[167] Rosenne, supra fn. 25, at 33

[168] Rosenne, supra fn. 21, at 1399.

[169] Miles, *supra* fn. 117; Oellers-Frahm, *supra* fn. 2; Le Floch, *supra* fn. 157; UCHKUNOVA, Inna. Provisional Measures Before the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, vol. 12, n. 1, 2013, pp. 391-430.

conditions indicated have been analysed by the Court in all of its provisional measures orders since 2007.

3.3.1 Prima facie *jurisdiction*

The urgent character of provisional measures requests, by its very essence, often precludes a full examination of all the legal issues involved in the dispute at hand. Nonetheless, as international adjudication is fundamentally based on consent, an international court or tribunal could not make a decision regarding the rights subject to litigation - which could ultimately limit the sovereignty of the parties to the dispute - without first establishing that it had a valid source of jurisdiction. This assessment, in the context of the ICJ, is not seen as part of the "circumstances" to which Article 41 is referring, but rather as a precondition for the examination of whether such circumstances exist.[170]

The necessity of a jurisdictional review for a court to grant interim measures is uncontroversial,[171] but, as jurisdictional challenges became increasingly common in the post-war era, the matter of the threshold for this condition, a question which had not arisen during the PCIJ's period of activity,[172] became a problem for the ICJ in its early years.[173]

The first request for provisional measures request brought before the Court was made in the *Anglo-Iranian Oil Co.* case (United Kingdom v. Iran), in which the jurisdiction was based on an optional clause declaration made by the Iranian Government under Article 36(2) of the Statute, in 1932.[174] Iran objected to the Court's jurisdiction and did not take part in the provisional measures oral hearings. The Court indicated provisional measures despite the objections, establishing a negative threshold for the jurisdictional review, in which it could grant interim protection if the matter, *a priori*, did not fall "completely outside the scope of international jurisdiction."[175] Judges

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[170] Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, Separate Opinion of Judge Mosler, I.C.J. Reports 1976, p. 3, at 25.
[171] INSTITUT DE DROIT INTERNATIONALE. Final Resolution of the Third Commission on Provisional Measures. *Annuaire de l'Institute de Droit Internationale – Séssion de Hyderabad 2017*, vol. 78, no. 1, p. 99-130.
[172] See: MENDELSON, M. H. Interim Measures of Protection in Cases of Contested Jurisdiction. *British Year Book of International Law*, vol. 46, 1972-1973, pp. 259-322, at 266-268; Sztucki, *supra* fn. 6, at 225-231.
[173] Miles, *supra* fn. 117, at 148.
[174] Anglo-Iranian Oil Co., Preliminary objections, p. 103.
[175] Anglo-Iranian Oil Co., Provisional Measures, at 93.

Winiarski and Badawi Pasha appended a joint dissenting opinion, arguing for a higher standard of analysis of this requirement, so that, in the event of a challenge to jurisdiction, "the Court must consider its competence reasonably probable."[176] This positive test was to be considered fulfilled after a summary consideration that did not prejudge the Court's final decision on the matter.[177]

Throughout the Court's case law on provisional measures, different thresholds were proposed for the jurisdictional assessment, from the negative approach adopted by the majority in *Anglo-Iranian Oil*,[178] to a standard of near-certainty advanced by some individual judges in the *Nuclear Tests* and *Aegean Sea* cases.[179] Nonetheless, the standard the Court eventually settled on is that of *prima facie* jurisdiction, proposed by Sir Hersch Lauterpacht in his separate opinion on the 1957 *Interhandel* case (Switzerland v. United States of America):

> The correct principle […] which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.[180]

This test was applied by the majority in the 1972 *Fisheries Jurisdiction* cases (United Kingdom v. Iceland; Germany v. Iceland), in which jurisdiction was based on a treaty between the parties. The ICJ affirmed that the provisions invoked by the applicant as conferring jurisdiction upon the Court must "appear, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded"[181] and refrained from examining the two objections to jurisdiction brought forth by the respondent, asserting only that they would be "examined by the Court in due course" and that the order "in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits of the case."[182] As such, jurisdiction *prima facie* was considered to be fulfilled whenever

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[176] Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Interim Measures of Protection, Order of July 5th, 1951, Dissenting Opinion of Judges Winiarski and Badawi Pasha, *I. C. J. Reports 1951*, p. 89, at 96.
[177] Ibid., at 97.
[178] Anglo-Iranian Oil Co., Provisional Measures, at 93.
[179] Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, Dissenting Opinion of Judge Forster, *I.C.J. Reports 1973*, p. 111; Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, Separate Opinion of Judge Morozov, *I.C.J. Reports 1976*, p. 21.
[180] Interhandel (Switzerland v. United States of America). Provisional Measures, Separate Opinion of Judge Sir Hersch Lauterpacht, *I. C. J. Reports 1957*, p. 118.
[181] Fisheries Jurisdiction (Germany v. Iceland). Provisional Measures, Order of 17 August 1972, *I.C.J. Reports 1972*, p. 34, para. 18.
[182] Ibid, p. 34, para. 21-22.

the requesting party could indicate an instrument on which the formal possibility of jurisdiction might be founded.[183]

More recently, however, the Court has examined more thoroughly the issues surrounding jurisdiction at the provisional measures stage, particularly when jurisdictional challenges are raised. For example, the Court may analyse its jurisdiction *ratione materiae*, i.e. whether the allegations brought by the parties are capable of fitting into the legal instrument that the requesting party points as a jurisdictional basis.[184] An example of this can be found in the *Legality of the Use of Force* cases (Serbia and Montenegro v. Belgium and others), in which the former Federal Republic of Yugoslavia instituted proceedings against several States, all members of the North Atlantic Treaty Organization (NATO), for violations of the prohibition of the use of force and other obligations of humanitarian law, due to the bombings conducted by that organisation on the applicant's territory in 1999.[185] The applicant invoked Article IX of the Genocide Convention as a jurisdictional basis,[186] but the Court concluded that "the acts imputed by Yugoslavia to the respondent[s] are [not] capable of coming within the provisions of the Genocide Convention," since the NATO bombings did not appear to have the element of genocidal intent necessary to constitute genocide within the meaning of the Convention.[187] Therefore, it rejected the provisional measures request due to lack of *prima facie* jurisdiction, removing from the General List the applications against Spain and the United States.[188] Later, at the preliminary objections stage, the

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[183] Miles, *supra* fn. 117, at 152.

[184] See, e.g.: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, *I. C. J. Reports 1996*, p. 595, at 614, para. 27 et seq; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, *I. C. J. Reports 1996*, p. 803, at 810, para. 16 et seq.

[185] Legality of Use of Force (Serbia and Montenegro v. France), Application Instituting Proceedings, *I.C.J. Pleadings 1999*.

[186] The applicant also invoked declarations made under Article 36, paragraph 2 of the Statute (Declarations accepting the compulsory jurisdiction of the Court), when the respondent party had made such a declaration. That was the case for Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom. Nonetheless, the Court did not accept the declarations as a valid source of jurisdiction, even at the provisional measures stage, since they were based on reciprocity, and Yugoslavia's own declaration under Article 36(2) only allowed for disputes arising after 25 April 1999 to be considered by the Court. As the bombings had begun in 24 March 1999, and had been discussed in the United Nations Security Council on the 24 and 26 of March 1999, the Court found that the dispute had arisen before the date of the applicant's declaration, which, in turn, could not serve as a valid source of jurisdiction. (Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I. C. J. Reports 1999, p. 124, at 134-135, para. 28-30).

[187] Legality of Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999, *I. C. J. Reports 1999*, p. 363, at 373, para. 27-28.

[188] Both Spain and the United States had reservations to Article IX of the Genocide Convention. Spain also had made a declaration under Article 36(2) of the Statute, which excluded "disputes in regard to which the other party [...] accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application." In both cases, the lack of jurisdiction was considered manifest. (Legality of

remaining cases were unsurprisingly dismissed.[189] Although the Court usually makes a point to indicate that the finding of lack of jurisdiction at the provisional measures stage "in no way prejudge[s] the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application,"[190] the fact that a case cannot reach the lower standard of *prima facie* jurisdiction does not bode well for its prospects in relation to jurisdiction on the merits.

3.3.1.1 Existence of a dispute

As seen, the standard of *prima facie* jurisdiction has evolved to encompass an analysis of the ICJ's jurisdiction as a whole. The existence of a dispute, although usually seen as separate from matters of jurisdiction when dealt with at the preliminary objections stage,[191] has become part of the jurisdictional analysis in provisional measures proceedings. Considered a key preliminary condition for the exercise of the Court's contentious jurisdiction,[192] a dispute in international law was defined by the PCIJ as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[193] In the *South West Africa* case, the ICJ further developed this condition, by asserting that, in order to prove the existence of a dispute, "it must be shown that the claim of one party is positively opposed by the other."[194]

At the provisional measures stage, the existence of a dispute was first analysed in the *Case Concerning the Obligation to Prosecute or Extradite* (Belgium v. Senegal). The applicant relied on Article 30(1), of the Convention against Torture, under which the Court could exercise its jurisdiction over "[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention" which could not

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Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, *I. C. J. Reports 1999*, p. 761; Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, *I. C. J. Reports 1999*, p. 916).

[189] Legality of Use of Force (Serbia and Montenegro v. France), Preliminary Objections, Judgment, *I.C.J. Reports 2004*, p. 575.

[190] Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I. C. J. Reports 1999, p. 124, at 139-140, para. 46.

[191] BONAFÉ, Béatrice I. Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications. *QIL, Zoom-out*, vol. 45, 2017, pp. 3-32, at 3.

[192] MACH, Tomàs. A Legal Dispute Between States: On the Conditions of the ICJ's Jurisdiction in Contentious Cases. Aplikované Právo, 1/2008, pp. 69-87, at 71. See also: BONAFÉ, Béatrice I. Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications. *QIL, Zoom-out*, vol. 45, 2017, pp. 3-32.

[193] The Mavrommatis Palestine Concessions (Greece v. Britain). Objection to the Jurisdiction of the Court, Judgment of 30 August 1924, *PCIJ Series A* No. 2, p. 6, at 11.

[194] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, *I.C. J. Reports 1962*, p. 319, at 328.

be solved by negotiation or arbitration.[195] The Court considered it should establish whether such a dispute existed at the time of the filing of the application, since it is on that date that its jurisdiction must be considered. It found that the Parties seemed to "hold differing views as to how Senegal should fulfil its treaty obligations"[196] and that a dispute, therefore, existed at the time of the application and continued to exist at the provisional measures stage.[197]

Since then, the existence of a dispute condition has been part of the analysis of provisional measures proceedings, particularly in cases based on compromissory clauses.[198] For instance, the Court did not concern itself with assessing the existence of a dispute in the provisional measures order for the *Certain Documents and Data* case (Timor-Leste v. Australia), which was based on declarations under Article 36(2) of the Statute.[199]

When invoked at the provisional measures phase, the threshold for the fulfilment of the dispute precondition is not entirely clear. The Court has not further explained it other than mentioning the *prima facie* character of the examination at this stage, but some of its components can be extracted from the case law. Firstly, as shown in the *Prosecute or Extradite* case, the dispute must exist at the time of the filing of the application. In order to assess this, the Court may examine any documents or statements exchanged by the parties prior to the institution of proceedings, as well as pronouncements made in multi-lateral settings, indicating their opposing views on the subject matter of the case.[200] The examination of jurisdiction *ratione materiae*, as seen in the previous section, may also be found under the analysis of the existence of a dispute, as compromissory clauses generally establish the dispute submitted to the Court must relate to the interpretation or application of the treaty in which they are inserted.[201] The fulfilment of other formal requirements established by the clause in question, such

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[195] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, *I.C.J. Reports 2009*, p. 139, at 148, para 46. [hereinafter, "Prosecute or Extradite, Provisional Measures"].
[196] Ibid, at 149, para. 48.
[197] Ibid, at 149, para. 47-48.
[198] MAROTTI, Loris. Establishing the existence of a dispute before the International Court of Justice': Glimpses of flexibility within formalism?. *QIL, Zoom-out*, vol. 45, 2017, pp. 77-88, at 86.
[199] Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, *I.C.J. Reports 2014*, p. 147.
[200] See, e.g.: Prosecute or Extradite, Provisional Measures, at 149, para. 47-48; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, at 12-13, para. 27-28. [hereinafter, Rohingya Genocide, Provisional Measures"].
[201] See, e.g.: Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016*, p. 1148, at 1159, para. 47 et seq.

as the necessity of negotiations or other forms of dispute settlement prior to the filing of a case before the Court, can also be examined at this stage, especially when argued by the opposing party.[202]

One possible exception refers to proceedings under Article 60 of the Statute, regarding requests for interpretation of a previous judgment. Such a case would not require an additional source of jurisdiction, but Article 60 can only be invoked in the event of a dispute as to the meaning or scope of a judgment.[203] Furthermore, a dispute within the meaning of Article 60 must "relate to the interpretation of the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause."[204]

3.3.1.2 *Prima facie* admissibility

Especially after asserting the binding character of provisional measures in the *LaGrand* judgment, the Court has shown increasing willingness to examine the respondent's objections as possible impediments to the indication of provisional measures. Separately, but in connection to matters of jurisdiction, the Court may also examine objections relating to the admissibility of the application.[205]

The Court has defined the threshold for admissibility at the provisional measures stage merely as *prima facie*, clearly based on the standard of review developed with respect to jurisdiction, but without further explaining what this would mean for

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[202] See, e.g.: Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, at 387-388, para. 113-117; 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, Order of 16 November 2023, p. 10-13, para. 34-46.

[203] Statute of the Court, Article 60.

[204] Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, *I.C.J. Reports 2011*, p. 537, at 542, para. 23.

[205] Judge Fitzmaurice, in his separate opinion on the Northern Cameroons case put the distinction between matters of jurisdiction and matters of admissibility in the following terms: "A given preliminary objection may on occasion be partly one of jurisdiction and partly of receivability, but the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such a provision, then it will normally be an objection to the receivability of the claim." (Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, Separate Opinion of Judge Sir Gerald Fitzmaurice: I.C. J. Reports 1963, p. 97, at 102-103.). In this sense, matters of jurisdiction can be defined as relating to the power of the court to entertain a given case, while matters of admissibility presuppose the existence of jurisdiction and consider other reasons for the court or tribunal to decline to exercise its competence. Further: KOLB, Robert. *The International Court of Justice.* Oxford: Hart Publishing, 2013, at 199-223; SHANY, Yuval. *Questions of Jurisdiction and Admissibility before International Courts*. Cambridge: Cambridge University Press, 2015.

admissibility concerns.[206] The first time it spoke on the matter expressly during provisional measures proceedings, in *Land and Maritime Boundary* (Cameroon v. Nigeria), the Court, faced with objections raised by the respondent, decided not to address whether or not admissibility must be examined for the purpose of interim measures, merely stating that Cameroon's application did not appear, *prima facie*, to be inadmissible.[207] Hence, it used a negative threshold, as opposed to the positive test of *prima facie* jurisdiction that it had reached.[208] More recently, however, in the *Rohingya Genocide* case (Gambia v. Myanmar), the standard seemed to be set higher. The respondent's objections to the applicant's standing were examined by the Court in order to indicate provisional measures and, instead of taking the *Land and Maritime Boundary* route by simply stating that the applicant did not seem to lack standing, the Court opted to make an innovative finding in its jurisprudence to indicate that "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end."[209] As the applicant's attempt was unprecedented, the Court was most likely concerned with challenges to the legitimacy of a decision indicating provisional measures if it adopted merely a negative test to address the matter of standing.

Differently from its practice in regards to jurisdiction, the ICJ usually does not examine matters of admissibility by its own initiative, if the opposing party does not raise objections in this respect.[210] As they do not affect the consent of the Parties and are not expressly built into the Statute, there seems to be more discretion for the Court to deal with admissibility requirements. In this sense, the admissibility review is not considered an essential condition for the indication of provisional measures, even though challenges to it should be dealt with, if presented by the respondent.[211] One exception to this is found in the recent case of the *Application of the Genocide Convention in the Gaza Strip* (South Africa v. Israel). The Court noted that the

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[206] Miles, *supra* fn. 117, at 165.
[207] Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I. C. J. Reports 1996, p. 13, at 21, para. 33.
[208] Le Floch, *supra* fn. 157, at 27.
[209] Rohingya Genocide, Provisional Measures, at 17, para. 41.
[210] See, e.g.: Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011*, p. 6; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, *I.C.J. Reports 2022*, p. 211 (in which the respondent did not participate in the provisional measures proceedings).
[211] Miles, *supra* fn. 117, at 166.

respondent had not objected to South Africa's standing, but it made a point to address the matter, reaffirming the reasoning of the *Rohingya Genocide* case.[212]

3.3.2 Risk of irreparable harm

As permitted by the openness of the term "circumstances" employed in Article 41, the Court has also adopted in its jurisprudence of provisional measures the interconnected conditions of risk of irreparable harm and urgency, as a way to verify whether or not it would be necessary to create additional obligations to the State parties to the dispute before the judgment on the merits. Such criteria result from the purpose of interim relief to preserve the object of the dispute, in the sense that such object must be at risk of prejudice to warrant the indication of measures for its preservation.[213]

The Permanent Court of International Justice was instrumental in the development of the irreparable prejudice requirement, notably in the *Sino-Belgian Treaty* (Belgium v. China) and *South-Eastern Greenland* (Norway v. Denmark) cases. The ICJ predecessor considered it could only grant interim measures of protection in cases in which potential damages to the rights *sub judice* could not be repaired "simply by the payment of an indemnity or by compensation or restitution in some other material form."[214]

By its turn, the current Court adopted a similar standard of harm as the one established by the PCIJ and clarified, in the *Fisheries Jurisdiction* cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), that the power to indicate provisional measures, under Article 41 of the Statute, "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings."[215] However, unlike the Permanent Court, the ICJ did not equate irreparability to the impossibility of monetary compensation equivalent to the damage. It only made such a correspondence once, in the *Aegean Sea Continental Shelf* case (Greece v. Turkey). The applicant had made a request for provisional measures so that

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[212] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, at 12, para. 33-34. Available at: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Accessed 14 February 2024.
[213] Oellers-Frahm, *supra* fn. 2, at 1323; Uchkunova, *supra* fn. 169, at 410-411.
[214] Denunciation of the Treaty of 2 November 1865 between China and Belgium. Interim Measures of Protection, Order of 8th January 1927, *PCIJ Reports Series A* No. 8, p.6, at 7.
[215] Fisheries Jurisdiction (Federal Republic of Germany v. Iceland). Provisional Measures, Order of 17 August 1972, *I. C. J. Reports 1972*, p. 34, para. 22.

both parties would refrain from all exploration of the disputed continental shelf areas. While agreeing that the seismic exploration of the continental shelf could constitute an infringement of Greece's rights, if their claims were upheld on the merits, the Court found that the possibility of prejudice to the rights in question did not justify the indication of provisional measures, since the alleged breach "if it were established, is one that might be capable of reparation by appropriate means."[216]

As the Court had not considered the possibility of compensation as obstructing the award of interim protection in previous interim relief proceedings,[217] it is clear that the *Aegean Sea* approach is an outlier within the ICJ's case law. Since then, the Court has concerned itself more with whether the lack of provisional measures would hinder full restitution to the *status quo ante*, if the Court eventually rules in favour of the applicant.[218] As one author puts it, "[t]he test is not whether adequate compensation can ultimately be provided but whether 'irreparable prejudice' would be occasioned to the rights of the applicant if interim protection is refused."[219]

The Court's provisional measures case law reveals a number of examples of what could comprise "irreparable prejudice", depending on the circumstances of each case.[220] For example, in situations of risk to human life and health, especially those involving armed conflict,[221] the Court considers any potential harm to such rights to be *ipso facto* irreparable,[222] as can be observed in judgments such as *LaGrand* and *Avena*.

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[216] Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, *I.C.J. Reports 1976*, p. 3, at 11, para. 33.

[217] See: Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, *I.C.J. Reports 1972*, p. 12, at 16, para. 21-22; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, *I.C.J. Reports 1972*, p. 30, at 34, para. 22-23; Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, p. 99, at 105, para. 29-30; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, *I. C.J. Reports 1973*, p. 135, at 141, para. 30-31.

[218] See, e.g.: Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016*, p. 1148. In analysing the risk of irreparable prejudice in the case, the Court found that "any infringement of the inviolability of the premises may not be capable of remedy, since it might not be possible to restore the situation to the *status quo ante*." (at 1169, para. 90).

[219] GOLDSWORTHY, Peter J. Interim Measures of Protection in the International Court of Justice. *American Journal of International Law*, vol. 68, no. 2, 1974, pp. 258-277, at 269.

[220] Oellers-Frahm, *supra* fn. 2, at 1323.

[221]ZYBERI, Gentian. Provisional Measures of the International Court of Justice in Armed Conflict Situations. *Leiden Journal of International Law*, vol. 23, no. 3, p. 574, 2010.

[222] Miles, *supra* fn. 117, at 229. See, e.g.: Tehran Hostages, Provisional Measures, at 20, para. 42; Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, at 396, para. 142.

Risk of environmental harm,[223] as well as potential prejudice to the administration of justice itself,[224] have also been considered to fulfil this requirement.

The standard adopted by the Court for this condition is flexible. It can be said to refer not always to a harm that could not be repaired by any means, but rather to a situation that could not be endured until the judgment on the merits is delivered.[225] In this sense, the risk of irreparable harm condition is inextricably linked to that of urgency, and they are commonly examined by the Court in conjunction.[226]

One final observation with respect to this requirement refers to the terminology employed in its definition. Although the Court commonly affirms that it may only indicate provisional measures when there is a risk of irreparable prejudice to the rights which are the subject of judicial proceedings, some scholars point out that legal rights cannot be diminished by unilateral actions and their existence remains unaffected regardless of whether they have been violated.[227] In that sense, the prejudice analysed by the Court is not to the rights themselves, but to the "physical reality that underpins those rights."[228]

3.3.3 Urgency

Urgency, in provisional measures proceedings, has both a procedural and a material scope.[229] The former is articulated in Article 74 of the Rules of Court, which determines that requests of that order have priority over all other cases and that the Court, if not in session when the request is filed, shall be convened immediately for the purpose of proceeding to a decision. [230]

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[223]See, e.g.: Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). Provisional Measures, Order of 8 March 2011, *I. C. J. Reports 2011*, p. 6-28; Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Provisional Measures, Order of 13 December 2013, *I. C. J. Reports 2013*, p. 398-408.

[224] See: Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia). Provisional Measures, Order of 3 March 2014, *I. C. J. Reports 2014*, p. 147-162.

[225]ELKIND, Jerome B. *Interim protection – A Functional Approach*. The Hague: Martinus Nijhoff, 1981, p. 223.

[226] Oellers-Frahm, *supra* fn. 2, at 1327.

[227] THIRLWAY, Hugh. *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence.* Volume I. Oxford: Oxford University Press, 2013, at 940-941; KOLB, Robert. *The Elgar Companion to the International Court of Justice.* Cheltenham, UK: Edward Elgar Publishing, 2014, at 346-347.

[228] Miles, *supra* fn. 117, at 226. The author states, as an example, that "the inviolability of diplomatic persons may be prejudiced through the detention of an ambassador or other consular personnel."

[229] Rosenne, *supra* fn. 21, at 1395.

[230] Rules of the Court. Art. 74.

On the other hand, the material aspect of urgency refers to the impossibility of waiting for the final decision on the case, due to a real and, above all, imminent risk of harm to the rights that the requesting party seeks to guarantee in the procedure. [231] In other words, the Court must be convinced that the irreparable prejudice claimed could materialise before the judgment on the merits, or, as put in the Order of provisional measures in the case of *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), that "the acts likely to cause such a prejudice to the rights claimed by [the requesting party] could occur at any moment."[232] In cases of continued breaches, the party may demonstrate that such damage has already materialised and is still being perpetrated by the other State.[233]

An extreme example of this requirement is found in the previously discussed *LaGrand* case, in which the application instituting proceedings, along with the request for provisional measures, were filed on the day before the date set for the execution of Walter LaGrand. The Court made its decision on the provisional measures within less than 24 hours and, for the first and only time, without a previous hearing. [234] In this case, the fact that Germany was aware of LaGrand's situation for an extended period of time before taking action before the Court was criticised by some scholars,[235] but did not influence its finding of urgency. On the opposite end of the spectrum, in *Trial of Pakistani Prisoners of Wa*r, the Court found that it "no longer [had] before it a request for interim measures which is to be treated as a matter of urgency," since the applicant had requested the postponement of the provisional measures proceedings due to negotiations between the parties.[236]

The likelihood that the alleged prejudice will be made concrete does not need to be established with absolute certainty, although a purely hypothetical risk of harm is not sufficient to fulfil the urgency requirement. For example, in the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), the applicant had requested the Court to annul the international arrest warrant issued by a Belgian judge against the former Congolese Minister for Foreign Affairs, but the ICJ found there was no risk of irreparable harm or urgency in the situation since the subject

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[231] Le Floch, *supra* fn. 157, at 38.
[232] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016*, p. 1148, at 1169, para. 90.
[233] Miles, *supra* fn. 117, at 232-233.
[234] Oellers-Frahm, *supra* fn. 2, at 1326.
[235] Jennings, *supra* fn. 83.
[236] Trial of Pakistani Prisoners of War (Pakistan v. India), Interim protection, Order of 13 July 1973, *I.C.J. Reports 1973*, p. 328, at 330, para. 13-14.

of the warrant had been reassigned to Minister of Education, whose responsibilities involved less international travel, and therefore, was less likely to be arrested.[237]

The behaviour of the respondent is also a significant consideration in determining urgency.[238] A representation by the respondent declaring it will not take certain steps to prejudice the rights *sub judice* may lead the Court to consider that the alleged prejudice is unlikely to materialise and that the situation is no longer urgent. This has occurred in several instances before the PCIJ and the ICJ.[239] In *South Eastern Territory of Greenland*, both parties gave statements before the Permanent Court declaring their intention to abstain from the disputed territory while the case was pending, and the PCIJ declined to indicate interim protection, significantly for finding that it could not "presume that the two Governments concerned might act otherwise than in conformity with the intentions thus expressed."[240] Before the ICJ, this was first attempted in *Interhandel*, regarding the selling of shares of the General Aniline and Film Corporation claimed by the Swiss Government as the property of its nationals. In that case, the United States submitted that the sale in question was dependent upon domestic judicial proceedings, still pending, and that it was "not taking action [...] to fix a time schedule for the sale of such shares," which was considered by the Court as an indication that circumstances were not urgent to warrant provisional measures.[241]

The effects of representations by the respondent in provisional measures proceedings have been further addressed recently in *Certain Documents and Data* (Timor-Leste v. Australia), in which the Australian Attorney General undertook, among other commitments, not to make himself aware of the content of the seised confidential material that was the object of the proceedings and that such documents would not be used by the Australian government, except for national security purposes.[242] The Court considered that, although it had no reason to believe the respondent would not

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[237] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, *I. C. J. Reports 200*0, p. 182, at 201, para. 72.
[238] Miles, *supra* fn. 117, at 234.
[239] See, e.g.: Interhandel (Switzerland v. United States of America). Provisional Measures, Order of 24 October 1957, *I. C. J. Reports 1957*, p. 105; Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal*)*, Provisional Measures, Order of 28 May 2009, *I. C. J. Reports 2009*, p. 139.
[240] Legal Status of the South-Eastern Territory of Greenland (Norway v. Denmark), Request for the Indication of Interim Measures of Protection, Order of 3 August 1932, *PCIJ Series A/B* No. 48, p. 277, at 287.
[241] Interhandel (Switzerland v. United States of America). Provisional Measures, Order of 24 October 1957, *I. C. J. Reports 1957*, p. 105, at 112.
[242] Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147, at 156, para. 38.

implement the undertaking in the terms presented, the commitments did not remove entirely the risk of prejudice alleged by the applicant.[243] In this sense, for an undertaking or less formal declaration by the respondent to deprive a situation of the urgency and risk of irreparable prejudice that the requesting party alleges, it would not be sufficient for the commitments to merely lower the risk below the required threshold of irreparability, but rather to remove it entirely.[244]

3.3.4 Link between the rights to be protected and the measures requested

As previously emphasised, the purpose of the institute of provisional measures in the proceedings before the International Court of Justice is to preserve the respective rights of the parties *pendente lite*, avoiding, therefore, that the object of the dispute be lost before a judgment could be delivered on the merits. Thus, in its case law, the ICJ developed, as a requirement, that the requesting party demonstrate a "link", meaning that "the rights to be protected by the imposition of provisional measures must be linked to those rights that are the subject of the main claim."[245] It was notably in the *Avena (Interpretation)* case (Mexico v. United States of America) that the Court acknowledged this link as an independent condition for the indication of provisional measures and characterised the standard for its fulfilment as "a sufficient connection with" the proceeding on the merits, which in the case was the Request for Interpretation of the 2004 *Avena* judgment.[246] In the following case, concerning the Application of the International Convention for the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), the Court found the link requirement to be met by asserting that "the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings."[247]

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[243] Ibid, at 158-159, para. 44; 47.
[244] This finding was criticised by the minority, as seen in the dissenting opinions of Judges Keith, Greenwood and Callinan, and on the separate opinion of Judge Donaghue. See, also: Miles, *supra* fn. 117, at 234-239.
[245] Miles, *supra* fn. 117, at 180.
[246] Request for Interpretation of the Judgment of 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America). Provisional Measures, Order of 16 July 2008, *I. C. J. Reports 2008*, p. 328, para. 64.
[247] Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation). Provisional Measures, Order of 15 October 2008, *I.C.J. Reports 2008*, p. 392, para. 126.

Although the ICJ did not recognise it as an independent prerequisite for the indication of provisional measures until 2008, this connection between measures requested and rights whose protection is sought has been examined in the case law since as early as the 1933 *Polish Agrarian Reform* case, in which the Permanent Court considered that "the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures […] is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court."[248] The PCIJ went on to observe that, according to the application submitted by Germany, the object of the dispute was to obtain a declaration that the Polish agrarian reform had resulted in violations of the Treaty of Versailles to the detriment of certain individual Polish nationals of German race and to order reparations to be made in respect of such infractions. However, it identified that the provisional measures requested were beyond the scope of the main claims, since, if granted, they would result in a general suspension of the agrarian reform in so far as concerns all Polish nationals of German race, as opposed to a suspension of its effects solely in relation to the cases in which violations of the Treaty were alleged to have occurred.[249] The Permanent Court, therefore, did not award provisional measures in the case.

The *Polish Agrarian Reform* case may have been the reason for the amendment to the Rules of Court in 1936, to provide, in Art. 61, para. 1, that a request for provisional measures was to include the rights to be protected in the proceedings, as well as the case to which it relates and the interim measures of which the indication is proposed.[250] This provision was maintained in the Rules until the 1978 reform when it was replaced by the current terms of Article 73.2, which establishes that the requesting party shall specify the reasons for the request, the possible consequences if it is not granted, and the measures requested. While the 1936 provision intended to facilitate the identification of the matters at stake, its exclusion from the rules in 1978 demonstrates that, in assessing the fulfilment of conditions for the indication of provisional measures, the Court must take into consideration the substance of the dispute as a whole, and not solely the arguments made in the request.[251]

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[248] Case Concerning the Polish Agrarian Reform and the German Minority (Germany v. Poland), Interim Measures of Protection, Order of 29 July 1933, *PCIJ Series A/B* No. 58, p. 175, at 177.
[249] Ibid, at 178.
[250] Elaboration of the Rules of Court of March 11th 1936. *PCIJ Series D*, 3rd Addendum to No. 2. Leiden: A. W. Sijthoff's Publishing Company, 1936, at 1014.
[251] Oellers-Frahm, *supra* fn. 2, at 1322.

Despite the previous PCIJ jurisprudence, the International Court of Justice, up until 2008, considered the link requirement in an inconsistent manner, usually implicitly and as part of the examination of other prerequisites. The ICJ took a similar approach to its predecessor in the *Arbitral Award of 1989* case (Guinea-Bissau v. Senegal). The case concerned the validity of an arbitral award delivered within a maritime dispute between the parties, and the applicant requested provisional measures to order the parties to abstain from any action of any kind in the disputed area, until a decision on the merits is given by the Court.[252] It argued that, although the maritime dispute between the parties was not the subject of the main proceedings, a request for provisional measures needed only to be connected to the "conflict of interests underlying the question or questions put to the Court."[253] The reasoning was not adopted by the Court, which rejected the request considering that the dispute over the maritime delimitation claims would not be resolved by the Court's judgment on the validity, or lack thereof, of the Arbitral Award.[254] While the Court did not use any other requirement as a guise to analyse the link on that occasion, it also did not elaborate on it as a condition for the indication of interim relief. Judge Shahabudeen, in his separate opinion, considered that the link required was one "which should exist between rights sought to be preserved by provisional measures and rights sought to be adjudicated in the case,"[255] rather than, as argued by Guinea-Bissau, between the request and the "principal" underlying dispute, which in the case would be the maritime delimitations claims.

Later examples equally lacked clarity. In the second provisional measures order on the *Pulp Mills* case (Argentina v. Uruguay), which decided on a request by the respondent, the link was considered under the analysis of *prima facie* jurisdiction. Argentina argued that the provisional measures requested by Uruguay had "no link with the Statute of the River Uruguay, the only international instrument serving as a basis for the Court's jurisdiction to hear the case"[256] and the Court had to examine whether the request was aimed at protecting rights within its jurisdiction to adjudge the main proceedings. It concluded that the rights invoked by Uruguay had a sufficient

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[252] Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990, *I.C.J. Reports 1990*, p. 64 at 65 para. 3.
[253] Ibid, at 69-70, para. 25.
[254] Ibid, at 70, para. 26.
[255] Ibid, Separate Opinion of Judge Shahabudeen, p. 74.
[256] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, *I.C.J. Reports 2007*, p. 3, at 8, para. 20.

connection with the merits of the case and, therefore, that it had *prima facie* jurisdiction to address the request.[257]

The existence of a link, before its establishment as an independent condition, was most commonly assessed alongside the risk of irreparable prejudice to the rights *pendente lite*.[258] In the *Certain Criminal Proceedings* case (Republic of Congo v. France), for example, the Court reaffirmed the object of provisional measures as preserving the respective rights of the parties, presupposing that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, from which, it would follow "that the Court must concern itself with the preservation by such measures of the rights which may subsequently be adjudged by the Court to belong either to the applicant or to the respondent."[259] Similarly, during the provisional measures proceedings on the case concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), the respondent argued that there was an absence of any clear link between the request and the original claim. The Court did not address such link expressly as a condition for the request to be granted, however, it did note that it "must be concerned to preserve by [interim] measures the rights which may subsequently be adjudged by the Court to belong either to the applicant or to the respondent", before asserting the following:

> Whereas the rights which, according to the Congo's Application, are the subject of the dispute are essentially its rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources, and its rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights; and whereas it is upon the rights thus claimed that the Court must focus its attention in its consideration of this request for the indication of provisional measures.[260]

In that sense, the Court did connect the rights of the main proceedings with the request for provisional measures, though it did so, not as an independent exercise, but to conclude that such rights were at risk of suffering irreparable prejudice.

It was only in 2008, after the *Avena (Interpretation)* Order for Provisional Measures, that the Court seemed to consistently analyse the existence of a link between the provisional measures requests and the case on the merits independently from other

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[257] Ibid, at 11, para. 30.
[258] Miles, *supra* fn. 117, at 182.
[259] Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measures, Order of 17 June 2003, *I. C. J. Reports 2003*, p. 102 at 107, para. 22.
[260] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I. C. J. Reports 2000*, p. 111, at 127, para. 40.

requirements,[261] including it as a formal condition for the indication of interim relief. Then, the standard set for this requirement to be met was simply that "the rights which [the Requesting party] invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings."[262] However, the main development of this criterion came in the *Certain Activities Carried Out in the Border Area* case (Costa Rica v. Nicaragua). In the 2011 order, the ICJ analysed each measure requested by Costa Rica, considering the link test to be fulfilled if it found that the denial of the requested interim relief would be *likely* to affect the rights which might be adjudged on the merits to belong to the requesting party.[263] In that sense, the analysis to be made was no longer whether the rights to be protected by provisional measures were the same or connected to the rights disputed on the main proceedings, which was the approach presumed to be taken in the previous cases, but whether the rights claimed on the merits could effectively be protected by means of the measures requested. This interpretation is criticised, since, as permitted by Article 75(2) of the Rules, the Court is entitled to indicate measures entirely or partially different from those requested.[264] It would then be unnecessary to assess if the specific measures requested were adequate to protect the rights claimed if the Court could disregard the request entirely to order other conducts it found more suitable to the situation.

One could wonder if the link test, as interpreted in *Border Area* and following cases, was less of a requirement for the Court to decide if provisional measures were to be indicated at all and more of an assessment of *which* provisional measures to indicate. This seems supported by the link analysis in *Rohingya Genocide* (The Gambia v. Myanmar). The Court mentioned each of the measures requested by the applicant to assert whether they were aimed at preserving the rights it asserted on the basis of the

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[261]Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, *I.C.J. Reports 2008*, p. 311 at 327, para. 58; Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, *I.C.J. Reports 2008,* p. 353 at 389, para. 118; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, *I.C.J. Reports 2009*, p. 139 at 151, para. 56.

[262] Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, *I.C.J. Reports 2008*, p. 353 at 392, para. 126.

[263] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011*, p. 6 at 20, para. 60-61.

[264] LANDO, Massimo. Provisional Measures and the Link Requirement. *The Law & Practice of International Courts and Tribunals*, vol. 19, no. 2, 2020, pp. 177-199.

Genocide Convention and found that the first three, regarding the prevention of genocidal acts by State agents, military or paramilitary groups and other organisations or persons, as well as the preservation of evidence relating to the case, fulfilled the requirement, but that the last measure, under which Myanmar should cooperate with United Nations fact-finding bodies investigating alleged genocidal acts against the Rohingya, was not necessary in the circumstances of the case.[265] From this order, it is also made clear that the matter of the link with the rights to be protected on the merits does not need to be examined in relation to measures of non-aggravation and procedural measures,[266] such as requests for information, under Article 78 of the Rules of Court.[267]

Related to the matter of the connection between the rights whose protection is sought by means of provisional measures and the merits is the question of the existence of these rights themselves. Scholars have referred to this point in the Court's analysis as the existence of a *prima facie* case on the merits, meaning that the Court would consider the claimant's possibility of success in the dispute, since otherwise there would not be a need to grant interim protection.[268] Whether decisions on provisional measures required, or even allowed such an assessment to be made was heavily discussed. Within the Court the matter was initially developed by means of separate and dissenting opinions, leading the Court to take a stance, albeit a cautious one, on the issue of merits review, by developing the plausibility test, which will be the focus of the following chapter.

3.4. Practice Directions

Article 30(1) of the Statute[269] is also seen to provide the basis for the Court to formalise developments to its procedural practice, in addition to the Rules of Court and in a more flexible manner, the so-called Practice Directions.[270] They are, in principle, binding to the parties,[271] but do not share the same status as the Rules and, if in conflict,

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[265] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, at 24, para. 60-63.
[266] Ibid, at 24, para. 61.
[267]"Article 78. The Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated." (Rules of Court (1978)).
[268] Oellers-Frahm, *supra* fn. 2, at 1320.
[269]See Section 3.2 above.
[270]FORLATI, Serena. The International Court of Justice: An Arbitral Tribunal or a Judicial Body?. Cham: Springer, 2014, at 26.
[271]Ibid, 28. Also, HIGGINS, Rosalyn. Respecting sovereign States and running a tight courtroom. International and Comparative Law Quarterly, vol. 50, 2001, pp. 121–132.

the latter shall prevail. The Court adopted its first Practice Directions in 2002,[272] however, the mechanism is still underused, with the most recent developments, other than amendments, being added in 2009.

Specifically in regard to provisional measures, they are only addressed by Practice Direction XI, promulgated in 2004. It specifically addresses oral proceedings for provisional measures, noting the increasing recourse to these proceedings[273] and advising the parties to limit themselves to what is relevant to the criteria for the indication of provisional measures and not enter into the merits of the case beyond the strictly necessary.[274] The language used is of exhortation, rather than command: the parties *should* limit their arguments and *should not* enter the merits. Nonetheless, as one author points it, despite the language not indicating an obligatory instruction, "no party dares to defy the expectations of the Court when litigating before it."[275]

What is considered a strictly necessary address of matters that would otherwise be left to the merits can only be judged by the parties to the proceedings, as it is unlikely that any consequences would arise directly, such as the interruption of counsel during their pleadings. However, the Court most likely takes that into account when setting the timetable for oral proceedings, therefore, it is up to the parties to choose well the arguments they advance during the hearings and, as such, not use their allotted time to stress questions that should only be addressed in the merits, which might lead to unsuccessful results.[276]

It is important to note that Practice Direction XI was adopted before significant developments in the Court's procedure regarding provisional measures and, as such, it is inevitably outdated, specifically in the light of the introduction of the plausibility test to the Court's list of criteria and its evolution in the last years. Judge *ad hoc* Pocar, in his Separate Opinion to the order of provisional measures in *Application of the ICSFT and CERD* (Ukraine v. Russia), questioned how the parties could be expected to reconcile

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[272] See WATTS, Arthur. New Practice Directions of the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, vol. 1, no. 2, August 2002, pp. 247-256.
[273] This portion of the instruction was excluded by an amendment in 2006.
[274] Practice Direction XI, *Acts and Documents No. 7*, at 169. Available at https://www.icj-cij.org/sites/default/files/documents/acts-and-documents-en.pdf. Accessed 28 February 2024.
[275] YEE, Sienho. Notes on the International Court of Justice (Part 3): Rule-Making at the Court: Integration, Uniformization, Keeping Existing Article Numbers and Giving Public Notice. *Chinese Journal of International Law*, vol. 8, no. 3, pp. 681-694, at 687.
[276] WATTS, Arthur. The ICJ's Practice Directions of 30 July 2004. *The Law and Practice of International Courts and Tribunals*, vol. 3, no. 3, November 2004, pp. 385-394, at 390.

the stringent standard of merits review introduced in the case and Practice Direction XI.[277] Nonetheless, those developments will be addressed in the following chapter.

[277]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge *ad hoc* Pocar, *I.C.J. Reports 2017*, p. 217, at 220, para. 8.

4. THE PLAUSIBILITY TEST IN PROVISIONAL MEASURES PROCEEDINGS

As the primary purpose of provisional measures in the International Court of Justice is to "preserve the respective rights of either party," the matter of the existence of such rights, or the probability of the applicant's success on the merits, as one of the requirements for the indication of interim relief, has been the subject of discussion. Although this is a common requirement within domestic legal systems,[1] as international adjudication is fundamentally based on consent, the relevance of the merits to the interim relief stage becomes problematic.[2] On the one hand, for the "circumstances" to require the ordering of measures for the protection of rights, it would logically be necessary for these rights not to be manifestly nonexistent. This gains particular importance after the definitive finding of the binding character of provisional measures orders in *LaGrand*,[3] since it would be, as one author puts it, "wholly wrong" to impose a duty of compliance to likely sovereignty-limiting measures on the opposing State if the case brought by the requesting party is frivolous or has no possibility of succeeding.[4] At the same time, due to the preliminary character of provisional measures proceedings, the Court should also tread carefully not to prejudge the merits of the main claim. Specifically in cases of contested jurisdiction, that seem to make the majority before the ICJ, a pronouncement on the merits of the case without a definitive finding of competence would be "incompatible with the judicial function"[5] and could raise legitimacy concerns.

The scholarly debate on the topic has been divided. As early as 1932, Dumbauld considered that "a *prima facie* showing of probable right and probable injury is all that is required. In view of the need for rapidity and the provisional nature of the order, absolutely convincing proof [...] is not necessary."[6] Similarly, in his dissenting opinion in the *Polish Agrarian Reform and German Minority* case, Judge Anzilotti seemed to advocate for a test of "the *possibility* of the right claimed"[7] by the requesting party to be considered by the

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[1]See Section 2.1. See, also, COLLINS, Lawrence. Provisional and Protective Measures in International Litigation. *Recueil des Cours de l'Académie de Droit International*, vol. 234. The Hague: Martinus Nijhoff, 1992, at 24-29, 224; DUMBAULD, Edward. Interim Measures of Protection in International Controversies. The Hague: Martinus Nijhoff, 1932, at 42-82.

[2]MILES, Cameron. *Provisional Measures before International Courts and Tribunals*. Cambridge: Cambridge University Press, 2017, at 194.

[3]See: LEE-IWAMOTO, Yoshiyuki. The Repercussions of the LaGrand Judgment: Recent ICJ Jurisprudence of Provisional Measures. *Japanese Yearbook of International Law*, vol. 55, 2012, pp. 237-262.

[4]Collins, *supra* fn. 1, at 225.

[5]ROSENNE, Shabtai. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea.* Oxford: Oxford University Press, 2005, at 72.

[6]Dumbauld, supra fn. 1, at 160-161.

[7]Case Concerning the Polish Agrarian Reform and the German Minority (Germany v. Poland), Interim Measures of Protection, Order of 29 July 1933, Dissenting Opinion by M. Anzilotti, *PCIJ Series A/B* No. 58, p. 175, at 181. (emphasis on the original)

Permanent Court at the interim protection stage. Other scholars were also convinced that a request for provisional measures in the ICJ should demonstrate "a *prima facie* case as to the existence of the rights alleged"[8] and that "the degree of likelihood on the merits in the applicant's favour, like the prospect of substantive jurisdiction, is an element relevant to a consideration of the risk of prejudice to the position of one or other of the parties."[9] This position would be accompanied by an acknowledgement of the summary character of the assessment to be made at this stage.[10]

Inversely, other writers did not see the need for such a requirement. Merrills, for one, interpreted the expression "the respective rights of either party" included in Article 41 as referring "to the rights which the parties *claim*, not those which they actually have, which cannot be decided at this stage."[11] Additionally, Sztucki, although acknowledging the possibility of this condition, as proposed by Dumbauld, to be included in the future, considered that "[f]rom the theoretical and formal point of view, [the merit of the principal claim] is, in principle, irrelevant. The law of the Court does not require that the applicant and requesting States show a '*prima facie* case' and, accordingly, as a rule, they do not argue this point."[12] He also added that, even if considered, the existence of a *prima facie* case would be of little use to the proceedings, as "the very nature of inter-State disputes is usually complex and the legal positions of the litigants [...] are, more often than not, fairly balanced."[13]

Throughout most of the Court's period of activity, the latter position seemed to prevail. It was only in 2009 that the International Court of Justice formally articulated a condition for the indication of provisional measures that would resemble a *prima facie* review of the merits, the so-called plausibility test, not without criticism from judges in the minority and scholars. After this introduction to the debate, this chapter aims to explore the review of the merits in provisional measures proceedings before the International Court of Justice, specifically the plausibility test, its application, its criticisms and its congruence with the institute of provisional measures as developed in the Court's Statute and practice. For this purpose, it shall be divided into four sections: first, it will examine how the Court inserted itself in the debate regarding the necessity of a *prima facie* review of the merits at the

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[8]MANI, V. S. International Adjudication: Procedural Aspects. Leiden: Brill Nijhoff, 1981, at 293.
[9]MENDELSON, M. H. Interim Measures of Protection in Cases of Contested Jurisdiction. *British Year Book of International Law*, vol. 46, 1972-1973, pp. 259-322, at 316.
[10]See: Ibid, at 316; Mani, *supra* fn. 8, at 293; Collins, *supra* fn. 1, at 226.
[11] MERRILLS, J. G. Interim Measures of Protection and the Substantive Jurisdiction of the International Court. *Cambridge Law Journal*, vol. 36, no. 1, 1977, pp. 86-109, at 102. (emphasis on the original)
[12]SZTUCKI, Jerzy. *Interim Measures at the Hague Court: An Attempt at a Scrutiny*. Boston: Kluwer Law and Taxation Publishers, 1983, at 123.
[13]Ibid.

provisional measures stage by analysing its case-law pre-2009 and how the plausibility test came to be (4.1). Then, it will consider both ways the Court has applied the plausibility test since its inception: the plausibility of rights (4.2) and the plausibility of the claims (4.3). Lastly, the chapter will take into account the vulnerability test, proposed by late Brazilian Judge Cançado Trindade, and ponder its compatibility with the plausibility test (4.4).

4.1 Emergence: The role of Separate Opinions

For most of its history, the Court was reluctant to make any findings as to the existence of the rights claimed by the parties in provisional measures proceedings,[14] concerned with the non-anticipatory character of the institute.[15] In its very first order of provisional measures, in the *Anglo-Iranian Oil* case (United Kingdom v. Iran), the Court affirmed that it "must be concerned to preserve by [interim] measures the rights which may be subsequently adjudged by the Court to belong either to the applicant or to the respondent,"[16] from which one could presume that it would be relevant to evaluate whether those rights had any chance of being adjudged as belonging to the party that sought to protect them before interim measures were indicated in its favour. Nonetheless, not in *Anglo-Iranian Oil* nor following orders, did the Court pay much attention to this factor. It briefly did so, however, in the *Tehran Hostages* case (United States v. Iran), in which the applicant made extensive arguments relating to the substantial violations in the case in its interim protection request.[17] Though the respondent did not participate in the provisional measures proceedings, it sent a letter arguing that the Court should not take cognisance of the case for a number of

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[14]See, e.g., Anglo-Iranian Oil Co. (United Kingdom v. Iran). Request for the Indication of Interim Measures of Protection, Order of 5 July 1951, *I. C. J. Reports 1951*, p. 89; Fisheries Jurisdiction (United Kingdom v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August 1972, *I. C. J. Reports 1972*, p. 12; Fisheries Jurisdiction (West Germany v. Iceland), Request for the Indication of Interim Measures of Protection, Order of 17 August 1972, *I. C. J. Reports 1972*, p. 30; Nuclear Tests (Australia v. France), Request for the Indication of Interim Measures of Protection, Order of 22 June 1973, *I. C. J. Reports 1973*, p. 99; Nuclear Tests (New Zealand v. France), Request for the Indication of Interim Measures of Protection, Order of 22 June 1973, *I. C. J. Reports 1973*, p. 135; Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, *I. C. J. Reports 1996*, p. 13; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I. C. J. Reports 2000*, p. 111; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measures, Order of 17 June 2003, *I. C. J. Reports 2003*, p. 102. See, also: Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, Joint Declaration of Vice President Ammoun and Judges Forster and Jiménez de Aréchaga, *I.C.J. Reports 1972*, p. 18.
[15]Sztucki, *supra* fn. 12.
[16]Anglo-Iranian Oil Co. (United Kingdom v. Iran). Request for the Indication of Interim Measures of Protection, Order of 5 July 1951, *I. C. J. Reports 1951*, p. 89, at 93.
[17]United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Oral Arguments on the Request for provisional Measures, *I.C.J. Pleadings 1979*, p. 13, at 21-26.

reasons, including that the applicant was seeking a judgment on the substance of the case before it.[18] In response, the Court found that "a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party."[19] It also made reference to the "fundamental prerequisite for the conduct of relations between States [of] the inviolability of diplomatic envoys and embassies" and to "the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, [as] similarly principles deep-rooted in international law."[20] This ruling was later interpreted as "the Court [being] clearly concerned to satisfy itself affirmatively that there was a case for holding that the rights sought to be protected by provisional measures did exist in international law and were, in fact, being violated."[21] Nonetheless, the Court did make a point of noting that the decision "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves."[22]

This matter became of importance again in the *Passage Through the Great Belt* case (Finland v. Denmark), in which the respondent argued that, for the indication of provisional measures, the requesting party must "substantiate the right it claims to a point where a reasonable prospect of success in the main case exists" and that the applicant had not even demonstrated a *prima facie* case.[23] The Court did not make a detailed finding as to whether there was, in fact, a need for such a *prima facie* case to be established in every request. However, it did find it necessary to reinforce the purpose of provisional measures under Article 41 and determine that the right of passage claimed by Finland was undisputed, with the case between the parties concerning only the extent of that right.[24] Judge Shahabuddeen, in his separate opinion, explored Denmark's argument much further. He questioned:

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

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[18]Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). Request for the Indication of Provisional Measures, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7, at 16, para. 22, 27-28.
[19]Ibid, at 16, para. 28.
[20]Ibid, at 19, para. 38; 20, para. 40.
[21]Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, Separate Opinion of Judge Shahabudeen, *I.C.J. Reports 1991*, p. 12, at 33.
[22]Tehran Hostages, Provisional Measures, at 20, para. 45.
[23]Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12, at 17, para. 21.
[24]Ibid, at 17, para. 22.

> preservation of which the measures are sought? The Court has never pronounced on the question.[25]

The Guyanese judge then made an extensive recollection of the doctrine and of the practice of the Court until that point, arguing that, however important to consider the need to avoid any appearance of prejudgment, that need had to be balanced against the interests of the State which would be constrained by the interim measures in showing that the rights claimed by the applicant have not been shown even possibly to exist.[26] Regarding the standard to be considered for such a test, he advanced the same threshold as Anzilotti, that the requesting party, while not being required to anticipate each and every issue which could arise at the merits, should establish the possible existence of the rights sought to be protected, which would be assessed by a *summaria cognitio*.[27] Whether this right was, in fact, being violated by the party sought to be constrained was not considered an essential part of this assessment, but a matter presumably inserted in the condition of risk of irreparable prejudice.[28] The proposed test exclusively concerned the existence of the rights claimed by the requesting party.

While the Court did not formulate an explicit criterion to the effect of Judge Shahabuddeen's proposal until 2009, the matter was implicitly, though not consistently, discussed in a number of cases after *Great Belt*. In the *Lockerbie* case (Lybia v. United Kingdom), for example, the respondent argued that "Libya had failed to establish the possible existence of the rights claimed."[29] The Court somewhat accepted this argument when it concluded that the rights claimed by Libya under the Montreal Convention were not "appropriate" for protection by the indication of provisional measures and that the indication of the measures requested "would be likely to impair the rights which appear *prima facie* to be enjoyed by the United Kingdom [and the United States] by virtue of Security Council resolution 748 (1992)."[30] Though the underlying issue in the case was whether the Court was

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[25]Great Belt, Provisional Measures, Separate Opinion of Judge Shahabuddeen, at 28.
[26]Ibid, p. 29.
[27] Ibid, p. 36.
[28]MILES, Cameron. Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice. *The British Yearbook of International Law*, 2018, pp. 1-46, at 5.
[29]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, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 3, at 11, para. 25. Libya had also initiated a case under the same premises against the United States, though it did not make a similar argument, only stating that "Libya had not demonstrated that provisional measures were necessary to protect rights at imminent risk of irreparable injury" (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 114, at 122, para. 26).
[30] Ibid, at 15, para. 40-41.

empowered to give a decision which may conflict with Security Council resolutions,[31] it is notable that the Court considered the *prima facie* existence of the rights claimed *by the respondent* as an impediment to the indication of provisional measures. Judges Bedjaoui and Ajibola, in their respective dissenting opinions, argued that the Court should, in provisional measures proceedings, properly identify the legal rights of the applicant and consider whether they were sustainable under international law, and that Lybia, in the case, had passed that test.[32]

Later, in the first round of provisional measures requests of *Bosnian Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), then-Yugoslavia had argued that "[t]he assertions on the basis of which the Court is requested to grant these provisional measures are not true, i.e. they are inconsistent with facts,"[33] so that the request should be dismissed. Here, the respondent appeared to submit that the Court had the competence to consider the credibility of the allegations as a condition for the provisional measures stage. In the order, the Court stressed that it could not make definitive findings of fact or imputability and that it was not called upon, at that stage in the proceedings, to determine the existence of breaches of the Genocide Convention by either party, but at the same time acknowledged that the circumstances indicated a risk of acts of genocide being committed and both parties were under a clear obligation to do all in their power to prevent the commission of any such acts in the future.[34] In this sense, it implicitly acknowledged that the parties, both of which had presented requests to protect their interests under the Genocide Convention, had the rights they claimed. In the second round of provisional measures, Judges Shahabuddeen, Lauterpacht and Kreca seemed to endorse the view implied by the respondent, according to

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[31] On this, see: KAIKOBAD, Kaiyan Homi. The Court, the Council and Interim Protection: A Commentary on the Lockerbie Order of 14 April 1992. *Australian Year Book of International Law*, vol. 17, 1996, pp. 87-186; MARTENCZUK, Bernd. The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie. *European Journal of International Law*, vol. 10, no. 3, 1999, pp. 517-547; GOWLLAND-DEBBAS, Vera. The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case. *American Journal of International Law*, vol. 88, no. 4, 1994, pp. 643-677.

[32] 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, Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui, *I.C.J. Reports 1992*, p. 33; 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, Order of 14 April 1992, Dissenting Opinion of Judge Ajibola, *I.C.J. Reports 1992*, p. 78.

[33] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Request for the Indication of Provisional Measures by the Federal Republic of Yugoslavia and Written Observations on the Request submitted by the Republic of Bosnia and Herzegovina for the Indication of Provisional Measures, 1 April 1993, *I.C.J. Pleadings 1993*, at 3, para. 6.

[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, p. 3, at 22, para. 44-45.

which it was necessary to address the facts in the context of a request for provisional measures.[35]

For years afterwards, the matter seemed forgotten.[36] While making a point to enumerate the rights of which the parties claimed to seek protection,[37] and at times summarily examining evidence presented to it, mostly in connection to the condition of risk of irreparable prejudice,[38] the Court did not discuss, at least not explicitly, whether the requesting party had demonstrated on some level that it possessed those rights, acting on the presumption that it did, even if the request was rejected on different grounds.[39] One possible exception can be found in the *Legality of the Use of Force* cases.[40] Although the requests made by Yugoslavia were rejected ostensively on the basis of lack of *prima facie* jurisdiction, the analysis of jurisdiction *ratione materiae* conducted in the orders can easily be construed as an analysis of the substantive basis of the case. The Court had to examine the allegations made by the applicant to conclude that the conditions for establishing the crime of genocide

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[35]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Shahabuddeen, *I.C.J. Reports 1993*, p. 353, at 359-360; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge ad hoc Lauterpacht, *I.C.J. Reports 1993*, p. 407, at 424-425, para. 47-49; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge ad hoc Kreca, *I.C.J. Reports 1993*, p. 453, in passim.

[36]In their dissenting and separate opinions, some judges would occasionally mention the necessity for a *prima facie* review of the merits at the provisional measures stage, sometimes as an already established condition. For example, Judge Rezek, in the *Arrest Warrant* case (Congo v. Belgium), affirmed that the "*bonus fumus juris*, the *prima facie* merit of the applicant's argument in support of its claim" was one of the bases of provisional measures requests, alongside the "danger in delay." (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, Dissenting Opinion of Judge Rezek, *I. C. J. Reports 2000*, p. 216).

[37]See, e.g., Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, *I. C. J. Reports 1996*, p. 13, at 22, para. 39; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I. C. J. Reports 2000*, p. 111, at 127, para. 40; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, *I. C. J. Reports 2000*, p. 182, at 201, para. 70; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measures, Order of 17 June 2003, *I. C. J. Reports 2003*, p. 102, at 108, para. 28; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, *I.C.J. Reports 2006*, p. 113, at 129-130, para. 63-65; Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, *I.C.J. Reports 2008*, p. 311, at 327-328, para. 59, 63.

[38]See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, p. 3, at 21, para. 40-43; Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, *I. C. J. Reports 1996*, p. 13, at 22-23, para. 38, 42-43; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, *I. C. J. Reports 2000*, p. 111, at 127-128, para. 41-43.

[39]According to Lawrence Collins, this irrelevance of the merits, although it has marked the general practice of the ICJ, is entirely theoretical since "it is wholly unrealistic to suppose that the apparent merits of the case have no influence on the outcome of the application for interim measures of protection." (Collins, *supra* fn. 1, at 225).

[40]For a brief contextualisation of the cases, see Section 3.3.1.

were manifestly lacking, i.e. the rights that the applicant sought to protect did not exist under the Genocide Convention, and therefore, that it could not afford a jurisdictional basis for the case.[41]

A significant development came, again by way of separate opinion, in the *Pulp Mills on the River Uruguay* case (Argentina v. Uruguay). The case was based on the 1975 Statute of the River Uruguay and concerned the respondent's unilateral "authorisation, construction and future commissioning of two pulp mills."[42] The applicant requested interim relief to ensure, among other measures, the suspension of all construction works of the two mills. Argentina argued that the request was necessary to protect procedural and substantial rights under the 1975 Statute. The former included its rights to be fully informed and consulted with regard to construction activities affecting the river, to be given the opportunity to object to projects and, in the event of an objection, to have access to effective dispute settlement before any construction work is authorised. The substantial rights claimed were in relation to Uruguay's obligations not to allow any construction before the requirements of the Statute have been met and not to cause environmental pollution or consequential economic and social harm, including loss of tourism.[43]

The Court took note of the interpretation advanced by Argentina of its procedural rights under the 1975 Statute but left the consideration of whether those rights existed and whether Uruguay had violated them to the merits.[44] Regarding the substantive rights, the Court recognised the applicant's concerns about protecting its natural environment before concluding that the record did not show that the construction of the mills represented "an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river."[45] The parties had presented diverging positions during the oral proceedings regarding the existence of a requirement to demonstrate a "*fumus boni iuri*s", meaning that provisional measures were only to be indicated if "the alleged rights relied upon are [not] *prima facie* based on a clearly insufficient legal foundation, or if the allegations relating to the infringement of the rights in question are [not] based on arguments which are easily

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[41]KOLB, Robert. *The International Court of Justice*. Oxford: Hart Publishing, 2013, at 632-633. Also: OELLERS-FRAHM, Karin. Article 41. In: ZIMMERMAN, Andreas, et al. (eds). The Statute of the International Court of Justice: A Commentary. 2.ed. Oxford: Oxford University Press, 2012, pp. 1302-1358, at 1321.

[42]Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 113, at 114, para. 1.

[43] Ibid, at 130, para. 64-65.

[44] Ibid, at 131, para. 70-71.

[45] Ibid, at 132, para. 72-73.

ascertainable to be inconsistent,"[46] but the majority of the Court pointedly ignored this discussion.

Once again, it was left to the individual opinions of judges to deal with the matter directly. Judge Bennouna argued that, as the point had been brought by the parties during the oral hearings, the Court should have taken the opportunity to examine the *prima facie* existence of the right concerned. He considered that a missing link in the Court's reasoning and that only "[o]nce a decision had been reached as to the existence of the rights at issue, the risk of irreparable prejudice and the indication or otherwise of provisional measures should then have followed."[47]

Regarding the risk of prejudgment, the Moroccan judge considered that the matter was one of the extent to which the merits of the claim are addressed at the preliminary stage.[48] Although proposing that the circumstances of the case required the Court to examine the existence of the rights at issue, Judge Bennouna did not appear to advance that this was to become a permanent condition for the indication of provisional measures, but rather one that the Court had discretion to assess.[49]

Even more influential was Judge Abraham's Separate Opinion. After referring to the position adopted by Judge Shahabuddeen in his *Great Belt* opinion,[50] he dismissed criticisms of a *prima facie* review of the merits at the provisional measures phase by stating they were premised on an illusory separation between the interim protection and merits proceedings and that there was a need to balance the interests of both parties at this stage:

> [T]he Court is never, and in all logic can never be, confronted solely with rights asserted by only one of the parties, rights which it could (provisionally) assume to be established exclusively for purposes of ruling as to whether they require protection. When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties, and it cannot avoid weighing those rights against each other. [...] Yet the measure sought by the [requesting] party from the Court often — as in the present

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[46]Pulp Mills on the River Uruguay (Argentina v. Uruguay), Oral Arguments on the Request for Provisional Measures, Verbatim record 2006/47, *I.C.J. Pleadings 2006*, p. 32. (Condorelli) (translated by the author). For Argentina's response to this argument, see Professor Alain Pellet's oral presentation in Pulp Mills on the River Uruguay (Argentina v. Uruguay), Oral Arguments on the Request for Provisional Measures, Verbatim record 2006/48, *I.C.J. Pleadings 2006*, p. 38-40.

[47]Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Bennouna, *I.C.J. Reports 2006*, p. 142, at 145, para. 11.

[48] Ibid, at 146, para. 15.

[49]Miles, *supra* fn. 28, at 6. See Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Bennouna, *I.C.J. Reports 2006*, p. 142, at 143, 145, para. 3-4, 12.

[50]"I could nearly confine myself to referring the reader to that opinion." (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, *I.C.J. Reports 2006*, p. 137, at 138, para. 3.)

> case — consists of enjoining the other party to take an action which it does not wish to take or to refrain — temporarily — from taking an action which it wishes, and indeed intended, to take. In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise. [...] I find it unthinkable that the Court should require particular action by a State unless there is reason to believe that the prescribed conduct corresponds to a legal obligation (and one predating the Court's decision) of that State, or that it should order a State to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.[51]

He went on to point out that, after the then-recent development of *LaGrand*, which made clear that provisional measures were binding to the parties, it became crucial for the Court to carry out "some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated — and irreparably so — in the absence of the provisional measures."[52] In this sense, unlike his predecessors, Judge Abraham advocated for an assessment of not only the existence of the rights claimed but also of the credibility of the allegations of them being breached. He considered that, in adopting this test, the Court would not be going beyond the limited nature of the provisional measures stage in prejudging the merits but would instead be including a logical step for carrying out its judicial function when faced with a request for interim protection.[53]

In terms of the standard to be adopted for this condition, Judge Abraham considered varying degrees of strictness present in both municipal and international jurisdictions, from *fumus non mali juris*, meaning that the existence of the right and of the opposing party's conduct in its breach must not be patently lacking, to the *fumus boni juris*, as had been formulated by the Uruguayan Advocate during the oral proceedings, to a more stringent requirement that the requesting party showed the probability of its success on the merits, the latter which he found too exacting and unnecessary. In the end, he considered that the most important is that the requesting party shows that its arguments are sufficiently serious on the merits.[54] He summarised his proposed test by asserting that, before granting interim measures for the protection of the rights of the parties, and even before considering the risk of injury and the urgency of the situation, the Court must be satisfied "that there is a *plausible* case for the existence of the right."[55]

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[51]Ibid, at 138-139, para. 6.
[52]Ibid, at 140, para. 8.
[53]Miles, *supra* fn. 41, at 6-7.
[54]Pulp Mills, 2006 Provisional Measures, Separate Opinion of Judge Abraham, at 141, para. 10.
[55]Ibid, at 141, para. 11. (emphasis added)

4.2 Plausibility of rights

Though Judge Abraham's opinion in Pulp Mills appeared to be well-received by the Court,[56] it still took some three years for "plausibility" to formally enter the lexicon of provisional measures orders. Any analysis regarding the existence of the rights claimed by the requesting party is notably absent from the second request for provisional measures in the *Pulp Mills* case and from the request in *Avena (Interpretation)* (Mexico v. United States).[57] It is submitted, however, that, in *Application of the CERD* (Georgia v. Russia), the first suggestions of what would later be further developed can be found.

The case, initiated soon after Russian armed forces entered the applicant's territory in August 2008, concerned alleged violations of the International Convention for the Elimination of All Forms of Racial Discrimination (CERD) by Russia and separatist movements in the Georgian provinces of South Ossetia and Abkhazia. Georgia claimed those movements were conducting attacks and mass expulsions of ethnic Georgian populations from their regions to advance their quest for independence, with Russia providing material support.[58] The applicant requested provisional measures, stating that the rights it sought to

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[56]Miles, *supra* fn. 28, at 7.

[57]As this case was initiated under Article 60 of the Statute, regarding the interpretation of paragraph 153 (9) of the 2004 Avena Judgment, any consideration of the existence of Mexico's rights would inevitably differ from a test to be applied in a regular contentious proceeding, rather referring to whether the interpretation of the judgment advanced by the requesting party was probable, arguable or not patently ill-founded. Nonetheless, the Court did not take the opportunity to clarify how such a test would be conducted for provisional measures under a Request for Interpretation, merely asserting that "the execution of a national, the meaning and scope of whose rights are in question, before the Court delivers its judgment on the Request for interpretation "would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims." (Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, *I.C.J. Reports 2008*, p. 311, at 330, para. 72) The case is, however, still relevant for the ICJ's provisional measures case law, as the first in which the Court could detail how the usual requirements for provisional measures developed up until that point could be applied to cases under Article 60, and, as seen in the previous chapter, as the formal introduction of the link test as a condition for the indication of provisional measures. On this, see, HOPPE, Carsten. A Question of Life and Death: The Request for Interpretation of Avena and Certain Other Mexican Nationals (Mexico v United States) before the International Court of Justice. *Human Rights Law Review*, vol. 9, no. 3, 2009, pp. 455-464; OELLERS-FRAHM, Karin. Provisional Measures in Interpretation Proceedings – A New Way to Extend the Court's Jurisdiction? The Practice of the Court in the Avena and Temple of Preah Vihear Cases. In: JALLOH, Charles Chernor; ELIAS, Olufemi (eds). *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma.* Leiden: Brill Nijhoff, 2015, pp. 61-84.

[58] For a more thorough exploration of the context of the case and of the order for provisional measures as a whole, see, THIENEL, Tobias. The Georgian Conflict, Racial Discrimination and the ICJ: The Order on Provisional Measures of 15 October 2008. *Human Rights Law Review*, vol. 9, no. 3, 2009, pp. 465-472; Id. Provisional Measures in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation). *Goettingen Journal of International Law*, vol. 1, no. 1, 2009, pp. 143-158; OKOWA, Phoebe. "The Georgia v. Russia Case: A Commentary - Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Request for the Indication of Provisional Measures (Georgia v. Russia Federation). *Hague Justice Journal*, vol. 3, no. 3, 2008, pp. 215-225; GHANDHI, Sandy. I. International Court of Justice Application on the Elimination of All Forms

protect were under Articles 2 and 5 of the CERD, under which Russia had obligations not to engage in acts or practices of racial discrimination against persons, groups of persons or institutions, not to sponsor, defend or support racial discrimination by any persons or organisations, to prohibit and bring to an end racial discrimination by any persons, group or organisation. It also added that Georgia and its nationals were entitled to the right to security of person and protection against violence or bodily harm, the right of return, freedom of movement and residence within the borders of the State, and the right to own property. After asserting its *prima facie* jurisdiction under Article 22 of the CERD,[59] the ICJ recalled that its power under Article 41 was intended to preserve the respective rights of the parties *pendente lite* from irreparable prejudice, from which it followed that the Court was to be concerned to protect by provisional measures the rights which may be adjudged to belong either to the applicant or to the respondent on the merits, and went on to present the newly-introduced link requirement.[60] Before, however, analysing whether the rights to be protected by provisional measures were sufficiently connected with the subject of the main proceedings, the Court briefly and not quite expressly considered the existence of the rights claimed by Georgia. The respondent had argued that Articles 2 and 5 of the CERD could not be interpreted as imposing a duty of preventing breaches to the Convention by other actors, which the Court thought would be a subject to be resolved on the merits. Nonetheless, it stated the following:

> Whereas the Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein; [...] whereas States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; whereas there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.[61]

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of Racial Discrimination (Georgia v Russian Federation) Provisional Measures Order of 15 October 2008. *International and Comparative Law Quarterly*, vol. 58, no. 03, 2009, pp. 713-725; PALCHETTI, Paolo. La controversia tra Georgia e Russia davanti alla Corte internazionale di giustizia: l'ordinanza sulle misure provvisorie del 15 ottobre 2008. *Diritti umani e diritto internazionale*, 2009, no. 3, pp. 111-128.

[59] This was a divisive point amongst the judges, with 7 of the 15 voting against the indication of provisional measures, for lack of *prima facie* jurisdiction. (See, Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov. *I.C.J. Reports 2008*, p. 353, at 400.) At the preliminary objections stage, the majority of the Court considered the dispute between the parties did not relate to matters falling under CERD prior to the institution of proceedings and ruled that the case would not be proceeding to the merits phase. As such, the Order of Provisional Measures ceased to be operative. (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, *I.C.J. Reports 2011*, p. 70).

[60] See Section 3.3.4.

[61] Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, at 391-392, para. 126.

Here, although the Court did not consider whether the specific rights claimed by Georgia could be interpreted as being contained in the CERD, it did find, at least, the existence of one right: that of Georgia to demand compliance by Russia with specific obligations under Articles 2 and 5 to protect individuals from racial discrimination. It is not argued that this brief pronouncement effectively introduced a new condition to be fulfilled by provisional measures requests. Still, the Court had not gone through the same effort in *Avena (Interpretation)*, in which the link test was formally presented, and it is notable that the Court saw that establishing the existence of at least some of the rights claimed by Georgia was a necessary logical step to accomplish the analysis required by such link test. This is certainly in accordance with how the plausibility test has been assessed.

It was in *Obligation to Prosecute or Extradite* (Belgium v. Senegal) that plausibility was first mentioned. Belgium had initiated the proceedings concerning obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as under customary international law, concerning Hissène Habré, the former President of Chad, who was charged with widespread human rights violations during his eight-year rule and who had been residing in Senegal since being overthrown in 1990.[62] The applicant requested the Court to order provisional measures determining that Senegal "take all the steps within its power to keep Mr H. Habré under the control and surveillance of [its] judicial authorities."[63] After finding that Article 30 of the Convention Against Torture afforded a sufficient basis of jurisdiction for the purpose of the proceedings, the Court went on to analyse the "link between the right protected and the measures requested," making the same introductory remarks as it had in *Georgia v. Russia*, regarding the purpose of provisional measures and the rights which the Court should be concerned to protect by those means. It then included that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least *plausible*."[64]

In analysing this new condition, the Court first cautioned that it did not need, at that stage of the proceedings, to determine the definitive existence of the rights claimed by Belgium before stating that the rights appeared to fulfil the plausibility requirement, as they

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[62]ANDENAS, Mads; WEATHERALL, Thomas. II. International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012. *International and Comparative Law Quarterly*, vol. 62, no. 3, 2013, pp. 753-769, at 753-756.
[63]Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 139, at 142, para. 15.
[64]Ibid, at 151, para. 57. (emphasis added)

were "grounded in a possible interpretation of the Convention against Torture."[65] The threshold adopted then seemed to be an intermediary between the negative of *fumus non mali iuris* and the more stringent probability of success on the merits: the existence of the rights claimed under the source invoked had to be *possible*, or arguable.[66]

Despite scholars pointing to this case as an innovation, or at least a verbalisation of a so far implicit practice, in the Court's provisional measures case law,[67] the Court did not appear to acknowledge that it did anything new. The dictum that the Court required plausibility of rights for the indication of provisional measures, which would be replicated in many subsequent orders,[68] was inserted without much explanation as if it had always been there and seemed to go unnoticed even by some of the Judges since no mention of it was made in the individual opinions of the case. Judge Koroma would later state that it "seem[ed] to have appeared out of nowhere."[69]

The Court continued to expand on the application of the plausibility test in the following cases involving provisional measures requests. In the *Request for Interpretation of Temple of Preah Vihear* (Cambodia v. Thailand), the Court had the opportunity to explain what this new criterion would mean in cases under Article 60 of the Statute. Under the heading of "Plausible Character of the Alleged Rights in the Principal Request and Link

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[65]Ibid, at 152, para. 60.

[66]Writing after the *Obligation to Prosecute or Extradite* and the 2011 *Border Area* orders of provisional measures, Oellers-Frahm pointed out that "[t]he term 'plausibility', which is not a legal term, appears, however, to a German lawyer as a tentative translation of the German legal term '*Schlüssigkeit*', meaning that a claim is 'plausible' (*schlüssig*) if, supposing that the alleged facts exist, the claim will succeed." (Oellers-Frahm, *supra* fn. 41, at 1321).

[67]Miles, *supra* fn. 28; Oellers-Frahm, *supra* fn. 41; MAROTTI, Loris. « Plausibilità » dei diritti e autonomia del regime di responsabilità nella recente giurisprudenza della Corte internazionale di giustizia in tema di misure cautelari. Rivista di Diritto Internazionale, vol. 97, no. 3, 2014, pp. 761-786; KOLB, Robert. Digging Deeper into the "Plausibility of Rights" - Criterion in the Provisional Measures Jurisprudence of the ICJ. *The Law & Practice of International Courts and Tribunals*, vol. 19, no. 3, November 2020, pp. 365-387; LANDO, Massimo. Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice. *Leiden Journal of International Law*, vol. 31, no. 3, 2018, pp. 641-668.

[68]See, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011*, p. 6, at 18, para. 53; Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, *I.C.J. Reports 2011*, p. 537, at 545, para. 33; 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, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 354, at 360, para. 24; 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, Order of 13 December 2013, *I.C.J. Reports 2013*, p. 398, at 402 para. 15; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, *I.C.J. Reports 2014*, p. 147, at 152, para. 22; Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016*, p. 1148, at 1165, para. 71.

[69]Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, Separate Opinion of Judge Koroma, *I.C.J. Reports 2011*, p. 29, at 30, para. 6.

between these Rights and the Measures Requested,"[70] it stated that the rights claimed by the applicant as deriving from the judgment whose interpretation is requested should be considered "in the light of its interpretation of that judgment."[71] Thailand contested the plausibility of the rights claimed by Cambodia based on a restrictive interpretation of Article 60, arguing that the rights invoked in the request for interpretation must be based on the facts examined in the original 1962 Judgment and not on facts subsequent to it. The Court addressed this point by resorting to the concept of dispute under Article 60, which it had already established as existing earlier in the order. It asserted that the provision in the Statute did not establish a time limit for a request for interpretation to be filed, as long as a dispute regarding the meaning and scope of a previous judgment existed between the parties and such a dispute could, in fact, arise from facts subsequent to the judgment itself.[72]

Cambodia advanced a lenient standard to the plausibility test, under which it would be sufficient to establish that the existence of the rights may reasonably be argued. This seemed to be accepted by the Court, which, after considering the operative clause of the 1962 Judgment and the interpretation purported by the applicant, concluded that the rights invoked by Cambodia were plausible in so far as they were based on the 1962 Judgment as interpreted by it.[73] In other words, in harmony with the threshold adopted in *Prosecute or Extradite*, the rights claimed by Cambodia were seemingly grounded on a plausible interpretation of the Judgment.

Since then, there have been no new requests for provisional measures under interpretation cases; hence, the more recent developments regarding plausibility have yet to be applied in such proceedings.

The plausibility test received more attention in the 2011 Order of Provisional Measures requested by Costa Rica in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua). In the case, involving competing claims over the

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[70] According to Marotti, this division and title, which is also present in the 2011 Order in *Border Area*, shows the close relationship between the plausibility test and the link requirement. This was already clear from Obligation to Prosecute or Extradite, in which plausibility was also found as a part of the link analysis, but in those two 2011 orders, the plausibility test appears endowed with more visibility and autonomy. (Marotti, *supra* fn. 67, at 766-767). The orders that followed, however, did not adopt the same division. In the 2013 orders for provisional measures in *Border Area*, for example, plausibility is found under the heading "The Rights whose Protection Is Sought and the Measures Requested", which gives greater prominence to the link requirement. (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, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 354, at 359).

[71] Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, *I.C.J. Reports 2011*, p. 537, at 545, para. 33.

[72] Ibid, at 545-546, para. 36-37.

[73] Ibid, at 546, para. 39-40.

northern portion of Isla Portillos, Costa Rica alleged it had sovereignty over the entirety of that territory and over the Colorado River and intended to protect, through provisional measures, its rights to protect the environment in those areas and to request the suspension of the dredging operations on the San Juan River "if they threaten seriously to impair navigation on the Colorado River or to damage Costa Rican territory."[74] In its analysis of plausibility, the Court stated that it was not called upon, at that stage in the proceedings, to settle the parties' claim to sovereignty over the disputed territory and that it needed only to assess whether the rights claimed by the applicant on the merits were plausible. In this sense, it found that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos was plausible and that it was not called upon to decide whether Nicaragua had any plausible title to the disputed territory as well. As such, it made clear that the plausibility test did not require any examination of the rights that the respondent claimed to have that may serve as an impediment to the exercise of the applicant's rights.[75] Such scrutiny should be left to the merits.

Additionally, the Court also analysed the plausibility of the specific right of Costa Rica to request the suspension of the dredging operations on the San Juan River based on the Cleveland Arbitral Award of 1888. While Nicaragua had argued, at one, that its dredging of the San Juan River had only a negligible impact on the flow of the Colorado River, and, at two, that, under the Award, indemnification was the only remedy available for Costa Rica in the case of any damage to the Colorado River resulting from such operations, the Court only paid attention to the second argument. It concluded that it was plausible that Costa Rica could seek, by means of provisional measures, remedies other than compensation to avert destruction or impairment of navigation of the Colorado River, such as the suspension of dredging activities.[76] It did not consider, however, whether the condition established by the 1888 Award for the prevention of such operations in Nicaraguan territory - for them to

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[74]Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011*, p. 6, at 20, para. 59. [hereinafter, "Border Area, 2011 Provisional Measures"].

[75]GHANTOUS, Marie. Les Mesures Conservatoires Indiquees par la Cour Internationale de Justice dans le Cadre de Conflits Territoriaux et Frontaliers: Developpements Recents. *Canadian Yearbook of International Law*, 50, 2012, pp. 35-94., at 45; Miles, *supra* fn. 28, at 9; Marotti, *supra* fn. 67, at 768. In this regard, Oellers-Frahm commented: "While this statement may seem at a first glance not to be in accordance with Art. 41 of the Statute which concerns the preservation of 'the respective rights of either party', it nevertheless is justified because what is at stake in this context is exclusively whether the claim of the applicant is one being susceptible of a legal decision." (Oellers-Frahm, supra fn. 41, at 1321-1322.)

[76]Border Area, 2011 Provisional Measures, at 19-20, para. 55, 59, 61.

seriously impair navigation or damage Costa Rican territory[77] - was met, adopting a purely legal view of the plausibility test, consistently with its earlier finding in the case.

Here, the introduction of plausibility to the permanent list of criteria for the indication of provisional measures was not overlooked in the individual opinions. Judge Sepúlveda-Amor, although accepting the rationale behind a preliminary assessment of the merits in provisional measures proceedings, criticised the impreciseness of the term adopted, as it was unclear in expressing what would be required of the parties to demonstrate the prima facie existence of the rights claimed. He argued that the indeterminate terminology and the emphasis that was placed on the test might encourage parties to overburden interim relief proceedings with discussions most appropriate for the merits.[78]

On a similar note, Judge Koroma dedicated his entire separate opinion to chastising the introduction of this requirement, which he considered vague and ambiguous in the English language,[79] as well as inconsistent with the Court's previous jurisprudence, which so far had only required the demonstration of risk of prejudice to the rights claimed. He was also concerned by the impression that it was unclear whether plausibility applied to legal rights, to facts or both. Judge Koroma considered that the analysis conducted in *Prosecute or Extradite* merely related to whether the Convention against Torture, as a matter of law, gave Belgium the right to bring criminal proceedings against an alleged torturer, while, in *Border Area*, the fact that Costa Rica is entitled to sovereignty and territorial integrity was so self-evident, as rights enshrined in the UN Charter, that the Order did not need to evaluate their plausibility, but instead examined whether the title to sovereignty claimed by Costa Rica over the entirety

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[77]As determined in the Cleveland Arbitral Award of 22 March 1888: "The Republic of Costa Rica *cannot prevent* the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same.* The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement." (Ibid, at 20, para. 59, emphasis added).

[78]Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, Separate Opinion of Judge Sepúlveda-Amor, *I.C.J. Reports 2011*, p. 35, at 37-38, para. 11-12, 15.

[79] Judge Koroma objected to the term in English specifically, as it could have a negative connotation of an argument that, while appearing truthful, is in reality deceitful. He pointed out that the plausibility test had been introduced in a case in which the French version of the judgment was authoritative and that "plausible" in French had a somewhat different meaning, appearing "to only have a positive connotation and therefore better reflect the Court's intention when the term was used." (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, Separate Opinion of Judge Koroma, *I.C.J. Reports 2011*, p. 29, at 32, para. 9.). Judge *ad hoc* Dugard also pointed to this dual meaning of the term in English, but, in turn, considered that the expression sufficiently conveyed the standard of proof required for the new condition, provided that the positive meaning was presumed. (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, Separate Opinion of Judge *ad hoc* Dugard, *I.C.J. Reports 2011*, p. 60, at 63, para. 5).

of Isla Portillos was plausible, which he saw as a matter of fact.[80] Though the concerns of the Sierra Leonean judge cannot be dismissed, this point does not seem consistent with the considerations regarding plausibility made by the Court in the 2011 *Border Area* order. In that case, the rights claimed by the requesting party were not simply the right to sovereignty and territorial integrity in the abstract; the question was whether such rights plausibly existed in relation to a disputed territory. The conclusion reached by the Court was that the territory of Isla Portillos could plausibly be the subject of sovereign title and that Costa Rica could plausibly be said to hold that title, which seems to reference the *legal* plausibility of the rights, as the existence of an opposing title by Nicaragua, the dominion of the territory or the alleged violations of Costa Rica's plausible rights were not taken into account.[81]

Despite his criticisms, Judge Koroma was not against including a *prima facie* pronouncement on the merits at the provisional measures phase but instead argued that such an assessment needed to be articulated on clear terms, explaining the rationale behind its inclusion. He considered such a condition would perform a similar role to *prima facie* jurisdiction in dissuading States from bringing patently meritless claims to obtain provisional measures.[82] Nonetheless, he did not adopt a particular stance on what this clear standard should be, naming, instead, two possible routes: either the requesting party would have to present evidence that, standing alone, would establish its entitlement to certain rights, or it could be required that the rights asserted by it "be grounded in a reasonable interpretation of the law or of the facts."[83] Notwithstanding his use of "reasonable" instead of "plausible", this latter proposal does not seem much different from the standard presented in *Prosecute or Extradite*.

The criticisms referencing the lack of clarity of the plausibility test were not entirely shared. Judge Greenwood, on his declaration, considered that the Court had made sufficiently clear that the standard introduced in *Prosecute or Extradite*, regardless of the word chosen to express it, was one of "reasonable possibility," and it merely spelt out the implications of the principle that provisional measures are aimed at protecting rights which might be adjudged to belong to one of the parties, from which it would follow that "unless there is a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that

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[80]Border Area, 2011 Provisional Measures, Separate Opinion of Judge Koroma, at 32, para. 10-11.
[81]Miles, *supra* fn. 28, at 9; SPARKS, Tom; SOMOS, Mark. The Humanisation of Provisional Measures?—Plausibility and the Interim Protection of Rights Before the ICJ. In: PALOMBINO, Fulvio Maria; VIRZO, Roberto; ZARRA, Giovanni (Eds.). *Provisional Measures Issued By International Courts and Tribunals*.Haia: T. M. C. Asser Press, 2021, pp. 77-105, at 88-89.
[82]Border Area, 2011 Provisional Measures, Separate Opinion of Judge Koroma, at 32-33, para. 13, 17.
[83]Ibid, at 33, para. 16.

that right is applicable to the case, then it cannot be said that that right *might* be adjudged to belong to it."[84] On the other hand, part of the doctrine commenting on the decision considered the failure by the Court to detail the content of the plausibility test was justified by both the expediency of the procedure in which it is inserted and by the need to ensure a margin of discretion under which the Court could modulate the degree of ascertainment required by the circumstances on a case by case basis.[85]

Three more requests for provisional measures were considered in the *Border Area* case, including one request for modification under Article 76 of the Rules of Court and one request made in the *Construction of a Road in Costa Rica along the San Juan River* case (Nicaragua v. Costa Rica), which was initiated by Nicaragua and joined with *Border Area*. The Court denied the requests for modification of the 2011 provisional measures, submitted by both parties, and no consideration of plausibility was made, most likely because the rights that Costa Rica was seeking to protect were the same that were analysed in the previous request.[86] With respect to Nicaragua's request, the Court considered that it was not based on any change in the situation that gave rise to the indication of provisional measures in the 2011 Order; therefore, Article 76 could not be invoked.[87] As the primary condition for the modification of the Order had not been fulfilled, the Court did not even get to the analysis of the regular criteria for provisional measures, which such a request would also have to meet.

In September 2013, Costa Rica made a new request for provisional measures based on the discovery that Nicaragua had commenced construction of two new artificial canals in the disputed territory.[88] As the rights which the applicant sought to protect were, again, equal to those it declared in the 2011 request, the Court essentially repeated the same analysis of plausibility it had carried out in the former request, stating that it saw no reason to depart from the previous conclusion in the context of the new request. It merely added that "to the

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[84] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, Declaration of Judge Greenwood, *I.C.J. Reports 2011*, p. 46, at 48, para. 5.
[85] Marotti, *supra* fn. 67, at 772.
[86] Although this was not explicit in the order, Judge *ad hoc* Dugard, in his Dissenting Opinion, pointed out that the analysis of plausibility and of the link test both were thought as "unnecessary to reconsider" after the Court found that the presence of organized groups of persons in the disputed territory, in which Costa Rica based its request, was a sufficient change in circumstances that may warrant modification of the 2011 Order. (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), Order of 16 July 2013, Dissenting Opinion of Judge *ad hoc* Dugard, Provisional Measures, *I.C.J. Reports 2013*, p. 271, at 275, para. 11).
[87] 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), Order of 16 July 2013, Provisional Measures, *I.C.J. Reports 2013*, p. 230, at 237, para. 26-29.
[88] 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, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 354, at 357, para. 13.

extent that Costa Rica's claimed title is plausible, [...] any future environmental harm caused in the disputed territory would infringe [its] alleged territorial rights."[89] In this sense, it did not deviate from the approach of plausibility developed in the previous decisions. It is interesting to note, however, that, under the header of the risk of irreparable prejudice and urgency, the Court thought it necessary to analyse the evidence presented to it to conclude that the alleged breaches of Costa Rica's plausible rights were credible, before properly assessing the two formal conditions.[90] This logical step, although not a permanent addition at this point, somewhat fulfils the role of what would become the factual dimension of plausibility, connecting the plausibility test, i.e., an assessment of the credibility of the claims, to the risk of irreparable prejudice.[91]

The last order of provisional measures in this context was actually based on a request on the *Construction of a Road* case (Nicaragua v. Costa Rica) and, as such, concerned the rights of Nicaragua as the applicant and requesting party. The rights claimed by it were similar to those claimed by Costa Rica in its previous requests, regarding the right of territorial sovereignty and integrity, the right to be free from transboundary harm and the right to receive a transboundary environmental impact assessment from Costa Rica.[92] It did not concern, however, the disputed area of Isla Portillos but the San Juan River. The analysis of plausibility in the case followed the same logic as the 2011 *Border Area* Order, first establishing that Nicaragua enjoyed dominion and sovereign jurisdiction over the waters of the river under the 1858 Treaty of Limits between the two parties, then observing that the existence of Nicaragua's right to be free from transboundary harm, deriving from this sovereignty, was plausible. Lastly, it concluded that the right to receive an environmental impact assessment where there is a risk that a proposed industrial activity may have a significant adverse impact in a transboundary context was also plausible since this was now

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[89]Ibid, at 360, para. 28.

[90] Ibid, at 364-365, para. 44-47.

[91]The Court noted that the evidence submitted showed that two new *caños* (canals) had been built in the disputed territory since the 2011 Order, that Nicaraguan personnel carrying out dredging operations, infrastructure and equipment, as well as a Nicaraguan military encampment, were stationed there, along with the presence of other Nicaraguan nationals, including members of the Guardabarranco Environmental Movement, in regard to whom the Court had expressed concerns of aggravation of the dispute in the Order of July 2013. It then went on to specifically consider "whether the situation in the disputed territory, and in particular, the *caños* and the trench as they currently stand, pose a risk of irreparable prejudice to the rights claimed by Costa Rica." (Ibid, at 365-366, para. 48). Rather than addressing the risk of irreparable prejudice under conjectures that violations to the rights in question may incur prejudice, here the Court verified that there was evidence that those plausible rights were being violated by the opposing party before ascertaining that this specific violation was causing or would cause prejudice to those rights if allowed to continue.

[92] 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, Order of 13 December 2013, *I.C.J. Reports 2013*, p. 398, at 403, para. 17.

considered a requirement under general international law, as the Court had found in *Pulp Mills*.[93] Once again, the Court did not find it necessary to consider, within the plausibility test, whether the activity to which Nicaragua objected, the road project, was an industrial activity capable of having such an adverse transboundary impact and it solely focused on the fact that Nicaragua's claimed rights were plausibly grounded in international law. Nonetheless, similarly to the order of September 2013, it did conduct this examination under the risk of irreparable harm criteria, reviewing the evidence presented to conclude that Nicaragua did not establish there was significant harm being caused to the river due to the construction.[94]

At that point, it seemed established that the plausibility test was meant only to examine whether the rights claimed by the requesting party could reasonably be derived from a source of international law, and any analysis pertaining to whether the rights established as plausible were credibly being violated was allocated under the header of risk of irreparable harm and urgency. The two cases that followed seemed to defy this logic somewhat.

In *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), concerning the seizure by Australian agents of material including documents, data and correspondence between Timor-Leste and its legal advisers relating to a pending Arbitration under the Timor Sea Treaty of 20 May 2002 between the two parties to the case, the applicant requested provisional measures aiming to protect the ownership and property rights which it claimed to hold over the documents, entailing the rights to inviolability and immunity of this property, to which it is entitled as a sovereign State, and its right to the confidentiality of communications with its legal advisers, which it argued was derived from the general principle of law of legal professional privilege.[95] Australia contested the plausibility of such rights by asserting that, first, it was not established that the seized material belonged to Timor-Leste, and, second, that there were no principles of law from which those rights could be derived, and even if there were, they would not be absolute and would not apply to situations in which the communications between the State and its counsel constituted a threat to national security or to the higher public interests of a State.[96] There are notably two elements to this line of argument, one factual - whether the seized documents belonged to Timor-Leste, i.e., whether Australia violated Timor-Leste's claimed rights - and one legal - whether the rights claimed by Timor-Leste were grounded in international law.

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[93] Ibid, at 403-404, para. 19.
[94] Ibid, at 407, para. 34.
[95] Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147, at 148, 152, para. 1, 24.
[96] Ibid, at 152-153, para. 25.

Though the Court focused on the latter, as it had been doing in previous cases, the former was briefly addressed, when the Court stated that Australia did not dispute "that at least part of the documents and data seized [...] relate to the Timor Sea Treaty Arbitration or to possible future negotiations on maritime delimitation between the Parties and that they concern communications of Timor-Leste with its legal advisers."[97] One might notice the similarity between this dictum and the one in the *Great Belt* order, in which, faced with a contention by Denmark that Finland's claims were insufficiently substantiated, the Court noted that the existence of the right of passage claimed by Finland was undisputed.[98] In that case, years before the plausibility test was formally introduced, the Court was referring to the existence of the rights, while in the *Certain Documents and Data*, it was referring to the credibility of the requesting party's factual claims. Although far from an explicit determination that the applicant had to provide evidence of their claims, Australia's factual argument could have been ignored, as the Court had done numerous times before.

In regard to the plausibility of the rights, the Court found Timor-Leste's claimed right to confidentiality with legal advisers, specifically with respect to ongoing arbitral proceedings and future negotiations between the Parties, could be seen as deriving from the principle of sovereign equality of States, enshrined in Article 2.1 of the UN Charter, as well as from the procedural equality required by Article 2.3 of the Charter, regarding the settlement of international disputes by peaceful means.[99] As such, it concluded that *at least some* of the rights claimed were plausible, "namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers."[100] The Court did not explain, and this would be repeated in many decisions to come, why did it not consider the plausibility of all the rights claimed by the applicant. Did the rest not meet the threshold of plausibility or was their analysis unnecessary after the Court found that some others were plausibly grounded in international law? This lack might be explained by procedural economy, or by a concern not to prejudge the merits by declaring that some of the rights were implausible, but a more transparent reasoning would be ideal. Similarly, no consideration was given to the relationship between the principles of substantive equality and equality applied in a

[97] Ibid, at 153, para. 27.
[98] Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12, at 17, para. 22.
[99] Certain Documents and Data, Provisional Measures, at 153, para. 27.
[100] Ibid, at 153, para. 28.

procedural context.[101] In addition to that, remarkably, the rights that the Court found to be plausible in the case were not expressed in the same terms as the rights for which Timor-Leste sought protection. This active approach can be interpreted as an expression of the principle of *iura novit curia*, as applicable in incidental proceedings.[102] A less favourable reading might wonder whether the Court took it upon itself to correct the applicant's pleadings.

Though most of the separate and dissenting opinions in this case were related to the matter of risk of irreparable prejudice,[103] Judge Greenwood still made a few relevant considerations regarding the plausibility test. He reinforced the view expressed in his 2011 *Border Area* declaration, by stating that plausibility means that "there is a realistic prospect that when the Court rules upon the merits of the case they will be adjudged to exist and to be applicable."[104] He cautioned, however, that the Court should not, at this stage, let itself be influenced by the perceived likely outcome of the merits or by matters which could only be resolved after the Court definitively established it had jurisdiction and after the parties were allowed to present their full arguments and evidence.[105] This opinion makes clear that the fear of prejudgment, in relation to the plausibility test, had not yet been fully overcome. At the same time, no similar fear was being expressed at this point with regard to the condition of *prima facie* jurisdiction, despite the fact that, as previously seen, they fulfil similar purposes, only in relation to different stages of the proceedings, which can be interpreted as contradictory.[106]

The exclusive analysis of the existence of rights under the plausibility test was also challenged in the *Immunities and Criminal Proceedings* case (Equatorial Guinea v. France), which was initiated due to judicial investigations opened by French authorities against Mr. Teodoro Nguema Obiang Mangue, Second Vice-President of Equatorial Guinea, which resulted ultimately in the attachment (*saisie immobielière*) of a building allegedly serving as the premises of Equatorial Guinea's diplomatic mission in France, which had also been

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[101]BONAFÉ, Beatrice. Les mesures adoptées pour sauvegarder les droits de Timor-Leste d'un préjudice irréparable. *Ordine Internazionale i diritti umani*, 2014, pp. 332-335, at 333.

[102]From the Latin, 'the Court knows the law". See, MAROTTI, Loris. Ancora in tema di plausibility: L'ordinanza sulle misure cautelari nel caso Ucraina c. Russia. *Ordine Internazionale i diritti umani*, 2017, pp. 244-249, at 248.

[103]Particularly, the matter of the undertaking given by Australia, which the majority of the Court found insufficient to entirely remove the risk of prejudice in the case, a finding four of the judges disagreed with. On this, see Section 3.3.3.

[104] Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, Dissenting Opinion of Judge Greenwood, *I.C.J. Reports 2014*, p. 194, at 195, para. 4.

[105] Ibid, at.196, para. 6.

[106]Miles, *supra* fn. 28, at 6.

previously searched and had items seized. The applicant requested provisional measures so that all criminal proceedings brought against the Vice-President were suspended and that the building located at 42 Avenue Foch in Paris be treated as premises of Equatorial Guinea's diplomatic mission in France, with its inviolability assured. Measures of non-aggravation were also requested.[107]

Though the Court considered it did not have *prima facie* jurisdiction to entertain Equatorial Guinea's request relating to the immunity of the Vice-President, it did find jurisdiction pertaining to the matter of the violation of the diplomatic premises under the Optional Protocol of the Vienna Convention on Diplomatic Relations.[108] As such, only those rights were considered for the purposes of the plausibility test. The Court reached the following conclusion:

> Given that the right to the inviolability of diplomatic premises is a right contained in Article 22 of the Vienna Convention, *that Equatorial Guinea claims that it has used the building in question as premises of its diplomatic mission in France since 4 October 2011, and that France acknowledges that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 Avenue Foch* (see paragraph 59 above), it appears that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention.[109]

Here the Court did not limit itself to asserting that the existence of the right claimed by Timor-Leste was plausible. It also made a point to note that such a right would be applicable to the factual context of the case, as the record before it showed that the building in question could plausibly constitute the premises of the diplomatic mission. Under the analysis of irreparable prejudice, the Court also examined the record to conclude that the premises were at risk of being violated again before the decision on the merits, and, if that were to happen, it might not be possible to restore the situation to the *status quo ante*.[110]

Although one author considers that it was in *Immunities and Criminal Proceedings* that the Court expanded the plausibility test to encompass a factual assessment,[111] the decision seems more indicative of a transition rather than firmly within one category or the other. The consideration, by the Court, of whether the premises are factually used for the purposes of its mission is definitely one step further from its usual assessment, which would

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[107]Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016, p. 1148, at 1152, para. 17.
[108]Ibid, at 1160, para. 50; 1165, para. 69.
[109]Ibid, at 1167, para. 79. (emphasis added)
[110] Ibid, at 1169, para. 90.
[111]Lando, *supra* fn. 67, at 648.

have stopped after the finding that the right to inviolability of diplomatic presence is contained in the VCDR. Nonetheless, it is still short of the threshold that would be required in the following cases.

4.3 Plausibility of claims: Evolution?

Factual plausibility, or plausibility of claims, does not merely refer to the Court conducting a review of evidence presented during provisional measures proceedings, but to a requirement according to which the requesting party must demonstrate, not only that its respective rights plausibly exist, but also that they are plausibly being breached by the opposing party.[112] As most of the doctrine concludes,[113] it is in *Application of ICSFT and CERD* (Ukraine v. Russia) that this expansion of the plausibility test is unequivocally expressed.

The case concerned numerous allegations regarding the respondent's support of organisations engaged in terrorist acts in Ukrainian territory, through the supply of funds, weapons, and other forms of material assistance, in violation of the International Convention for the Suppression of the Financing of Terrorism (ICSFT), as well as regarding the systematic discrimination of ethnic Ukrainian communities and the Crimean Tatar people, in particular by persecuting their political leaders and banning the *Mejlis*,[114] in the context of the Russian occupation of Crimea, violating the CERD.[115] Ukraine requested provisional measures of non-aggravation and other more specific measures regarding Russia's preventing further acts of terrorism, transfers of assets from its territory to terrorist groups and refraining

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[112]Miles, *supra* fn. 28, at 36.

[113]Ibid, *in passim*; Kolb, *supra* fn. 67, at 368; RIETER, Eva. The International Court of Justice and Provisional Measures Involving the Fate of Persons. In: KADELBACH, Stefan et al (eds). *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts*. Cham: Springer International Publishing, 2019, pp. 127-170, at 154-155; Sparks, Somos, *supra* fn. 81, at 91-92.

[114] The *Mejlis* of the Crimean Tatar people is the highest representative and executive body of the Crimean Tatar group, established in 1991. Its main goal was to eliminate the consequences of the genocide committed by the Soviet regime against the Crimean Tatars, restore the national and political rights of the Crimean Tatar people, and realize their right to free national-state self-determination on their national territory. The *Mejlis* was outlawed by Russia after the start of the occupation of Crimea in 2014 and its members were either banned from the region or criminally charged. (MEJLIS OF THE CRIMEAN TATAR PEOPLE. *About Mejlis*. Available at https://qtmm.org/en/about/. Accessed 8 March 2024.) Further: TAHIIEV, Akif. Transformation of the Status of the Mejlis of the Crimean Tatar People in the Ukrainian Legislation. *Journal of European Studies*, vol. 40, no. 1, 2024, pp. 49-67; MURATOVA, Elmira. The Transformation of the Crimean Tatars' Institutions and Discourses After 2014. *Journal of Nationalism, Memory & Language Politics*, vol. 13, no. 1, 2019, pp. 44-66.

[115] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, *I.C.J. Reports 2017*, p. 104, at 106-111, para. 1-7. [hereinafter, "Application of ICSFT and CERD, Provisional Measures"].

from acts of racial discrimination and political and cultural suppression against the Crimean Tatar and ethnic Ukrainians.[116] In its request, Ukraine barely addressed plausibility, merely stating that provisional measures could be indicated as long as the Court concludes that the rights invoked are plausible, citing the previous case of *Immunities and Criminal Proceedings*, and that its claims "far exceed this modest standard."[117]

During the hearings for the indication of provisional measures, the matter of plausibility gained importance. Counsel for Ukraine, despite reinforcing the standard established in *Prosecute or Extradite*, after making arguments relating to the plausible existence of the Applicant's rights under ICSFT, went on to address the factual allegations of terrorism, contending that it was "far more than simply 'plausible' that Russia has engaged and continues to engage in [acts of terrorism against civilians]."[118] This part of the hearing was primarily focused on the shelling of civilian targets at Volnovahka, Mariupol, Kamatorsk and Avdiivka and relied on evidence presented in OSCE and UNHCHR reports.[119] The arguments regarding the CERD followed the same pattern, first contending that the existence of the rights claimed was grounded on a possible interpretation of the Convention, then presenting evidence, again based on reports by international organisations, of Russia's alleged acts of racial discrimination.[120] One author claims that, in addressing its factual claims, Ukraine "appeared to make a concession that the plausibility requirement extended beyond the mere existence of rights and their possession by [the requesting party], and included consideration of whether the rights to be protected had been breached by [the Respondent]."[121] If so, it went considerably further than previous requests.

Although Russia did not submit any written observations to Ukraine's provisional measures request, it became clear, during the hearings, that the plausibility of the claims was the main point of the respondent's opposition to the indication of interim relief. Relying on the separate opinions of Judge Abraham in *Pulp Mills* and Judge Greenwood in *Border Area*, Russian Counsel Samuel Wordsworth initiated his plaidoiries by stating that "it is a necessary

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[116]Ibid, at 112-113, para. 14.
[117]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures of Protection Submitted by Ukraine, *I.C.J. Pleadings 2017*, p. 5, para. 15.
[118]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), Oral Arguments on the Request for Provisional Measures, Verbatim record 2017/1, *I.C.J. Pleadings 2017*, p. 41, para. 28. (Cheek)
[119] Ibid, at 42-48, para. 29-50. (Cheek)
[120] Ibid, at 56-61, para. 8-18. (Gimblett)
[121] Miles, *supra* fn. 28, at 22.

corollary of the mandatory nature of a provisional measures order that there must be something more than acceptance at face value of the facts as alleged by Ukraine."[122] He also argued that, in assessing the plausibility of the evidence presented, the Court should consider the gravity of the allegations, in line with the approach taken at the merits phase.[123] In provisional measures proceedings, specifically ones involving very grave allegations, that would mean that "a commensurate focus on the specific rights and breaches asserted, and also on the evidence that has been put forward" would be required.[124]

The cornerstone of Russia's argument in relation to the plausibility of the claims regarding violations of the ICSFT was the lack of demonstration, by Ukraine, of the specific intent element (*dolus specialis*) necessary to frame a conduct within the definition of terrorism set forth in Article 2 of the Convention.[125] Under this provision, in the light of which all other obligations of the ICSFT should be read, it is required, for a violation of the ICSFT to be configured, that the person directly or indirectly providing or collecting funds has the intention or knowledge that they are to be used in an "act intended to cause death or serious bodily injury to a [...] person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act [...] is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act."[126] As such, Russia's oral presentation called into question the evidence of such intention since the reports by international organisations on which Ukraine relied did not make a conclusion on that point, not mentioning any intimidatory or political purpose. It also focused on elements indicating possible military objectives targeted by the shellings at Volnovahka, Mariupol and Kamatorsk and pointed to the lack of corroboration of the shellings in Avdiivka. Lastly, it referred to the fact that Ukraine was also engaged in indiscriminate shelling, which would "place a very important question mark next to the characterisation that Ukraine alone places on these acts as acts of terrorism."[127]

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[122]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), Oral Arguments on the Request for Provisional Measures, Verbatim record 2017/2, *I.C.J. Pleadings 2017*, p. 22, para. 3. (Wordsworth)

[123]At this point, he quoted the separate opinion of Judge Higgins in the *Oil Platforms* case according to which "the graver the charge the more confidence must there be in the evidence relied on." (Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Separate Opinion of Judge Higgins, *I.C.J. Reports 2003*, at 234, para. 33).

[124]Application of ICSFT and CERD, CR 2017/2, at 23, para. 6. (Wordsworth)

[125]Ibid, at 22 et seq.

[126]UNITED NATIONS. International Convention for the Suppression of the Financing of Terrorism. *United Nations Treaty Series*, vol. 2178, December 1999, p. 197.

[127]Application of ICSFT and CERD, CR 2017/2, at 30, para..23 (Wordsworth)

Regarding the contentions under CERD, the Russian tactic was also to try to discredit the allegations of breaches of the rights invoked, without much focus on the existence of such rights, by attempting to paint a much more positive picture of the situation of non-Russian communities in Crimea.[128]

Ukraine did not try to refute Russia's construction of plausibility as requiring an assessment of the credibility of breaches to the rights invoked, seemingly accepting the scope of the test that had been advanced.[129] Instead, it attempted to demonstrate that the *dolus specialis* required by the ICSFT was present in the evidence submitted and to discredit Russia's version of the facts regarding the violations of the CERD, reinforcing its factual contentions.[130] In its sur-rebuttal, Russia noted this lack of challenge to the content of the plausibility test:

> [O]n the relevant test for plausibility, there was no response at all, and nor could there be. It is understood now to be common ground that the Court cannot accept at face value the facts as alleged by Ukraine, and that the Court must be satisfied that the arguments that Ukraine makes are sufficiently serious on the merits, and all the more so here where the allegations are of a particular gravity.[131]

Efforts then went to tackle Ukraine's substantial claims in its rebuttal, with particular focus on the evidence related to the *dolus specialis* of the attacks to cause civilian casualties, under the ICSFT.[132] Russia also argued that, even if this intention could be sufficiently established, still the second element of the requirements of Article 2(1)(b), that the act be done with the purpose of intimidating the population or coercing the government, could not be proven.[133]

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[128]Ibid, at 70-73, para. 22-32 (Forteau)

[129]Miles, *supra* fn. 28, at 24.

[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), Oral Arguments on the Request for Provisional Measures, Verbatim record 2017/3, *I.C.J. Pleadings 2017*, p. 36-44, para. 3-29 (Cheek); p. 51-59, para. 4-27. (Gimblett).

[131] 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), Oral Arguments on the Request for Provisional Measures, Verbatim record 2017/3, *I.C.J. Pleadings 2017*, p. 12, para. 3 (Wordsworth).

[132]Ibid, at 12-28, para. 4-67 (Wordsworth). In regard to the claims under CERD, less attention was paid to the matter of plausibility, however the Russian Counsel Mathias Forteau still called into question the construction of the plausibility test proposed by Ukraine the day before ("You do not need to enter into […] the merits of this case to conclude that a plausible right needs protection. [...] [I]t is sufficient if the rights claimed are "grounded in a possible interpretation" of the treaty invoked." (Application of ICSFT and CERD, CR 2017/3, at 51, para 2 (Gimblett).).) and attempted to discredit the evidence that was presented as insufficient to meet the plausibility standard and cited constitutional, legislative and administrative measures adopted since 2014 regarding the rights of the Tatar and Ukrainian communities, including through the inclusion of these languages in the Crimean Constitution as official languages of Crimea. (Application of ICSFT and CERD, CR 2017/4, at 46-48, para 3-11 (Forteau).)

[133] Application of ICSFT and CERD, CR 2017/4, at 16, para. 18-19 (Wordsworth).

This discussion warranted an extensive analysis of the issue by the Court. After ascertaining the *prima facie* existence of a dispute between the parties and the apparent fulfilment of the procedural conditions of both instruments invoked,[134] the ICJ started its plausibility analysis no differently than any previous cases, stating that it "need[ed] only decide whether the rights claimed by Ukraine on the merits, and for which it is seeking protection, are plausible."[135] Although the quote of this dictum implied that the test would be conducted only in relation to rights, not to claims, the Court seemed to accept the Russian standard for plausibility. After reproducing the content of Articles 18 and 2 of the ICSFT, which appeared to fulfil the role of legal plausibility, the order noted that the obligations set out in the Convention were premised on the definition established in Article 2 and, as such, "in the context of a request for the indication of provisional measures, a State party to the Convention may rely on Article 18 [...] only if it is plausible that such acts constitute offences under Article 2 of the ICSFT."[136] This would mean the test could only be met if there were sufficient evidence that the elements of intention and knowledge (Article 2.1 of the Convention) and the element of intimidatory or coercive purpose (Article 2.1.b) were present in the acts complained of. The Court concluded that Ukraine, at that stage, had not provided a sufficient basis that those elements were present.[137] For the first time, it declined to indicate provisional measures in relation to a claim for not meeting the plausibility test.

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[134]Both of these matters were considered under the condition of *prima facie* jurisdiction. Under the existence of a dispute, the Court made a short consideration regarding jurisdiction *ratione materiae*, and concluded that at least some of the allegations made by Ukraine were capable of falling within the scope of the ICSFT and of the CERD, respectively. This indicates a somewhat close relationship between plausibility and jurisdiction. In this regard, Kolb finds that "[i]n general, the two aspects remain neatly separated: the jurisdictional issue is preliminary and will be settled in the first place; if jurisdiction is provisionally affirmed, the Court will enter into the concrete legal positions and scrutinise their plausibility. But in a series of cases, the two issues may come closely together. Thus, jurisdictional assessments of compromissory clauses may entail questioning the legal scope of the convention; and this in turn includes issues *ratione materiae*; these can be settled only in view of the rights and obligations set out in the text. However, in most cases, the jurisdictional assessment will take place on a more abstract level than the plausibility test, which is shrouded in concrete evidence and facts; further, the applicable standards could differ, e.g. plausibility requiring a "not manifestly unfounded"-approach and prima facie jurisdiction setting a higher threshold; finally, plausibility may entail also taking account of rights and obligations of the other party, while jurisdiction will not. It may further be useful to distinguish between the probable existence of jurisdiction (based on the title of jurisdiction) and the existence or not of concrete rights probably falling within the scope of jurisdiction (the rights flowing from the provisions).The title of jurisdiction and the existence of subjective legal positions are thus distinguished. The plausibility test approaches the jurisdictional test mainly in the context of the second limb. However, that may be, conceptually the two processes remain separated; but they may sometimes come to narrow confines." (Kolb, *supra* fn. 67, at 383-384.) This is consistent with the approach of the present case, but the Court has opted, at least once, to adopt a more concrete verification of jurisdiction *ratione materiae* and, in turn, limit the plausibility consideration. (See Allegations of Genocide (Ukraine v. Russia), Provisional Measures, examined below).

[135]Application of ICSFT and CERD, Provisional Measures, at 126, para. 64.

[136] Ibid, at 131, at 74.

[137] Ibid, at 131-132, para. 75.

The same standard was applied to the claims under the CERD, though with a more favourable result for the applicant. The Court again quoted Articles 2 and 5, which Ukraine invoked as its plausible rights, and noted that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith,[138] meaning that it was plausible that Ukraine had the rights it claimed, even if the most affected by the alleged violations were individuals and not the State itself. Then, the Court proceeded to briefly expose a similar logical path as the one it had drafted in relation to ICSFT, by stating that, as the CERD provisions had the purpose of protecting individuals from racial discrimination, they could only be invoked by a State party for obtaining provisional measures of protection if the acts complained of plausibly constituted acts of racial discrimination. Lastly, without making a detailed assessment of the evidence presented, the Court found that it was sufficient to conclude that at least some of the allegations made by Ukraine were plausible breaches of CERD, namely the banning of the *Mejlis* and the restrictions on the educational rights of ethnic Ukrainians.[139]

The rest of the criteria for the indication of interim measures were only considered in relation to those rights deemed plausible. The Court ordered measures of non-aggravation directed at both parties and, in relation to the CERD allegations, that Russia complied with its obligations under the Convention, by ensuring the availability of education in the Ukrainian language and ceasing any limitations imposed on representative institutions of the Crimean Tatar people, including the *Mejlis*.

The Court did not explicitly determine the relationship between the gravity of the charges and the plausibility test, but, as one author argues, it seemed that the most crucial consideration is the structure of the rules invoked.[140] As Article 2 of the ICSFT requires a twofold *dolus specialis* for a breach of the Convention to be configured, this would affect the evidentiary threshold of the test as well.[141] This interpretation increases the difficulty of setting a precise standard for the test, which would have to be assessed on a case-by-case basis, significantly changing in accordance with the norms or instrument invoked.

It is also worth noting that, once again, the Court did not acknowledge any change in its application of the plausibility test. In fact, in summarising the parties' contentions, it did

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[138]Ibid, at 135, para. 81.
[139]Ibid, at 135, para. 83.
[140]Marotti, *supra* fn. 102, at 247.
[141]"[E]ven if one were to accept a milder notion of plausibility and assimilate the relevant test to the fumus non mali iuris or "not manifestly unfounded" finding [...], the structure of the rule invoked does not change. It will always be necessary to sufficiently relate the conduct complained of in the present case to the rule invoked." (Ibid, at 247, translated by the author).

not pay any mind to the fact that Russia had construed the plausibility test in a different manner than the previous jurisprudence, instead just noting its opposing arguments to the plausibility of the specific claims made by Ukraine. As such it was not clear at that point whether this standard would only be applied in this case, given that the parties seemingly accepted this exceptional threshold during their oral arguments, or whether this was a permanent expansion of the meaning of the test.[142]

Still, the discrepancy was noted in some Judges' individual opinions. Judge Cançado Trindade pointed to the "erratic" application of the plausibility test, sometimes appearing "to be related to rights, sometimes to facts, or else to arguments of the parties."[143] He advanced that provisional measures should be more concerned with the vulnerability and the rights of human beings than with the plausible construction of the rights of the State parties.[144] Judge *ad hoc* Pocar also took issue with the uncertainties surrounding plausibility and considered the construction adopted in the case posed risks to the good administration of justice, ultimately blurring the lines between interlocutory proceedings and the merits and overburdening the Court with evidence and materials which could strain its ability to indicate urgent measures promptly.[145] Judge Owada, for his part, noted that, up to that point, the threshold for plausibility had been fairly low and only concerned whether an asserted right possibly or arguably existed.[146] He considered it should not be expected of Ukraine, in this case, to present evidence that the elements of intention, knowledge, and purpose set out in the ICSFT are satisfied, which would go beyond the requirements for the provisional measures stage and prejudge the merits, "leading to a conclusion, in fact if not in law, that the Court would be prevented, from embarking upon further examination of the legal validity of the asserted rights under the Convention in question."[147]

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[142]MARCHUK, Irina. Case Note: 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. Russia). Melbourne Journal of International Law, vol. 18, 2017, pp. 436-459, at 453.

[143]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2017*, p. 155, at 169, para. 37.

[144]For further exploration of the "vulnerability test" defended by Judge Cançado Trindade, see Section 4.4.

[145]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge *ad hoc* Pocar, *I.C.J. Reports 2017*, p. 217.

[146] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge *Owada*, *I.C.J. Reports 2017*, p.142, at 147-148, para. 20-24.

[147]Ibid, at 144-145, para. 10.

Judge Bhandari, despite disagreeing with the conclusion the Court reached in regard to the plausibility of Ukraine's rights, specifically the rights claimed under the ICSFT, did not consider the approach taken by the Court to be any different. He construed the plausibility test as follows:

> As developed since its first appearance in Belgium v. Senegal, the plausibility test entails a two-step examination by the Court: first, whether the rights asserted by the applicant State exist in the abstract; second, whether the applicant State holds such rights in the circumstances of the case. The applicant State does not need to show that it has good chances to succeed on the merits, the so-called *fumus boni iuris*. Conversely, the applicant State must show that the rights it invokes are not manifestly unfounded, the so-called *fumus non mali iuris*.[148]

He also noted that the former version of the test (*fumus boni iuris*) had been "wrongly suggested by the Russian Federation"[149] during the hearings. Bhandari still considered that the evidence presented by Ukraine should have been more closely discussed in the order, as, in his opinion, they demonstrated both the elements of intent or knowledge and the purpose of intimidating the population in the acts complained of, at least sufficiently for the provisional measures stage.[150] Though he initially defended the plausibility test as only encompassing an assessment regarding the existence of rights, as seen above, his disagreement with the Russian construction of the condition seems more related to the evidentiary threshold required for this phase of the proceedings, than to the factual dimension of plausibility argued by Russia.

The case that followed did not get the same extensive analysis of plausibility and it is uncertain whether it followed the threshold established in *ICSFT and CERD*. The *Jadhav* case (India v. Pakistan) concerned alleged violations of the VCCR by the respondent, related to the detention and trial of Mr Kulbhushan Sudhir Jadhav, an Indian national sentenced to death in Pakistan and denied consular access.[151] The case is very similar in scope to the proceedings brought against the United States in the late 1990s and early 2000s, most notably *LaGrand*, and India's provisional measures request was also intended to protect the right to provide consular assistance to its nationals detained in another State, and, as such, to ensure Mr Jadhav was not executed pending the Court's final decision.

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[148]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge Bhandari, *I.C.J. Reports 2017*, p. 187, at 195-196, para. 16.
[149] Ibid, at 196, fn. 31.
[150] Ibid, at 205, para. 33.
[151]Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 231. [hereinafter, "Jadhav, Provisional Measures"].

The Court addressed the legal plausibility of India's claimed right by stating that it was recognised in Article 36(1) of the VCCR and went on to consider Pakistan's argument that the right to consular assistance under the VCCR was not applicable to persons suspected of espionage or terrorism and that Mr Jadhav's situation was governed by the Agreement on Consular Access signed by both parties in 2008. The Court found that the parties had not advanced any legal analysis on these questions, so they did not provide a sufficient basis to deprive of plausibility the rights claimed by India. Lastly, it considered that the allegations regarding the detention, trial and sentence of Mr Jadhav without consular assistance had not been challenged by Pakistan, therefore the rights invoked by the requesting party were plausible.

Whether *Jadhav* confirmed the *ICSFT and CERD* standard or represented a continuation of the Court's previous practice is a matter of debate among scholars. Some consider that the Court, in addressing arguments made by Pakistan and concluding that the breaches of the VCCR have not been challenged, effectively addressed the plausibility of the claims.[152] At the same time, others find that there is a pattern between the analysis conducted in *Jadhav* and in *Immunities and Criminal Proceedings*, both of which the Court relied on the fact that certain factual allegations were not disputed by the opposing party to conclude that plausibility was met, and as such, the 2017 order did not follow the same logic as the *Application of ICSFT and CERD* case.[153] The fact that the Court concludes this part of the *Jadhav* decision by stating that "the rights invoked by India [...] [appear to be] plausible,"[154] while in the case between Ukraine and Russia, it explicitly addressed "the acts complained of by Ukraine,"[155] seems more indicative of the latter position, but the acknowledgement that it took into account both the "legal arguments and evidence"[156] to conclude that the plausibility test was met could point to the former. Since the Court did not expressly state the logical steps behind its reasoning, it is not possible to make a conclusion as to its intention in addressing the plausibility test the way it did in *Jadhav*. In a way, it is difficult to disagree with Judge Cançado Trindade's opinion that the Court uses the test in an imprecise manner.[157] The standard also seemed to oscillate in the cases that followed.

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[152]Miles, *supra* fn. 28, at 31-32; Lando, *supra* fn. 67, at 649.
[153]Sparks, Somos, *supra* fn. 81, at 90, 92.
[154]Jadhav, Provisional Measures, at 243, para. 45.
[155]Application of ICSFT and CERD, Provisional Measures, at 135, para. 83.
[156]Jadhav, Provisional Measures, at 242-243, para. 45.
[157]Application of ICSFT and CERD, Provisional Measures, Separate Opinion of Judge Cançado Trindade, at 170, para. 39.

In the *Application of the CERD* case (Qatar v. United Arab Emirates), Qatar sought to protect the rights of Qatari nationals in the territory of the UAE under Articles 2 and 4-7 of the CERD and asserted that the respondent was violating the Convention's prohibition on collective expulsion, interfering with Qataris' rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals.[158] The UAE's main point of contention was that the CERD did not prohibit acts based on present nationality, but rather acts based on national origin, which should be distinguished. It also argued that there was no evidence of the facts alleged.[159] In its plausibility enquiry, the Court quoted, verbatim, the CERD provisions that had been invoked by the applicant and noted that the articles were intended to protect individuals from racial discrimination, therefore, for the rights claimed by Qatar to be considered plausible, the acts complained of should plausibly constitute acts of racial discrimination. Nonetheless, it found no need to examine, even preliminarily, whether discriminatory acts based on present nationality were encompassed in the Convention's definition of racial discrimination.[160] Factual plausibility was considered satisfied, as the evidence presented showed that measures imposed by the UAE had been targeting only Qataris, regardless of their individual circumstances, and, as such, appeared to constitute acts of racial discrimination. The conclusion was that "at least some of the rights asserted by Qatar under Article 5 of CERD are plausible," citing as examples the alleged racial discrimination in the enjoyment of rights such as the right to marriage and to choice of spouse, the right to education, freedom of movement, and access to justice.[161]

This seems in line with the approach taken in the *ICSFT and CERD* case, but a close comparison shows that the Court lowered the threshold of legal plausibility while requiring a higher level of factual plausibility.[162] The assessment mostly focused on the supposed

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[158] For a background of the case, see, HOFER, Alexandra. Introductory Note to Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates): Request for the indication of provisional measures (I.C.J.). *International Legal Materials*, vol. 57, 2018, pp. 973-975; ROSSI, Christopher R. Game of Thrones: The Qatar Crisis, Forced Expulsions on the Arabian Peninsula. *Penn State Journal of Law and International Affairs*, vol. 7, no. 1, 2019, pp. 1-52.

[159] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, *I.C.J. Reports 2018*, p. 406, at 423, para. 48-49. [hereinafter, "Qatar v. UAE, 2018 Provisional Measures"].

[160] This particular point was examined in the preliminary objections stage and the Court found that the term "national origin", included in the definition of racial discrimination of Article 1 of the CERD, did not encompass "present nationality". As such, the case did not move on to the merits stage for lack of jurisdiction *ratione materiae*. (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, *I.C.J. Reports 2021*, p. 71, at 106, para. 105.).

[161] Qatar v. UAE, 2018 Provisional Measures, at 427, para. 53-54.

[162] Sparks, Somos, *supra* fn. 81, at 94.

breaches of the Convention, rather than whether it applied in the first place, as the Court appeared to adopt Qatar's argument that the rights claimed were "grounded on possible interpretation" of the CERD.[163] This point was somewhat stressed in the Joint Declaration of Judges Tomka, Gaja and Gevorgian, and in the Dissenting Opinion of Judge *ad hoc* Cot, all of whom considered the Court had to ascertain, at that stage, whether the rights claimed by the requesting party plausibly fell within the scope of the treaty that contains the compromissory clause conferring jurisdiction on the Court, which in that case would involve considering whether acts based on current nationality could plausibly be considered as acts of racial discrimination within the meaning of the CERD.[164]

The case also included another request for provisional measures by the respondent, asking the Court to order that Qatar withdraw its Communication submitted to the CERD Committee, desist from hampering the UAE's attempts to assist Qatari citizens and refrain from acts which might aggravate the dispute.[165] The analysis conducted by the Court was perfunctory: it concluded that neither measure concerned a plausible right under CERD, as the first was rather related to the interpretation of its compromissory clause, and the second regarded the compliance of the parties to the previous order, which would be properly assessed during the merits phase.[166] The measures of non-aggravation were not indicated either, as they could only be ordered to accompany other measures directed at the protection of specific rights.[167] Among the six individual opinions appended to the decision, Judge Abraham expressed his disagreement with these formulations, which seemingly excluded procedural rights from the protection of provisional measures.[168] In his view, though the rights claimed were not deriving from the CERD, they were still plausible rights that a State party to judicial proceedings before the ICJ would have on the basis of the Statute, and the reason the UAE's request had to be rejected was that those plausible rights were not subject to any imminent risk of harm.[169]

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[163]Qatar v. UAE, 2018 Provisional Measures, at 422, para. 46.
[164]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian, *I.C.J. Reports 2018*, p.435, *in passim*.
[165]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 14 June 2019, *I.C.J. Reports 2019*, p. 361, at 366, para. 12. [hereinafter, "Qatar v. UAE, 2019 Provisional Measures"].
[166]Ibid, at 369-371, para. 25-28.
[167]On this, see, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007, p. 3, at 16, para. 50.
[168] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 14 June 2019, Separate Opinion of Judge Abraham, *I.C.J. Reports 2019*, p. 378, at 382, para. 21.
[169] Ibid, at 384, para. 27-28.

The following case was regarding alleged violations of the 1955 Treaty of Amity between Iran and the United States. Based on the Treaty, Iran challenged the legality of sanctions imposed by the United States following the announcement, in May 2018, that the respondent would no longer be participating in the 2015 Joint Comprehensive Plan of Action (JCPOA) concerning the Iranian nuclear programme.[170] Iran claimed that the rights it sought to protect - namely, the right to fair and equitable treatment, the prohibition of restriction on transfers of funds, the right to no less favourable treatment to Iranian products, companies or nationals, and freedom of commerce and navigation between the two parties - were "grounded in a possible interpretation and in a natural reading of the Treaty,"[171] and that the evidence before the Court establishes that the sanctions imposed constituted a violation of Iran's rights under the Treaty. For its part, the US argued that Iran's asserted rights arose from the JCPOA and not from the Treaty of Amity. It also contended that Iran's claim was not sufficiently serious on the merits, as the 1955 Treaty expressly provided exceptions to the rights claimed, allowing the respondent to take measures "relating to fissionable materials" or "necessary to protect its essential security interests."[172]

In terms of legal plausibility, *Treaty of Amity* initially followed the same pattern as *Qatar v. UAE*. The Court reproduced the content of the invoked provisions of the 1955 Treaty and accepted the applicant's argument, by stating that the rights invoked by Iran appeared to be based on a possible interpretation of the instrument.[173] The Court also noted that the US did not "contest that Iran holds these rights under the 1955 Treaty or that the measures adopted are capable of affecting these rights."[174] Regarding factual plausibility, the Court found that some of the sanctions imposed by the respondent appeared to be capable of affecting some of the rights invoked by Iran under certain provisions of the 1955 Treaty, namely the revocation of licences granted for the import of products from Iran, the limitation of financial transactions and the prohibition of commercial activities.

In relation to the first argument of the opposing party, the Court simply noted that Iran's claims only referred to the Treaty of Amity, not to the JCPOA. But the second

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[170]The factual background of the case is provided in paragraphs 16-23 of the provisional measures order. (Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018, p. 623, at 628-630, para. 16-23. [hereinafter, "Treaty of Amity, Provisional Measures"]). See, also, CHACHKO, Elena. Introductory Note to Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America): Request for the Indication of Provisional Measures (I.C.J.). International Legal Materials, vol. 58, no. 1, 2019, pp. 71–73.

[171] Treaty of Amity, Provisional Measures, at 639, para. 55.

[172] Ibid, at 641, para. 63.

[173] Ibid, at 643, para. 67.

[174] Ibid, at 641, para. 65.

argument had an interesting response, as the Court addressed the possible defence of the respondent for the purpose of assessing the plausibility of the applicant's rights, despite its earlier resistance to do so.[175] As put by two authors, the Court, for the first time, seemed to set two plausibilities against each other: both of the applicant's rights and of the respondent's exceptions to those rights.[176] It found that the exceptions argued by the US, under Article XX of the 1955 Treaty, "might affect at least some of the rights invoked by Iran under the Treaty of Amity," though rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, could not fall under those exceptions.[177]

Why the Court felt the need to consider, and to some extent accept, the exceptions invoked by the respondent, in this case, is unclear. The order merely stated that this consideration was prompted by "the invocation by the United States of Article XX, paragraph 1, subparagraphs (b) and (d), of the Treaty."[178] Nonetheless, other States had previously attempted to countervail the plausibility of rights claimed in provisional measures proceedings by advancing exceptions to those rights and, up to that point, the Court had always refrained from analysing them, most likely to avoid the risk of prejudgment.[179] The fact that national security exceptions had not been accepted as an impediment for the indication of provisional measures before was pointed out by Judge Cançado Trindade in his Separate Opinion, though he considered the *Treaty of Amity* order was in line with that jurisprudence.[180]

So far, this work has attempted to chronologically survey the provisional measures decisions delivered since the formal development of the plausibility test. However, at this point, it is in the best interest of this examination to deviate from the timeline, so that all three cases based on the 1948 Genocide Convention be addressed together, to allow for a closer

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[175] See, e.g., Certain Documents and Data, Provisional Measures, at 152-153, para. 24-28; Border Area, Provisional Measures, at 58.
[176]Sparks, Somos, *supra* fn. 67, at 95.
[177]Treaty of Amity, Provisional Measures, at 643, para. 68-69.
[178] Ibid, at 643, para. 68.
[179]As an example, the year before the *Treaty of Amity* order, in the *Jadhav* case, Pakistan had invoked a similar national security exception to the right to consular assistance provided in the Vienna Convention on Consular Rights. The Court did not accept the argument, considering that "at this stage of the proceedings, where no legal analysis on these questions has been advanced by the Parties, these arguments do not provide a sufficient basis to exclude the plausibility of the rights claimed by India." (Jadhav, Provisional Measures, at 242, para. 43.) Similarly, in the *Qatar v. UAE* case, the Court did not see the need to address the UAE's defence and determine if the term "national origin," present in the CERD definition of a racially-based discriminatory act, could plausibly include current nationality. (Qatar v. UAE, 2018 Provisional Measures, at 427, para. 53).
[180]Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2018*, p. 654, at 659, para. 17-18.

comparison of the plausibility standard in cases involving allegations of genocide. Therefore, the cases of The Gambia v. Myanmar (2020), *Allegations of Genocide* (Ukraine v. Russia) (2022) and South Africa v. Israel (2024) will be addressed first, and the CERD cases between Armenia and Azerbaijan (2021) and the *Application of the Convention Against Torture* case (Canada and The Netherlands v. Syria) (2023) shall be reviewed afterwards.

Since the development of the plausibility test, four provisional measures orders relating to the Genocide Convention[181] were delivered by the Court. At the time of writing, another request on that basis is pending, in the *Proceedings instituted by Nicaragua against Germany,* which was also based on other sources of jurisdiction.[182]

In the cases of Gambia v. Myanmar, Ukraine v. Russia, and South Africa v. Israel, a somewhat consistent, though not homogenous, approach to the plausibility test can be observed. The compromissory clause of the Genocide Convention - Article IX -, as a limited provision, also raises the question of the relationship between *prima facie* jurisdiction and plausibility.[183] This is specifically due to the fact that genocide, as defined by Article II of the Convention, requires a specific intent (*dolus specialis*) to be established, which, on the merits, represents a heavy burden on the party claiming it is being committed.[184] As such,

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[181] There was also a request for additional measures submitted by South Africa in the *Gaza Strip* case, under Article 75(1) of the Rules of Court, asking that the Court use its powers to indicate measures proprio motu, due to "significant development in the situation in Gaza," i.e. the ground invasion of Rafah. (Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for additional measures under Article 75(1) of the Rules of Court submitted by South Africa, 12 February 2024, *I.C.J. Pleadings 2024*. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240212-wri-01-00-en.pdf. Accessed 10 March 2024.) Nonetheless, the Court did not accept the request and delivered its decision by means of a letter directed to the parties, in which it found that the situation "demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024 [...] and does not demand the indication of additional provisional measures." (Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Pending) I.C.J. Press Release 2024/16, 16 February 2024. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf. Accessed 10 March 2024).

[182]Proceedings instituted by the Republic of Nicaragua against the Federal Republic of Germany on 1 March 2024 (Nicaragua v. Germany), Application instituting proceedings and request for the indication of provisional measures, 1 March 2024, *I.C.J. Pleadings 2024.* Available at https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf. Accessed 10 March 2024.

[183]"Article IX. Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." (UNGA. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277).

[184]This specific intent is defined as the intention, on the part of the perpetrators, to destroy, in whole or in part, a defined group (Article II of the 1948 Genocide Convention, ibid) and is a crucial element of the crime. On the *Bosnian Genocide* judgment, the Court found this intent "has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, *it would have to be such that it could only point to the existence of such intent*." (Application of the Convention on the Prevention and Punishment of the Crime of

there is the matter of whether this mental element should be considered as part of the assessment of the *prima facie* jurisdiction *ratione materiae*, i.e., whether the facts complained of by the requesting party fit within the scope of the Convention - that was the approach taken in the Legality of the Use of Force cases, though the plausibility test had not been formulated at the time -, or whether it should be found under the plausibility test, specifically the plausibility of claims. It could even be debated if it should be considered at all, given the risk of prejudgment: since the threshold for genocidal intent is so high on the merits, a negative conclusion as to its plausibility could signal to the parties that the case has no chance to succeed at all.

Also, interestingly, in two of the three cases mentioned, the Genocide Convention was invoked by a third party, instead of a State directly affected by the alleged violations of the Convention.[185] The word directly should be emphasised, as the entire premise of those cases is that all State parties to the Genocide Convention have a common interest in its fulfilment, based on the *erga omnes partes* character of the obligations there contained.[186]

In the case of the *Rohingya Genocide* (The Gambia v. Myanmar), the applicant pointed out that it sought, in the proceedings, to assert the rights of the Rohingya group who are in the territory of Myanmar to exist as a group, and to be protected against acts of genocide and other acts prohibited by Article III of the Convention, as well as its own right to seek compliance with the obligations set out in the invoked instrument. The Gambia asserted that, for the purposes of indicating provisional measures, the rights were plausible and their protection was in accordance with the object and purpose of the treaty. It relied mostly on reports by the Independent International Fact-Finding Mission on Myanmar (FFM) established by the UN Human Rights Council to argue that genocidal intent could be inferred from the pattern of conduct against the Rohingya in Myanmar, considering, however, that the Court should not be required, before granting provisional measures, to ascertain whether

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Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, at 196-197, para. 373.)

[185]That is the case for the *Rohingya Genocide* case (The Gambia v. Myanmar), in which the alleged genocidal acts were being committed in the Respondent's own territory, the *Gaza Strip* case (South Africa v. Israel), regarding acts committed in the territory of Palestine. The Proceedings instituted by Nicaragua (*supra* fn. 183) also refer to acts committed in the Gaza Strip, but it has a slightly different framework, intending to invoke the responsibility of Germany for failure to prevent genocide, rather than the direct commission of the crime.

[186]Further: TANAKA, Yoshifumi. The Legal Consequences of Obligations Erga Omnes in International Law. *Netherlands International Law Review,* vol. 68, no 1, 2021; CHOW, Pok Yin S. On Obligations Erga Omnes Partes. *Georgetown Journal of International Law*, vol. 52, no. 2, 2021. See, also: ROCHA, Ana Luísa de Oliveira. A legitimidade processual perante a Corte Internacional de Justiça: O caso do Genocídio Rohingya e os efeitos processuais das obrigações *erga omnes partes*. In: LIMA, Lucas Carlos; ROCHA, Ana Luísa de Oliveira (orgs). *Cadernos de Direito Internacional da Universidade Federal de Minas Gerais - Volume II*. Belo Horizonte: Editora Dialética, 2023, pp. 71-118.

genocidal intent was the only plausible inference to be drawn from the evidence presented at that stage.[187]

The respondent maintained that provisional measures could only be granted if the allegations made by The Gambia, based on the facts alleged in its application, were plausible, which in turn should include evidence of genocidal intent, given that this element is essential to distinguish the crime of genocide from other violations, such as war crimes and crimes against humanity.[188] On this basis, Myanmar claimed that the requirement was not met, since the alleged state conduct towards the Rohingya could lead to inferences other than an intention to destroy members of the protected group in whole or in part.[189]

The requirement that genocidal intent be plausibly demonstrated to be the only inference from a pattern of conduct for the indication of provisional measures seems contradictory in and of itself, as plausibility could not possibly mean excluding all other alternative readings of the circumstances. The Court did not adhere to this position and considered that it was not necessary to determine genocidal intent at that stage of the proceedings, but, first, it still quoted the reports from the FFM, as well as UN General Assembly resolutions, which pointed to "factors allowing the inference of genocidal intent."[190] This is a departure from the examination made in the *ICSFT and CERD* case, referenced by Myanmar during the oral proceedings,[191] and it is not clear whether it only referred to genocidal intent, due to its high evidentiary threshold and the grave character of

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[187]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, at 18-19, para. 45-46. [hereinafter, "Rohingya Genocide, Provisional Measures"].

[188]The theme has also been explored by the Court in the *Bosnian Genocide* case: "Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated." (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia). Judgment, *I.C.J. Reports 2007*, p. 43, at 175, para. 319). Additionally, in the *Croatian Genocide* case (Croatia v. Serbia), one of the main arguments put forward by Serbia was that the conduct described by the plaintiff state, which included torture, sexual violence and degrading treatment, did not constitute genocide, but rather war crimes and crimes against humanity. (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia). Judgment, *I.C.J. Reports 2015*, p. 3). For a thorough analysis of the differences between the three cases, see WALD, Patricia M. Genocide and Crimes Against Humanity. *Washington University Global Studies Law Review*, vol. 6, no. 3, 2007, p.621-633.

[189]Rohingya Genocide, Provisional Measures, at 19, para. 47-48.

[190]Ibid, at 22, para. 55.

[191]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Oral Arguments on the Request for Provisional Measures, Verbatim record 2019/19, *I.C.J. Pleadings 2019*, p. 24, para. 9-10. (Schabas)

the allegations, or if the Court observed criticism of the previous case and decided to cast aside the standard there established.

The full plausibility assessment was conducted in two stages. First, the Court addressed the scope of the obligation to prevent and punish the crime of genocide under the provisions of the Convention and the purpose of these provisions to protect the members of a national, ethnical, racial or religious group from acts of genocide. Under this step, the Court found that the Rohingya appeared to constitute a protected group within the meaning of the Convention.[192] Secondly, the Court addressed the evidence of the situation in Myanmar,[193] which pointed to the possibility of serious crimes being committed, including extreme violence against the Rohingya, denial of legal status, identity and nationality, and the incitement of hatred on ethnic, racial and religious grounds.[194] At this point, the legal and factual dimensions of plausibility appear as two distinct analytical steps, with the determination of the Rohingya as a protected group - i.e., the analysis of whether the rights claimed existed under the invoked instrument and whether they belonged to the requesting party, or to the individuals they were claiming to represent - serving the former purpose, and the examination of the evidence of possible genocide being committed representing the latter. However, this line became blurred as the Court concluded that the *facts and circumstances* were sufficient to conclude that the *rights* claimed by The Gambia were plausible.

The decision to order provisional measures was unanimous, but the reasoning, particularly in relation to plausibility, gave rise to some disagreement. Judge Xue pointed out that her vote for the measures was only due to the gravity and scale of the human rights situation in Myanmar, and objected to the approach of genocidal intent in the order. She argued that this element was crucial to distinguish genocide from other crimes and, as such, there should be a minimal standard of *dolus specialis* for the provisional measures stage, which, in her opinion, was not present.[195] Judge *ad hoc* Kress, on a different note, contextualised the arguments advanced by Myanmar in the light of the 2017 order in the case between Ukraine and Russia, which had "given rise to the interpretation that the Court has widened the scope of the plausibility requirement so that it includes, at least partially, the

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[192]Ibid, at 19-20, para. 49-52.

[193]For the context of the humanitarian crisis in the Rakhine State of Myanmar, see PILLAI, Priya. Case and Comment: Expanding the Scope of Provisional Measures under the Genocide Convention. *The Cambridge Law Journal*, vol. 79, no. 2, 2020, p.203; RAJ, Vatsal. The Gambia v. Myanmar: Paving the Yellow Brick Road to International Accountability for the Crime of Genocide. *De Lege Ferenda*, v. 3, n. 1, 2021, p. 53.

[194]Rohingya Genocide, Provisional Measures, at 19-22, para. 53-55

[195]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, Separate Opinion of Vice-President Xue, *I.C.J. Reports 2020*, p. 32, at 32, para. 2-3.

plausibility of breach of rights,"[196] but such a standard could possibly be too demanding with respect to the mental elements of certain international violations. Agreeing with the Court's consideration regarding *dolus specialis*, he suggested that the gravity of the allegations, rather than demanding a stricter standard of plausibility, as had been advanced by the respondent, should, instead, entail more flexibility in this assessment, giving precedence to the protective function of provisional measures, especially given the fundamental values at stakes.[197] He also added, in relation to the standard adopted:

> [I]t is apparent from paragraph 56 of the Order, read in its immediate context, that the Court has applied a low plausibility standard with respect to the question of genocidal intent. Whatever the correct interpretation of the standard applied in the Court's Order in the Ukraine v. Russian Federation case might be, the Court, in the present case, has not proceeded to anything close to a detailed examination of the question of genocidal intent. In that respect it seems worth recalling that, in the separate opinion he appended to the Pulp Mills case, Judge Abraham distinguished between fumus boni juris and fumus non mali juris [...]. In my view, it is the latter formulation that captures far better the approach taken by the Court in this Order with respect to the question of genocidal intent. Drawing a distinction between the words "boni" and "non mali" may be a "subtlety", as Judge Abraham suggested in his separate opinion. But in the present case at least, it would be an important subtlety.[198]

The Judge seems correct in his observation. The assessment conducted in the order seemed to require more that genocidal intent not be plausibly excluded from the evidence examined than that it be *prima facie* positively found to exist.

Straying again from the timeline, the 2022 *Allegations of Genocide* case will be addressed after the case of *Application of the Genocide Convention on the Gaza Strip* (South Africa v. Israel), the Court's most recent provisional measures decisions at the time of writing, as the latter is closer in scope to the *Rohingya Genocide* case.

South Africa instituted proceedings before the Court due to the large-scale military operation in Gaza initiated by Israel following the Hamas attack of 7 October 2023. The applicant claimed the acts threatened, adopted, condoned, taken and being taken by the Israeli Government and military constituted breaches of the Convention because they were intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, and could not be justified by an armed attack on the State's territory no matter

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[196]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, Declaration of Judge *ad hoc* Kress, *I.C.J. Reports 2020*, p. 65, at 65, para. 3.
[197]Ibid, at 66, para. 4.
[198] Ibid, at 66, para. 5.

how serious.[199] South Africa submitted a request for provisional measures, including suspending the military operations in the Gaza Strip, desisting from acts included in Article II of the Convention in relation to Palestinian people, measures of non-aggravation and procedural measures regarding the preservation of evidence and submission of reports to the Court. In relation to the plausibility test, the requesting party submitted that the rights it sought to protect - namely the rights of Palestinians in Gaza to be protected from genocide and its own right to seek compliance with obligations under the Convention - were "grounded in a possible interpretation"[200] of the Genocide Convention and that the evidence before the Court "show[ed] incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts."[201]

For its part, Israel contended that the Court must consider not only the existence of the rights invoked but also the claims of fact in the relevant context, including the question of the possible breach of the rights claimed. It argued that the appropriate legal framework for the conflict in Gaza is international humanitarian law, not the Genocide Convention, and that efforts to mitigate harm when conducting operations and to alleviate hardship and suffering through humanitarian activities in Gaza militated against any allegation of genocidal intent.

The Court began its plausibility assessment in the same manner as it did in the *Rohingya Genocide* case, by reproducing the content of Article II of the Convention and mentioning the scope and purpose of the obligation to prevent and punish the crime of genocide. Its next step was to recall its finding in the *Bosnian Genocide* judgment that, for acts to fall within the scope of Article II, the very nature of the crime of genocide required an intent to destroy at least a substantial part of the particular group. In this sense, the Court found that the Palestinian group appeared to constitute a protected group, noting that the population in Gaza, estimated at more than 2 million people, represents a substantial portion of the group. In relation to the acts complained of by South Africa, the Court observed that the military operation conducted by Israel has resulted in a large number of deaths and injuries, massive destruction of homes, forcible displacement of the vast majority of the

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[199] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, *I.C.J. Pleadings 2023*, para. 1. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf. Accessed 23 March 2024.

[200] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, para. 37. Available at: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Accessed 14 February 2024. [hereinafter, "Gaza Strip, Provisional Measures"].

[201] Ibid, para. 38.

population, and extensive damage to civilian infrastructure. It then cited reports and pronouncements by UN bodies and authorities confirming these facts and took note of pronouncements by Israeli ministers and the President of Israel, citing specialised agencies and high-ranking UN officials who characterised them as "discernibly genocidal rhetoric" and "racist hate speech and dehumanisation directed at Palestinians."[202]

The ICJ considered that the circumstances mentioned were sufficient to conclude that at least some of the rights invoked by the applicant were plausible, namely the rights of Palestinians in Gaza to be protected from genocidal acts and of South Africa itself to seek Israel's fulfilment of its obligations under the 1948 Convention.[203] This final conclusion, as well as the conclusion in the *Rohingya Genocide* case, which was worded very similarly, is reminiscent of decisions in which exclusively legal plausibility was considered, however, this is not consistent with the analysis actually conducted by the Court. A mere legal examination would not need to consider evidence of violations of the Convention before concluding that a right not to be submitted to genocide was plausible. This hesitancy in openly addressing the factual plausibility of the claims may be due to the highly publicised and highly political character of the two disputes, as the Court could be seen as biased if it expressly proclaimed that genocide was plausibly being committed.

It is worth noting that South Africa's main request was the suspension of the Israeli military operations in Gaza, and the Court did not address the plausibility of this measure or, rather, if the plausible existence of a right to a ceasefire could be inferred from the Genocide Convention. Even when turning to the link between the measures requested and the rights whose protection is sought, the Court did not openly consider this, merely concluding that "by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving the plausible rights it asserts," without naming the measures it was referring to.[204]

The decision generated a number of individual opinions and some reflections on what plausibility entails in relation to claims under the Genocide Convention. Judge Sebutinde, who had voted against all measures indicated by the Court, considered that "the acts complained of by South Africa, as well as the rights correlated to those acts, can only be capable of 'falling within the scope of the [Genocide] Convention' if a genocidal intent is present, otherwise such acts simply constitute grave violations of international humanitarian

[202]Ibid, para. 53.
[203]Ibid, para. 54.
[204]Ibid, para. 59.

law and not genocide as such."[205] This is noteworthy when considering the relation between plausibility and jurisdiction *ratione materiae*. Under Judge Sebutinde's view, addressing the matter of intent would be a necessary step to verify whether the *rights claimed and the acts complained of* fell within the scope of the Convention, i.e. constituted a question of plausibility, not whether the request could be adjudicated under the Convention. She argued, as such, that the Court should have examined the evidence put before it to determine whether there were indicators of genocidal intent, which she did not find could be inferred from the evidence presented.[206] Judge Nolte echoed these reservations, noting the crucial role of genocidal intent in the configuration of the crime. He observed that his vote in favour of the measures was due to considering not that Israel could be plausibly committing genocide, but that "certain statements by Israeli State officials, including members of its military, [could] give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention."[207]

South Africa also made two following requests for provisional measures, one request which the Court rejected with no analysis of plausibility, considering the situation only required the effective implementation of the previous order,[208] and one request which was granted on 28 March 2024, considered by the Court as a request for modification of the Order of January 2024, based on the deterioration of the living conditions of the Palestinians in the Gaza Strip, particularly with respect to the widespread deprivation of food and other basic necessities. The plausibility analysis in this case merely repeated the conclusions of the January order, with the Court finding no need to depart from the decision in that aspect.[209] Most of the judges appeared to adhere to that position, but Judge *ad hoc* Barak, voting against

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[205]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, Dissenting Opinion of Judge Sebutinde, para. 17. Available at: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf. Accessed 14 February 2024.

[206]Ibid, para. 18-23.

[207]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, Separate Opinion of Judge Nolte, para. 15. Available at: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf. Accessed 14 February 2024.

[208]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Pending) I.C.J. Press Release 2024/16, 16 February 2024. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf. Accessed 10 March 2024.

[209]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 28 March 2024, para. 25. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf. Accessed 28 March 2024.

most of the measures, considered that "[t]o modify provisional measures, the Court needs to be satisfied that plausible [genocidal] intent is present in the 'new' situation in Gaza," which he found Israel had successfully excluded.[210]

Lastly in the Genocide Convention cases, the *Allegations of Genocide* case (Ukraine v. Russia) is the only one concerning negative claims,[211] meaning that the applicant did not initiate the proceedings with the intention that the respondent be held responsible for committing genocide, but rather alleged that Russia used genocide allegations in order to justify its invasion of Ukrainian oblasts of Lugansk and Donetsk, which, it was argued, would in itself constitute a violation of the Convention. In this case, the ICJ assessed the plausibility of the rights claimed by Ukraine, namely those "not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide" in its territory.[212]

Although this case seemed like an interesting opportunity for the Court to refine the plausibility criterion in cases relating to reverse claims, the Order paid little attention to it. It didn't reference the standard of plausibility that it was adopting, merely asserting that the right claimed by the Applicant, that of not being subjected to military operations for the purpose of preventing and punishing an alleged genocide in its territory, is grounded on a possible interpretation of the Convention, specifically of Article I, which, in conjunction to Articles VIII and IX and the Preamble, can be viewed as establishing an obligation of preventing and punishing the crime of genocide, to be performed *in good faith*.[213] The conclusion was that "it [was] doubtful that the Convention, in light of its object and purpose, authorises a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide."[214] From this, it can be gathered that the Court adopted a *fumus non mali iuris* standard, requiring that the possibility of a right not to be subjected to acts of aggression under allegations of genocide not be excluded from all interpretations of the Genocide Convention.

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[210]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 28 March 2024, Separate Opinion of Judge ad hoc Barak, para. 19. Available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf. Accessed 28 March 2024.

[211]On this, see RAJU, Deepak. Ukraine v. Russia, A "Reverse Compliance" case on Genocide. *EJIL! Talk*, 15 March 2022. Available at: https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/. Accessed 8 Oct. 2023.

[212]Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, *I.C.J. Reports 2022*, p. 211, at 224, para. 52.

[213]Ibid, at 224-225, para. 56-60.

[214] Ibid, at 225, para. 59.

The Court here only analysed the legal dimension of plausibility and, as seen, it adopted a very low threshold to that effect. A consideration of the factual dimension would perhaps entail verifying whether Russia's military operations were in fact plausibly grounded on allegations of genocide, which the Court did, but rather under *prima facie* jurisdiction, specifically, under the existence of a dispute, considering the Russian argument that its invasion was based rather on the United Nations Charter and customary law. In this sense, the Court considered numerous statements by Russian officials regarding allegations of genocide against Ukraine.[215] This may explain the lack of factual examination regarding plausibility, as most likely the reasoning would be the same. Certainly, it would not be possible for the applicant to prove it was *not* committing genocide, as that would be an undue inversion of the burden of proof and too high a standard for the provisional measures stage regardless, but, at the same time, a minimum review of Ukraine's factual allegations, or at least a reference to the previous findings under *prima facie* jurisdiction, would seem necessary in light of the previous jurisprudence. The Court did note that it was not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory, which could be read as implying that, if such evidence had been presented, the plausibility of those claims would have been addressed under the plausibility test. At the same time, it preceded that statement with a finding that it could "only take a decision on the Applicant's claims if the case proceeds to the merits,"[216] possibly alluding to previous decisions that opposed any merits review at the provisional measures stage due to the risk of prejudgment.[217]

Returning to the chronology, the Armenia and Azerbaijan cases generated seven provisional measures decisions: five from Armenia, including two requests for modification of previous measures, and two from Azerbaijan. Both States instituted proceedings against each other under CERD in 2021 in the context of the conflict that arose between the parties in September 2020 over the region of Nagorno-Karabakh.[218]

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[215]Ibid, at 221-222, para. 37-41.
[216]Ibid, at 225, para. 59.
[217] See Section 4.1 above.
[218]KIRCHMAIR, Lando. Cultural Heritage and the International Court of Justice: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021. International Journal of Cultural Property, vol. 29, 2022, pp. 563–575, at 565. For a technical analysis of all aspects of the provisional measures decision of 2021, see: SALKIEWICZ-MUNNERLYN, Ewa; ZYLKA, Bartlomiej. Interim Measures of Protection, Order of the ICJ from 07 December 2021 in Case of Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) and (Azerbaijan v. Armenia). Ukrainian Journal of International Law, vol. 2022, no. 3, 2022, pp. 52-59.

Armenia's first request for provisional measures was intended to protect the rights of prisoners of war and civilian detainees of Armenian national or ethnic origin to be repatriated and to be protected from inhuman treatment, as well as the rights of national or ethnic Armenians not to be subject to hate speech by Azerbaijan and to have access and enjoy their cultural heritage.[219] The applicant claimed those rights were grounded on a possible interpretation of the CERD.

The Court began its assessment by reproducing the invoked provisions of CERD and stated that "[a] State party to CERD may invoke the rights set out in the abovementioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention."[220] It then went on to find that at least some of the rights claimed by Armenia were plausible, based on the information furnished by the parties. Regarding the right of prisoners of war and detainees to be repatriated, the Court noted that this was governed by International Humanitarian Law (IHL), and that, furthermore, Armenia had not provided any evidence that these people continued to be detained due to their national or ethnic origin. This was the only allusion to factual plausibility made in the order. The Court then found plausible the right of detainees not to be subjected to inhuman or degrading treatment, without considering the credibility of the allegations and whether they amounted to "acts of racial discrimination", according to the requirement it had indicated just a few paragraphs above.[221] In the same vein, the rights of national or ethnic Armenians "allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage"[222] were also considered plausible, without any open examination of the evidence. That is not to say that no evidence had been presented since Armenia supplemented its request for provisional measures with nearly 300 pages of documents and other material to support its claims.[223] Rather than a lack

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[219]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, *I.C.J. Reports 2021*, p. 361, at 375-376, para. 46. [hereinafter, "Armenia v. Azerbaijan, 2021 Provisional Measures"].
[220]Ibid, at 382, para. 58.
[221]Ibid, at 383, para. 60. This was noted in the Separate Opinion of Judge Yusuf (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, *I.C.J. Reports 2021*, p.395, at 397, para. 9.)
[222]Ibid, at 383, para. 61.
[223]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Application Instituting Proceedings and Request for Provisional Measures, Volume II - Annexes, *I.C.J Pleadings 2021*. Available at https://www.icj-cij.org/sites/default/files/case-related/180/180-20210916-APP-01-00-EN.pdf. Accessed 18 March 2024.

of plausibility in the case, the problem is related to a lack of clarity and transparency in the reasoning.

In 2021, Azerbaijan also made a request for provisional measures in the proceedings it had initiated. In that case, it claimed that the Armenian government was engaged in a racial discrimination campaign against Azerbaijanis, including by not condemning nor punishing the actions of armed ethnonationalist hate groups. Additionally, it argued that, by laying landmines in civilian areas previously inhabited by ethnic Azerbaijanis and allegedly refusing to share information about their location, Armenia had deliberately made it impossible for members of that ethnic group to return to their homes, as part of a longstanding campaign of "ethnic cleansing" by Armenia which constitutes "racial discrimination" under CERD.[224] The initial structure of the plausibility assessment was largely the same as the order on the request submitted by Armenia, as both decisions were delivered simultaneously. The Court found that at least some of the rights invoked by Azerbaijan in the case were plausible, namely the rights allegedly violated through Armenia's failure to condemn and punish the activities within its territory of "armed ethnonationalist hate groups that incite violence against ethnic Azerbaijanis."[225] In making that finding, the Court did not make a factual examination, which could possibly contain verification of the activities of such groups and whether they amounted to Azerbaijan's contentions. In regards to the laying of landmines, the Court considered CERD does not impose an obligation on Armenia to demine certain areas, since Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct amounted to racial discrimination under the Convention.[226] It appears, from both Armenia's and Azerbaijan's requests that the Court only explicitly addressed the plausibility of claims when it found that evidence of plausible breaches of the invoked instrument was lacking.

In October 2022, Armenia filed a request for the modification of the measures previously ordered, based on a large-scale armed attack against its territory by the respondent, but the Court considered the situation did not require a change in measures

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[224]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 405, at 419, para. 44-45.

[225]Ibid, at 424, para. 52.

[226]Ibid, at 425, para. 53. Azerbaijan's second request for provisional measures was also related to Armenia's alleged obligation to cease the laying of mines, and the analysis of plausibility conducted there was merely a reproduction of the previous decision, with the Court noting that it saw no reason to depart from those findings.(Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 22 February 2022. Available at https://www.icj-cij.org/sites/default/files/case-related/181/181-20230222-ORD-01-00-EN.pdf. Accessed 18 March 2024.)

previously ordered, but their effective implementation. As such, no plausibility assessment was conducted. However, in February 2023, the Court delivered another order based on a new request by Armenia, this time regarding Azerbaijan's blockade of the Lachin Corridor, the only route connecting Nagorno-Karabakh and the territory of the requesting party, arguing that it constituted an act of racial discrimination since it had "both the purpose and effect of impairing the enjoyment and exercise by ethnic Armenians of their human rights on an equal footing with other ethnic groups," by preventing their access to medical treatment and the importation of essential goods to Nagorno-Karabakh.[227] The Court found that the rights claimed by Armenia were plausible, again only referring to legal plausibility.[228] The allegation that the disruption of the Lachin Corridor had impeded the enjoyment of basic human rights by ethnic Armenians was considered under the risk of irreparable prejudice and urgency assessment. The Court found the condition was met based on the "information available" to it, without specifically naming the materials that informed this finding.[229]

After an unsuccessful application to modify the order of February 2023,[230] Armenia filed a fifth request for provisional measures, after Azerbaijan had initiated a large-scale military assault on Nagorno-Karabakh, what it called counter-terrorism measures to respond to acute security threats in the region, resulting in more than 100,000 persons of Armenian

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[227]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023, para. 30-31. Available at: https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ORD-01-00-EN.pdf. Accessed 19 March 2024. [hereinafter, "Armenia v. Azerbaijan, 2023 Provisional Measures (I)"].

[228] Judge Yusuf, in his declaration to the order, noted this absence: "This is perhaps where the problem lies — the lack of examination by the Court of whether the claims made by the Applicant are capable of falling within the terms of CERD. In the present case, there is not a shred of evidence that the acts complained of by Armenia are capable of falling within CERD. Nor is there a shred of evidence that the alleged acts or omissions constituted, even plausibly, acts of racial discrimination. As a matter of fact, there was not a single word regarding racial discrimination or discriminatory treatment in the final submissions of Armenia to the Court in its request for provisional measures. I have therefore voted against the operative paragraph of the Order because of its unjustified reference to CERD which has nothing to do with the acts or omissions complained of by Armenia, and is not, in my view, at all applicable to the request by Armenia. It is high time that the Court put an end to the attempts by States to use CERD as a jurisdictional basis for all kinds of claims which do not fall within its ambit. Acceding to such requests undermines the credibility of a very important multilateral convention and the reliance on its compromissory clause (Article 22) for genuine claims relating to racial discrimination." (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023, Declaration of Judge Yusuf, para. 8-10, Available at https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ORD-01-01-EN.pdf. Accessed 19 March 2024.)

[229]Armenia v. Azerbaijan, 2023 Provisional Measures (I), para. 54.

[230]Plausibility was not considered, since the Court found the circumstances referred by Armenia did not constitute a change in the situation justifying modification of the order. (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 6 July 2023. Available at https://www.icj-cij.org/sites/default/files/case-related/180/180-20230706-ord-01-00-en.pdf).

national or ethnic origin fleeing Nagorno-Karabakh for Armenia.[231] The requesting party sought to protect the rights of ethnic Armenians not to be subjected to ethnic cleansing, which it argued implicated every substantive obligation under CERD. Armenia complained that Azerbaijan's military assault on September 2023, resulted in "hundreds of ethnic Armenians being killed; more than 100,000 being forcibly displaced [...]; homes and other civilian infrastructure being destroyed; cultural sites and monuments being under direct threat of destruction or desecration; the collapse of the education system; a complete paralysis of [the] healthcare system; and dire shortages of basic necessities," as well as the proliferation of hate speech and violence against Armenians by Azerbaijani soldiers.[232] Azerbaijan did not dispute these allegations but rather made a series of undertakings to protect those rights.[233]

The Court did not mention ethnic cleansing, which would directly implicate the legal plausibility of the rights claimed by Armenia, but it did find plausible "the right of persons not to find themselves compelled to flee their place of residence for fear that they will be targeted because they belong to a protected group under CERD, and the right of those persons to be guaranteed a safe return."[234] The factual allegations were not addressed under plausibility, which could be attributed to the fact that they were not disputed by the respondent in the case, even though, in previous requests in the same case, the Court took a similar approach even when faced with objections to the plausibility of the claims. Under the risk of irreparable prejudice assessment, the Court noted that it was not called upon to establish the existence of breaches of CERD obligations, only taking note of the vulnerability of the population of Armenian ethnic or national origin, both those who left and those who remained in Nagorno-Karabakh, without expressly addressing evidence of the allegations, other than a brief mention of United Nations reports regarding the number of forcibly displaced persons.[235]

The CERD cases between Armenia and Azerbaijan can be seen as a strong example of the inconsistent manner in which the Court addresses plausibility, and even as a dividing point in relation to the approach to factual plausibility. From *ICSFT and CERD* up until the *Rohingya Genocide* case, the Court had continuously analysed both legal and factual plausibility, even if the scope and standard of both dimensions of the test were imprecise.

[231]Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023, para. 26. Available at https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf. Accessed 19 March 2024.)
[232]Ibid, para. 33.
[233]Ibid, para. 35.
[234]Ibid, para. 40.
[235]Ibid, para. 55-57.

Here, however, the ICJ was significantly less stringent in its consideration of the plausibility of the claims, sometimes addressing evidence of breaches to the Convention under irreparable prejudice, sometimes not addressing it at all. The initial requests for provisional measures preceded three other cases in which the plausibility test oscillated between the *ICSFT and CERD* approach[236] and a return to *Prosecute or Extradite*.[237]

At last, the *Application of the Convention Against Torture* case (Canada and The Netherlands v. Syrian Arab Republic) is another proceeding instituted under the logic of *erga omnes partes* obligations, this time contained in the CAT. The applicants requested provisional measures, claiming to seek to protect their right to secure compliance by Syria with its obligations under the Convention against Torture and the rights of persons in Syria who, they argue, are currently, or are at imminent risk of, being subjected to torture and other cruel, inhuman or degrading treatment or punishment.[238] Syria did not participate in the proceedings but addressed a letter to the Court communicating the position of his Government regarding the request. In relation to plausibility, the assessment was summary. Syria had argued that specific evidence of alleged acts of torture must be presented by the Applicants for such rights to be plausible and that no such evidence was submitted. The Court, however, only recounted the content of the specific provisions of the CAT invoked by the applicant and concluded that they had "a plausible right to compliance by Syria with those obligations under the Convention which have an *erga omnes partes* character."[239] The alleged breaches to the Convention were left to be reviewed under the risk of irreparable prejudice and urgency conditions, in which the Court referred to General Assembly resolutions and reports by the Independent International Commission of Inquiry on the Syrian Arab Republic set up by the UN Human Rights Council to verify the occurrence of systematic acts of torture and cruel, inhuman and degrading treatment and punishment in detention facilities operated by the Syrian authorities.[240]

After this extensive review of the Court's practice in regard to plausibility, from which the inconsistency of the test can be observed, a few elements are worth noting. First, the number of requests for provisional measures has been steadily increasing. Since 2017,

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[236]Gaza Strip, Provisional Measures.
[237]Allegations of Genocide, Provisional Measures.
[238]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, Order of 16 November 2023, para. 54. Available at https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf. Accessed 20 March 2024.
[239]Ibid, para. 57.
[240]Ibid, para. 72-74.

requests have been made in 13 cases.[241] Also, more requests are being made under individual cases, including a slight increase in requests filed by the respondent. States also seem more willing to make use of some prerogatives under the Rules of Court they were previously hesitant to invoke, such as requests for modification of previous measures. In comparison, from 2009 up to 2016, roughly comprising the same amount of time, six cases included provisional measures requests, and only in one of them more than one request was filed.[242] Before that, in nearly 60 years of ICJ activity since its first interim relief request in *Anglo-Iranian Oil*, 39 cases involved provisional measures requests,[243] with numbers fluctuating from decade to decade.

This difference in numbers, while reflecting the growing importance of provisional measures in ICJ proceedings, can also be seen as a factor influencing the practice of the Court. A high number of provisional measures proceedings, which, under the Rules of Court, take priority over all other cases and are urgent by their very nature, can disrupt the activity of the ICJ. As such, a lack of transparent reasoning can be attributed to the necessity of procedural economy. However, this is a double-edged sword since States seeking to protect their substantive rights from harm, when faced with an unclear jurisprudence in relation to the requirements they should meet, are more likely to conform to higher standards of plausibility previously adopted and present more arguments and more evidence than would, at first, be necessary at that preliminary stage, which in turn, can drag out the proceedings.

Secondly, there seems to be an emergence in the use of ICJ proceedings, and of provisional measures in particular, for the purpose of protecting general interests of the international community, as opposed to only the individual interests of the parties.[244] This is

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[241]This includes the requests filed under the cases of *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property* (Germany v. Italy) and *Request relating to the Return of Property Confiscated in Criminal Proceedings* (Equatorial Guinea v. France), which were withdrawn before hearings. (Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy), Withdrawal of the Request for the Indication of Provisional Measures, Order of 10 May 2022, *I.C.J. Reports 2022*, p. 462; Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France), Withdrawal of the Request for the Indication of Provisional Measures, Order of 21 October 2022, *I.C.J. Reports 2022*, p. 610).

[242]That was the case of *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), in which the applicant filed three requests for provisional measures, one of them being for a modification of a previous order.

[243]This number includes proceedings instituted on similar bases, but with different parties, such as the Fisheries Jurisdiction cases (United Kingdom v. Iceland; Germany v. Iceland), the Nuclear Test cases (Australia v. France; New Zealand v. France), the Lockerbie cases (Libya v. United Kingdom; Lybia v. United States of America) and the ten Legality of the Use of Force (Serbia and Montenegro v. Belgium; Canada; France; Germany; Italy; Netherlands; Portugal; Spain; United Kingdom; United States of America). Those were all counted individually despite the analysis conducted by the Court being roughly similar.

[244]On this, see Section 2.4. See, also, LEE-IWAMOTO, Yoshiyuki. The ICJ as a Guardian of Community Interests? Legal Limitations on the Use of Provisional Measures. In: BYRNES, Andrew; et al (eds). *International Law in the New Age of Globalization*. Leiden: Martinus Nijhoff, 2013, pp.71-92.

shown especially by the four cases that have been filed in the last five years by States not directly affected by the acts complained of - such as alleged genocide, violations of IHL and torture or inhuman treatment or punishment - under the logic of obligations *erga omnes partes*.[245]

Nonetheless, international adjudication exists within a primarily bilateral framework, and, as such, attempts at using the International Court of Justice for community purposes may find systematic obstacles. Provisional measures are no exception since their main purpose under the ICJ Statute is to "preserve the respective rights of either party." The conditions for their indication were developed around this assumption, especially requirements relating to the rights at stake, i.e. the plausibility test, the link test and the risk of irreparable prejudice condition. Community interests, as such, are usually required to be construed as the rights of an individual State and they must be connected to the dispute which is the subject of the main proceedings in order to be protected by means of provisional measures.

Some scholars have noted that the Court has not rigorously applied the conditions relating to rights in cases involving the maintenance of peace or the protection of human rights.[246] Pointing out that "the procedure for the provisional measures [...] acquire[d] a procedural autonomy," one author argued the following:

> [T]he Court has really introduced and substantiated some general interests or universal values for the international community into its dispute settlement process when it may accelerate the autonomy of the provisional measures procedure, maintaining a formalistic object of the preservation of the parties' rights as a legal fiction.[247]

Writing in 2013, Lee-Iwamoto took a more pragmatic position, noting an increase in the procedural formalism of provisional measures proceedings. He viewed this trend, which was reflected in the then-recent inclusion of both the link and plausibility tests, as a contribution to safeguarding the Court's judicial function, despite bringing interim relief proceedings closer to the subject of the merits.[248] Nonetheless, he considered it too early to

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[245]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar); Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel); Proceedings instituted by the Republic of Nicaragua against the Federal Republic of Germany on 1 March 2024 (Nicaragua v. Germany).

[246] See, e.g., Sparks, Somos, *supra* fn. 67; Rieter, *supra* fn. 113; BENZIG, Markus. Community Interests in the Procedure of International Courts and Tribunals. The Law & Practice of International Courts and Tribunals, vol. 5, no. 3, 2006, pp. 369-408; IWAMOTO (LEE), Yoshiyuki. The Protection of Human Life Through Provisional Measures Indicated by the International Court of Justice. Leiden Journal of International Law, vol. 15, 2002, no. 1, pp 345-366.

[247]SAKAI, Hironobu. New Developments of the Orders on Provisional Measures by the International Court of Justice. Japanese Yearbook of International Law, vol. 52, no. 1, 2009, pp. 231-270, at 255.

[248]Lee-Iwamoto, *supra* fn. 244, in passim.

determine its scope and effects of plausibility with any degree of certainty at that time.[249] Over ten years later, this question is still not entirely clear, however, there is an argument to be made in the opposite direction, as will be seen below.

4.4 The Human Vulnerability Test

Late Brazilian Judge Cançado Trindade was one of the fiercest critics of the plausibility test and the basis for his disapproval was very different from that expressed by some of his peers. From 2017 onwards. he had been attempting to advance the necessity of a human vulnerability test in lieu of plausibility. This was in harmony with his even more *avant-garde* thesis regarding the autonomy of the provisional measures regime.

Since his term as judge of the Inter-American Court of Human Rights, Judge Trindade argued that provisional measures constituted "a true jurisdictional guarantee of a preventive character."[250] He continued to advance and develop this position, through individual opinions, after his appointment to the ICJ. Under his view, although provisional measures were originally established to safeguard the effectiveness of the jurisdictional function itself and, as such, were constrained by formalism, they have evolved and turned to the protection of substantive rights, appearing to become endowed with a "more than precautionary, truly tutelary" character.[251] Such evolution made clear to the Brazilian judge that the institute operated within an autonomous legal regime, which should be refined by international courts and tribunals, but, nonetheless, fully encompassed its "juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with [it]."[252] This was reinforced by the fact that, as established by the Court in the *LaGrand* case, provisional measures generate *per se* obligations, independently from those ensuing from the Court's Judgments on the merits or on reparations, and non-compliance to them would represent an autonomous breach of international law, without prejudice to the result of the particular case on the merits.[253]

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[249]Ibid, at 89.
[250]See, e.g. INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR). Asunto James y otros respecto Trinidad y Tobago. Medidas Provisionales. Resolución de la Corte Interamericana de Derechos Humanos de 25 de mayo de 1999. Voto Concurrente del Juez A. A. Cançado Trindade, para. 10.
[251]TRINDADE, Antônio A. Cançado. The Construction of a Humanized International Law: A Collection of Individual Opinions. Leiden: Brill Nijhoff, 2017, at 738.
[252]Ibid, at 739.
[253]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Separate Opinion of Judge Cançado Trindade,

The autonomy proposition can be seen as the foundation for the human vulnerability test, as Judge Trindade's thesis reflected his view regarding the humanisation of international law. He constantly stressed the expansion of the protective scope of provisional measures to encompass the rights of individuals rather than only of sovereign States.[254]

Some criticisms of the plausibility test expressed by Judge Trindade have already been reviewed in the previous section. Nevertheless, his biggest concern was that the contours of plausibility undermined the protection of the substantive rights at stake,[255] especially those belonging to the individuals affected by the circumstances underlying the requests for urgent measures. This became of particular importance after the *ICSFT and CERD* case, in which, for the first time, the lack of plausibility of the requesting party's rights - or rather, claims - under the ICSFT led the Court to deny indicating some of the provisional measures requested by Ukraine. It was in this case that the Brazilian judge initially proposed his human vulnerability test.

In his Separate Opinion, Judge Trindade began by recalling previous cases in which the Court was called upon to decide on a request for provisional measures with the alleged vulnerability of segments of the population concerned playing a central role, especially in situations involving armed conflict, similarly to the case at hand. He reinforced his position regarding the overcoming of the inter-State paradigm in contemporary international law and the increasingly people-centred outlook of the discipline, noting the attention given by other principal UN organs, such as the General Assembly and the Secretary-General, to the needs of people in their activities.[256] This, he argued, was "a sign of the new paradigm of the humanised international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability."[257] In this context, he highlighted the case law of international human rights courts in centring the suffering and necessities of human beings in their interim protection decisions.

Taking into account the indiscriminate shelling of civilians that was taking place in the conflict between Russia and Ukraine, the judge considered that, in indicating provisional

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I.C.J. Reports 2017, p. 155, at 181-184, para. 74-83. [hereinafter, "Application of ICSFT and CERD, Provisional Measures, Sep. Op. of Judge Cançado Trindade"].

[254]Trindade, *supra* fn. 251, at 754; Application of ICSFT and CERD, Provisional Measures, Sep. Op. of Judge Cançado Trindade, at 170, para. 41-44; Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, Concurring Opinion of Judge Cançado Trindade, *I.C.J. Reports 2017*, p. 247, at 254-256, para. 19-23.

[255]See, e.g. Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2014, p. 167, at 186, para. 48.

[256]Application of ICSFT and CERD, Provisional Measures, Sep. Op. of Judge Cançado Trindade, at 161, para. 12-15.

[257]Ibid, at 162, para. 17.

measures in those circumstances, the ultimate beneficiaries would be human beings and, as such, a verification for human vulnerability would be much more appropriate and cogent than the plausibility test. He further contended:

> Attention is to be kept on the needs of protection, rather than on strategies of litigation. I find it regrettable that, in the present Order the ICJ distracts attention from the key test of the vulnerability of victims [...] to the inconsistencies of so-called "plausibility", whatever that might concretely mean. The rights to be protected in the *cas d'espèce* are rights ultimately of human beings (individually or in groups), to a far greater extent than rights of States. [...] The individuals concerned live (or survive) in a situation of great vulnerability. In addition, there is here another related point to be kept in mind, namely, that the rights protected at the stage of provisional measures of protection are not necessarily identical to the rights vindicated later, at the stage of the merits of the case. *The requirements for the granting of provisional measures of protection are the gravity of the situation, the urgency of the need of such measures, and the probability of irreparable harm.*[258]

The Brazilian judge continued to defend this position in his following cases.[259] Considering that, since 2017, most cases including provisional measures requests considered by the ICJ, if not all, implicated individual rights to some extent,[260] his proposal seems of more and more practical relevance. However, as pointed out by some authors, there doesn't seem to be an intrinsic incompatibility between the plausibility test and the proposed human vulnerability test, with both tending to different institutional needs.[261] While plausibility is meant to ensure that provisional measures are only indicated when the requesting party's case on the merits is not frivolous and, in that way, strengthens the legitimacy of the decisions,

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[258]Ibid, at 170, para. 40-43. (emphasis added).

[259]See, Jadhav, Provisional Measures, Con. Op. of Judge Cançado Trindade; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2018*, p. 438; Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2018*, p. 654; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 14 June 2019, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2019*, p. 385; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports 2020*, p. 36.

[260]One possible exception may be found in *Treaty of Amity* (Iran v. United States), however, even then, the effects of sanctions related to essential goods, such as medicines and medical devices, foodstuffs and agricultural commodities, and goods necessary for the safety of civil aviation on the life and security of individuals was a major point in the Court's reasoning.

[261]Miles, *supra* fn. 28, at 30; Rieter, *supra* fn. 113, at 151-157; PETERS, Anne. "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. Available at: https://www.ejiltalk.org/vulnerability-versus-plausibility-righting-or-wronging-the-regime-of-provisional-measures-reflections-on-icj-ukraine-v-russian-federation-order-of-19-apr/. Accessed 10 March 2024; ALEXANDER, Atul. Plausibility to Human Vulnerability or Both: Shifting Provisional Measures Standards in Human Rights Cases Before the International Court of Justice. *Liverpool Law Review*, 2024.

human vulnerability, if meant to be the sole circumstance taken into account, would impose the award of interim relief in a far wider range of circumstance, even if a connection between the applicant's rights or claims and the legal instruments it invokes is manifestly lacking. If currently most of the substantive measures ordered by the Court are already not complied with,[262] a radically lowered standard for their indication would be of no assistance in solving this problem, not to mention that it might encourage the filing of patently unfounded cases.[263]

As such, a balance must be struck between the two. While the Court does take into account human vulnerability when considering the risk of irreparable harm and urgency criteria, it is true that a threshold for plausibility as stringent as the one applied in *ICSFT and CERD* can lead to unsuccessful requests for provisional measures, even in face of dire situations for the individuals affected. Nonetheless, from very early on in its case law, the Court has shown considerable flexibility in the conditions for provisional measures when it found that human life and health were at risk.[264]

Especially in recent years, Sparks and Somos have identified an emergence of a so-called "doctrine of *humanitarian stasis*" regarding provisional measures in the ICJ, resembling the proposals by Judge Cançado Trindade.[265] Though not all cases before the Court will directly implicate human rights - that is hardly the case for *Right of Passage through the Great Belt* and *Seizure of Certain Documents and Data*, for example -, a significant number of requests have been filed with respect to situations involving great vulnerability and suffering of individuals. The fact that the Genocide Convention and the Convention for the Elimination of All Forms of Racial Discrimination are the instruments that have based the most requests for provisional measures before the ICJ is illustrative of this point. In this sense, the authors argue that the Court is becoming increasingly aware of the difference between cases purely involving the rights of States, in which the consideration would be whether it is necessary for reasons of the fair administration of justice to take action to prevent prejudice to the rights *pendente lite*, and those impacting the rights of human beings, in which "the Court increasingly seeks to hold the situation in *humanitarian stasis* in order to protect the lives and interests of individuals until a decision can be reached."[266] In

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[262]See ALEXIANU, Matei. Provisional, but Not (Always) Pointless. EJIL: Talk!, November 3, 2023. Available at: https://www.ejiltalk.org/provisional-but-not-always-pointless-compliance-with-icj-provisional-measures/. Accessed 15 January 2024.
[263]Miles, *supra* fn. 28, at 30.
[264]In this regard, see HIGGINS, Rosalyn. Interim Measures for the Protection of Human Rights. *Columbia Journal of Transnational Law*, vol. 36, no. 1&2, 1998, pp. 91-108.
[265]Sparks and Somos, *supra* fn. 81. They argue for the "humanisation" provisional measures, with particular emphasis given to the application of the plausibility test up to 2020.
[266]Ibid, at 99.

this sense, human vulnerability can already be said to be a part of the Court's calculus, especially when considering the risk of irreparable harm and urgency.[267] In addition to that, considerations of the gravity of humanitarian situations in provisional measures orders are increasingly articulated in the opinion of the individual judges of the ICJ, even as a way to justify more flexible standards for the plausibility test itself.[268]

Of course, only a limited number of cases could be considered to fall within this trend and a firm conclusion that the vulnerability of human beings will always surpass other conditions for indication of provisional measures is far from the current scenario. Moreover, the fact that, time and again, the contours of the plausibility test have been changed without warning seems like a more concrete threat to the accomplishment of the purpose of preservation of substantive rights *pendente lite*, both of the parties and of the affected individuals. Without more transparency in the requirements for provisional measures, multiple factors, not the least of which is changes in the configuration of the Court, can turn this protective tendency into a much more formalist approach to the institute.

[267]See Section 3.3.

[268]See, e.g. Rohingya Genocide, Provisional Measures, Separate Opinion of Judge Xue; Allegations of Genocide, Provisional Measures, Separate Opinion of Judge Robinson; Gaza Strip, Provisional Measures (I), Declaration of Judge Bhandari.

5. CONCLUSION

This thesis attempted to shed light on the current state of provisional measures proceedings before the International Court of Justice, addressing the institute's purposes, the formal provisions governing it, and the conditions a requesting party must meet for their indication. It aimed, more specifically, to consider how the most recently introduced criterion, the plausibility test, fits within this scenario. In that regard, a few remarks can be drafted.

First, despite some concerns regarding the risk of prejudgment, the plausibility test seems fully integrated into the framework of provisional measures in the ICJ and, accordingly, is accepted as a permanent condition for its indication. Though its specific scope still needs refinement, specifically when considering the limits of *prima facie* jurisdiction and of the risk of irreparable prejudice, no conflict has yet arisen between plausibility and other conditions for the award of interim measures. Instead, they complement each other, all serving different aims in the Court's consideration of the necessity to act preventively to protect the rights *sub judice*.

The test also cannot be said to conflict with a protective and humanised approach to provisional measures. The purpose of provisional measures is to protect the subject matter of the dispute and avoid its aggravation, which means that in cases concerning the general interests of the international community, especially when there are imminent human rights violations, the Court must take into account the vulnerability of the individuals affected by the controversy. Although the analysis of plausibility inherently places an additional obstacle to be surpassed before the Court can indicate provisional measures for the protection of such rights, this obstacle becomes necessary in light of findings related to the binding character of provisional measures. In addition to that, the existence of a risk to the life and well-being of individuals is taken into consideration by the Court in the analysis of the risk of irreparable prejudice and may even justify the adoption of a more lenient plausibility parameter. As such, a "human vulnerability" test need not replace plausibility, as both have different purposes within the proceedings.

Nonetheless, though a significant portion of the literature considered that the 2017 order in the *Application of ICSFT and CERD* case permanently expanded the scope of the plausibility test, to encompass both legal and factual allegations,[1] this is currently not the

[1]MILES, Cameron. Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice. *The British Yearbook of International Law*, 2018, pp. 1-46; LANDO, Massimo. Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice. *Leiden Journal of International Law*, vol. 31, no. 3, 2018, pp. 641-668; KOLB, Robert. Digging Deeper into the "Plausibility of Rights" -

case. Instead, the last seven years of provisional measures jurisprudence have shown that the application of plausibility has become increasingly erratic, even in cases involving the same legal instruments. In the initial aftermath of the 2017 order, both these elements, the plausible existence of the rights claimed and the plausibility of their breach, were analysed in every order, showing at least a surface-level consistency since the standard and the specific requirements for their fulfilment, particularly of the plausibility of claims portion of the test, oscillated significantly. Two aspects of this are more notable, namely the requirement that when the rules invoked require an element of specific intent, such *dolus specialis* should be plausibly demonstrated,[2] and the appraisal of the plausibility of the rights claimed by the respondent, or the possible defences advanced by it.[3]

After this attempt, however, and one can specifically point to the Armenia and Azerbaijan CERD cases as a divide in this regard, the Court seemed to abandon the previously drawn contours of the plausibility test, sometimes addressing both the legal and factual dimensions of the test, sometimes referring only to legal plausibility and only examining factual elements, if at all,[4] under other conditions for indication of provisional measures, especially *prima facie* jurisdiction and irreparable prejudice and urgency. This may not constitute a problem in and of itself, but the inconsistency is aggravated by the fact that the Court hardly ever seems to acknowledge that its approach to the plausibility condition has changed from case to case. In this sense, States intending to protect their respective rights by means of provisional measures are left without a frame of reference as to what is required of them to demonstrate so that their rights and the acts they complain of are considered

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Criterion in the Provisional Measures Jurisprudence of the ICJ. *The Law & Practice of International Courts and Tribunals*, vol. 19, no. 3, November 2020, pp. 365-387.

[2]Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, *I.C.J. Reports 2017*, p. 104; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, *I.C.J. Reports 2020*, p. 3; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Accessed 2 February 2024 (not yet published).

[3]Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 231; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, *I.C.J. Reports 2018*, p. 406; Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2018, p. 654.

[4]See, e.g. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023. Available at https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf. Accessed 19 March 2024.

plausible. As such, they have to toe the line between burdening the Court with materials and arguments that should be addressed in the merits, slowing down urgent proceedings, and the risk of being surprised by a negative finding of plausibility because the Court added a new element to the assessment without previous indication. This, it is submitted, is the biggest obstacle to the protection of substantive rights through provisional measures, which becomes even graver when considering that, in the last decade, these proceedings have been increasingly used with the aim to protect rights involving general interests of the international community.

Though the need for procedural economy at that phase may, to some extent, justify the lack of detailed reasoning in regard to plausibility, there are other ways for the Court to address the matter without the need to extensively clarify step by step the assessment conducted in every particular case. Practice Directions or Notes to the Parties, both widely underused, can be employed to the effect of clarifying what is expected of the parties to a dispute involving requests for the indication of provisional measures. The fact that the only Practice Direction on interim relief proceedings was adopted in 2004, before plausibility was even introduced to the criteria list, indicates the urgent need, if not to expand the instructions, at least to update them.

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