INDICATION OF PROVISIONAL MEASURES AMIDST THE INTERPRETATION OF JUDGMENTS IN THE INTERNATIONAL COURT OF JUSTICE

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Abstract

The judgment of the International Court of Justice has the effect of *res judicata* as confirmed by Article 60 of the Statute. However, under certain circumstances, a party may file a petition to the Court requesting an interpretation or a revision of a judgment. As for the interpretation, where there is a dispute pertaining to the meaning or scope of the judgment, either party may request the Court to construe such disputing subject matter. Considering the objective of the provisional measures to preliminarily protect parties before the issuance of final judgments, one may question the Court's authority to order provisional measures amidst the interpretation proceeding. Notwithstanding this concern, the Court has granted provisional measures in the middle of two interpretation proceedings: the *Avena* the *Preah Vihear* Interpretations. This article focuses on the Court's authority to order provisional measures during interpretation proceedings. It aims to clarify when and under what circumstance can and should the Court exercise such power.

Keywords: Provisional Measure, Interpretation of Judgment, International Court of Justice, Avena, Preah Vihear

1. Introduction

Adjudication is a crucial dispute settlement method. That said, it might take some time before a final decision could be rendered so that due process is preserved, i.e., that each disputing party has reasonable opportunity to present its case.[1] Thus, under certain circumstances, it might be necessary for an adjudicatory tribunal to order a disputing party, especially a respondent, to do or refrain from doing something that may vitiate the effect of the tribunal's final decision. This kind of order has been *inter alia* referred to as "injunction", "interim measure", and "provisional measure", which could be effectively used to alleviate the problem of "*la lenteur de la justice*" (justice delayed is justice denied).[2] Most domestic jurisdictions, if not all, authorize their domestic courts to issue such provisional measures.

From the end of the nineteenth to the beginning of the twentieth century, scholars and other participants had endeavored to replace the use of force in settling international disputes with international adjudication.[3] To achieve this objective, they had to assure the states that the proposed substitution was truly efficient. That is, notwithstanding the time-consuming character of the adjudication process, *status quo pendente lite* must be preserved.[4] Hence, to maintain the disputing states' rights pending the decision on the merits,[5] the tool of provisional measure was introduced. However, unlike the domestic system whereby the court has compulsory jurisdiction, an international tribunal's jurisdiction is generally based on the

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[1] Masanori Kawano, *Comparative Studies on Enforcement and Provisional Measures - Provisional Measures as a Necessary Instrument for Effective Justice* (Mohr Siebeck 2011) 192

[2] Karin Oellers-Frahm, 'Expanding the Competence to Issue Provisional Measures - Strengthening the International Judicial Function' (2011) 12 German Law Journal, 1279

[3] Jerry Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Kluwer Law and Taxation 1983) 1

[4] ibid

[5] Oellers-Frahm (n 2) 1281

disputing parties' consent.[6] Thus, as Sztucki observes, one should refrain from an exercise of mechanical analogy between the indications of provisional measures in domestic and international levels.[7] As such, and rightly so, this issue of provisional measure in international law has been a subject of much controversy among scholars.[8]

The International Court of Justice ("ICJ"), the successor of the Permanent Court of Justice ("PCIJ"), generally known as the principal judicial organ of the United Nations, has been ascribed with this provisional measure function as set forth in its statute with an objective to preserve respective rights of disputing parties.[9] While the Court's jurisdiction over a dispute is dependent on the parties' consent,[10] its ability to order provisional measures is referred to as the Court's incidental jurisdiction.[11]

Once the ICJ renders its final judgment, the judgment would have the effect of *res judicata* as confirmed by Article 60 of the Statute, which states that the judgment is "final and without appeal." However, under certain circumstances, a party may file a petition to the Court requesting an interpretation or a revision of a judgment. As for the interpretation, where there is a dispute pertaining to the meaning or scope of the judgment, either party may request the Court to construe such disputing subject matter.[12]

Considering the objective of the provisional measures to preliminarily protect parties before the issuance of final judgments, one may question the ICJ's authority to order provisional measures amidst the

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[6] ibid

[7] Sztucki (n 3) 3

[8] Jerome B. Elkind, *Interim Protection: A Functional Approach* (Martinus Nijhoff 1971) 3

[9] Statute of the International Court of Justice, art 41 (June 26, 1945) 59 Stat. 1031-33 U.N.T.S. 993

[10] ibid, art 36

[11] Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005) 9

[12] Statute of the International Court of Justice (n 9) art 60

interpretation proceeding. Notwithstanding this concern, the Court has granted provisional measures amidst two interpretation proceedings: the *Avena* Interpretation[13] and the *Preah Vihear* Interpretation.[14] Judge Donoghue mentioned this point in passing in her dissenting opinion in the *Preah Vihear* Interpretation, stating that she had "doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case."[15]

This article focuses on the ICJ's authority to order provisional measures during interpretation proceedings. It aims to clarify when and under what circumstance can and should the Court exercise such power. In order to achieve this task, the historical context of Article 41 of the ICJ Statute regarding provisional measures will be examined in Part II. Part III will then discuss the contents and objectives of the provision as well as its applications in contentious cases. A general observation of the interpretation proceeding will be made in Part IV. Subsequently, Part V will review the facts and the Court's decisions in *Avena* and *Preah Vihear*. An appraisal of the decisions, as well as their associated declarations, separate opinions and dissenting opinions, will also be made. Finally, the author's conclusions and suggestions will be provided in Part VI.

2. Historical Context

2.1 Provisional Measures in International Law Before the Establishment of the Permanent Court of International Justice

The first implementation of the concept of provisional measure in international adjudication can be traced back to the late nineteenth century when the Institute of International Law considered this matter in the

[13] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) Provisional Measures, 2008 I.C.J. 311 (16 July 2018)

[14] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.) Provisional Measures, 2011 I.C.J. 151 (18 July 2018)

[15] ibid, (Donoghue, Dissenting) para 10

context of arbitration procedure. In particular, at the recommendation of Asser, a Dutch Jurist, Article 19 of the *Projet de règlement pour la procedure arbitrale international* was incorporated; it stipulates that "*[l]e tribunal arbitral peut render des jugements interlocutories ou préparatoires*."[16] As for international judiciary, it was not until the early twentieth century when the first provision concerning indication of provisional measure found its place in Article XVIII of the Convention for the Establishment of a Central American Court of Justice of December 20, 1907,[17] which reads:

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

In 1913, to advance international peace, William Jennings Bryan, the then United States Secretary of State, urged the United States to conclude bilateral treaties with other countries to set up a Permanent International Commission to review disputes that might arise. A number of provisions in the bilateral treaties with various countries ("Bryan Treaties") provided the Commission with power to indicate provisional measures;[18] they reads:

> 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

[16] Rosenne (n 11) 12–13

[17] Karin Oellers-Frahm, 'Article 41', *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman et al, OUP 2006) 925 para 2

[18] Sztucki (n 3) 2

> each party ought in its opinion to be taken provisionally and pending the delivery of its report.[19]

2.2 Drafting of the PCIJ Statute

When the League of Nations was founded in the aftermath of the First World War, Article 14 of the Covenant of the League of Nations proposed the establishment of the PCIJ. Consequently, the Advisory Committee of Jurists was appointed on February 13, 1920. The Committee, performing its duty from June 10 to July 24 1920, was entrusted with a prominent duty to draft the Statute of the Court.[20] To facilitate this task, the Secretariat of the League provided the Committee with the Memorandum presented by the Legal Section of the Secretariat of the League. The Memorandum included a point that was directly concerned with provisional measure: "Is the Court competent to decree, as regards the subject-matter of the dispute, the fixation of status quo pending its decision?" Additionally, it referred to Article XVIII of the Convention for the Establishment of a Central American Court of Justice. However, the Committee seemingly paid little attention to the document.[21]

It was not until the very last days of the Committee's working period that a Brazilian representative, Raul Fernandes, raised the issue of provisional measure. Fernandes, citing Article 4 of the Bryan Treaty, proposed that the Committee insert the following clause into its draft.[22]

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may,

[19] Treaty between China and the United States for the Advancement of Peace, art 4, reproduced in 10 American Journal of International Law 268 (1916) 269

[20] Rosenne (n 11) 21–22

[21] Sztucki (n 3) 23–24

[22] ibid, 24

> provisionally and with the least possible delay, order appropriate protective measures pending the final judgment of the Court.[23]

Interestingly, Fernandes also proposed that there should be penalty imposed on those who did not comply with the order. Nevertheless, other members promptly rejected the proposition.[24] The provision, which was enshrined in the final version of Article 41 of the PCIJ Statute, reads:

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

2.3 Drafting of the ICJ Statute

According to Article 92 of the United Nations Charter, the ICJ is to be the principal judicial organ of the United Nations, thereby replacing its predecessor, the PCIJ and, accordingly, the Committee of Jurists was set up to revise the PCIJ Statute. With some negligible modifications, the ICJ Statute was adopted in the United Nations Conference on International Organization—the San Francisco Conference. Indeed, the "Procedure" matter under Section III of the Statute was regarded as the least controversial part.[25] The summary of the seventh meeting of the Conference reveals that "[t]he Chairman then read in turn Articles 40, 41, 42, and 43, which were approved without objection."[26] Thus, Article 41 was

[23] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurist (28th meeting, 1920) 609

[24] ibid

[25] Oellers-Frahm (n 17) 927 para 7

[26] United Nations Conference on International Organization, San Francisco, U.S. (Vol. XIV, 25 April – 26 June 1945) 172

again not the main subject of discussion and was left barely touched. Ultimately, there are merely two insignificant changes in Article 41 of the ICJ Statute from the same provision in the Statute of the PCIJ. One is the change from "reserve" to "preserve" in paragraph one given the typographical error in the earlier version and the other is the change from "Council" to "Security Council" in paragraph two.

2.4 The Rules of Court

Article 30 of the Court Statute grants the Court power to enact its own set of procedural rules. Accordingly, the Court has enacted several sets of rules. The first set of rules was adopted in 1922. Seven modifications were subsequently made in 1926, 1927, 1931, 1936, 1946, 1972, and 1978 respectively. These modifications essentially reflected the past experience that the Court had encountered. Under these rules, the term "Provisional Measure" did not appear until the 1978 Rules was enacted, as the term "Interim Protection" had previously been chosen.

Article 57 of the 1922 Rules, the only provision concerning interim protection within the legal instrument, granted the President of the Court power to indicate interim protection when the Court was not sitting. Paragraph two of the Article provided that failure to comply with the suggestion shall be recorded.[27]

The rule concerning interim protection was amended for the first time in 1931 when the concept of urgency was introduced. It entailed that the application for interim protection shall have priority over all other cases. Moreover, parties were guaranteed the right to be heard before the Court made its decision.[28]

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[27] Article 57 of the 1922 Rules provides:

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.

[28] Article 57 of the 1931 Rules provides:

The rule was then thoroughly revised in 1936 with some minor modifications in 1946. Article 61 of the 1946 Rules comprised eight paragraphs.[29] The period to request for indication of interim measures was

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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.

[29] Article 61 of the 1946 Rules, which later became Article 66 of the 1972 Rules, provides:

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.

for the first time stipulated in broad language in paragraph one. The paragraph reads "[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 [...]."

In 1978, the provision concerning interim protection was split up into six articles—Articles 73 to 78. However, the content of the Rules on this matter remained significantly similar to the 1946 Rules.

Having reviewed the drafting history of the Court Statutes and their *travaux préparatoires*, it seems that pertinent committees did not devote much attention to the subject of the indication of provisional measures. This was partly because the drafting was based primarily on past decisions and the Court's experience and was not much concerned with instances that might occur in the future. In particular, the question of whether the indication of provisional measures could be made after a final judgment had been delivered was never discussed. In other words, as Rosenne aptly notes, "[w]hile Article 41 certainly empowers the Court to indicate provisional measures for the purpose of preserving the respective rights of each party, it does little more than that, and leaves it to the Court to develop the law."[30]

3. Indication of Provisional Measures in International Tribunals

Article 41 of the ICJ Statute provides that "The Court shall have the power to indicate, if it considers *that circumstances so requires*, any provisional measures which ought to be taken *to preserve the respective rights of either party*" (emphasis added). The provision only prescribes a vague requirement—"that circumstances so requires"—for the Court to indicate any provisional measures and a broad objective of such measure, that is "to preserve the respective rights of either party." Because of this

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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.

[30] Rosenne (n 11) 33

ambiguity, Article 41 has been described as one of the most complicated provisions to apply.[31]

Moreover, as aforesaid in the preceding Part, although the Court has established rules to clarify certain matters, such clarifications are restricted to procedural aspects of Article 41; substantive and jurisdictional matters are still left open for future judicial development.[32] Hence, an exploration of cases as well as other resources is needed to understand more thoroughly the content and the nature of this judicial tool. As Oellers-Frahm intriguingly observes:

> The case of provisional measures provides a particularly fine example of incremental judicial law making through progressive interpretation supported a holistic vision of the international judiciary, reciprocal strengthening and later state practice, as well as its functional legitimation and its limits.[33]

3.1 Functions of Provisional Measures

The first obvious function of provisional measures is the preservation of the rights of either party pending a Court decision. This objective is prescribed in the Statute itself and has frequently been reiterated in several Court decisions.[34] Also, the Court and jurists have also elaborated its other purposes. For instance, an author categorizes the objects of provisional measures into two main groups: the traditional purpose to resolve conflicts between states and the purpose to protect individuals in such conflict.[35]

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[31] J. G. Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 International and Comparative Law Quarterly 90, 90

[32] ibid

[33] Oellers-Frahm (n 2) 1280

[34] *See*, *e.g.*, Fisheries Jurisdiction (U.K. v. Ice.) Interim Measures, 1972 I.C.J. 12 (August 17) para 21; Nuclear Tests (Austl. v. Fr.) Interim Measures, 1973 I.C.J. 99 (June 22) para 20

[35] Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Intersentia 2010) 13–36

Preservation of *status quo*,[36] prevention of irreparable prejudice,[37] prevention of aggravation and extension of dispute,[38] and preservation of evidence[39] are some other examples that have been mentioned.

In order to achieve the aforesaid functions, the Court has granted provisional measures in various forms. Moreover, it has been promulgated in Article 75 of the 1978 Rules that the Court may indicate provisional measures other than those requested by the parties.[40] Pursuant to the same provision, the Court may decide *proprio motu* whether provisional measures should be granted in certain circumstances. As such, it can be assumed that the indication of provisional measures is a very crucial tool of the Court to fulfill its task of resolving disputes. Against this backdrop, the Court in *Lagrand* enunciated that provisional measures "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."[41] Without this tool, the rights that the parties seek to protect by submitting their claims to a judicial institution may rarely be realized. This failure of the judicial system may result in a situation whereby the aggrieved parties are forced to resort to other hostile options.

3.2 Requirements of the Indication of Provisional Measures

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[36] Sztucki (n 3) 72–73

[37] Legal Status of the South Eastern Territory of Greenland (Den. v. Nor.) 1932 P.C.I.J. (ser. A/B) No. 48 (August 3) 284

[38] Electricity Company of Sofia and Bulgaria, 1939 P.C.I.J. (ser. A/B) No. 79 (December 5) 199

[39] Frontier Dispute (Burk. Faso v. Mali) Provisional Measures, 1986 I.C.J. 3 (January 10) para 20

[40] Article 75 paragraph 2 of the 1978 Rules provides:

When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

[41] Lagrand (Ger. v. U.S.) 2001 I.C.J. 466 (June 27) para 102

In general, the power of the Court to order provisional measures is deemed discretionary. To put it differently, it is the Court that has to consider whether that circumstance so requires.[42] That said, the Court generally follows past decisions which set up good standards. In other words, the Court's exercise of this function is not purely discretionary, as the Court's jurisprudence has gradually developed.[43] According to the current jurisprudence, the Court takes a number of factors into account in considering the issue, including the prospect of the applicant's success on the merit and the existence of nexus between alleged rights in main claims and requested rights in interlocutory proceedings and intentions of the parties.[44] In short, there are three main factors to which the Court usually gives weight: (1) whether there is *prima facie* jurisdiction; (2) whether there would be irreparable harm; and (3) whether there is urgency.

3.2.1 *Prima Facie* Jurisdiction

Article 36 of the Statute concerns the Court's substantive jurisdiction, which is based on the parties' consent. Yet, this substantive jurisdiction could possibly be distinguished from the Court's jurisdiction to indicate provisional measures because the latter is part of the Court's incidental jurisdiction,[45] as is also the case for the Court's power to interpret[46] and revise[47] judgment, as well as its power to allow third states' intervention.[48] In contrast to the jurisdiction to decide on the merits, these incidental powers do not emerge from the disputing parties' direct consent;

[42] Sztucki (n 3) 111

[43] Elkind (n 8) 209

[44] Merrills (n 31) 114–25

[45] M. H. Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972) 46 British Yearbook of International Law 259, 308

[46] Statute of the International Court of Justice (n 9) art 60

[47] ibid, art 61

[48] ibid, arts 62–63

rather, they are bestowed upon the Court by the Statute itself.[49] For this reason, it is generally accepted that the Court can decide to indicate or not to indicate provisional measures prior to any conclusive decision as to the question of substantive jurisdiction.[50]

Nevertheless, as the effect of provisional measures could be substantial as it deprives or restricts states' sovereign ability to act independently, the Court cannot completely ignore the issue of substantive jurisdiction.[51] As a result, it is widely agreed that at least *prima facie* jurisdiction is required before the Court can exercise this power to indicate provisional measures.[52] Given this requirement, an applicant requesting provisional measures shall have burden of proof to demonstrate preliminarily that the Court likely has jurisdiction over the substantive dispute. This is a balanced solution between two extreme ends.[53] On the one hand, a total ignorance of the Court's substantive jurisdiction might result in unfairness and cause unanticipated damage to the targeted party if the jurisdiction does not in fact exist. On the other hand, the applicant's rights might be irreparably prejudiced if the Court does not order provisional measures in due time. On a related note, the order issued during this interlocutory proceeding should in no way prejudice the effectiveness of the final judgment.[54] Also, the scope of provisional measures indicated should

[49] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius 1986) 533; J. G. Merrills, *International Dispute Settlement* (Cambridge University Press 2011) 124; The word "direct consent" is used because this incidental jurisdiction is in fact based on state's consent as well since each party which agrees to be bound by the United Nation Charters is at the same time bound by the Statute of the Court; *see* M. H. Mendelson (n 45)

[50] Alison Duxbury, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights' (2000) 31 California Western International Law Journal 141, 163

[51] Merrills (n 31) 92

[52] Fisheries Jurisdiction (n 34) para 17

[53] Mendelson (n 45) 261

[54] Interhandel (Switz. v. U.S.) Interim Measures, 1957 I.C.J. 105 (October 24) 111

not exceed the remedies sought by the applicant in its application,[55] as the provisional measures indicated should merely serve the Court's ultimate function to render the most effective judgment.

3.2.2 Irreparable Harm

Generally, there are two approaches adopted in determining whether an irreparable harm may take place in absence of the provisional measure. On the one hand, the Court could use a narrow interpretation approach where only absolute legal irreparability would be recognized. That is, irreparable harm can be found only in cases where damage cannot be adequately compensated. As the Court in *Sino Belgian Treaty* observes: "[harm is irreparable when it cannot] be made good simply by the payment of an indemnity or by compensation or restitution in some other material form."[56] This approach is criticized given that it extremely restricts the scope of provisional measure.[57] One scholar even notes that every violation of rights could be made good in law by reparation.[58] On the other hand, the Court could take into account irreparability with respect to both the fact and the law.[59] This alternative approach would apparently broaden the scope of possible provisional measure. In recent cases, the Court has tended to adopted this approach. Its application, however, remains obscure.[60]

Notwithstanding its complexity, this requirement of irreparable harm could easily be satisfied where the matter involves individual lives; death

[55] Oellers-Frahm (n 17) 938-39 para 38

[56] Denunciation of the Treaty of 2 November 1865 between China and Belgium (China v. Belg.) 1927 P.C.I.J. (ser. A) No. 8 (January 8) 7

[57] Merrills (n 31) 108

[58] Sztucki (n 3) 109

[59] Legal Status of the South Eastern Territory of Greenland (n 37) 284

[60] Oellers-Frahm (n 17) 940 para 42

and torture of individuals are axiomatically deemed irreparable.[61] This is evident in several ICJ cases including *Genocide*,[62] *Breard*,[63] *Lagrand,*[64] and *Avena*.[65] For instance, the Court in *Breard* states that "an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims."[66]

3.2.3 Urgency

According to the Court, this urgency condition is concerned with the imminence of any hostile action against the rights at dispute in merits.[67] Simply put, the temporal factor is the one to be considered here. The Court in a number of cases have implied that the requirement of urgency is satisfied when "action prejudicial to the rights of either party is likely to be taken before such final decision is given."[68] Again, in cases where human lives are at stake, the Court would usually affirm the existence of urgency. Notably, the Court in *LaGrand* even waived the oral proceedings requirement stipulated under the 1978 Rules since Germany filed its application only one day before the execution was to be taken. It based this decision on Article 75 of the Rules specifying that the Court may decide

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[61] Jo M. Pasqualucci, 'Provisional Measures in the American Human Rights System: An Innovative Development in International Law' (1993) 26 Vanderbilt Journal of Transnational Law 803, 842

[62] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) Provisional Measures, 1993 I.C.J. 3 (April 8)

[63] Vienna Convention on Consular Relations (Para. v. U.S.) Provisional Measures, 1998 I.C.J. 248 (April 9)

[64] Lagrand (Ger. v. U.S.) Provisional Measures, 1999 I.C.J. 9 (March 3)

[65] Avena and Other Mexican Nationals (Mex. v. U.S.) Provisional Measures, 2003 I.C.J. 77 (February 5)

[66] Vienna Convention on Consular Relations (n 63) para 37

[67] Oellers-Frahm (n 17) 941 para 46

[68] Passage through the Great Belt (Fin. v. Den.) Provisional Measures, 1991 I.C.J. 12 (July 29) para 23

proprio motu on the matter.[69] So far, this case was the only instance that the Court applied Article 75. Additionally, in spite of the fact that four to six weeks have approximately been used in each provisional measure case,[70] the Court in *LaGrand* spent only twenty-three hours to order the United States to postpone the execution of Mr. Walter LaGrand, a German national. This case obviously reflects the implication of Article 74 Paragraph 1 of the 1978 Rules, which obliges the Court to prioritize requests for indication of provisional measures over all other cases.

3.3 Proceed at One's Own Risk Principle

In cases where the Court considers that the circumstances do not so require the indication of provisional measures and thus dismiss the application, it does not imply that the requesting parties are left without protection under international law. In this regard, international tribunals have consistently declared that the other parties are still governed by the "proceed at own risks" principle. For example, this principle was pronounced by the ICJ in *Great Belt*[71] and a Permanent Court of Arbitration ("PCA") tribunal in *Kishenganga*.[72]

3.3.1 The *Great Belt* Case

In the late twentieth century, Denmark planned to construct a high-level suspension bridge across the East Channel of the strait of the Great Belt, a strait connecting the Baltic with the Kattegat.[73] The construction would permanently prevent any vessels with the height of over 65 meters from sailing through the Channel.[74] Hence, Finland claimed that the

[69] Lagrand (n 64) para 21

[70] Oellers-Frahm (n 17) 942 para 46

[71] Passage through the Great Belt (n 68)

[72] Indus Waters Kishenganga (Pak. v. India) Interim Measures (Permanent Court of Arbitration 2011)

[73] Passage through the Great Belt (n 68) para 1

[74] ibid, para 2

construction of the bridge would adversely affect its drill ship and oilrig businesses as these vessels normally navigated through the Great Belt.[75] Although it was mutually agreed between the disputing parties that Finland did have the right of passage through the Great Belt, the nature and the extent of such right was inconclusive.[76] Therefore, Finland brought this dispute to the ICJ and requested that Denmark temporarily stay its construction and refrain from any action that might prejudice the case outcome.[77]

As Denmark did not challenge the Court's jurisdiction on the merits, the Court ruled that it had *prima facie* jurisdiction over the case and therefore had incidental jurisdiction to indicate provisional measures.[78] As for the urgency requirement, the Court elaborated that the urgency could be found in cases where "action prejudicial to the rights of either party is likely to be taken before such final decision is given."[79] Relying on Denmark's statement that the construction shall not adversely affect Finland's rights before the end of 1994[80] and the prediction that the decision on the merits should be rendered by that time, the Court held that no Finland's claimed rights would be infringed pending the final decision.[81] Therefore, the Court refused to order provisional measures.[82]

The principle of proceed at one's own risks was mentioned in the very last paragraphs of the decision where the Court warned both parties of possible consequences in case where the final judgment were not in favor of either of them. For Denmark, the country would have to consider not only the possibility that damages shall be paid but also that the project

[75] ibid, para 3
[76] ibid, para 22
[77] ibid, para 7
[78] ibid, paras 14–15
[79] ibid, para 23
[80] ibid, para 24
[81] ibid, para 27
[82] ibid, para 38

shall be discontinued, modified, or dismantled.[83] As a result, it might consider delaying or modifying the construction itself.[84] In contrast, as to Finland, the state should reconsider the position of its drill ship and oilrig businesses.[85]

3.3.2 The *Kishenganga* Case

In 1960, India and Pakistan entered the Indus Waters Treaty, arranged by the International Bank for Reconstruction and Development ("World Bank"), concerning management of rivers, one of which is the Kishenganga, in their territories.[86] According to the Treaty, in case of differences or disputes, either party shall have an option to refer them to arbitration.[87]

In 2007, India started the Kishenganga Hydro-Electric Project ("KHEP"), including construction of a dam planned to be completed in 2016. The dam was designed to divert water from the Kishenganga River to a power plant. Pakistan argued that, because of the diversion of river flow potentially caused by the KHEP, India had breached its "obligation to let flow all the waters of the Western Rivers and not permit any interference with those waters"[88] and obligation to "maintain the natural channels of the Rivers"[89] respectively.[90] The dispute was referred to arbitration on May 17, 2010. In its request for arbitration, Pakistan stated that it would, at the first meeting, request provisional measures indicating India to refrain temporarily from continuing the planned diversion of the Kishenganga

[83] ibid, para 31

[84] ibid, para 33

[85] ibid, para 34

[86] Indus Water Treaty between India and Pakistan, Preamble, September 19, 1960

[87] ibid, art IX and Annexure G

[88] ibid, art III (2)

[89] ibid, art IV (6)

[90] Indus Waters Kishenganga (n 72) para 6

River.[91] The provision governing the indication of provisional measures is provided in Paragraph 28 of Annexure G, which reads:

> Either Party may request the Court *at its first meeting* to lay down, pending its Award, such interim measures as, in the opinion of that Party, are *necessary to safeguard its interests under the Treaty with respect to the matter in dispute*, or *to avoid prejudice to the final solution* or *aggravation or extension of the dispute* [...]. (Emphasis added).

However, at its first meeting on January 14, 2011, Pakistan did not file an application for provisional measures, explicating that it did not consider the harm caused by the project to be imminent. However, the country expressly reserved its right to request for provisional measures at any time in the future.[92] It later submitted an application for provisional measures on June 6, 2011, asking India, in Paragraph 15 of its application, 1) to cease all its work on the KHEP, 2) to report the project progress if necessary, 3) to recognize that it had to take at its own risk that the work may later be discontinued, modified, or dismantled, and 4) to commit any relief that the Court deems necessary.[93]

In analyzing a question as to whether provisional measures should be indicated, the tribunal initially addressed a number of pertinent issues. First, despite Pakistan's failure to request provisional measures at the first meeting as it previously declared, given that India did not challenge the present application, Pakistan shall not be precluded from its right to pursue provisional measures.[94] Second, paragraph 28 of Annexure G is *lex specialis.* Consequently, the tribunal did not have to follow the ICJ's jurisprudence on the indication of provisional measures; rather, it need only apply the Treaty.

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[91] ibid, para 30

[92] ibid, para 31

[93] ibid, paras 34, 52

[94] ibid, paras 60, 125

[95] In particular, the applicant need not proven the existence of *irreparable harm* and *urgency*, which are two concepts developed the ICJ.[96] Thus, applying Paragraph 28 of Annexure G, the tribunal primarily considered whether provisional measures were *necessary* to avoid prejudice to the final solution of the dispute.[97] Accordingly, it determined whether each particular work of the project would cause adverse effect toward Pakistan before the rendition of the award, which was supposed to be released in late 2012 or early 2013.[98] In this regard, the tribunal expounded:

> In the Court's view, the suspension of many of the key components of construction activity of the KHEP, such as the boring of tunnels and the construction of the power house, does not appear to be "necessary" to safeguard its ability to render an effective Award. As seen during the Court's site visit, the construction and completion of these elements of the KHEP occur at some distance from the Kishenganga/Neelum riverbed, and would thus not in and of themselves affect the flow of the river. Thus, even under the hypothesis that the Court finds at the merits stage that Pakistan's claims, or elements of those claims, are meritorious and the KHEP cannot be completed and put into operation as planned, no violations of Pakistan's rights would have been caused by the tunneling and power house construction aspects of the KHEP, and no particular remedies seem to be available from the Court in this regard (at least as far as the Court can see at this early phase in the proceedings).
>
> [...]

[95] ibid, paras 129-30
[96] ibid
[97] ibid, para 136
[98] ibid, para 141

> Conversely, the Court considers that the construction of the permanent dam which India proposes to emplace in and on the Kishenganga/Neelum riverbed falls squarely within the category of works that create a significant risk of "prejudice to the final solution." Although the dam component of the KHEP presumably accounts for only a fraction of the overall construction costs, Pakistan's legal arguments are, in essence, conditional upon its completion. It is the dam that would eventually enable India to exercise a certain degree of control over the volume of water that will reach Pakistan; the temporary obstruction of the river and its channeling through a by-pass tunnel does not have any such effect. Moreover, it is the dam that would eventually place India in a position to divert parts or all of the waters of the Kishenganga/Neelum river into the Bonar-Madmati Nallah, thus potentially affecting water supplies in downstream areas of the Neelum valley.[99]

Therefore, the tribunal held that India might continue all the works, including the temporary by-pass tunnel, except for the sub-surface foundations of the dam.[100]

With regard to the proceed at own risk principle, it was raised by Pakistan at the first meeting, citing the ICJ decision in *Great Belt*, that "a state engaged in works that may violate the rights of another state can proceed only at its own risk. The court may in its decision on the merits order that the works must not be continued or must be modified or dismantled."[101] The tribunal regarded this suggestion as the most contentious assurance sought by Pakistan from India.[102] That said, on the last day of the hearings, the tribunal found that India's counsel

[99] ibid, paras 142, 146

[100] ibid, para 152

[101] ibid, para 65

[102] ibid, para 122

unequivocally stated that the country "is committed to proceed on the 'own-risk principle' of international law."[103] Moreover, India asserted that it will "fully and wholly abide by any decision taken by the Court of Arbitration."[104] Taking these statements into account, the tribunal denied the risk of prejudice to the final solution and concluded that:

> The continuation of such activity is appropriately governed by the 'proceed at own risk' principle of international law, as specifically recognized by India during the hearing. The situation would merely be one in which India would have invested considerable sums of money without reaping the benefit of the operation of the KHEP as currently envisaged. This, however, is precisely the risk that India has declared it is willing to assume, and there seems to be no further risk of "prejudice to the final solution," in terms of the Court's Award, in allowing these aspects of the KHEP's construction works to proceed.[105]

4. Interpretation of Judgments in the ICJ

Under the ICJ Statute, no appellate mechanism is available. In other words, there is no controlling entity that can completely re-examine the decisions. In general, the ICJ's judgments are final and binding between disputing parties;[106] they are *res judicata* and thus "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."[107] This principle of *res judicata* serves two principal values: the stability of legal relations and the parties' interests.[108] Notwithstanding this

[103] ibid

[104] ibid, para 126

[105] ibid, para 143

[106] Statute of the International Court of Justice (n 9) arts 59–60

[107] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) 2007 I.C.J. 47 (February 26) para 115

[108] ibid, para 116

finality of judgment, under some circumstances, e.g., if a judgment itself is unclear or there is a dispute as to its meaning or scope, either party can request the Court to make an interpretation of the judgment in accordance with Article 60 of the Statute.[109]

The purpose of interpretation is to clarify the judgment concerning the parts that are in dispute between the parties.[110] For this reason, the Court's authority to interpret is restricted to the issues that have already been decided in the judgment and no new facts can be taken account of.[111] The Court expressly upholds this notion in the *Asylum* Interpretation:

> The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.[112]

The restriction *ratione temporis* of the interpretation of judgment is different from the revision of judgment. That is, whereas Article 61 provides that a request for revision of judgment must be made within ten years from the date of the judgment, there is no such temporal limitation prescribed in

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[109] Article 60 of the ICJ Statute provides:

"The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

[110] Kaiyan Homi Kaikobad, *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press 2007) 85

[111] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, vol 3 (3rd edn, Martinus Nijhoff 1997) 1670; Andreas Zimmermann and Tobias Thienel, 'Article 60' *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman et al, OUP 2006) 1277 paras 3–4

[112] Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colom. v. Peru) 1950 I.C.J. 395 (November 27) 402

Article 60. As such, there is no time limit for either party to request the interpretation of judgment,[113] provided that there is a dispute as to the scope and meaning of the judgment.[114] The most evident example would be the request for interpretation in *Preah Vihear* submitted by Cambodia in 2011, forty-nine years after the judgment was rendered in 1962.

5. Indication of Provisional Measures Amidst Interpretation Proceeding in the International Court of Justice: The Cases of *Avena* and *Preah Vihear*

Since the establishments of the PCIJ and its successor, the ICJ, the Court has had received only two requests for provisional measures during the interpretation proceedings. The first submission was made in 2008 in *Avena,*[115] a dispute concerning rights of individuals stemmed from dispute regarding international instruments between Mexico and the United States of America, which the Court rendered its final judgment in 2004. The other was made recently in 2011 in *Preah Vihear,*[116] a boundary dispute between Cambodia and Thailand, which was decided about half a century ago.

5.1 The *Avena* Case

On January 9, 2003 the United Mexican States filed an application to the ICJ against the United States of America alleging that the latter had breached its obligations under paragraph 1(b) of Article 36 of the 1963 Vienna Convention on the Law of on Consular Relations ("Vienna

[113] Kaikobad (n 110) 125

[114] Zimmermann and Thienel (n 111) 1291–93 paras 46–53

[115] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (n 13)

[116] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (n 14)

Convention").[117] The provision obliges the authorities of the receiving state, in this case the United States, to inform without delay any nationals of another state, in this case Mexico, detained by those authorities of the right to contact his consulate. Moreover, the authorities have to inform without delay the nearest consular post of the state concerned of the detention and any communication addressed to the consular post by the detained individual.[118] According to the application, fifty-four Mexican nationals were on death row in the United States where the relevant authorities failed to inform without delay the Mexican nationals of their rights. Mexico argued that the ICJ had jurisdiction over the case in accordance with paragraph 1 of Article 36 of the ICJ Statute and Article I of the Vienna Convention's Optional Protocol pursuant to the Compulsory Settlement of Disputes.[119]

5.1.1 Indication of Provisional Measures in 2003

Mexico requested the Court to order the United States to take sufficient measures to ensure that no Mexican national be executed and that no date for the execution of a Mexican national be set.[120] Given the fact that three Mexican nationals were to be executed within a short period, the Court concluded that it had power to indicate provisional measures under Article 41 of the Statute of the Court.[121] It unanimously ordered that 1) the United States shall take all measures necessary to ensure that these three Mexican nationals were not executed before the final judgment, and

[117] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) Application Instituting Proceedings, 2008 I.C.J. 1 (June 5) para 1

[118] Vienna Convention on Consular Relations, art 36 para 1(b) April 24, 1963

[119] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (n 117) paras 7–9

[120] Avena and Other Mexican Nationals (n 65) para 51

[121] ibid, para 55

2) the United States shall inform the Court of all measures taken with regard to the order.[122]

5.1.2 Judgment of the Court in 2004

The Court first recalled that the victims were successfully proven to be Mexican and as a result the United States shall have obligations under the Vienna Convention toward these people.[123] Moreover, the United States had never challenged that a large number of Mexican defendants were not informed of their rights. In addition, having expounded that the obligation to inform "without delay" required a contracting state to inform an arrested person as soon as it realized that such person was or was probably a foreign national,[124] the Court stated that the United States had failed to perform such obligation. Thus, the Court concluded that the United States had violated its obligation under paragraph 1(b) of Article 36 of the Vienna Convention.[125] It then sentenced the United States to "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals [...] by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this judgment."[126]

5.1.3 Request for Interpretation of the Judgment in 2008

Following the 2004 judgment, President George W. Bush issued a Memorandum for the Attorney General enunciating that the United States shall discharge its duty under international obligations "by having State

[122] ibid, para 59

[123] Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12 (March 31) paras 53–57

[124] ibid, para 88

[125] ibid, para 90

[126] ibid, para 53

courts give effect to the decision with general principle of comity."[127] However, in 2008, the Supreme Court of the United States in *Medellín v. Texas*, despite having acknowledged that the *Avena* judgment "constitutes an international law obligations on the part of the United States,"[128] ruled that the judgment was not automatically enforceable under domestic law.[129] The Court furthermore decided that the President did not have authority to unilaterally convert non-self-executing obligations under treaties into domestic law, as such authority was in fact belonged to the Congress.[130]

Given the decision in *Medellín* and the fact that only one state court had granted review and reconsideration of dispute to a Mexican national, Mexico requested the ICJ to interpret the judgment. It claimed that there were disputes concerning the scope and meaning of the judgment as the United States understood that it merely constituted an obligation of *means* whereas Mexico understood that it constituted an obligation of *result*.[131]

5.1.4 Indication of Provisional Measures in 2008

On June 5, 2008, after Mexico found out that five Mexican were going to be executed,[132] the country filed an application asking the ICJ to indicate the following provisional measures: 1) the Government of the United States should take all measures to ensure that the five Mexicans would not be executed before the interpretation is made; 2) the

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[127] George W Bush, 'Memorandum for the Attorney General: Compliance with the Decision of the International Court of Justice in Avena' <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html> accessed 27 December 2018

[128] *Medellín v. Texas*, 552 U.S. 491, 503 (2008)

[129] ibid, 511

[130] ibid, 525–26

[131] Avena and Other Mexican Nationals (Mex. v. U.S.) Request for the Indication of Provisional Measures of Protection (2008) para 3

[132] ibid, para 5

Government of the United States should inform the Court of all measures taken; and 3) the Government of the United States should ensure that no action that might prejudice the rights of Mexico or its national would be taken.[133]

The Court began its analysis by discussing its jurisdiction on the basis of Article 60. The Court confirmed its long practice that such power was considered as part of the Court's incidental jurisdiction: Even if its original jurisdiction ceased to exist, in this case because of the United States' withdrawal from the Optional Protocol to the Vienna Convention, the Court was still able to consider Mexico's request for interpretation.[134] Given that there were "different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities," the Court pronounced that it had power to interpret the judgment.[135]

Furthermore, as the Court found that there would have been irreparable harm to the lives of human beings had no provisional measure been provided, and that there was an urgency because the execution would be carried out within months, it concluded that the circumstances required that provisional measures be provided.[136] Thus, the majority of the Court indicated provisional measures as requested by Mexico.[137]

5.2 The *Preah Vihear* Case

The Temple of Preah Vihear has long been at the center of dispute between the Kingdom of Thailand and the Kingdom of Cambodia. Cambodia filed the application instituting proceeding to the Court on October 6, 1959

[133] ibid, para 15

[134] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (n 13) para 44

[135] ibid, para 55

[136] ibid, paras 72–74

[137] ibid, para 80

alleging that Thailand had persistently intervened the occupation of Cambodian Territory since 1949.[138] The Court rejected Thailand's preliminary objection as to the Court's jurisdiction in its judgment of May 26, 1961[139] and rendered its final judgment on June 15, 1962.[140]

5.2.1 Judgment of the Court in 1962

Given that the dispute was concerned with the territorial sovereignty over the region of the Temple of Preah Vihear and its precincts,[141] the Court focused its proceedings on the finding of the frontier line between Thailand and Cambodia. In this regard, maps and other considerations submitted to the Court were examined "only to such extent as [the Court] may find in them reasons for the decision," which in this case was whether the Temple of Preah Vihear and its precincts were under the territorial sovereignty of Thailand or Cambodia.[142]

As Cambodia had been a colony of France until its independence in 1953, the Court had to examine the 1904-1908 boundary settlements between France and Thailand (Siam). Consequently, a boundary treaty dated February 13, 1904 was the most crucial instrument that had to be scrutinized and the Court considered Articles 1 and 3 of the treaty to be the most relevant provisions to the dispute.[143] Whereas Article 1 provided that the frontier shall be based on several watersheds, Article 3 assigned a Mixed Commissions, officers of which shall be appointed by contracting states, to delimit the frontier. It was further stated in Article 3 that "[t]he work of the Mixed Commissions will relate to the frontier determined by Articles 1 and

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[138] Temple of Preah Vihear (Cambodia v. Thai.) Application Instituting Proceedings (October 6, 1959) 4

[139] Temple of Preah Vihear (Cambodia v. Thai.) Preliminary Objections, 1961 I.C.J. 1 (May 26) 17

[140] Temple of Preah Vihear (Cambodia v. Thai.) 1962 I.C.J. 1 (June 15) 6

[141] Temple of Preah Vihear, Preliminary Objections (n 139)

[142] Temple of Preah Vihear, Judgment (n 140) 14

[143] ibid, 16

2." Regarding the relationship between these two provisions, the Court noted that the consideration of watershed as provided in Article 1 was only *prima facie* and the frontier line would ultimately be the line drawn by the Mixed Commissions.[144]

To support its claim, Cambodia submitted a map showing the Dongrak territory, in which the Temple of Preah Vihear was located, as part of its annex—the Annex I map.[145] According to this map, which had not been approved by the Mixed Commissions, the Temple of Preah Vihear was indisputably located in Cambodia's territory. Given the map status, the Court preliminarily held that the map had no binding effect between the parties.[146] Nevertheless, although the frontier line found in Annex I map apparently did not follow the watershed line as prescribed in Article 1, the Court continued to assess whether the parties had in fact adopted the Annex I map.[147] As the majority of the Court determined that Thailand had failed to express its disagreement with the map within a reasonable period, the Court ruled that the country be held to have acquiesced in its content.[148] In its operative clauses, the Court ruled that: 1) the Temple of Preah Vihear is situated in territory under the Sovereignty of Cambodia; 2) Thailand had to withdraw any military or police forces, or other guards or keepers, from the Temple and its vicinity on Cambodian Territory; and 3) Thailand had to return objects removed by her from the Temple or the Temple area by the Thai authorities.[149]

5.2.2 Request for Interpretation of the Judgment in 2011

Following several clashes between Cambodian and Thai armies in the late 2000s around the area of the Temple of Preah Vihear, Cambodia

[144] ibid, 17
[145] ibid, 21
[146] ibid
[147] ibid, 22
[148] ibid, 23
[149] ibid, 36–37

applied a request for interpretation of the 1962 judgment to the ICJ on April 28, 2011.[150] According to Cambodia, there were disputes as to the meaning or scope of judgment between Thailand and Cambodia on three points: 1) whether the judgment recognized the binding force of the frontier line drawn by the Annex I map; 2) whether the meaning and scope of the phrase "vicinity on Cambodian territory" are in aligned with the Annex I map; and 3) whether the obligation to withdraw any military or police forces, or other guards and keepers is of a continuing or an instantaneous character.[151]

5.2.3 Indication of Provisional Measures in 2011

On the same day of the request for interpretation of the judgment, Cambodia also filed a request for provisional measures. Having indicated the incidents of violence that had occurred in the vicinity of the Temple,[152] the urgent necessity of preventing the damage to the Temple, and the losses of lives and human suffering,[153] it asked the Court to indicate the following provisional measures: 1) Thai forces shall immediately and unconditionally withdraw from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear; 2) Thailand shall refrain from all military activity in the area of the Temple of Preah Vihear; and 3) Thailand shall not interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.[154]

Having concluded that there were disputes concerning the scope and meaning of the judgment and, therefore, that the Court had *prima facie*

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[150] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Application Instituting Proceedings (April 28, 2011)

[151] ibid, para 5

[152] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Request by the Kingdom of Cambodia for the Indication of Provisional Measures (April 28, 2011) para 2

[153] ibid, paras 6–7

[154] ibid, para 8

jurisdiction to entertain the request for interpretation made by Cambodia, it rejected Thailand's submission to dismiss the case.[155] The Court subsequently considered the requirements stipulated in Article 41 of the Statute to decide whether it should indicate provisional measures. These conditions were: 1) the plausible character of the alleged rights in the principal request and link between these rights and the measures requested; 2) the plausible character of the alleged rights in the principal request; 3) the link between the alleged rights and the measures requested; and 4) the risk of irreparable prejudice and urgency. As these conditions were satisfied, the Court decided that it could indicate provisional measures,[156] which might or might not be the same as those requested by Cambodia.[157] Hence, in its operational clause, the Court indicated that: 1) there shall be no military presence in the Provisional Demilitarized Zone ("PDZ") specified by the Court; 2) Thailand shall not obstruct Cambodia's free access to the Temple or its provision of fresh supplies to non-military personnel in the Temple; 3) both Parties shall continue the cooperation under ASEAN; and 4) both parties shall refrain from any action which might aggravate or extend the dispute.[158]

5.3 An Appraisal

Several judges and scholars have extensively discussed the orders of provisional measures in the aforesaid cases. Five judges provided their dissenting opinions with regard to the order of provisional measures indicated in the *Avena* Interpretation in 2008. Judge Buergenthal questioned the Court's jurisdiction to consider the request because he did not believe that there was any dispute regarding the scope and meaning of the judgment. He argued that whereas Mexico cited *Medallín* to support its

[155] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (n 14) para 32

[156] ibid, para 57

[157] ibid, para 59

[158] ibid, para 69

argument that some U.S. governmental authorities, especially Texas, disobeyed the *Avena* judgment,[159] it was the Federal Government who legally represented the country and the latter had declared its intention to comply with the obligations as stated in the February 28, 2005 President Proclamation.[160] In Judge Buergenthal's opinion, this action should already satisfy the 2004 judgment, which provided that the United States shall give effect to the judgment by "means of its own choosing."[161] Judges Owada, Tomka, and Keith reaffirmed Judge Buergenthal's opinion that there was no dispute as to the meaning and scope of judgment.[162] They also pointed out that the request for interpretation did not differ from the judgment.[163] Judge Skotnikhov was of the same opinion that there was no dispute as stipulated in Article 60 of the Statute.[164] He further added that the provisional measures indicated did not have any meaning as it reiterated those that had already been stated in the judgment.[165]

With regard to the provisional measures ordered in the *Preah Vihear* Interpretation in 2011, five judges dissented. While all the judges concluded that the Court had jurisdiction as to the indication of provisional measures, they questioned the scope of measures. Disagreements primarily concerned the Court's establishment of the PDZ, which illegitimately covered areas that indisputably belonged to both countries.[166] In short, they argued that

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[159] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Buergenthal, Dissenting) (n 13) para 12

[160] ibid, 336 paras 13–14

[161] ibid, 337 para 16

[162] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Owada, Tomka and Keith, Joint Dissenting) (n 13) 334 para 12

[163] ibid, 344–45 para 13

[164] ibid, (Skotnikov, Dissenting) 351 para 9

[165] ibid, 351 para 10

[166] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Owada, Dissenting) (n 14) para 9; ibid (Al-Khasawneh,

the Court had exceeded its power. Some scholars also expressed had also expressed their views, in both concurring and dissenting manners, regarding the Court's imposition of the PDZ.[167]

Notably, the question of whether provisional measures can be indicated during the proceeding under Article 60 of the Statute has rarely been discussed by either the Court or scholars. Only one judge sitting in the *Preah Vihear* Interpretation raised the issue. In particular, in her dissenting opinion, Judge Donoghue briefly noted that "I have doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case."[168] However, instead of tackling this suspicion, she merely offered a recommendation that the function of Article 41 to preserve parties' rights can too be achieved by accelerating the interpretation proceeding.[169] She then concluded that, "[n]onetheless, the Statute does not preclude such measures and the Court has issued one such Order, in *Avena Interpretation*."[170] One author briefly mentioned this issue. Given the need to preserve the parties' rights before an interpretation is made, which is identical to the function of provisional measures in normal proceedings, Traviss succinctly concludes that the indication of provisional measures should be allowed in Article 60 cases.[171]

Neither the Statute of the ICJ nor the 1978 Rules provides any answer to this question: Article 41 of the Statute only prescribes general

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Dissenting); ibid (Xue, Dissenting); ibid, (Cot, Dissenting) para 20; ibid, (Donoghue, Dissenting) para 27

[167] Alexandra C. Traviss, 'Temple of Preah Vihear: Lessons on Provisional Measures' (2012) 13(1) Chicago Journal of International Law, 317; Kate Shulman, 'The Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand): The ICJ Orders Sweeping Provisional Measures to Prevent Armed Conflict at the Expense of Sovereignty' (2012) 20 Tulane Journal of International and Comparative Law, 555

[168] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Donoghue, Dissenting) (n 14) para 10

[169] ibid, para 9

[170] ibid, para 10

[171] Traviss (n 167) 337–38

content of the indication of provisional measures, and Article 73 of the Rules merely states that a request can be made "at any time during the course of the proceedings in the case in connection with which the request is made." According to these provisions, one might argue that provisional measures can be indicated only before final judgments on the merits are made. Nonetheless, there is in no place where the relationship between Articles 41 and 60 of the Statute is expressly mentioned. Thus, according to the text of the relevant instruments, the question is still left open.

Now, the author will consider a hypothetical situation drawn upon the facts in *Preah Vihear* and examine the implications of the following two possible outcomes—one where provisional measures are available and another where provisional measures are unavailable. Having contemplated these options, we should be able to concretely assess both advantages and drawbacks that might arise from each instance and make a decision on whether the indication of provisional measures should be applicable during the interpretation proceeding.

In the final judgment of *Preah Vihear* in 1962, the Court in paragraph 2 of its operative clause ordered Thailand to "withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in *its vicinity on Cambodian territory*"[172] (emphasis added). There was dispute over the meaning and scope of the phrase "its vicinity on Cambodian territory." While Cambodia argued that the vicinity of the Temple should be based on the delimitation drawn by the line on the Annex I map, Thailand disagreed with such understanding and asserted that the Court had never defined such vicinity.

Suppose that, relying on its understanding of the judgment, Thailand reasonably believes that only the Temple itself and its extremely limited vicinity are situated in the territory of Cambodia, but the surrounding area, which is in dispute between both countries, belongs to Thailand. Therefore, noticing that some Cambodian nationals are settling down in the disputed

[172] Temple of Preah Vihear, Judgment (n 140) 37

area, Thai Government sends its officials, including both military and police officers, into the area to expel those Cambodian nationals. On the other hand, learning of such operation, Cambodia argues that the operation is unlawful and must immediately be suspended, and all officers must be withdrawn from the area. However, Thailand insists that the area is in its territory and consequently declines Cambodia's requests. As a result of this conflict, Cambodia files a request for interpretation to the Court and simultaneously applies for provisional measures requesting the Court to indicate that Thailand shall halt its operation.

Based on this hypothesis, let us first assume that the Court does not have power to indicate provisional measures. Whereas Thailand would insist that it has authority to continue the expulsion, Cambodia would assert that its nationals have legitimate rights to possess the disputed land. In such circumstance, even though the principle of "proceed at own risks" shall apply, damage would have been inevitable; Cambodian nationals may get injured or even get killed because of Thailand's rational belief that it has rights to use reasonable force in the operation. Accordingly, applying the "proceed at own risks" principle, should the Court, in its interpretation of the judgment, rule that Thailand has violated international obligations, the country would be liable for any damage against Cambodia. Alas, the prejudice suffered by Cambodian individuals is irreversible. In the worst case, in order to protect its people, Cambodia may feel pressured to deploy its armed force, a move that would inevitably aggravate the tension between these two neighboring countries.

By contrast, let us now turn to another hypothetical situation whereby the indication of provisional measures is available. Since it is quite evident that there is a dispute over the meaning and scope of the judgment regarding the vicinity of the temple, the Court tends to have *prima facie* jurisdiction under Article 60. Moreover, as human's lives are at stake here, the requirements of irreparable harm and urgency would also be satisfied. As a result, it is likely that the Court would indicate provisional measures to avoid the damage possibly occurred. Thus, during the interpretation

proceeding, violations are supposed to be temporarily paused because the Court's provisional measures are legally binding under international law.[173] Then, once the Court issues its interpretation, the disputing states shall know its relevant rights and duties under international law: either Thailand will have to withdraw its officers from Cambodia's territory on the one hand, or Cambodia will have to inform its people to abandon their places and leave Thailand's territory on the other hand. Obviously, this presumption would lead to far less violence and conflicts between states.

As can be seen, allowing the Court to use its discretion to indicate provisional measures in interpretation proceedings would bring the parties some significant advantages in protecting rights pending the interpretation. This power, should it be used appropriately, could effectively promote the United Nations' sacrosanct goal of maintaining international peace and security.[174] Moreover, concerning the enforceability of the Court's judgment, there are no effective enforcement tools such as those normally found in domestic jurisdictions. Although states have legal recourse to the Security Council as the option of last resort, there is no guarantee that the Council will exercise the power.[175] In this respect, the indication of provisional measures could enhance the effects of judgments, which are considered ambiguous, in particular cases. Consequently, the next question would be whether there is any legal foundation for this implementation given that the relevant legal instruments are silent on the issue.

In general, there are two categories of authority that are fundamental to the international judicial organs' power to indicate provisional measure: the express or explicit authority and the inherent authority. Concerning the express authority, it is an authority expressly conferred by constituent legal instruments establishing particular

[173] Lagrand (n 41) para 109

[174] U.N. Charter, art 1

[175] ibid, art 94

adjudicatory entities.[176] This is also the case for the ICJ where the power to order provisional measures is clearly promulgated in Article 41 of the Statute.

With regard to the inherent authority, the concept is often raised where no power to indicate provisional measures is explicitly conferred upon judicial organs. It is generally accepted that every judicial organ has this interim power.[177] For instance, Elkind has focused his study on the aspect as to whether the power to indicate provisional measure is a general principle of international law.[178] After surveying several international judicial decisions and scholarly comments,[179] he concludes that the answer is positive.[180] This conclusion, he adds, is supported by the considerable importance of such interlocutory measures to the function of law "*as an impartial and impersonal technique for the settlement of dispute*."[181] Meanwhile, focusing on the concept of incidental jurisdiction, Rosenne expounds that a court or tribunal can administer the proceedings or the parties' conduct in relation to the subject matter of dispute with any necessary means as long as it has *prima facie* jurisdiction over the main case.[182]

This explanation of inherent authority can *a fortiori* be applied to the situation where express authorization does exist, but the text may not explicitly cover all circumstances.[183] Therefore, even though the written

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[176] Jo M. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38(1) Vanderbilt Journal of Transnational Law, 11

[177] Oellers-Frahm (n 2) 1283; Rüdiger Wolfrum, 'Interim (Provisional) Measures of Protection' *The Max Planck Encyclopedia of Public International Law* (2006) para 1 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-978019 9231690-e32?prd=EPIL> accessed 27 December 2018

[178] Elkind (n 8) 23

[179] ibid, 23–25

[180] ibid, 162

[181] ibid, 256

[182] Rosenne (n 11) 9

[183] Pasqualucci (n 176) 13–14

documents do not explicitly prescribe the power to indicate provisional measures in specific circumstances, international judicial organs, including the ICJ, should be able to rely on such inherent authority principle to order the measures, as this would enhance the main goal of the adjudicatory bodies of resolving disputes effectively and peacefully.

In sum, from the policy perspective, limiting the Court's power to indicate provisional measures to only the merit phase and prohibiting the Court from using such power in other proceedings such as the interpretation phase does not serve the function of this judicial organ. In other words, this approach does not support the objectives of the Court and its principal organ, the United Nations, to preserve and enhance international peace and security. The result of such restriction would be the inevitability of the potential irreparable harm, as exemplified above in the hypothesis, and the lack of efficiency of the Court's judgments. Thus, the power to indicate provisional measures should not be used too sparingly and should be assigned to the Court whenever it has jurisdiction to hear contentious cases. As such, the Court, which naturally has restrictive and passive power, would be in possession of more tools so that it can successfully manage and resolve disputes at hand.

However, one should also be mindful that the use of provisional measures will inevitably affect disputing states' sovereignty. Accordingly, the power must not be exercised without limit. As the purpose of the interpretation proceeding is to clarify meaning and scope of the judgment that is in dispute, the power to indicate provisional measures must be confined by such aim. The abuse of this mechanism in any interpretation proceeding would result in utterly adverse consequences, because some devious parties may submit their applications for interpretation, which has no time limits,[184] and simultaneously request provisional measures. On this matter, although the Court possesses this power to order provisional

[184] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Buergenthal, Dissenting) (n 13) para 25

measures in both the *Avena* and the *Preah Vihear* Interpretations, the author opines that in both cases inappropriately exercised the power.

With regard to the *Avena* Interpretation, the Court ordered the United States to assure that no Mexican nationals, who were not informed of their rights under the Vienna Convention, would be executed pending the interpretation proceeding. This provisional measure is in essence equivalent to the 2004 judgment, which ordered the United States to refrain from the same action. The implication of such provisional measure became more devastating, as the Court later pronounced that it did not have jurisdiction to interpret the judgment.[185] Concerning the *Preah Vihear* Interpretation, regardless of the obvious dispute over the meaning of the phrase "vicinity of the Temple," the Court decided to set up the PDZ extending to the area which had never been in dispute between Thailand and Cambodia either in the main or the interpretation proceedings.

6. Conclusion

If legitimately utilized, provisional measures are significant tools, which could be effectively utilized to enhance the adjudicatory entities' function to settle disputes. For this reason, the restriction of the use of such mechanism without any compelling reason to do so would be destructive to ICJ's function. Therefore, this mechanism should not be utilized too sparingly and should be available in every phase of the Court's proceedings. Although the Statute, the Rules of the Court, and their preparatory works do not specify a clear answer as to whether this power to indicate provisional measure is extended to the interpretation proceeding under Article 60 of the Statute, as well as the revision proceeding under Article 61, considering the Court's functions, responsibilities, and its inherent authority, as well as the benefits of provisional measures, the Court should have such power.

[185] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2009 I.C.J. 3 (January 19) para 61

Nonetheless, conferring upon the Court this power would inevitably affect the disputing states' sovereignty. Thus, the jurisprudence that the Court has developed regarding the indication of provisional measures amidst the main proceeding should also be applied in other proceedings *mutatis mutandis*. Notably, the Court's jurisdiction in the interpretation proceeding is naturally narrower than its jurisdiction in the main proceeding. This is because the Court would only have jurisdiction over disputes concerning the meaning and scope of the judgment. Consequently, the Court's authority to indicate provisional measures in Article 60 cases would naturally be more restricted. Therefore, notwithstanding the severe and irreparable prejudice that may happen, the Court must always bear in mind of its limited jurisdiction and exercise its power only within that boundary. In case of the lack of jurisdiction, the Court should step aside and let other pertinent actors perform their roles. Only by doing so that the Court, the jurisdiction of which fundamentally bases on states' consent, could gain state members' trust and recognition as the principal judicial organ of the world community.

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