Expanding the Competence to Issue Provisional Measures—Strengthening the International Judicial Function

By Karin Oellers-Frahm[*]

A. Preliminary Remarks

In international law, jurisdiction serves the same principal aim as in national law, namely the settlement of disputes in order to maintain (legal) peace and security. In international law, as in national law, judicial procedures take time, sometimes a lot of time, during which the rights at stake may be negatively affected by acts of one of the parties potentially resulting in an ineffective judgment. A remedy against such an occurrence has been developed through an instrument of interim protection by which the court directs the parties to leave the rights as they stand and not to interfere with the situation.[1] Such an instrument appears indispensable in order to ensure that a court or tribunal is able to effectively exercise its function.[2] At the national level, interim protection is usually unproblematic since the competence of the tribunals is mostly comprehensive. In international law, in contrast, the competence of judicial organs is one of the most discussed problems because it depends on the consent of states.[3] Any expansion of competence without an explicit agreement of the states concerned is therefore of utmost significance for the role and the acceptance of international courts and reflects the organizational status of international society. Thus, in the context of the project "Beyond

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[1] The aim of provisional measures as a remedy against "la lenteur de la justice" was explicitly expressed by the Mixed Arbitral Tribunal in the case *Ellermann v. Etat polonais*, 5 TAM 457, 459 (1924).

[2] Rüdiger Wolfrum, *Interim (Provisional) Measures of Protection*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL), margin number 7 (Rüdiger Wolfrum ed., 2006), available at: http://www.mpepil.com; Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 RECUEIL DES COURS 9, 19 (1992/III).

[3] This is the undisputed basic principle of international jurisdiction; *cf.* Christian Tomuschat, *International Courts and Tribunals*, in: MPEPIL, margin number 46 (Rüdiger Wolfrum ed., 2006); JOHN G. MERRILS, INTERNATIONAL DISPUTE SETTLEMENT ch. 6 (2005); Karin Oellers-Frahm, *Nowhere to Go? - The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction*, in: A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT; DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE, 435 (Thomas Giegerich ed., 2009); SABINE SCHORER, DAS KONSENSPRINZIP IN DER INTERNATIONALEN GERICHTSBARKEIT, 2003; *see also Eastern Carelia Case*, PCIJ 1923, Series B, No. 5, 27 and *Mavrommatis Palestine Concessions Case*, PCIJ 1924, Series A, No. 2, 16.

https://doi.org/10.1017/S2071832200017302 Published online by Cambridge University Press

Dispute: Lawmaking by International Judicial Institutions," the subject-matter of this contribution mostly relates to the role and self-understanding of international judicial organs; it is less concerned with the creation of substantive normative expectations between international subjects.[4] Yet, the expansion of judicial competences fits into the conceptual apparatus of this research as it innovates the legal order and reaches beyond the case at hand. The case of provisional measures provides a particularly fine example of incremental judicial law making through progressive interpretation, supported by a holistic vision of the international judiciary, reciprocal strengthening and later state practice, as well as its functional legitimation and its limits.

B. Summary Overview Over the Institution of Provisional Measures

I. Historical Development

The power to issue provisional measures, a characteristic of the national judiciary, only appeared in the international context at the beginning of the 20th century. At the Hague Peace Conferences of 1899 and 1907, the peaceful settlement of international disputes was one of the three items on the agenda; but neither the then elaborated Convention for the Pacific Settlement of International Disputes nor the 1907 project of a Permanent Court of Arbitration addressed the issue of provisional measures. However, an initial provision relevant in this context dates back to the same period: Art. 18 of the Convention for the Establishment of a Central American Court of Justice of 1907 provided (in a very general manner) for the preservation of the *status quo* while a case was pending. This provision was followed by a more detailed rule in the Bryan Treaties of 1914.[5] Although the Bryan Treaties did not institute a court, but rather a Commission for the settlement of disputes, they served as a basis for what became Art. 41 of the Statute of the Permanent Court of International Justice (PCIJ). This article provided that 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." This clause has been maintained in the Statute of the International Court of Justice (ICJ), the "successor" of the PCIJ; it also served as a model for a large number of other international courts and tribunals,[6] such as the Commission of Investigation and Conciliation founded by the Pact of Bogotá of 1948; the Arbitration Tribunal established by the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Supreme Restitution Court after World War II; the International Tribunal of the Law of the Sea; the

[4] *Infra* section B.II.

[5] For more details, *see* Karin Oellers-Frahm, *Art. 41*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE - A COMMENTARY, 925, margin number 1-3 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[6] Oellers-Frahm (note 5), 929, margin number 17.

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OSCE Court of Arbitration; the Inter-American Court of Human Rights; the African Court of Human Rights; the European Court of Justice; the EFTA Court; the MERCOSUR Court; the NAFTA Court; the ECOWAS Court; ICSID tribunals and the Permanent Court of Arbitration; as well as a large number of tribunals instituted in treaties on technical matters.[7] Additionally not so much judicial bodies but rather Committees were created under several human rights instruments, e.g., the Committee on the Elimination of All Forms of Racial Discrimination, the Human Rights Committees established according to Part IV of the International Covenant on Civil and Political Rights respectively the International Covenant on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women as well as the Committee established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide for the adoption of interim measures of protection.

This impressive number of courts and tribunals empowered to issue provisional measures and the increasing use made of this power reflect the fact that the preservation of the rights at stake in a particular case is an indispensable means of guaranteeing the effectiveness of a final decision. This is in particular due to the fact that international procedures often take rather long.

II. Requirements of Interim Protection

The particularity of interim protection, as provided for in the instituting treaty or the statute of an international court or tribunal, lies in the fact that the power of the judicial body is not strictly defined but is, to a high degree, discretionary,[8] a fact that is inherent in the character of the institution of interim protection which aims to preserve the rights at stake of either party in order to guarantee the effectiveness of the judgment. Art. 41 of the ICJ Statute, which can be considered the model rule, does not contain more details circumscribing the "circumstances" which require the adoption of provisional measures, and the Rules of Court are also silent on this point. Thus, the appreciation of the "circumstances" and also the choice of the measures to be indicated are left to the court. The parameters governing the exercise of the court's discretion have to be guided merely by the aim to preserve the rights of either party. According to the jurisprudence of the PCIJ, in particular, and the ICJ, measures aimed at preserving the rights at stake are required if an irreparable damage is imminent. The key aspects are thus the irreparability of the damage and the urgency of action.[9] The relevant provision in the Inter-American Convention on Human Rights, Art. 63 (2), which dates from 1969, explicitly contains these

[7] KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 2 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1075 *et seq* (2001).

[8] Collins (note 2), 24.

[9] Wolfrum (note 2), margin number 32 *et seq*.

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basic requirements by stipulating: "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 . . . ." However, these are also rather vague terms which reflect the discretionary task of the judicial body and which in fact open the door for expanding the power to issue provisional measures. Yet the exercise of interim protection and the interpretation of urgency and irreparable damage are only provisional in character: They will be reviewed during the procedure on the merits on the basis of a detailed examination of facts and law. Although the contents of the provisional measures can be confirmed in the judgment, it is only the judgment that definitely decides the dispute, and thus the legal question at stake. Accordingly, under the aspect of the legitimacy of lawmaking by international judicial organs, developing the competence on interim measures of protection is not to be seen as dramatic, because these measures are only in force until the final judgment is delivered. At the same time, the development of interim protection in the context of the project of international jurisdiction is interesting with regard to other aspects which rather refer to questions of competence than to questions relating to substantial law.

C. The Competence to Issue Provisional Measures

I. The Basis of the Competence: Explicitly Conferred or Implied Power?

As already mentioned, the competence of judicial organs is one of the core aspects of international jurisdiction because it depends on the consent of the states parties to the treaty instituting a court or tribunal. As third party dispute settlement requires a limitation of state sovereignty, the competence of any international judicial organ is usually limited to the powers explicitly conferred upon it. These, however, also include those powers that are inherent in those explicitly conferred.[10] With regard to interim protection this principle is reflected in the fact that the power to issue provisional measures is provided for in the instituting treaties or statutes of a great number of international courts and tribunals.[11] Therefore, the question whether such an explicit provision was indispensable or only declaratory of a power already inherently existing was not advanced. This question did, however, become relevant in the context of the European Convention of Human Rights, where the power to indicate provisional measures is not provided for in the Convention, but only in the Rules.[12] Due to the fact that the rules of procedure, which are elaborated and adopted by the Court itself,[13] have to keep within the framework set by

[10] Tomuschat (note 3).

[11] *Supra* section B.I.

[12] Until the coming into force of Protocol No. 11 of 1994, Rule 36 of the Commission provided for the power to adopt provisional measures; today Rule 39 of the Rules of Court of 1998 contains a provision on the adoption of provisional measures by the Court.

[13] Art. 26 of the Convention as amended by Protocol No. 11.

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the Statute or Convention creating the court or tribunal, the question arose whether the Court had overstepped its competences or whether the power to issue provisional measures need not be provided for in the instituting treaty because it is implied in the powers of a court. There is, in fact, a longstanding opinion according to which interim protection has to be considered as an implied power of any judicial organ.[14] This opinion, that today is generally accepted,[15] finds support in a case going back as far as 1906;[16] as another example, reference may be made to the Administrative Tribunals of the United Nations and the ILO, which used to issue provisional measures notwithstanding the absence of any provision to this effect.[17]

This result raises the question of whether the presently undisputed power to issue provisional measures also in the absence of an explicit provision constitutes an expansion of the Court's powers exceeding the underlying consent of the states concerned—a question that must be answered in the negative: An implied power to issue provisional measures does not constitute an expansion of competences. The reason for this finding refers to the fact that the adoption of provisional measures is part of what is generally known as *incidental* jurisdiction of international courts and tribunals. Incidental proceedings[18] (or incidental or implied jurisdiction) means that a court or tribunal seized of a case, can take all necessary decisions pending the final decision, provided that it has at least prima facie jurisdiction[19] over the merits. As interim protection is an instrument for the conduct of the case, the consent of a state to the jurisdiction of the Court to decide the particular case on the merits carries with it, so goes the core legal argument, the consent to exercise any incidental step necessary to guarantee the effectiveness of the judgment.[20]

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[14] *Cf*. for a rather early example the *Northern Cameroons Case*, Individual Opinion of Sir Gerald Fitzmaurice, ICJ Reports 1963, 3, 103; KARIN OELLERS-FRAHM, DIE EINSTWEILIGE ANORDNUNG IN DER INTERNATIONALEN GERICHTSBARKEIT 122 *et seq*. (1975); JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT 221 *et seq*. (1983).

[15] Wolfrum (note 2), margin number 1; SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW 10 (2005); Collins (note 2), 215.

[16] The relevant case concerning a revolution in Honduras which allegedly was supported by Nicaragua was brought before an arbitral tribunal on the basis of Art. 11 of the Peace and Arbitration Treaty of 20 January 1902 between Costa Rica, El Salvador, Honduras and Nicaragua. The arbitral tribunal "ordered the immediate disarmament and disbandment of force, in order that this may return to the pacific state which the arbitral *compromis* contemplates". This measure was taken for the reason that the tribunal "considered its principal duty was to see to it that the award to be pronounced should be made effective", *cf*., for more details, DANA G. MUNRO, THE FIVE REPUBLICS OF CENTRAL AMERICA 208 *et seq*. (1967).

[17] OELLERS-FRAHM (note 14), 127 *et seq*.

[18] This term is used in the Rules of the ICJ, section D.

[19] ROSENNE (note 15), 9, whether this statement is valid without any restriction will be discussed *infra* text to note 57.

[20] ROSENNE (note 15), 9.

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The competence to issue provisional measures is thus governed by the competence of the court to decide upon the merits of the case. If this competence exists, provisional measures can be adopted whether there is a provision to this effect in the statute or the rules of court or not.

II. The Question of Competence

The only relevant particularity with regard to the competence of a judicial organ to issue provisional measures relies on the fact that the competence to decide the case must not have been definitely decided before provisional measures are adopted, but that such competence must only be asserted prima facie. This exception to the requirement that international courts can only act if their competence is established constitutes a compromise between the urgency of action, where the rights at stake in a dispute are endangered, and the sovereignty of states which need not accept any action of a court without their consent. This compromise was considered justified because interim measures of protection are without prejudice to the final decision, including a decision on the jurisdiction or the admissibility of the case.[21] Furthermore, and more importantly, provisional measures were largely regarded as lacking binding force[22] so that there was no interference with the sovereign rights of states if the jurisdiction had to be later denied. Whether this appreciation requires reconsideration with regard to the fact that, at present, the binding character of such measures is generally affirmed, will be examined in the following section.

III. The Effect of Provisional Measures

International treaties or statutes creating a court or tribunal provide for detailed rules concerning its competence. Usually there is a provision concerning the effect of decisions of the judicial organ because it is relevant for the obligations of the states flowing from these decisions. While all treaties or statutes instituting a judicial organ explicitly provide that its final decision is binding upon the parties,[23] they mostly lack a clear provision concerning the effect of provisional measures. Art. 41 of the ICJ Statute, which has been copied by numerous other international courts and tribunals, is by no means clear in this regard because it uses the term "indicate" provisional measures, instead of "prescribe" or "order." This term was deliberately chosen for the reason that "great care must be

[21] Wolfrum (note 2), margin number 19 *et seq.*; Oellers-Frahm (note 5), 934, margin number 26 *et seq.*; HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 254 *et seq*. (1958).

[22] For an overview over court practice and doctrine, *see* Oellers-Frahm (note 5), 953, in particular margin number 85 *et seq*.

[23] *Cf.*, *e.g.*, Art. 59 ICJ Statute.

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exercised in any matter entailing the limitation of sovereign powers"[24] and, furthermore, because the Court had no means of assuring execution.[25] The practice of state parties to disputes before the ICJ concerned by provisional measures reflects this ambiguity.[26] This question became relevant for the first time when the United Kingdom brought a complaint before the Security Council against Iran for non-compliance with the provisional measures indicated by the Court in the *Anglo-Iranian Oil Co.* case.[27] Although the complaint was not made under Art. 94, para. 2, of the Charter, which provides for the involvement of the Security Council only in case of non-compliance with a judgment, the discussion in the Security Council centered essentially on the question whether decisions other than judgments empowered the Security Council to make recommendations concerning the implementation of that decision. As no agreement could be reached, the question was finally postponed until the Court had pronounced on its jurisdiction and became moot when, on 22 July 1952, the Court found that it had no jurisdiction. The Security Council had no occasion to resume this item, which became, however, a permanent issue in legal writings, which were divided on that issue.[28] The majority of the authors have denied the binding force relying on the texts of drafting history and concerns regarding restrictions of sovereignty without specific consent. The argumentation of authors supporting the binding character of provisional measures centered on the effectiveness of the judicial function, on the one hand, and the prestige of the Court, namely that it cannot be assumed that the Statute of the Court contains provisions relating to any merely moral obligations of States, on the other.

While the question remained controversial with regard to the ICJ, partly due to the fact that the Court did not pronounce itself on the issue,[29] other judicial organs expressed the

[24] *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* 735 (1920); *see also* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 423 (1943).

[25] With regard to this difference, *see Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 325, 374; and para. 107 of the Judgment of the Court in the *LaGrand* Case where the Court affirms that "the lack of means of execution and the lack of binding force are two different matters", ICJ Reports 2001, 466.

[26] Oellers-Frahm (note 5), 956, margin number 88.

[27] ICJ Reports 1951, 89; *see also* SHABTAI ROSENNE, 1 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 249 *et seq*. (2006).

[28] Oellers-Frahm (note 5), margin number 86 *et seq*.

[29] The clearest statement that does, however, also not support the binding character of provisional measures can be found in the *Nicaragua* Case, where the Court stated: "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. This is particularly so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to be contrary to international law", ICJ Reports 1986, 114, para. 289; a similar statement can be found in the *Genocide Convention* Case (Provisional Measures), where the Court required their "immediate and effective implementation", ICJ Reports 1993, 325, 349, para. 59.

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view that the provisional measures they issued are binding although the relevant provisions in their statutes were as unclear as Art. 41 of the ICJ Statute. The first court, which explicitly held that its provisional measures are binding, was the Inter-American Court on Human Rights which stated that the relevant provision of the Convention "makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal."[30] What seems even more significant in this context is the fact that the Human Rights Committee established under the Covenant on Civil and Political Rights (which does not even have the power to deliver binding decisions) also considers non-compliance with provisional measures adopted under Rule 86 to be a violation of the obligations flowing from the Covenant as well as a violation of the obligation to cooperate with the Committee in the context of its consideration of communications.[31] Furthermore, the Committee established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[32] (which is not empowered to give binding decisions) stated that provisional measures issued by the Committee under Rule 108, Section 9, require compliance in order to prevent the occurrence of irreparable damage with regard to the individual concerned.[33] It is in fact not surprising that it was in the field of human rights protection where judicial bodies particularly insisted on the effectiveness of the means of guaranteeing and controlling implementation (including interim protection), which in this context is of particular relevance.

However, these developments are certainly not unrelated to the fact that the unsatisfactory situation, in particular with regard to the ICJ and the lesson learned there, led the drafters of the United Nations Convention on the Law of the Sea and the Statute of the ITLOS[34] to explicitly provide for the binding effect of provisional measures by

[30] Inter-Am. Court H.R., *Constitutional Court Case (Peru)*, Provisional Measures, Judgment of 14 August 2000, Series E, No. 3; it has, however, to be mentioned that Art. 25(1) of the Rules of the IACtHR empowers the Court to "order" provisional measures what raises again the question whether the Rules exceed the frame set by the Convention.

[31] *See Glenn Ashby v. Trinidad and Tobago,* 27 July 1994, UN Doc. CCPR/C/74/D/580/1994; and *Dante Piandong et al. v. The Philippines,* 19 October 2000, Un Doc. CCPR/C/70/D/869/1999 where the Committee stated in para. 5.1: "By adhering to the Optional Protocol, a state party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. ... Implicit in a state's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views. … It is incompatible with these obligations for a state party to take action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views". For the follow-up, *see* Nisuke Ando, *The Follow-Up Procedure of the Human Rights Committee's Views*, in: 2 LIBER AMICORUM JUDGE SHIGERU ODA, 1437 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds, 2002).

[32] Convention of 10 December 1984, UN GAOR, 39th Session, Resolutions, Supp. 51, UN Doc. A/39/51, 197.

[33] *Cf*. case *Rosana Nunez Chipana v. Venezuela,* 10 November 1998, UN Doc. CAT/C/21/D/110/1998, Annex; and case *T.P.S. v. Canada,* 16 May 2000, UN Doc. CA T/C/24/D/99/1997.

[34] Convention of 10 December 1982, 21 INTERNATIONAL LEGAL MATERIALS 1261 (1982).

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stipulating, in Art. 290 of the Convention and Art. 25 of the Statute, that they are "prescribed." There is no doubt that this solution not only best fits the function of dispute settlement, but also the prestige owed to international courts and tribunals. Under these conditions it did not come as a surprise that the ICJ also affirmatively decided on the binding character of its provisional measures when asked to take a decision on this issue in the *LaGrand* case.[35] The example of the ICJ was followed by the ECHR which found in favor of the binding nature of provisional measures in the *Mamatkulov v. Turkey* case, reversing its previous jurisdiction in the judgment *Cruz Varas v. Sweden.*[36]

On the basis of this development, it can be stated that provisional measures today are considered as having binding effect, which in fact constitutes an enhancement of international jurisdiction.[37] In the present context concerning the expansion of the competence of international courts, the decisive question refers to the reasons advanced for affirming the mandatory nature of provisional measures.[38] If the binding character can be justified by inferring it from the terms of the treaty instituting the court, there will be no expansion of competence;[39] if, however, it is considered as merely following from the purpose of the judicial function alone, this might be different.

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[35] *LaGrand* Case, Merits, ICJ Reports 2001, 466, 502, para. 100 *et seq*.; *cf*. Karin Oellers-Frahm, *Die Entscheidung des IGH im Fall LaGrand - Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht*, 28 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 265 (2001); Jochen A. Frowein, *Provisional Measures by the International Court of Justice - The LaGrand Case,* 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 55 (2002); Jörg Kammerhofer, *The Binding Nature of Provisional Measures of the International Court of Justice: the "Settlement" of the Issue in the LaGrand Case*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 67 (2003); Shabtai Rosenne, *The International Court of Justice: The New Form of the Operative Clause of an Order Indicating Provisional Measures*, 2 THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 201 (2003).

[36] *Mamatkulov v. Turkey,* Judgment of 6 February 2003; *cf*. Karin Oellers-Frahm, *Verbindlichkeit einstweiliger Maßnahmen: Der EGMR vollzieht - endlich - die erforderliche Wende in seiner Rechtsprechung*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 689 (2003); and *Mamatkulov v. Turkey,* Judgment of the Grand Chamber of 4 February 2005; Karin Oellers-Frahm, *Verbindlichkeit einstweiliger Anordnungen des EGMR - Epilog, Das Urteil der Großen Kammer im Fall Mamatkulov u.a. gegen Türkei*, 32 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 347 (2005).

[37] OELLERS-FRAHM (note 14), 107 *et seq*.; Wolfrum (note 2), margin number 45 *et seq*.; Oellers-Frahm (note 5), 953, margin number 79 *et seq*.

[38] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 13 (2010).

[39] All clearly defined competences explicitly conferred upon a court or tribunal in the instituting instrument are irrelevant in a discussion concerning the question of expansion of competences. They may, however, reflect a development of international law, such as the provision in Art. 290 UNCLOS which empowers the competent court or tribunal to issue provisional measures not only to preserve the respective rights of the parties, but also "to prevent serious harm to the marine environment". This provision differs from the usual rules concerning interim protection; as, however, it is part of the Treaty and thus based on the consent of the states parties to the Convention, it does not raise questions of expansion of competence which may only come up in the context of the use made of the provision; *cf*. Philippe Gautier, *Mesures conservatoires, préjudice irréparable et protection de l'environnement*, in: LE PROCÈS INTERNATIONAL, LIBER AMICORUM JEAN-PIERRE COT, 131-154 (2009). In the same context

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IV. Expansion of Competence?

In the *LaGrand* case the argument of the United States against Germany's contention supporting the binding effect of provisional measures relied on the Court's and state practice and the "weight of publicists' commentary."[40] The United States further referred to the fact that "the sensitivities of states, and not abstract logic, had informed the drafting of the Court's constitutive documents" and that in this context "it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures."[41] The binding effect of provisional measures would, in the view of the United States, have "quite dramatic implications," because "by merely filing a case with the Court, an applicant can force a respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplusage. This is not the law, and this is not how States or this Court have acted in practice."[42] These arguments of the United States were simply reproduced, but not discussed by the Court which concentrated initially on the interpretation of the terms of Art. 41 of the Statute. Secondly, the Court (by way of confirming its interpretation of Art. 41) referred to the *travaux préparatoires* of the Statute and the purpose of the judicial function for justifying the binding character of its provisional measures. The Court's reasoning relied on the consideration that although Art. 41 uses the vague term that provisional measures can be "indicated," their binding nature had to be affirmed by referring to the context, which in the English version provides that the measures indicated "ought to be taken" versus the French version which employs a clearer usage of the terms "*doivent être prises*." These terms affirm, in the view of the Court, the binding effect of provisional measures as part of the competence explicitly conferred upon the Court.[43] Thus, no question of competence expansion would arise since the Statute of the Court is an integral part of the UN Charter and thus the agreed treaty basis governing the Court's competences.

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reference can be made to the Stockholm Arbitration Center, Chamber of Commerce, which on 1 January 2010 introduced an emergency arbitration procedure providing for the adoption of binding pre-arbitral provisional relieve which in fact raises questions of expansion of competence; text of the new rules, available at: http://www.sccinstitute.com/forenklade-regler-2.aspx; for a first comment, *see* Charles N. Brower, Ariel Meyerstein & Stephan W. Schill, *The Power and Effectiveness of Pre-Arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-States Disputes*, in: BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE, 61 (Kaj Hobér, Annette Magnusson & Marie Öhrström eds, 2010).

[40] ICJ Reports 2001, 500, para. 96.

[41] *Id*.

[42] *Id*.

[43] *Id*., 502 *et seq*., paras 100 *et seq*.; *see LaGrand* (note 35).

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In contrast to the findings of the ICJ in the *LaGrand* case, the reasoning of the ECHR in the *Mamatkulov* case was not based on an interpretation of the underlying provision but followed the considerations of human rights bodies according to which non-compliance with provisional measures constitutes a violation of the obligation to cooperate with the body and a frustration of the function conferred on the body.[44] This finding is particularly interesting as it deviates from earlier considerations of the Court on the effect of provisional measures. In the *Cruz Varas* case[45] and again in the *Conka* case[46] the Court explicitly stated that in the absence of a provision in the Convention and in the Rules of Court concerning the effect of provisional measures neither Art. 34 of the Convention nor other sources of law allow for a finding in favor of the binding effect of interim measures.[47] In the *Mamatkulov* case the Court justified the deviation from the earlier cases by referring to general principles of law and the decisions of other international organs as well as the rules of treaty interpretation,[48] which resulted in the statement that under Art. 1, 34 and 46 of the Convention provisional measures are binding because the effective exercise of the individual complaint procedure would otherwise be jeopardized. This reasoning also refers to the argument of "incidental jurisdiction" of the relevant judicial organ, however not in relation to the explicitly conferred competences concerning the judicial function as such but with regard to the general obligations flowing from the treaty. However, due to the principle of consent to international jurisdiction, the existence of a judicial body alone cannot justify the binding character of provisional measures which depends on the power conferred upon the court or tribunal to deliver binding judgments. In this alternative, declaring provisional measures binding does not constitute an expansion of competence—at least at a first glance[49]—because it is part of the competence transferred upon the judicial organ. Applying these findings to the ECHR's reasoning in the *Mamatkulov* case, it can consequently be stated that its decision that provisional measures are binding does not constitute an expansion of competence because the ECHR has the power to deliver binding decisions. The Grand Chamber explicitly relied on this argument when it stated that since

[44] *Supra* note 31 and 33.

[45] *Cruz Varas v. Sweden,* Judgment of 20 March 1991; *see also* the critical comments to this decision by Karin Oellers-Frahm, *Zur Verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte*, 18 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 197 (1991); Ronald S. J. Macdonald, *Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights*, 52 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 703 (1992); Gerard Cohen-Jonathan, *De l'effet juridique des "mesures provisoires" dans certaines circonstances et de l'efficacité du droit de recours individuel: à propos de l'arrêt de la Cour de Strasbourg Cruz Varas du 20 mars 1991*, 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME 205 (1991).

[46] *Conka et al.v. Belgium,* Judgment of 13 March 2001.

[47] *Mamatkulov v. Turkey* (note 36), para. 109.

[48] *Id*. paras 110 *et seq*.

[49] *Infra* section C.V.

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1 November 1998 an individual complaint is no longer optional and that an assessment of the effect of provisional measures cannot be separated from a decision on the merits which they shall protect according to Art. 46 of the Convention.[50]

With regard to the human rights bodies, on the other hand, which do not have the power to deliver binding decisions, these findings lead to the conclusion that the declaration of the binding nature of provisional measures clearly amounts to an unlawful expansion of their competence. The binding effect of provisional measures in these cases cannot be inferred from any consensual basis which only exists with regard to delivering non-binding "views" and thus constitutes an expansion of the competences conferred on the body. This finding does not, however, affect the fact that the lack of cooperation with a judicial organ, in particular the hindrance of the effective exercise of the judicial function, constitutes a violation of the treaty obligations. The Human Rights Committee rightly stated that "apart from any violation of the Covenant charged to a state party in a communication, a state party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile,"[51] but such treaty violation is not comprised in the competence of the judicial body which is merely empowered to take "views" on particular violations of the Covenant in a particular case. The ICJ in the *Nicaragua* case rejected the assertion that a compromissory clause in a treaty, "providing for the jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose."[52] According to this consideration, the rules on international jurisdiction do not empower judicial organs to go beyond their explicitly agreed competences. Where the competence does not imply the delivery of binding decisions, provisional measures cannot have binding effect although non-compliance with such measures may constitute a treaty violation.

V. Binding Character of Provisional Measures and Prima Facie Jurisdiction

In the above considerations it has been stated that declaring provisional measures binding constitutes an unlawful expansion of competence only with regard to those judicial bodies that do not have the power to deliver binding decisions. This does not imply, however, that declaring provisional measures binding could never amount to an expansion of competence due to the fact that a judicial body making such a declaration has the power

[50] Paras 122 *et seq*. of the Judgment.

[51] UN Human Rights Committee, *Dante Piandong et al. v. The Philippines,* 19 October 2000, Un Doc. CCPR/C/70/D/869/1999, para 5.2.

[52] ICJ Reports 1986, 136.

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to deliver binding judgments. This question requires a differentiated assessment not only with regard to the position taken by the ECHR, but also with regard to the decision of the ICJ and its seemingly safe argument inferring the binding nature of its provisional measures from Art. 41 of the Statute.

The argument of the ECHR in the *Mamatkulov* case relied primarily on the functional approach according to which the final settlement of the dispute shall not be frustrated by acts occurring during the proceedings, the so-called "reflector effect" of the final judgment;[53] it thus referred to the idea of incidental jurisdiction. As already mentioned, incidental jurisdiction is not dependent on the specific consent of the parties, but is part of the overall consent as to the exercise and functioning of that court including any decision that becomes necessary for the conduct of a particular case. What is relevant is thus the jurisdiction and competence of the court to decide on the merits of the claim which seems to support the conclusion that where a court is entitled to deliver binding decisions on the merits of a case, incidental decisions should also share the binding nature. However, in international law it does not follow from the mere fact that a court is entitled to give binding decisions that each and every incidental decision has binding character; this is the case only for those decisions that are covered by the consent of the states concerned. If, consequently, the jurisdiction of the judicial organ concerned is uncontroversial the binding character of incidental decisions is implied and does not constitute an expansion of competence. As the jurisdiction of the ECHR was established with the ratification of the Convention and as no particular act of submission is required nor any reservation to the jurisdiction admissible, the overall jurisdiction on the merits of a case covers the extent of the incidental jurisdiction. Thus, the adoption of binding provisional measures does not constitute an unjustifiable or unlawful expansion of the competence of the Court because the issue of provisional measures as well as their binding character is incidental to the jurisdiction conferred to the ECHR.[54]

This conclusion cannot be transferred to the ICJ, whose jurisdiction depends on a particular act of submission and, furthermore, is not all-comprehensive but open to reservations. This fact may explain the effort of the ICJ to justify the binding nature of provisional measures by referring to the terms of the relevant provision, Art. 41 of the Statute, in order to rely on a safe legal basis comparable to Art. 290 of the Law of the Sea Convention as an expression of the explicit consent of the parties to the binding nature of provisional measures. There is, however, a significant difference between the wordings of Art. 290 of UNCLOS and Art. 41 of the ICJ Statute in that Art. 290 explicitly provides that "if a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction . . . " it may "*prescribe* [emphasis added] any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the

[53] OELLERS-FRAHM (note 14), 109 *et seq*.

[54] *Supra* text to note 50.

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parties to the dispute . . . ." The *caveat* concerning the prima facie jurisdiction refers to the fact that in the case that the jurisdiction is controversial, the measures are nonetheless binding even if, at a later stage the case could be dismissed for lack of jurisdiction. The explicit consent to the binding nature of provisional measures in the absence of undisputed jurisdiction seems necessary because it obliges states to comply with a decision which might ultimately not be covered by their consent and which therefore interferes with their sovereignty. In this context it has to be stressed that the ICJ, if seized under UNCLOS, is also covered by this provision which governs any dispute "duly submitted to a court or tribunal" with the consequence that provisional measures may have different effects depending on whether the ICJ was seized under UNCLOS or under the Statute. This is due to the fact that Art. 41 of the ICJ Statute lacks any reference to the jurisdictional aspect of interim protection. Although it is undisputed that the adoption of provisional measures does not require a definite decision on jurisdiction, it hardly seems acceptable to interpret Art. 41 as implying the consent of the parties to binding provisional measures even in cases of controversial jurisdiction.[55] As any restriction to state sovereignty requires consent and cannot be presumed, the binding effect of provisional measures issued by the ICJ is dependent from the consent concerning the binding effect of the judgment. This consent is, however, restricted to cases where the Court's jurisdiction is uncontroversial. This conclusion reflects a more differentiated understanding of incidental jurisdiction than that supported by Rosenne[56] who only requires the existence of prima facie jurisdiction in order to justify incidental jurisdiction, a view which, with regard to the binding nature of provisional measures, is not in line with the consensual principle of international jurisdiction in cases of controversial jurisdiction.[57]

The above considerations lead to the conclusion that neither the textual approach nor the incidental jurisdiction approach provides a basis for empowering the ICJ to issue binding provisional measures in cases where its jurisdiction is not established. The fact that the Court has categorically stated that all provisional measures are binding upon the parties irrespective of the status of certainty of its jurisdiction thus constitutes an unlawful expansion of the competence of the Court not covered by the required consent of the parties.

[55] This aspect was explicitly underlined by Judge Dugard in his separate opinion in the case concerning *Armed Activities on the Territory of the Congo*, where he stated that due to their binding character provisional measures will assume greater importance than before and that in these circumstances "the Court should be cautious in making Orders for provisional measures where there are serious doubts about the basis for jurisdiction …", ICJ Reports 2002, 265.

[56] ROSENNE (note 15), 9: "'Incidental jurisdiction' is a term with no precise legal meaning in international law. It implies that the court or tribunal regularly seized of a case, and provided that it has *prima facie* jurisdiction over the merits, can take all necessary decisions for the conduct of the proceedings . . .".

[57] Oellers-Frahm (note 5), 957, margin number 92; Mita Manouvel, *Métamorphose de l'article 41 du Statut de la CIJ*, 106 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 103, 135 (2002).

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D. Concluding Remarks

It has been stated above that attributing binding force to provisional measures can constitute an unlawful expansion of competence even if the court has the power to deliver binding judgments. This is the case where the competence of the court—when adopting provisional measures—is only found to exist prima facie. If there is no provision as that in Art. 290 of UNCLOS, the binding character of provisional measures amounts to an expansion of competence, raising the question of which practical effects follow.

There can be no doubt that non-compliance with the orders contained in provisional measures may result in a violation of international law leading to the application of the rules on state responsibility. In practice, however, the unwillingness of a state to comply with provisional measures does not have concrete consequences. Of course, the court can take note of non-compliance in the final judgment; it may even decide to grant reparation, but the means of forceful implementation of provisional measures are even more restricted than those regarding the final judgment because the effect of provisional measures is limited—they are terminated with the delivery of the judgment on the merits—and forceful measures of execution are wanting in international law unless there is a threat to or breach of the peace.[58]

Nevertheless, the expansive interpretation of the competence to issue binding provisional measures under particular, in fact rather limited, conditions constitutes a positive development reflecting the status and acceptance of international jurisdiction. The fact that implementation is not guaranteed is a characteristic, although regrettable element of international law that should not diminish the achievements which have been made on the way to improving international jurisdiction, bringing it more in line with the jurisdiction at the national level in the sense that judicial dispute settlement is regarded as a normal instrument and not as something extraordinary, e.g., an unfriendly act, in state relations. The significance of this development should not be underestimated although in international law the distinction between binding and non-binding decisions or even, more generally, binding or non-binding commitments concerning coercive implementation is blurred.[59] What is of relevance in this context is finally the authority of the organ

[58] Karin Oellers-Frahm, *Souveräne Gleichheit der Staaten in der internationalen gerichtlichen Streitbeilegung? Überlegungen zu Art. 94 Abs. 2 und Art. 27 UN-Charta*, in: VERHANDELN FÜR DEN FRIEDEN, LIBER AMICORUM TONO EITEL, 169-191 (Jochen A. Frowein, Klaus Scharioth, Ingo Winkelmann & Rüdiger Wolfrum eds, 2003); Yuval Shani, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009); Rudolf Bernhardt, *Art. 59*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE - A COMMENTARY , 1246, margin number 52 *et seq* (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[59] Michael Bothe, *Legal and Non-Legal Norms - A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65 *et seq*., 87 (1980).

https://doi.org/10.1017/S2071832200017302 Published online by Cambridge University Press

delivering the decision, the acceptability of the decision and issues of prestige of the state concerned in the advent of non-compliance.

Finally, the question concerning the "democratic justification"[60] for competence expansion to adopt provisional measures will be addressed shortly. As has been shown, such expansion has developed particularly in the context of human rights protection[61] where the implementation of the values at stake is of particular relevance. As the expansion of competence, namely the binding character of provisional measures, in this context benefits an individual whose rights are preserved against an allegedly illegal interference by a state, this fact alone may be considered as a justification. As, however, in international law states are still the dominant law-makers today, the "democratic justification" for competence expansion of at least some judicial bodies in claiming the binding force of provisional measures should rather be seen in the fact that this expansion has not met with general protest—although states have not always acted accordingly—and, moreover, in the fact that the alleged binding effect of provisional measures requires states to justify or at least to explain why they have not complied with a binding interim order. That such attitude is particularly hard to justify in cases of human rights violations plays a significant role in explaining why competence expansion, particularly in human rights bodies, has apparently been accepted, in principle, although not always followed in a concrete case.

The international community seems, in principle, ready to accept the requirements of the effective peaceful settlement of disputes including the binding effect of provisional measures, although in practice not all states will always act accordingly. As, however, states make increasing, if not even excessive,[62] use of provisional protection, they may be inclined to comply with these measures in order to have a strong position if other states fail to comply with their international obligations. On the other hand, it depends, of course, on the sensible use of this instrument by international courts and tribunals in order to keep within the framework of acceptability of the exercise of their functions for only then will the judicial dispute settlement expand. In this context the concern of the United States, expressed in its argument against the binding character of provisional measures during the *LaGrand* case (namely that by merely filing a case an applicant can force the Respondent to refrain from certain acts)[63] should be seriously taken into consideration in every single case concerning the adoption of provisional measures and induce courts and tribunals to be particularly cautious in assessing the urgency of action and the proportionality of the measures required.

[60] *See* von Bogdandy & Venzke (note 38), 4.

[61] *Supra* section C.III.

[62] Oellers-Frahm (note 5), 962, margin number 102.

[63] ICJ Reports 2001, 500, para. 96.

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