INTERNATIONAL COURT OF JUSTICE

ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(UKRAINE *V.* RUSSIAN FEDERATION)

VOLUME OF ANNEXES

TO THE WRITTEN STATEMENT OF OBSERVATIONS AND SUBMISSIONS ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

SUBMITTED BY UKRAINE

3 February 2023

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Annex 1

Facebook Post of Valeriy Heletey (Minister of Defense of Ukraine)
(3 October 2014)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Facebook

facebook.com/261272817398460/posts/307913046067770

Valeriy Heletey
3 October 2014

“Regarding the criminal case against me and my colleagues in Russia for ‘genocide of the Russian-speaking population’:

This whole thing is a complete delusion. The Armed Forces of Ukraine do not fire at the civilian population. It is enough to go to Slovyansk, Kramatorsk, Artemivsk and other liberated cities and see that there is almost no significant destruction. Groznyi after its capture by Russian troops looked completely different.

Only crazy Kremlin propagandists can accuse the Ukrainian army, which is 40% Russian-speaking, of hating other Russian-speakers. No adequate person will believe this. We are liberating Ukrainian citizens from terrorists and occupiers, we are liberating our land, not conquering it.

Nevertheless, I am positive about the initiation of this case. Few people can objectively evaluate the results of our work in the flow of information garbage. The Kremlin can appreciate. And if it wants to see us behind bars, that's the highest possible score.”

Annex 2

Report on the Results of the First Round of Negotiations of the Delegation of Ukraine with the Russian Federation on the Meaning and Application of the International Convention for the Suppression of the Financing of Terrorism (28 February 2015)

This excerpt has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51. A copy of the whole document has been deposited with the Registry.

"APPROVED"
Minister of Foreign Affairs
of Ukraine
[Signed]
P.A. Klimkin

"28" February, 2015

Report
on the results of the first round of negotiations of the delegation of Ukraine with the Russian Federation on the meaning and application of the International Convention for the Suppression of the Financing of Terrorism of 1999
(the city of Minsk, the Republic of Belarus, 22 January 2015)

On 22 January 2015 in the city of Minsk, the Republic of Belarus, a bilateral negotiation between Ukraine and the Russian Federation on the issues of the meaning and application of the International Convention for the Suppression of the Financing of Terrorism of 1999 (thereafter - the Convention) took place.

At the negotiations the delegation of Ukraine, according to the Order of the President of Ukraine "On the delegation of Ukraine for participation in the negotiations with the Russian Federation regarding violation of its obligations based on the international agreements of Ukraine" No. 970/2014 of 31 December 2014, was introduced in the following composition:

1. **Zerkal Olena Volodymyrivna** - Deputy Minister of Foreign Affairs of Ukraine for the issues of European integration, head of the delegation;
2. **Yanchuk Anton Volodymyrovych** – Deputy Minister of Justice of Ukraine for the issues of European integration, deputy head of the delegation;
3. **Herasko Larysa Anatoliivna** – Director of the Department of International Law of the Ministry of Foreign Affairs of Ukraine, member of the delegation;
4. **Zalisko Oleh Ihorovych** – First Deputy Prosecutor General of Ukraine, Head of the Main Investigative Department, member of the delegation;
5. **Lopatyuk Serhiy Mykolayovych** – Head of the Unit of International Law, Adaptation and Systematization of Law of the Legal Support Department of the Border Guard of Ukraine, member of the delegation;
6. **Tsyupryk Ihor Volodymyrovych** – Deputy Head of the Main Investigative Department of the Ministry of Internal Affairs of Ukraine, member of the delegation;

Annex
To No. 180t
of 03.03.2015

db.29

7. Shkilevych Volodymyr Oleksandrovych – Deputy Director of the Department of International Law of the Ministry of Foreign Affairs of Ukraine, member of the delegation;

8. Yahun Viktor Mykhailovych – Deputy Head of the Security Service of Ukraine, member of the delegation;

9. Pelyukhovskyi Oleksandr Viktorovych – Assistant Deputy Head of the Security Service of Ukraine, member of the delegation;

10. Kovalenko Oleksandr Viktorovych – First Deputy Head of the Main Department for International Legal Cooperation of the Prosecutor's General Office of Ukraine, expert of the delegation.;

11. Haevskyi Ihor Mykolayovych – Head of the Legal Department of Statefinmonioring, expert of the delegation.

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The delegation of the Russian Federation was introduced in the following composition:

1. Rogachev Illia Igorevich – Director of the Department of New Challenges and Threats of the of the Ministry of Foreign Affairs of the Russian Federation, head of the delegation;

2. Drimanov Oleksandr Oleksandrovych – Head of Department of the Investigative Committee of the Russian Federation, member of the delegation;

3. Velichko Oleksandr Yuriyovych – Deputy Head of Department of Rosfinmonitoring, member of the delegation;

4. Gorlenko Serhiy Volodymyrovych – Deputy Head of Department of the General Prosecutor's Office of the Russian Federation, member of the delegation;

5. Zhafyarov Oleksiy Gayarovich – Deputy Head of Department of the General Prosecutor's Office of the Russian Federation, member of the delegation;

6. Litvishko Petr Andreevich - Head of Unit of the Investigative Committee of the Russian Federation, member of the delegation;

7. Zabolotska Mariya Volodymyrivna – acting Head of Unit of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, member of the delegation;

8. Lysenko Volodymyr Stanislavovich – Chief Advisor of the Second Department for the CIS Countries of the Ministry of Foreign Affairs of the Russian Federation, member of the delegation;

9. Kosorukov Konstantyn Oleksandrovych – First Secretary of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, member of the delegation;

10. Svirin Petro Oleksandrovych - First Secretary of the Department of New Challenges and Threats of the Ministry of Foreign Affairs of the Russian Federation, member of the delegation;

11. Krisanov Dmytro Viktorovych – Lead Advisor of Department of the Ministry of Internal Affairs of the Russian Federation, member of the delegation.

[…]

[…]

Deputy Minister of Foreign Affairs of Ukraine
for the issues of European integration,
Head of the delegation [Signed] **O.V. Zerkal**

Annex 3

MFA Statement on Russia's False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression, Facebook Post of the Ministry of Foreign Affairs of Ukraine/ MFA of Ukraine (26 February 2022)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

MFA The Ministry of Foreign Affairs of Ukraine / MFA of Ukraine
UA 26 February 2022

Already over the past few days, the world continues to see unprecedented and brutal aggression of the Russian Federation against Ukraine. Looking for justification of its groundless and unfair invasion into Ukraine, Russia has cynically distorted to perversion of the international community's most solemn human rights commitments.

Top military and political leadership of the Russian Federation have publicly tried to justify its own aggression against Ukraine as a means of preventing and punishing the genocide that is purportedly taking place in our country.

This brazen manipulation has no real basis, as the whole world knows. Ukraine strongly denies Russia's allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for unlawful aggression.

Russia's lie is all the more offensive, and ironic, because it appears that it is Russia planning acts of genocide in Ukraine. Russia is intentionally killing and inflicting serious injury on members of Ukrainian nationality. These acts must be viewed together with President Putin's rhetoric denying the very existence of the Ukrainian people, which is suggestive of Russia's intentional killings bearing genocidal intent.

Full text of the statement: https://cutt.ly/bP3xiMA

[*Symbol of Ukraine*]

MFA STATEMENT

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on Russia's False and Offensive
Allegations of Genocide As a Pretext
For Its Unlawful Military Aggression

#StopRussianAggression
#RussiaInvadedUkraine
#UkraineUnderAttack

439 20 comments 128 shares
Share

Annex 4

MFA Statement on Russia's False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression, Twitter Post of the Ministry of Foreign Affairs of Ukraine (@MFA_Ukraine) (26 February 2022)

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Tweet

← Thread

MFA of Ukraine
@MFA_Ukraine
Ukraine government organization

Over the past 2 days, the world continues to see brutal aggression of Russia against Ukraine. Russia must immediately cease its unlawful aggression against Ukraine taken under baseless pretext. 1/2

cutt.ly/rP3xM7C

11:02 AM · Feb 26, 2022

234 Retweets **10** Quote Tweets **681** Likes

MFA of Ukraine
@MFA_Ukraine
Ukraine government organization

🇷🇺's lie is all the more ironic, because it appears that it's 🇷🇺 planning acts of genocide in 🇺🇦. Russia is intentionally killing & inflicting injury on members of the 🇺🇦 nationality. These acts must be viewed together w/ rhetoric denying the very existence of a 🇺🇦 people

11:02 AM · Feb 26, 2022

162 Retweets **5** Quote Tweets **562** Likes

Annex 5

President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 September 2022)

Address by the President of the Russian Federation

September 21, 2022 09:00

President of Russia Vladimir Putin: Friends,

The subject of this address is the situation in Donbass and the course of the special military operation to liberate it from the neo-Nazi regime, which seized power in Ukraine in 2014 as the result of an armed state coup.

Today I am addressing you – all citizens of our country, people of different generations, ages and ethnicities, the people of our great Motherland, all who are united by the great historical Russia, soldiers, officers and volunteers who are fighting on the frontline and doing their combat duty, our brothers and sisters in the Donetsk and Lugansk people's republics, Kherson and Zaporozhye regions and other areas that have been liberated from the neo-Nazi regime.

The issue concerns the necessary, imperative measures to protect the sovereignty, security and territorial integrity of Russia and support the desire and will of our compatriots to choose their future independently, and the aggressive policy of some Western elites, who are doing their utmost to preserve their domination and with this aim in view are trying to block and suppress any sovereign and independent development centres in order to continue to aggressively force their will and pseudo-values on other countries and nations.

The goal of that part of the West is to weaken, divide and ultimately destroy our country. They are saying openly now that in 1991 they managed to split up the Soviet Union and now is the time to do the same to Russia, which must be divided into numerous regions that would be at deadly feud with each other.

They devised these plans long ago. They encouraged groups of international terrorists in the Caucasus and moved NATO's offensive infrastructure close to our borders. They used indiscriminate Russophobia as a weapon, including by nurturing the hatred of Russia for decades, primarily in Ukraine, which was designed to become an anti-Russia bridgehead. They turned the Ukrainian people into cannon fodder and pushed them into a war with Russia, which they unleashed back in 2014. They used the army against civilians and organised a genocide, blockade and terror against those who refused to recognise the government that was created in Ukraine as the result of a state coup.

After the Kiev regime publicly refused to settle the issue of Donbass peacefully and went as far as to announce its ambition to possess nuclear weapons, it became clear that a new offensive in Donbass – there were two of them before – was inevitable, and that it would be inevitably followed by an attack on Russia's Crimea, that is, on Russia.

In this connection, the decision to start a pre-emptive military operation was necessary and the only option. The main goal of this operation, which is to liberate the whole of Donbass, remains unaltered.

The Lugansk People's Republic has been liberated from the neo-Nazis almost completely. Fighting in the Donetsk People's Republic continues. Over the previous eight years, the Kiev occupation regime created a deeply echeloned line of permanent defences. A head-on attack against them would have led to heavy losses, which is why our units, as well as the forces of the Donbass republics, are acting competently and systematically, using military equipment and saving lives, moving step by step to liberate Donbass, purge cities and towns of the neo-Nazis, and help the people whom the Kiev regime turned into hostages and human shields.

As you know, professional military personnel serving under contract are taking part in the special military operation. Fighting side by side with them are volunteer units – people of different ethnicities, professions and ages who are real patriots. They answered the call of their hearts to rise up in defence of Russia and Donbass.

In this connection, I have already issued instructions for the Government and the Defence Ministry to determine the legal status of volunteers and personnel of the military units of the Donetsk and Lugansk people's republics. It must be the same as the status

of military professionals of the Russian army, including material, medical and social benefits. Special attention must be given to organising the supply of military and other equipment for volunteer units and Donbass people's militia.

While acting to attain the main goals of defending Donbass in accordance with the plans and decisions of the Defence Ministry and the General Staff, our troops have liberated considerable areas in the Kherson and Zaporozhye regions and a number of other areas. This has created a protracted line of contact that is over 1,000 kilometres long.

This is what I would like to make public for the first time today. After the start of the special military operation, in particular after the Istanbul talks, Kiev representatives voiced quite a positive response to our proposals. These proposals concerned above all ensuring Russia's security and interests. But a peaceful settlement obviously did not suit the West, which is why, after certain compromises were coordinated, Kiev was actually ordered to wreck all these agreements.

More weapons were pumped into Ukraine. The Kiev regime brought into play new groups of foreign mercenaries and nationalists, military units trained according to NATO standards and receiving orders from Western advisers.

At the same time, the regime of reprisals throughout Ukraine against their own citizens, established immediately after the armed coup in 2014, was harshly intensified. The policy of intimidation, terror and violence is taking on increasingly mass-scale, horrific and barbaric forms.

I want to stress the following. We know that the majority of people living in the territories liberated from the neo-Nazis, and these are primarily the historical lands of Novorossiya, do not want to live under the yoke of the neo-Nazi regime. People in the Zaporozhye and Kherson regions, in Lugansk and Donetsk saw and are seeing now the atrocities perpetrated by the neo-Nazis in the [Ukrainian-] occupied areas of the Kharkov region. The descendants of Banderites and members of Nazi punitive expeditions are killing, torturing and imprisoning people; they are settling scores, beating up, and committing outrages on peaceful civilians.

There were over 7.5 million people living in the Donetsk and Lugansk people's republics and in the Zaporozhye and Kherson regions before the outbreak of hostilities. Many of them were forced to become refugees and leave their homes. Those who have stayed – they number about five million – are now exposed to artillery and missile attacks launched by the neo-Nazi militants, who fire at hospitals and schools and stage terrorist attacks against peaceful civilians.

We cannot, we have no moral right to let our kin and kith be torn to pieces by butchers; we cannot but respond to their sincere striving to decide their destiny on their own.

The parliaments of the Donbass people's republics and the military-civilian administrations of the Kherson and Zaporozhye regions have adopted decisions to hold referendums on the future of their territories and have appealed to Russia to support this.

I would like to emphasise that we will do everything necessary to create safe conditions for these referendums so that people can express their will. And we will support the choice of future made by the majority of people in the Donetsk and Lugansk people's republics and the Zaporozhye and Kherson regions.

Friends,

Today our armed forces, as I have mentioned, are fighting on the line of contact that is over 1,000 kilometres long, fighting not only against neo-Nazi units but actually the entire military machine of the collective West.

In this situation, I consider it necessary to take the following decision, which is fully adequate to the threats we are facing. More precisely, I find it necessary to support the proposal of the Defence Ministry and the General Staff on partial mobilisation in the Russian Federation to defend our Motherland and its sovereignty and territorial integrity, and to ensure the safety of our people and people in the liberated territories.

As I have said, we are talking about partial mobilisation. In other words, only military reservists, primarily those who served in the armed forces and have specific military occupational specialties and corresponding experience, will be called up.

Before being sent to their units, those called up for active duty will undergo mandatory additional military training based on the experience of the special military operation.

I have already signed Executive Order on partial mobilisation.

In accordance with legislation, the houses of the Federal Assembly – the Federation Council and the State Duma – will be officially notified about this in writing today.

The mobilisation will begin today, September 21. I am instructing the heads of the regions to provide the necessary assistance to the work of military recruitment offices.

I would like to point out that the citizens of Russia called up in accordance with the mobilisation order will have the status, payments and all social benefits of military personnel serving under contract.

Additionally, the Executive Order on partial mobilisation also stipulates additional measures for the fulfilment of the state defence order. The heads of defence industry enterprises will be directly responsible for attaining the goals of increasing the production of weapons and military equipment and using additional production facilities for this purpose. At the same time, the Government must address without any delay all aspects of material, resource and financial support for our defence enterprises.

Friends,

The West has gone too far in its aggressive anti-Russia policy, making endless threats to our country and people. Some irresponsible Western politicians are doing more than just speak about their plans to organise the delivery of long-range offensive weapons to Ukraine, which could be used to deliver strikes at Crimea and other Russian regions.

Such terrorist attacks, including with the use of Western weapons, are being delivered at border areas in the Belgorod and Kursk regions. NATO is conducting reconnaissance through Russia's southern regions in real time and with the use of modern systems, aircraft, vessels, satellites and strategic drones.

Washington, London and Brussels are openly encouraging Kiev to move the hostilities to our territory. They openly say that Russia must be defeated on the battlefield by any means, and subsequently deprived of political, economic, cultural and any other sovereignty and ransacked.

They have even resorted to the nuclear blackmail. I am referring not only to the Western-encouraged shelling of the Zaporozhye Nuclear Power Plant, which poses a threat of a nuclear disaster, but also to the statements made by some high-ranking representatives of the leading NATO countries on the possibility and admissibility of using weapons of mass destruction – nuclear weapons – against Russia.

I would like to remind those who make such statements regarding Russia that our country has different types of weapons as well, and some of them are more modern than the weapons NATO countries have. In the event of a threat to the territorial integrity of our country and to defend Russia and our people, we will certainly make use of all weapon systems available to us. This is not a bluff.

The citizens of Russia can rest assured that the territorial integrity of our Motherland, our independence and freedom will be defended – I repeat – by all the systems available to us. Those who are using nuclear blackmail against us should know that the wind rose can turn around.

It is our historical tradition and the destiny of our nation to stop those who are keen on global domination and threaten to split up and enslave our Motherland. Rest assured that we will do it this time as well.

I believe in your support.

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Annex 6

The Kremlin, *Signing of Treaties on Accession of Donetsk and Lugansk People's Republics and Zaporozhye and Kherson Regions to Russia* (30 September 2022)

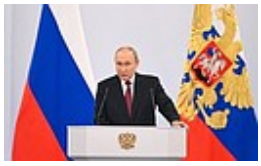
Signing of treaties on accession of Donetsk and Lugansk people's republics and Zaporozhye and Kherson regions to Russia

A ceremony for signing the treaties on the accession of the Donetsk People's Republic, the Lugansk People's Republic, the Zaporozhye Region and the Kherson Region to the Russian Federation took place in of the Grand Kremlin Palace’s St George Hall.

September 30, 2022 16:00 The Kremlin, Moscow 10 photos











Publication status

Published in sections: News, Transcripts
Publication date: September 30, 2022, 16:00
Direct link: en.kremlin.ru/d/69465

Annex 7

The State Duma, *The State Duma Ratified Treaties and Adopted Laws on Accession of DPR, LPR, Zaporozhye and Kherson Regions to Russia*
(3 October 2022)

THE STATE DUMA

THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION

The State Duma ratified treaties and adopted laws on accession of DPR, LPR, Zaporozhye and Kherson regions to Russia

October 3, 2022, 16:00

Heads of the Donetsk and Lugansk People's Republics and Zaporozhye and Kherson regions appealed to President of the Russian Federation to consider a possibility of accession of those territories as constituent units of the Russian Federation after the referendums on September 27

Members of the State Duma unanimously supported adoption of the bills on the ratification of treaties on accession of the Donetsk and Lugansk People's

Republics and the Kherson and Zaporozhye regions to the Russian Federation. The day before, those bills were submitted by the President of the Russian Federation.

“The accession of the Donetsk and Lugansk People's Republics, Zaporozhye and Kherson regions to the Russian Federation is the only way to save millions of people's lives from the criminal Kyiv regime. As well as to stop those attacks on civilian population, elderly people, women and children. To protect the right to speak their native language, to protect culture, history and faith,” the Chairman of the State Duma Vyacheslav Volodin posted on his Telegram channel.

The Chairman of the State Duma recalled that “now the Russian Federation consists of 89 constituent units”. According to him, the residents of the new territories have been waiting for reunification with Russia for 30 years.

“We all should understand: the current situation in Ukraine was caused by the provided assistance to the Kyiv regime by the USA ,Washington, and due to the fact that Ukraine has lost its sovereignty. That is the reason why we must value our sovereignty. Its loss would lead to the same consequences. And the ideology of the current regime in Ukraine has become Nazi,” he added at the plenary session.

Vyacheslav Volodin also stressed that “the goals and objectives of the special military operation have been defined, and they will certainly be achieved.”

Representatives of the DPR and LPR, Kherson and Zaporozhye regions attended the plenary session of the State Duma and witnessed the prosses of ratification. Members of the State Duma welcomed them.

The documents on ratification were presented by the Minister of Foreign Affairs of the Russian Federation Sergey Lavrov. “The process is a logical continuation of the reunification of Russian lands, which began with the accession of the Republic of Crimea and the city of Sevastopol to Russia in 2014,” he said.

The State Duma also adopted four federal constitutional laws on the accession of the Donetsk and Lugansk People's Republics,

Zaporozhye and Kherson regions to the Russian Federation.

According to the provisions of the federal constitutional draft laws, there will be an interim period starting from the day when the regions became the parts of Russia till January 1, 2026.

Residents of the DPR, LPR, Zaporozhye or Kherson regions will be provided with guarantees of protection labor activities rights. Diplomas, civil registration documents, work experience, the right to receive pensions, social and medical assistance, etc., issued in the DPR, LPR, as well as in Ukraine, will be recognized.

Property rights will be also guaranteed. Until January 1, 2028, the residents of those territories will be able to register their property just by providing the documents issued by state authorities of the People's Republics or Ukraine.

Residents of the new Russian territories, as well as those people who lived there, but had already moved to Russia, will acquire the citizenship of the Russian Federation, they should submit an application and take an Oath of a citizen of the Russian Federation. After that, they will be recognized as citizens of the Russian Federation.

Until June 1, 2023, federal executive bodies will open the representative offices in the new republics and regions. During the interim period, there also will be established prosecutorial bodies and will be implemented Russian judicial system. Within six months it is necessary to form city and municipal districts in the regions, to define the boundaries of municipalities.

The ruble will be the currency of the territories of the new entities. The Ukrainian hryvnia will be used there until December 31, 2022. The Bank of Russia will be empowered to establish the specifics of the activities of credit and non-credit financial institutions.

The budget legislation will be applied in the constituent entities from January 1, 2023. The Government of Russia will establish the specifics of the budgets of new entities for 2023 (for the republics, and for the planning period of 2024 and 2025), as well as the specifics of budget execution and budget reporting. Budgets will be approved by December 15, 2022.

There will be a special regime for regulating town planning activities till January 1, 2028. Then such activities will be brought into full compliance with the Town Planning Code of the Russian Federation.

duma.gov.ru/en/news/55407/

The Armed Forces, military formations and specialized bodies formed in the new subjects will be included in the Armed Forces of the Russian Federation, other troops, military formations and bodies.

The law includes provisions aimed at ensuring the safe use of atomic energy in the Zaporozhye region. Along with the current legislation, the President and the Government of the Russian Federation may establish specifics in certain areas of the use of atomic energy.

The heads of the People's Republics, Zaporozhye and Kherson regions appealed to the President of the Russian Federation to consider a possibility of accession of those territories as constituent units of the Russian Federation after the referendums on September 27. An absolute majority voted for the accession of those territories to the Russian Federation. On September 30, there were signed treaties between Russia and the DPR, LPR, Zaporozhye and Kherson regions on their accession to the Russian Federation and establishment of new Russian subjects. The names of the new constituent units remain the same.

Main news

Overview of the Legislative Process in the Russian Federation

October 4, 2018, 10:56

Vyacheslav Volodin met with President of Türkiye Recep Tayyip Erdoğan

December 13, 2022, 15:41

Annex 8

The Kremlin, *Vladimir Putin Spoke at an Expanded Meeting of the Board of the Defence Ministry, Which Was Held at the National Defence Control Center* (21 December 2022)

Meeting of Defence Ministry Board

Vladimir Putin spoke at an expanded meeting of the Board of the Defence Ministry, which was held at the National Defence Control Centre.

December 21, 2022 16:00 Moscow

Before the meeting, the President visited the exhibition of modern and future samples of equipment, arms, ammunition and means of protection for the troops in the various branches. The President was accompanied by Defence Minister Sergei Shoigu and Chief of the Armed Forces General Staff Valery Gerasimov. The exhibition was held in the atrium of the National Defence Control Centre.

* * *

President of Russia Vladimir Putin: Comrades,

This annual meeting of the Board of the Defence Ministry is taking place at a very important time in the country's life. The special military operation continues. Today, we will discuss key army and navy development areas based on the experience gained in combat operations.

First, I would like to convey my most sincere words of gratitude to our soldiers and officers who are now on the front lines or at military personnel training centres. All of them are fulfilling their military duty with dignity, risking their lives, sparing no effort and providing cover for their fellow soldiers when necessary.

And, of course, today we must commemorate our comrades-in-arms who gave up their lives for the Motherland.

(Moment of silence.)

Colleagues,

It is well known that the military potential and capabilities of almost all major NATO countries are being widely used against Russia.

Still, our soldiers, sergeants and officers are fighting for Russia with courage and fortitude and are fulfilling their tasks with confidence, step-by-step. Without a doubt, these tasks will be fulfilled in all territories of the Russian Federation, including the new territories, and a safe life for all our citizens will be ensured. Our Armed Forces' combat capability is increasing day by day, and we will certainly step this process up.

I would like to once again thank everyone who is fulfilling their combat duty today, including tank crews, paratroopers, artillerymen, motor riflemen, sappers, signalmen, pilots, special operations forces and air defence troops, sailors, military topographers, logistics support specialists, National Guard personnel and other formations for the way you are fighting. You are fighting – you know, I am not afraid to use these comparisons, and these are not some turgid words – like the heroes of the War of 1812, the First World War or the Great Patriotic War.

Special words of gratitude go to the military doctors who are bravely, often at risk to their own lives, saving our soldiers, and military and civilian construction workers who are building fortifications and vital infrastructure in the areas covered by the operation and for their help in rebuilding civilian sites in the liberated territories.

Meanwhile, the hostilities have highlighted issues that need our special attention, including issues we have discussed more than once. I am talking about communications, automated command and control systems for troops and weapons, counter-battery tactics, target detection, and so on.

This is the combat experience that we must and we will use in the further development and build-up of the Armed Forces.

Today, our goal is to implement the entire scope of necessary measures to achieve a qualitative renewal and improvement of the Armed Forces.

I would like to draw your special attention to the following.

We are well aware of all the NATO forces and resources that they have been using against us over the course of the special military operation. You have all the information, and it should be carefully analysed and used to build up our Armed Forces, as I have said, to improve the combat capabilities of our troops, as well as our national special services.

Our units have gained extensive combat experience during this special operation.

The job of the Defence Ministry and the General Staff, as I mentioned, is to carefully analyse this experience, systematise it as quickly as possible and include it in the programmes and plans for personnel training, training troops in general and supplying the troops with the necessary equipment.

In addition, the experience of the special military operation, as well as what our troops gained in Syria, should, as I have said, pave the way for a major improvement in combat training, and should be applied in our preparations and in our exercises and training at all levels.

In turn, officers and sergeants who have shown exemplary achievements during the special military operation should be promoted to higher command positions as a matter of priority, and be the prime personnel reserve to be admitted to military universities and academies, including the General Staff Academy.

Second. I would like to draw the attention of the Government, the Defence Ministry and other agencies to the need to cooperate closely at the Coordination Council, which is a specially created platform. You should also cooperate with the heads of regions and representatives of the defence industry.

I also expect our designers and engineers to continue the practice of visiting the frontline. I would like to express my gratitude to them for making regular trips and making the necessary adjustments to the equipment. I hope that they will continue the practice of checking the tactical and technical characteristics of weapons and equipment in real combat situations and, as I have already said, of improving them.

In general, it is necessary to conduct substantive work with related ministries and departments. We are seeing what works really well and what needs additional efforts. Engineers, technicians and scientists are seeing this. And this entire machine is working. When I said we are improving and will continue to improve our armaments and equipment, I had in mind this process as well. The Military-Industrial Commission must become a headquarters for the interaction of the defence industry, science and the Armed Forces with a view to resolving both urgent and future tasks, primarily related to military-technical supplies for the troops. I am referring to equipment, ammunition and so on.

The third point. We will continue maintaining and improving the combat readiness of the nuclear triad. It is the main guarantee that our sovereignty and territorial integrity, strategic parity and the general balance of forces in the world are preserved.

This year, the level of modern armaments in the strategic nuclear forces has already exceeded 91 percent. We continue rearming the regiments of our strategic missile forces with modern missile systems with Avangard hypersonic warheads.

In the near future, Sarmat ICBMs will be put on combat duty for the first time. We know there will be a certain delay in time but this does not change our plans – everything will be done. Our troops continue receiving Yars missiles. We will continue developing hypersonic missile systems with unique characteristics, unmatched in the world. In early January of next year, the Admiral of the Soviet Fleet Gorshkov frigate will start combat duty. I will repeat, it will carry cutting-edge Zircon sea-based hypersonic missiles without equal in the world.

We will continue equipping our strategic forces with the latest weapon systems. Let me repeat that we will carry out all of our plans.

Next. It is important to enhance the combat capabilities of the Aerospace Forces, including the numbers of fighters and bombers operating in the zone covered by modern air defence systems.

A pressing task is upgrading drones, including strategic and reconnaissance ones, as well as methods of using them. The experience of the special military operation has shown that the use of drones has become practically ubiquitous. They should be a must-have for combat units, platoons, companies and battalions. Targets must be identified as quickly as possible and information needed to strike must be transferred in real time.

Unmanned vehicles should be interconnected, integrated into a single intelligence network, and should have secure communication channels with headquarters and commanders. In the near future, every fighter should be able to receive information transmitted from drones. We must work towards this; we must strive for this. Technically, this can be implemented in the very near future, almost now. I ask you to focus on this when finalising the entire range of equipment and tactical gear for personnel.

We know that there are no small things on the battlefield, so you need to pay special attention – I know that the Ministry of Defense is working on this, but I want to emphasise it once again: medical kits, food, dry rations, uniforms, footwear, protective helmets, body armour – everything should be at the most up-to-date and highest level. The troops need to have enough night vision devices, high-quality sights, and new generation sniper rifles. I will not list everything now, but I will mention what is most important: everything that a fighter uses should be cutting-edge, convenient and reliable, and the supply should correspond to their actual needs. If some ministry standards are outdated, they need to be changed – and quickly.

I would like to draw the attention of the Defence Minister, the Chief of the General Staff and all the commanders here: we have no funding restrictions. The country, the Government will provide whatever the Army asks for, anything. I hope that the answer will be properly formulated and the appropriate results will be achieved.

Returning to the topic of drones, I must note that we have good experience in developing unique unmanned underwater systems. I know that the industry has every capability it needs to create a wide range of unmanned aerial and ground vehicles with the best and highest tactical and technical characteristics, including elements of artificial intelligence. In addition, we generally need to consider ways to expand the arsenals of the latest strike weapons.

Fifth, it is necessary to improve the management and communication system in order to ensure the stability and efficiency of command and control of the troops in any conditions. To do this, we need to use artificial intelligence more widely at all levels of decision-making. As experience shows, including that of recent months, the weapons systems that operate quickly and almost automatically are the most effective ones.

Furthermore, the partial mobilisation has revealed certain problems – this is common knowledge – that must be promptly resolved. I know that the necessary measures are being taken but we should still pay attention to this issue and build this system in a modern way. First, it is necessary to upgrade the system of military commissariat offices. I am referring to the digitisation of databases and interaction with the local and regional authorities. It is necessary to upgrade the organisation of civil and territorial defence and interaction with industry. In particular, we need to improve the system of stockpiling and storing arms, combat equipment and material resources for the deployment of units and formations during mobilisation.

As you know, 300,000 people have been drafted into the Armed Forces. Some of them are already in the zone of hostilities. As the Defence Minister and the Chief of the General Staff report, 150,000 people are undergoing training at military grounds and this reserve is adequate for conducting the operation. It is basically a strategic reserve that is not being used in combat operations currently, but people undergo the required training there.

Colleagues,

I would like to sincerely thank our people who are helping our Armed Forces out of the kindness of their hearts, sending autos, additional equipment, gear and warm clothes to the frontline and letters and presents to the wounded in hospitals. Even if the Defence Ministry provides our troops with all they need in some segment, we should still humbly thank people for it.

I would like to ask the Defence Ministry to pay attention to all civil initiatives, which includes considering criticism and offering an adequate and timely response. Obviously, the reaction of people who see problems – and problems are inevitable in such a big and difficult undertaking – their reaction may be emotional as well. There is no doubt that it is necessary to listen to those who are not hushing up existing problems but are trying to contribute to their resolution.

I am confident the Defence Ministry's dialogue with the public will remain ongoing. As we know, our strength has always been in the unity of the army and the people, and that has not changed.

Now for the reports.

The Defence Minister has the floor.

Thank you for your attention.

Defence Minister Sergei Shoigu: Comrade Supreme Commander-in-Chief,

I will begin my report with the special military operation.

Today in Ukraine, Russia is fighting against the collective forces of the West. The United States and its allies have been sending weapons to Ukraine, training Kiev's military personnel, providing them with intelligence, sending advisers and mercenaries, and waging an information and sanctions war on Russia.

The Ukrainian leaders are resorting to prohibited warfare, including terrorist attacks, contract killings, and the use of heavy weapons against civilians. The Western countries are trying to ignore this, as well as instances of nuclear blackmail, including provocations against the Zaporizhzhia Nuclear Power Plant and plans to use a so-called dirty nuclear bomb.

It is clear that the current situation primarily benefits the United States, which seeks to take advantage of it to maintain global dominance and weaken other countries, including its allies in Europe.

Of particular concern is the build-up of NATO's advance presence near the borders of the Russian Federation and the Republic of Belarus, as well as the West's interest in prolonging the hostilities in Ukraine as much as possible to further weaken our country.

After the confessions made by Ms Merkel, Poroshenko and other politicians about the true purposes of the Minsk agreements, it became obvious to everyone that Russia was not the source of the conflict in Ukraine; the reason was the Western-sponsored coup in Kiev in 2014, which brought anti-Russian forces to power and divided the two fraternal peoples. This provoked an armed confrontation in Donbass.

We are taking action to save the population from genocide and terrorism.

Russia is always open to constructive and peaceful negotiations.

Russian troops continue to destroy military targets, to deliver massive high-precision strikes on the military control system, defence industry enterprises and related facilities, including energy facilities. They are destroying the foreign weapons supply chain and crushing Ukraine's military potential. At the same time, every measure is being taken to rule out civilian deaths.

As a result, the armed forces of Ukraine have suffered significant losses; a significant part of the weapons and equipment they had available at the beginning of the operation has been destroyed. To compensate for these losses, the United States and other NATO countries have significantly increased their military assistance to the Kiev regime. The 27 countries have already spent $97 billion on arms supplies to Ukraine, which is much more than the cost of the weapons they abandoned in Afghanistan. Some of the weapons the US army left behind in Afghanistan have fallen into the hands of terrorists and are spreading all over the world. No one knows where the weapons in Ukraine will end up.

It is necessary to mention that NATO staff officers, artillerymen and other specialists are in the zone of hostilities. Over 500 US and NATO space vehicles, including over 70 military and the rest being of dual purpose, are working in the interests of the Ukrainian Armed Forces.

The United States and its allies are spending considerable funds on exerting information and psychological influence on Russia and our allies. We have realised in full what the allegedly free Western press is all about. Thousands of fakes about events in Ukraine are published daily according to the same templates on Washington's orders. Hundreds of TV agencies, tens of thousands of print publications and media resources on social media and messengers are working to this end.

The silence of the Western media about the war crimes of the Ukrainian military represents the height of cynicism. All the while, the criminal neo-Nazi regime in Kiev is being glorified. The terrorist methods of the Ukrainian Armed Forces are presented as lawful self defence or acts of Russian units. Armed Ukrainian nationalists are in the rear to make sure no one retreats. We receive daily reports of shootings of Ukrainian army personnel for refusing to follow orders.

We had to increase the combat and numerical strength of our troops to stabilise the situation, protect the new territories and conduct further offensive actions. We conducted a partial mobilisation for this purpose. It is a mark of the maturity of Russian society and a serious trial for the country and its Armed Forces.

Mobilisation plans had not been put into action since the Great Patriotic War. The basic system of mobilisation preparations was not even fully adapted to the new economic system. This is why with the beginning of the partial mobilisation we faced difficulties in notifying and calling up citizens in the reserve.

We had to fix all problems on the go. We changed the organisational and staffing structures of military administrative bodies in units and formations as fast as we could and took urgent measures to improve all types of support.

Partial mobilisation measures were fully carried out on time. Some 300,000 reservists were drafted for military service. The concerted efforts of federal and regional government bodies played an important role in this respect.

I would like to make special mention of the active engagement of Russian citizens – over 20,000 people volunteered for service without waiting for a draft notice.

To support the national economy, over 830,000 people have been exempted from the draft. They are employed in companies of the defence industry and other socially important areas that are vital for the activity of the state.

Owing to the decisions by the Supreme Commander-in-Chief, mobilised citizens are entitled to the same benefits and guarantees as contract service personnel.

Mobilised military personnel will be trained for combat operations from practicing individual skills to unit cohesion.

Military-political bodies have to shoulder an enormous burden. This confirmed the correctness of the 2018 decision to establish them. At the same time, much still has to be done to make the personnel fully ready for combat operations.

In general, the partial mobilisation made it possible to enhance the combat potential of troops and intensify the fighting. The troops liberated an area five times bigger than what the Luhansk and Donetsk people's republics occupied before February 24. In late May, Russian troops fully liberated from the Nazis the large industrial centre of Mariupol. The Kiev regime had turned the city into a powerful fortified area centered around the Azovstal Plant industrial zone. Following successful actions by the Armed Forces of Russia and the Donetsk militia forces, over 4,000 militants were eliminated and 2,500 Azov nationalists and servicemen of the Ukrainian Armed Forces laid down their arms and surrendered.

Peaceful life is being restored. The ports in Berdyansk and Mariupol are fully operational. We play to deploy ship bases, emergency-and-rescue services and ship repair units of the Navy there. The Sea of Azov has again become Russia's internal sea as it was during 300 years of our national history.

Land connection with Crimea by road and rail has been restored. Rail service with Donbass will soon be returned to normal. Cargoes have been delivered to Mariupol, Berdyansk and other liberated residential areas for several months now.

Control of the North Crimean Canal made it possible to restore water supply to the Crimean Peninsula, which did not exist for eight years due to the water and energy blockade.

During the special military operation, members of the Russian military are displaying courage, stamina and dedication. Over 100,000 people have received state awards, including 120 titles of Hero of the Russian Federation. Over 250,000 regular military personnel have received combat experience during the special military operation.

Today, the Russian Armed Forces are taking an active part in establishing peaceful life on the liberated territories. They have cleared mines from more than 27,000 hectares of land. In Mariupol, military builders have built 12 residential blocks and continue building another six, as well as a kindergarten and a school. In Lugansk and Mariupol, the construction of two multi-purpose medical centres with the latest equipment and 260 beds has been completed in record time.

Much is being done to restore water supply in the Donetsk and Luhansk people's republics. The construction of waterways with a total length of over 200 km has provided water for more than 1.5 million people. A 194-kilometre-long waterway from the Don River, which is now being built, will guarantee water supply for Donetsk.

In general, the special military operation has demonstrated the high professional skills of commanders, chiefs of staff at all control levels, and the readiness of the military to fulfil even the most complicated combat assignments. Our weapon and military equipment samples have confirmed their exceptional reliability and efficiency.

The special military operation is creating a unique opportunity to analyse modern methods of conducting combined operations, and the forces and means used in them for the purposes of refining plans for improving the Armed Forces.

Russian citizens have provided unprecedented support for the national leadership and the Armed Forces of the Russian Federation. This is graphically illustrated by the unity of the army and society.

This year, the Defence Ministry has been resolving and continues to resolve a number of other important tasks. In the beginning of this year, it conducted an operation jointly with the CSTO countries to stabilize the situation in Kazakhstan and prevent a "colour revolution" in that country.

Russian military units remain the main guarantor of preserving peace in Syria and Nagorno-Karabakh. During this year, they conducted humanitarian activities, removed mines and rendered medical aid to the population.

We maintain our nuclear triad at the level of guaranteed strategic deterrence. The combat readiness of the strategic nuclear forces stands at an unprecedented 91.3 percent.

The re-equipment of two missile regiments with the Yars mobile ground-based missile systems has been completed in the Strategic Missile Forces. One more regiment equipped with the Avangard missile with a hypersonic glide vehicle has been put on combat duty. Successful launches of the new Sarmat heavy missile complex during state tests made it possible to start its deployment.

Strategic aviation nuclear forces have received a Tu-160M strategic missile carrier and a Tu-95M aircraft. This year, 73 air patrols have been conducted, including two jointly with the People's Liberation Army of China. Nuclear-powered missile submarines are conducting planned military service in designated areas of the world's oceans. The Navy has adopted the Generalissimus Suvorov Borei-A class nuclear-powered submarine equipped with Bulava ballistic missiles. The efforts to enhance the combat capabilities of the branches and types of troops of the Armed Forces have been continued.

The Aerospace Forces further developed the uniform space system and launched the sixth Kupol space vehicle that makes it possible to continuously monitor missile-hazardous areas in the Northern Hemisphere. Training aviation is being steadily developed. Owing

to the arrival of new models of training aircraft, the flight hours of cadets have been increased by more than one third. This year saw the first graduating class of female military pilots. More than half of them graduated with distinction.

The Navy has received a cutting-edge submarine, six surface ships, three gunboats, 11 support vessels and boats and two coastal missile complexes.

Serial deliveries of the Zircon sea-based hypersonic missile have gotten underway. The preparations of the Admiral of the Fleet of the Soviet Union Gorshkov frigate with hypersonic missiles on board for combat service in an unplanned area of the world's oceans have entered the final phase.

A vital element of the implementation of the state defence order in 2022 was the delivery of weapons and equipment to the armed forces involved in the special military operation. To build up their combat capability, the delivery of staple systems has been expedited from 2024 and 2025 to 2023. A 10-day schedule has been formed to streamline the deliveries. Its implementation is being monitored by a joint task group of the Defence Ministry, the Military Industrial Commission, the Industry and Trade Ministry and defence enterprises.

The approved 2022 allocations, which include the supply of additional weapons and equipment, allowed us to increase the delivery of staple weapons to the armed forces by 30 percent and the supply of ammunition for artillery and missile systems and aircraft by between 69 and 109 percent. At the same time, the implementation of the state defence order with regard to staple weapons has reached 91 percent.

In 2022, all the planned events of operational and combat training have been carried out, including 14 international exercises held at different levels. At the beginning of the year, we conducted a series of large-scale naval exercises in training to repel sea and ocean military threats to Russia.

The final combat training event was the Vostok 2022 command post exercise, which involved over 51,000 miliary personnel from 14 foreign states. A specific element of the exercise was the establishment of an international group of forces for addressing common tasks. The exercise demonstrated the ability of international groups of forces to effectively fulfil regional security tasks.

During a special exercise, the strategic nuclear forces successfully trained in delivering a large-scale nuclear strike in response to the use of weapons of mass destruction by the enemy.

An Arctic expedition has been held in the eastern sector of the Arctic and on the Chukotka Peninsula, with a series of combat training and research elements and experiments. This confirmed the technical characteristics of all the types of weapons used in Arctic conditions.

Despite the attempts by the collective West to isolate Russia, we continue to expand the geography of international military and technical cooperation.

The Defence Ministry develops relations with the armed forces of 109 countries in Asia, Africa, the Middle East and Latin America. This year, we have held 350 significant international events.

The International Army Games have become one of the major joint training events with armies of foreign countries. More than 5,300 troops from 34 countries took part in the games. Held across 12 countries, the games were attended by more than 3 million people. Over the eight years since the first games, 80 training grounds have been modernised. Their training and resource capacity is extensively used for combat training of the military personnel.

The Army annual forum has contributed to strengthening international military cooperation. It was attended by delegations from 85 countries and almost 2 million visitors. Thirty-six state contracts with defence industry companies, worth over 525 billion rubles, were signed during the forum. This event is a successful and dynamically developing project that is substantially more productive than similar fairs around the world.

In August, we hosted the 9th Moscow International Security Conference, attended by more than 700 delegates from 70 countries. It is the most representative military and political event in the world.

This year, we held the first International Anti-Fascist Congress. It was attended by state officials and public activists, Great Patriotic War veterans, nine foreign delegations and military attaches from 26 countries. Forum participants unequivocally condemned any manifestation of fascism, neo-Nazism and chauvinism in the modern world. It is expected that the congress will be held every year.

The Russian higher military school is one of the best in the world. Students from 55 countries study at the Defence Ministry higher educational institutions, which is more than during the Soviet times. Starting September 1, 2023, the Donetsk Higher Military Command School of the General Forces will be included in the group of Defence Ministry education facilities.

We continue working to improve the system of Defence Ministry pre-university education. By September 1, 2023, a new Suvorov military school will open in Irkutsk.

We are working with the authorities to create a Federal Agency for Veterans' Affairs. It will help us to centralise the military veterans' social protection system and make it more effective. Mr President, thank you for supporting this initiative.

Housing conditions have been improved for 49,000 military families, and 100,000 people receive subsidies for renting apartments.

We are paying considerable attention to the development of military medicine. Thanks to prevention care measures taken in the armed forces, the incidence of medical conditions has decreased by more than 30 percent over the past 10 years. The number of military medical facilities that provide high-quality medical assistance has tripled and the range of services they offer has doubled. Over 28,000 patients have received this type of medical assistance.

Our combat medics have proved their worth during the special military operation. First aid is provided within 10 minutes. The wounded are delivered to medical units within an hour and to military hospitals within 24 hours.

They have decreased the fatality rate during evacuation stages. The fatality rate in hospitals has gone down to less than 0.5 percent, which is the lowest figure in the history of military medicine.

As per your instructions, we have launched a programme to modernise the military healthcare system until 2027. A modern military hospital with 150 beds has opened in Kazan. Nine military hospitals are under construction in Ryazan, Yuzhno-Sakhalinsk, Bryansk, Kursk, Belgorod, Kaspiysk, Sevastopol, Mirny and Vladikavkaz. The construction of a health rehabilitation centre has been completed at a unique spa resort in Kamchatka.

The Defence Ministry is waging a systematic battle against COVID-19. We have prevented the disease rate from peaking during the sixth wave.

We have fulfilled all plans regarding the military construction complex by erecting over 3,000 buildings and structures, while paying special attention to infrastructure development for the strategic nuclear forces. This year, we built 650 high-technology units, including for the Avangard, Yars and Sarmat missile systems.

We launched coastal energy and social infrastructure facilities for the Northern Fleet in Gadzhiyevo. A 1,154-metre berth has been commissioned at the Caspian Fleet base, and the construction of another berth has been completed. We rebuilt infrastructure at 15 military airfields to enable them to serve all of the latest aircraft as part of the effort to expand the air force deployment system. Efforts to improve permanent military townships proceeded according to plan. We completed 625 buildings in the park and barrack accommodation zones.

In keeping with your instructions, the railway troops continue rebuilding the 339-kilometre section of the Baikal-Amur Mainline between Ulak and Fevralsk, and have already completed some 3 million cubic metres of earthwork, which is about half of the planned work scope.

The Defence Ministry has implemented major patriotic education and cultural projects. Twenty-eight cities hosted military parades, and the traditional Main Naval Parade has been held too. In execution of your instructions, Saur-Mogila, a memorial that is a major symbol for the entire nation, has been restored in just 90 days. The Eternal Flame is once again ablaze at the top of this mount.

We carried on with our system-wide efforts to promote military and patriotic education for young people, focused on the Young Army movement, which has already gained a foothold in all the regions of Russia, bringing together over 1.25 million children and teenagers.

We have been working together with the regions of the Russian Federation to expand the Avangard Education and Methodology Centres for Military Patriotic Youth Awareness. In 2022, this included opening 20 regional centres and 25 centres in cities of over 100,000 residents. More than 150,000 high-school students took courses at 88 Avangard centres over the past year. We believe that setting up centres of this kind must serve as a foundation for basic military training and patriotic education for young people around the country.

Comrade Supreme Commander-in-Chief,

Overall, the Armed Forces have fulfilled the objectives they had for 2022, increasing their combat capability by more than 13 percent and ensuring the country's defence capabilities at the required level.

Measures to bolster Russia's security:

Considering NATO's aspirations to build up its military capabilities close to the Russian border, as well as expand the Alliance by accepting Finland and Sweden as new members, we need to respond by creating a corresponding group of forces in Russia's northwest.

Regarding the staffing of the Armed Forces, the conscription age must be gradually increased from 18 to 21 years, while raising the ceiling conscription age to 30 years. We must enable citizens starting their military service to serve under contract from day one.

We must create the Moscow and Leningrad military districts as two joint-force strategic territorial units within the Armed Forces.

We must continue improving branches of the Armed Forces in terms of their composition and structure, increase responsibility of the headquarters for training and deploying units and formations. We need to create two new motorised infantry divisions, including within integrated combined armed forces, in the Kherson and Zaporizhzhia regions, as well as an army corps in Karelia.

We need to transform seven motorised infantry brigades into motorised infantry divisions in the Western, Central and Eastern military districts, and in the Northern Fleet. The Airborne Forces must get two additional air assault divisions.

Each combined arms (tank) army must have a composite aviation division within it and an army aviation brigade with 80 to 100 combat helicopters. In addition to this, we need to add three more air division commands, eight bomber aviation regiments, one fighter aviation regiment, and six army aviation brigades.

We need to create five district artillery divisions, as well as super-heavy artillery brigades for building artillery reserves along the strategic axis.

We must create five naval infantry brigades for the Navy's coastal troops based on the existing naval infantry brigades.

In order to guarantee that the military can ensure Russia's security, we need to increase the size of the Armed Forces to 1.5 million service personnel, including up to 695,000 people serving under contract.

The transition to outsourcing practices in 2008–2012 decimated the army maintenance units, which had a negative effect on the operational status of weapons and machinery. Efforts to revive these structures were taken in 2012. The special military operation demonstrated that we need to further develop maintenance and repair units within our forces. Next year, we will create three repair factories and reinforce maintenance units within the troops.

Staff at conscription offices will receive federal state civil service status with an increased number of military posts. We must complete the transition of these conscription offices to digital technology.

Comrade Supreme Commander-in-Chief,

With your consent, the above approaches will be included in the plans for developing the Armed Forces according to the established procedure.

Our 2023 priorities are as follows:

To continue the special military operation until its goals are achieved in full. The Russian groups of forces are to ensure peace and stability in Nagorno-Karabakh and Syria.

To fully implement a set of operational and combat training measures with an emphasis on the threats stemming from further eastward NATO expansion.

To prepare and conduct the Zapad-2023 exercises.

To put 22 launchers with intercontinental ballistic missiles Yars, Avangard and Sarmat on combat duty in the Strategic Missile Forces.

To put three Tu-160 strategic missile carriers into service of the aviation strategic nuclear forces. To put the Borei-A Project Imperator Alexander III nuclear submarine, four submarines and 12 surface ships into service of the Navy.

To increase the supply of Kinzhal and Tsirkon high-precision hypersonic missile systems. To continue to develop other advanced weapons.

To increase to 521,000 the number of military personnel serving under contract by the end of the year, taking into account the replacement of mobilised citizens in the groups of forces and the recruitment of new formations.

Comrade Supreme Commander-in-Chief,

In accordance with your instructions, will continue to develop the Armed Forces and enhance their combat capabilities next year.

We will discuss our performance in detail during the closed part of the board meeting.

Thank you.

That concludes my report.

Vladimir Putin: Comrades,

In accordance with tradition, I will say a few words in conclusion of our meeting. I will speak in broad terms, but I believe that it is a matter of interest to us. At least, I think that the matter I will speak about is always of interest but especially so in the current situation.

I have pointed out many times and have written in my articles that the goal of our strategic adversaries is to weaken and divide our nation. This has been so for centuries, and there is nothing new in this now. They believe that our country is too large and poses a threat, which is why it must be diminished and divided. Wherever you look, this has been their goal over the past centuries. I will not provide any examples now; you can find them in the relevant materials. They have always nurtured this idea and such plans, hoping that they will be able to implement them, one way or another.

For our part, we have aways or nearly always pursued a completely different approach and had different goals: we have always wanted to be part of the so-called civilised world. After the Soviet Union's dissolution, which we ourselves allowed to take place, we thought for some reason that we would become part of that so-called civilised world any day. But it turned out that nobody wanted this to happen, despite our efforts and attempts, and this concerns my efforts as well, because I made these attempts too. We tried to become closer, to become part of that world. But to no avail.

On the contrary, they undertook, including with the use of international terrorists in the Caucasus, to finish off Russia and to split the Russian Federation. There is no need to prove this to many of you in this room, because you know what took place in the mid-1990s and the early

2000s. They claimed to condemn al-Qaeda and other criminals, yet they considered using them on the territory of Russia as acceptable and provided all kinds of assistance to them, including material, information, political and any other support, notably military support, to encourage them to continue fighting against Russia. We overcame that complicated period in our history thanks to the people of the Caucasus, thanks to the Chechen people, and thanks to the heroism of our military personnel. We have survived those trials, growing stronger in the process.

To be continued.

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Annex 9

Hugh Thirlway, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE, Vol. I (Oxford University Press 2013)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

I General Principles and Sources of Law, Division A: General principles, Ch.I: Good Faith and Related Principles

From: The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume I

Hugh Thirlway

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(p. 9) Chapter I: Good Faith and Related Principles

1. The Principle of Good Faith*

During the period under review, the concept of good faith, which had previously only been referred to by individual judges and not employed by the Court in its decisions,[3] developed into a notable element in the judicial armoury. The Court's statements on the subject are, however, at first sight somewhat contradictory. The period may be said to be framed, not merely chronologically but jurisprudentially, by the following two quotations:

> Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[4] (1973)

The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' …; it is not in itself a source of obligation where none would otherwise exist.[5] (1988)

The explanation for the apparent contradiction is, it is suggested, that the Court has used the expression 'good faith' to convey two different ideas; for clarity, these will be treated separately.

(1) Good faith *lato sensu*: creation of a '*servandum*'

(a) The Nuclear Tests cases

The most far-reaching effects yet attributed to the concept of good faith were those declared by the Court in the *Nuclear Tests* cases. These cases, as the Court found,[6] had been brought with the sole intention of putting an end to the nuclear tests in the atmosphere being conducted by France in the Pacific; and while the proceedings before the Court were in progress, the French Government made it known, by various unilateral announcements, that no more atmospheric tests would be held. The proceedings brought could therefore be regarded as having achieved their object,[7] provided France (p. 10) was legally bound to conform to the line of conduct announced, and was not free to change its mind and resume atmospheric testing. The relations between France and the two applicant parties were such that no element of synallagmatic contract could be identified; was France to be held bound by purely unilateral declarations?

The Court responded on this point in terms which show that it was consciously making a broad statement of principle:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect,

since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made …

Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.[8]

After explaining that international law laid down no requirements of form for such declarations, the Court continued:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[9]

This finding of the Court has been much criticized;[10] and one of its features which may inspire doubt is the creative role given to good faith. To some extent, however, the matter may be no more than one of terminology. What the Court is talking about here is something which would not normally be referred to as 'good faith'. The rule of *pacta sunt servanda* is based on a very fundamental idea or principle, and it may be that that fundamental idea can justify attaching legally binding effect to something which, lacking two-sidedness, is not a *pactum*; but 'good faith' is perhaps not the best name for it. It is instructive to consider Fitzmaurice's discussion of the basis of the *pacta sunt servanda* rule:

Consent may indeed be the foundation of the rules of customary international law. But the obligation to conform to these rules requires something more, namely the existence (p. 11) of a principle to the effect that the giving of consent, whether express or implied, creates obligation. This principle is the principle *pacta sunt servanda*. But strictly this is not a rule or principle of international law. It is, for international law, a postulate lying outside the actual field of international law. The system of international law cannot be clothed with force by a principle that is part of the system itself; for unless the system already had force that principle itself would have no validity, and there would be a *circulus inextricabilis* or *viciosus*. A principle exterior to the system must be sought. Such a principle is the rule *pacta sunt servanda*—, and if the principle is to do what is required of it, it must, in relation to international law, be regarded not as a principle but as a *postulate*—an assumption that has to be made before the system can work or have any meaning. In this sense, the principle *pacta servanda* becomes the postulate on which the whole system is founded, and becomes the theoretical foundation of international law and its binding force.[11]

It is the principle 'to the effect that the giving of consent'—consent to be bound—'creates obligation' which the Court appears to have had in mind in 1973, and to which it gave the inappropriate designation of 'good faith'. Avoiding the misleading implications of this term,

what is the contribution so made by the Court to the development, or to the clarification, of international law?

Despite the assertion by the Court that 'It is well recognized that declarations made by way of unilateral acts … may have the effect of creating legal obligations',[12] this cannot be said to have been clearly established as a legal rule prior to the Court's pronouncement.[13] At all events, the conditions enunciated for a unilateral declaration to have a binding character have not previously been stated systematically. Let us take them one by one, as stated in the *Nuclear Tests* judgments.

(i) The intention of the declarant State

> When it is the intention of the State making the declarations that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking …

Speaking very generally, when for the purposes of any system of law it is necessary to determine whether a statement (apparently of the nature of a promise, undertaking or commitment—but to use any of these terms would beg the question) is to be regarded as placing its maker under an obligation for the future to conform its conduct to that statement, the enquiry may be regarded as one into the nature of the intentions of the maker of the statement; but at a more direct and concrete level, it is necessary to apply a number of criteria to see whether the statement fits one or other of them. Thus: was the statement made in exchange, retrospectively or prospectively, for some statement (promise, undertaking) made in favour of, or benefit conferred on, the maker of the statement (contract situation)? Was the statement made in a form defined by the legal system as sufficient in itself to prove intention, or deemed intention, to create obligation (e.g., promise under seal: see below)?

The enquiry may, however, range wider than the actual intention of the maker of the statement: it may be asked whether the circumstances are such that the addressee of the statement could properly have supposed that the statement was intended to create a commitment (acquiescence). The passage quoted from the *Nuclear Tests* judgment shows that it justifies the enforceability of a unilateral declaration, in terms of the underlying (p. 12) principle of intention: this differentiates the legal situation from such hypotheses as estoppel, where the emphasis is on the reaction and expectations of the addressee of the declaration rather than the intentions of its maker.[14]

(ii) The context of the statement

> An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

The reference to international negotiations is presumably to emphasize that the Court is here consciously laying down a broader ruling than that of the Permanent Court with regard to the Ihlen declaration in the *Eastern Greenland* case, which was specifically found to be a 'response to a request by the diplomatic representative of a foreign Power'.[15]

It is unclear whether it is, in the Court's thinking, an essential condition that the undertaking be 'given publicly'. The statements made on behalf of the French Government in the *Nuclear Tests* cases were of course made publicly rather than being addressed to the applicant governments directly; but one would have thought that it would be sufficient, as a general rule, for the declaration to have been made in such a way that it in fact became known to the State seeking to rely on it. To require that it should have been *addressed* to a particular State or States would, in the circumstances of the *Nuclear Tests* cases, have been asking more than France could give, and thus made it impossible to give effect to the

declaration; but in general it is difficult to see why the legally binding effect of a declaration should depend on, *inter alia*, the fact of its having been made publicly.

A later paragraph of the judgment refers to the unilateral statements of the French authorities as having been made 'publicly and *erga omnes*',[16] which appears to add an additional element.[17] One cannot but recall the Court's *dictum* in the *Barcelona Traction* case, four years earlier:

> … an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[18]

Does a unilateral declaration made *erga omnes* necessarily give rise to an international legal obligation *erga omnes*? If so, it would appear to follow that if France had recommenced atmospheric nuclear tests, proceedings could have been brought against it by (p. 13) any other State which could assert a title of jurisdiction, whether or not it was affected by the fall-out from the tests.[19] Furthermore, if this is an essential aspect of the law of unilateral declarations, it must apply whatever the degree of international importance of the subject-matter of the declaration. An obligation not to carry out atmospheric nuclear tests might rank in the scale of gravity not far short of the obligations *erga omnes* which the Court in 1970 presented as examples:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[20]

It is not difficult, however, to think of examples of subjects to which a declaration— made publicly, and with intent to be bound—might relate, which would be of limited interest and minor significance, so that commitment *erga omnes* would be disproportionate.

(iii) and (iv) No quid pro quo or acceptance needed

> In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[21]

(iii) The Court here excludes anything corresponding to the requirement in English law of 'consideration' for an otherwise unilateral commitment to be legally enforceable.[22] It does more, however: the unqualified statement that 'nothing in the nature of a *quid pro quo* … is required' appears also to exclude anything corresponding to what French law refers to as 'la cause d'une obligation'. This concept to some extent parallels the English requirement of consideration: in a synallagmatic contract, the obligation of each party may be, and normally will be, the *cause* of the other; in the case of donations, wills, etc., the *cause* is the intention of conferring a benefit. A unilateral act of a contractual nature which is without a *cause* is invalid. Except in the special case of negotiable instruments, and similar commercial paper, an abstract promise, i.e., a promise unsupported by a *cause*, does not create an obligation.

It is not necessary to seek in comparative law the essence of a 'general principle' to appreciate that a confrontation of the International Court's conception of a unilateral act as productive of legal obligation with domestic law rules of legal commitment shows that the Court's conception is, to say the least, by no means a necessary deduction from the basic principle which underlies *pacta sunt servanda*. If English law has developed the doctrine of consideration, and French law the concept of the *cause*, it is because in (p. 14) neither system was it found appropriate that the mere assertion *in vacuo* of an intent to be bound should in all circumstances give rise to a binding obligation.[23]

In the terminology of the *Nuclear Tests* decision, 'good faith' alone does not, in municipal systems, necessarily require that an 'obligation assumed by unilateral declaration' should be legally enforceable.

(iv) An 'acceptance' of a unilateral declaration, if it were required for the enforceability of the obligation assumed, would impart a synallagmatic character into the legal relationship, and adulterate the purity of the concept of unilateral commitment.

(v) The question of form

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.[24]

In particular, the Court observes, 'Whether a statement is made orally or in writing makes no essential difference … '.[25] In view of the general tolerance of international law in the matter of forms,[26] this is in itself neither surprising nor controversial; but it prompts further reflection. The English rule whereby a promise made under seal is valid and binding without proof of consideration may appear no more than an historical anomaly, but its significance in modern law is surely that the need for the specific form (the seal) draws the attention of the maker of the promise to the fact that he is entering into a binding commitment. When the Court lays down that, at the international level,

> When it is the intention of the State making the [unilateral] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking …[27]

a gloss that should, it is suggested, be added is that it must have been the intention of the State concerned not merely to 'become bound according to its terms', but to become bound *unilaterally* according to its terms. A unilateral declaration which was intended to produce a response—in the *Nuclear Tests* cases, perhaps the discontinuance of the proceedings—may well entail an intention to become bound on the assumption, or indeed on the condition, that the response is forthcoming. This hypothesis is excluded from the Court's definition of the modalities of binding unilateral commitment.

The seal in English internal law further affords the necessary evidence of the nature of the intention of the author of the instrument; the question of proof is clearly more delicate, and more difficult, in the international sphere.

(vi) Ascertainment of intention

> … the intention [of being bound] is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.[28]

The meaning of the last sentence is presumably that unilateral statements by States should be interpreted restrictively in the sense that there should be a presumption against (p. 15) an intention to create a binding obligation, which would restrict the State's freedom of action. Whether there was such an intention is 'to be ascertained by interpretation of the act'; but the Court gives no guide as to how this might be done. In particular it is not clear

whether the intention must appear on the face of the act, or whether the circumstances of its making are to be taken into account. Normally in interpreting a legal act, one guide as to the intention of the party or parties to it will be the presumed reason why the act was performed—in terms of treaty-interpretation, the treaty's object and purpose. In the case of a unilateral declaration, as envisaged in the *Nuclear Tests* judgment, the exclusion of any need for a *quid pro quo*, or indeed any reaction, makes this approach difficult, to say the least. However, when examining the actual statements made by the French Government, the Court did in fact find that 'they must be held to constitute an engagement of the State having regard to their intention *and to the circumstances in which they were made*'.[29] Further the Court considered that it was 'entitled to presume … that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings'.[30]

It was perhaps not to be expected that the Court would spell out in any detail the requirements by reference to which a unilateral act might be interpreted as constituting a binding obligation. Some guidance might however be expected from the way in which the Court approached the specific instance before it: from what was it able to deduce that the declaration of cessation of atmospheric nuclear tests was intended to bind France internationally not to carry out any further such tests? This is perhaps the most obscure and least satisfactory aspect of the judgment.[31]

One of the relevant circumstances would appear to be the identity of the person making or issuing the statement on behalf of the State concerned. Thus the Court said:

> Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.[32]

The emphasis here seems to be less on the question of who was entitled to commit the French Government at the international level than on the essential credibility of statements made at this level.

Two paragraphs further on, the Court gives the essence of its thinking on the point:

> In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and (p. 16) their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained … that it 'has the conviction that its nuclear experiments have not violated any rule of

> international law', nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.[33]

The approach underlying this finding betrays, it is suggested, a shift between the two concepts of good faith discussed above. The Court took it as unquestionable that when the French Head of State announced the cessation of atmospheric tests, he was speaking in good faith, in the sense that he was correctly and honestly stating what was at the time the firm policy of the French Government. But was he at the same time guaranteeing that policy was immutable? The Court's reference to an 'arbitrary power of reconsideration' suggests that the reservation of such a power would be unusual and would have to be spelled out; but it is surely the irreversible unilateral commitment which is exceptional. In the sense first mentioned, the President's statement was fully entitled to 'confidence and trust'; and he was both entitled and bound to believe that it would be so received. But the more fundamental aspect of good faith, the principle whereby a unilateral commitment may rank as a '*servandum*' to be respected, requires the good faith intention to enter into such a commitment.

One element in the situation which was capable of importing this latter kind of good faith was one which the Court had ruled out of consideration, as a matter of principle, though its presence was detectable later in the reasoning. However '*erga omnes*' the statements were, they were obviously aimed at Australia and New Zealand in particular; and they were obviously related to the proceedings before the Court. If the parties had been in direct negotiation, the applicants would have been unlikely to agree to discontinue the proceedings in exchange for a cessation of atmospheric tests unless the respondent committed itself by way of legal obligation to make no more such tests.[34] Therefore, if the unilateral declaration was to achieve anything, it would have to be, and be intended to be, equally creative of obligations.

In conclusion, the *Nuclear Tests* judgments may be said to have contributed to the corpus of international law the development of the idea of a unilateral *servandum*, a (p. 17) legally enforceable obligation assumed purely unilaterally. The use of the concept of 'good faith' as a peg on which to hang this development is perhaps unfortunate, since what is operative here is a more fundamental principle, allied to the philosophical basis of *pacta sunt servanda*. Furthermore, in order to apply the principle of the unilateral obligation to the particularly recalcitrant facts of the case, the Court had to state the principle in a dangerously wide formulation—excluding any need for any acceptance of the unilateral undertaking, or indeed any sort of two-way relationship, or any *cause* in the sense of Continental law. In any future development of the law of the unilateral act as source of obligation, it may however be expected that some of the characteristics stated in *Nuclear Tests* will be tempered or modified.

(b) The WHO advisory opinion

In its advisory opinion on the *Interpretation of the Agreement of 25 March* 1951 *between the WHO and Egypt*, the Court had occasion to consider Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision of the ILC draft articles on treaties

between States and international organizations, or between international organizations; it commented:

> These provisions … specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.[35]

This *dictum* however prompts some doubts. The nature of the treaty postulated is such that a right of denunciation is to be implied: that is to say that if the treaty is *interpreted* in good faith, it will be recognized that a right of denunciation must have been intended. A right of instant denunciation without previous warning, and effective immediately, would not, save perhaps in exceptional cases, have been intended; the parties would have assumed a reasonable period of notice, and the Vienna Convention lays down, as a practical solution, 12 months. But the basis for this is not 'an obligation *to act in good faith*', it is *an interpretation in good faith* of the terms of the treaty 'in the light of its object and purpose'.[36]

Thus the *WHO* advisory opinion is not an authority for the proposition that good faith in itself can be a source of obligation.

(c) The Nicaragua v. United States of America case

In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court underlined the close relationship between a unilateral act, giving rise to binding obligations, and a *pactum*, both of which are therefore *servanda*. The United States had suggested that its policies and activities toward the Government of Nicaragua might be justified by alleged breaches by that Government of 'solemn commitments to the Nicaraguan people, the United States, and the Organization of American States'.[37] These commitments were supposed to have been undertaken through unilateral declarations in 1979 by the Nicaraguan Junta of National Reconstruction. After observing that (p. 18) the matters claimed to be covered by the commitment were questions of domestic policy, the Court observed that

> the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind.[38]

No specific reference was made, in the Court's discussion of the matter, to 'good faith' as the justifying principle whereby a unilateral statement could give rise to obligation; but the passage quoted shows that the Court was, as in the *Nuclear Tests* cases, concerned to enquire whether there was an intention to undertake a commitment which would render any subsequent reneging an act contrary to good faith. Similarly, in the question of a commitment to hold free elections, the Court concluded:

> But the Court cannot find an instrument with legal force, *whether unilateral or synallagmatic*, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections.[39]

It should not be overlooked that the United States was not in fact claiming[40] that there existed an obligation *erga omnes*; the specific beneficiaries of the obligation were, as noted above, stated to be the Nicaraguan people, the OAS and the United States. This differentiates the legal situation sharply from that contemplated in the *Nuclear Tests* cases where, it will be recalled, the Court avoided any suggestion that the French statements

were addressed to the applicant States by referring to a simple requirement that the undertaking should have been 'given publicly'.[41]

(d) The Frontier Dispute case

In the *Frontier Dispute* between Mali and Burkina Faso the question of the legal effects of a unilateral statement again arose, and in this case the statement was found to have been made *erga omnes*, or at least to have been 'not directed to any particular recipient'.[42] The Chamber took the opportunity to clarify the meaning of the *Nuclear Tests dicta*[43] on a number of points.

The unilateral statement relied on by Burkina Faso was a statement by the President of Mali whereby, in Burkina Faso's interpretation, Mali 'proclaimed itself already bound' by a report to be made by a Mediation Commission concerning the position of the frontier. The statement in question had been made at a press interview, and was to the effect that even if the commission decided that the frontier line passed through the Malian capital, the Government of Mali would comply with the decision.[44]

(p. 19) The Chamber based its rejection of the Burkina Faso contention essentially on the point that this was hardly a normal way of undertaking a legal commitment to accept a decision as binding, and it could therefore not be interpreted as having been intended as creating such a commitment.

The Chamber first indicated why each case had to be considered on its own facts:

> the Court … made clear in those cases that it is only 'when it is the intention of the State making the declaration that it should become bound according to its terms' that 'that intention confers on the declaration the character of a legal undertaking' … Thus it all depends on the intention of the State in question, and the Court emphasized that it is for the Court to 'form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation'.[45]

It then indicated why the French statements in the *Nuclear Tests* cases could, in the special circumstances of those cases, be regarded as a normal, indeed the only possible, way of creating a legal obligation:

> In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, in the *Nuclear Tests* cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government's unilateral declarations had 'conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests' *(ICJ Reports 1974*, p. 269, para. 51; p. 474, para. 53). In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful.[46]

After thus explaining the special nature of the *Nuclear Tests* cases, the Chamber continued:

> The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of

State on 11 April 1975 as a unilateral act with legal implications in regard to the present case.[47]

(e) The Border and Transborder Armed Actions case

The most recent attempt to build a legal obligation out of good faith and nothing more was made in the case of *Border and Transborder Armed Actions*, brought by Nicaragua against Honduras. Honduras had argued that under the provisions of the Pact of Bogotá, the jurisdictional title asserted by Nicaragua, and upheld by the Court, Nicaragua was debarred from having recourse to the Court so long as the 'pacific procedure' constituted, in the view of Honduras, by the Contadora Process, had not been concluded. The Court, without ruling on whether the Contadora Process was or was not a 'pacific procedure' as contemplated by the Pact of Bogotá, held that it had in any event been concluded by the time the case was brought to the Court.

(p. 20) The further argument of Honduras, and the Court's finding on it, was as follows:

> The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogota but also 'by elementary considerations of good faith' from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' *(Nuclear Tests, ICJ Reports 1974*, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist. In this case however the contention of Honduras is that, on the basis of successive acts by Nicaragua culminating in the Esquipulas Declaration of 25 May 1986 …, Nicaragua has entered into a 'commitment to the Contadora process'; it argues that by virtue of that Declaration, 'Nicaragua entered into a commitment with which its present unilateral Application to the Court is plainly incompatible'. The Court considers that whether or not the conduct of Nicaragua or the Esquipulas Declaration created any such commitment, the events of June/July 1986 constituted a 'conclusion' of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.[48]

The Esquipulas Declaration here referred to was one made by the Presidents of the five Central American countries indicating willingness to sign the Act of Contadora, and to comply with it. *Vis-à-vis* any other Government, this might be considered to be a unilateral act; but as between the five signatory Governments, it would seem, despite its form, to be essentially synallagmatic. Whether or not the Declaration is to be so regarded, the argument of Honduras was not so much that good faith had created an obligation on Nicaragua's part, as that the admitted commitment to the Contadora Process entered into by Nicaragua entailed an undertaking not to resort to judicial settlement procedures, such recourse being inconsistent with performance in good faith of the admitted obligation. Hence the question raised in this case—but not examined by the Court, for the reasons stated—was one of good faith execution of an obligation, good faith *stricto sensu*, to which we may now turn.

(2) Good faith *stricto sensu*

In its more traditional and established form, the principle of good faith is, as the Court pointed out in 1988, not creative of obligations, but rather governs the way in which existing obligations are carried out or existing rights exercised.

Fitzmaurice's own definition is as follows:

> The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily or capriciously.[49]

Good faith has of course a role to play in the interpretation of treaties and other instruments, as indicated in Article 31 of the Vienna Convention on the Law of Treaties; but consideration of this aspect of the matter will be reserved for a later article, in the context of treaty interpretation and treaty law.

A field in which recourse to the term 'good faith' has been frequent in the period under review has been in the context of the conduct of negotiations directed to settling a dispute or establishing the extent of the rights of the parties. The source of the obligation (p. 21) to negotiate, found in a number of recent decisions of the Court, will be examined elsewhere in these articles; for the present, attention will be addressed to what the Court has had to say concerning the way in which such negotiations are conducted.

(a) Negotiations and good faith

In the first of the series of modern cases in which the Court has had to grapple with problems of maritime delimitation, the *North Sea Continental Shelf* cases of 1969, it discerned 'certain basic legal notions which … have from the beginning reflected the *opinio juris* in the matter of delimitation' of the continental shelf. These were:

> that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.[50]

The court continued with an explanatory sentence which began with the following words:

> On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves …[51]

The sentence, which is of phenomenal length, contained *(inter alia)* the following prescription:

> (a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;
>
> (b) …[52]

Taking this passage as a whole, it appears that the prescription last quoted is in fact a definition—though probably not a limitative one—of what the Court considered to be the content of an obligation to negotiate in good faith.[53] Such an obligation had in fact been defined in not dissimilar terms in 1957 in *the Lake Lanoux* arbitration.[54]

effect doing was relying on that declaration in order to assert a right to sue the United States.

The Court did not accept the United States contention; it based its reasoning essentially on a finding that Nicaragua's situation had been 'wholly unique'. It referred to Nicaragua's absence of protest 'against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States':

> Hence, if the Court were to object that Nicaragua ought to have made a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of [its] sponsors) regarded [it] as more reliable than [it] really [was].[265]

The United States argument brings out the fact that the principle now under discussion can be given two interpretations: constitutional or volitional. Where there is a recognized means of achieving a particular end, it may be said that no other method is permitted by law; or it may be said that it will be presumed that States who wish to achieve that end will use the means provided, and there is a presumption against the conclusion that a State which acted in some other way was intending nevertheless to achieve the same end. The Court's finding in the *North Sea Continental Shelf* cases appears to be based at least primarily on the second interpretation, though the language used suggests that both ideas were in the Court's mind. In particular, the *reductio ad absurdum* mentioned above seems to be based on the idea that, no matter what the intentions of the State concerned had been, it would not be *allowed* to claim rights by the back door, as it were.

The United States argument in the *Nicaragua* case leans much more heavily on the constitutional conception, that what Nicaragua claimed to do was forbidden, or at least not permitted, by the Statute. The Court, however, answered it, in effect, on the consent basis, by saying that what would otherwise have been odd behaviour, from which consent or intention to be bound could not properly be deduced, was not so odd in view of the unique situation in which Nicaragua found itself.

Footnotes:

* The subject of this section is re-examined, in the light of later case-law, at p.1111 below.

3 See Fitzmaurice, this *Year Book*, 27 (1950), p. 12; 30 (1953), p. 52; 35 (1959), pp. 206–7; *Collected Edition*, I, pp. 12, 183; II, pp. 609–10,

4 *Nuclear Tests, ICJ Reports*, 1973, p. 268, para. 46.

5 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), ICJ Reports*, 1988, p. 105, para. 94.

6 There was strong dissent on this and other issues, but for purposes of discussion it may be assumed that the Court was correct in this view.

7 Whether, even so, the Court was entitled to put an end to the proceedings *ex officio* is a point to be discussed in a later article.

8 *ICJ Reports*, 1974, p. 267, paras. 43–4.

9 *ICJ Reports*, 1974, p. 268, para. 46.

10 See Zoller, *La Bonne Foi en droit international public*, pp. 340 ff.; Macdonald and Hough, 'The Nuclear Tests Case Revisited', *German Yearbook of International Law*, 20 (1977), p.

337; Rubin, 'The International Legal Effects of Unilateral Declarations', *American Journal of International Law*, 71 (1977), p. 1.

11 This *Year Book*, 35 (1959), pp. 195–6; *Collected Edition*, II, p. 597.

12 *ICJ Reports*, 1974, p. 267, para. 43.

13 See Rubin, loc. cit. above (n. 10), at p. 24.

14 Zoller, op. cit. above (n. 10), pp. 341–3, draws attention to the Court's references to 'trust and confidence' in this context, and suggests that the 'good faith' involved may be that of the addressee, which must not be abused. A similar view is expressed by Carbone, 'Promise in International Law: a Confirmation of its Binding Force', *Italian Yearbook of International Law, 1* (1975), p. 169. In view of the emphasis on the intentions of the maker of the declaration, however, it seems that these references are intended only to buttress the moral or ethical attractiveness of the principle propounded.

15 *Legal Status of Eastern Greenland, PCIJ*, Series A/B, No. 53, p. 53.

16 *ICJ Reports*, 1974, p. 269, para. 50.

17 A curious fact is that 'publicly' in the earlier paragraph is translated by 'publiquement' in the French text of the judgment, but here the expression used is 'en dehors de la Cour et *erga omnes*'. The idea seems to be not so much the publicity given to the statements as that they were made outside the framework nf the proceedings before the Court: cf. *Polish Upper Silesia, PCIJ*, Series A No 7 p 12; *Free Zones, PCIJ*, Series A/B, No. 46, p. 170.

18 *ICJ Reports*, 1970, p. 32, para. 33. To be discussed below, pp. 93–4.

19 This reading of the *Nuclear Tests* judgments seems to be adopted by Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law*, 77 (1983), p. 432.

20 *ICJ Reports*, 1970, p. 32, para. 34.

21 *ICJ Reports*, 1974, p. 267, para. 43.

22 This may be regarded as already established as far as treaties are concerned; 'it appears that the doctrine of consideration finds no room in international law': Mann, 'Reflections on a Commercial Law of Nations', this *Year Book*, 33 (1957), p. 30; cf. Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 177, 178.

23 Carbonnier *(Droit civil*, vol. 2 (1964)) quotes the Italian writer Gorla *(Il contratto* (1955), vol. 1, section 4 ff., section 22) as advancing the view that the essential purpose of the *cause* is to limit the principle that consent alone can give rise to obligation.

24 *ICJ Reports*, 1974, p. 267, para. 45.

25 Ibid.

26 Cf. the well-known *dictum* in the *Mavrommatis* case, *PCIJ*, Series A, No. 2, p. 34.

27 *ICJ Reports*, 1974, p. 267, para. 43.

28 Ibid., para. 44.

29 *ICJ Reports*, 1974, p. 269, para. 49 (emphasis added).

30 Ibid., para. 50.

31 Judge de Castro dissented on this point; he interpreted the statements made as showing only 'that the French Government has made up its mind to cease atmospheric nuclear testing from now on and has informed the public of its intention to do so. But I do not feel that it is possible to go farther. I see no indication warranting a presumption that France

wished to bring into being an international obligation possessing the same binding force as a treaty … ' (*ICJ Reports*, 1974, P- 375).

32 *ICJ Reports*, 1974, p. 269, para. 49.

33 *ICJ Reports*, 1974, pp. 269–70, para. 51.

34 Cf. the very realistic discussion of the Belgian/Spanish negotiations for a discontinuance in the *Barcelona Traction* case, *ICJ Reports*, 1964, pp. 22–4. It should not be overlooked that if Australia and New Zealand had discontinued proceedings, they could not have brought a fresh case, since the jurisdictional titles had been withdrawn in the meantime—a point that throws some doubt on the Court's finding that the unilaterally created obligation to cease tests gave the applicants full satisfaction.

35 *ICJReports*, 1980, p. 95, para. 47.

36 Cf. Waldock in *Yearbook of the ILC*, 1963, vol. 2, p. 67.

37 *ICJ Reports*, 1986, p. 130, para. 257.

38 Ibid., p. 131, para. 259.

39 Ibid., p. 132, para. 261 (emphasis added).

40 The Court also stated, curiously enough *after* examining the US contentions on the legal merits, that 'these justifications, advanced solely in a political context …, were not advanced as legal arguments' (ibid., p. 134, para. 266).

41 In respect of alleged human rights violations, the question of obligations *erga omnes* did arise in the case; but these obligations were not alleged to rest on good faith observance of unilateral acts, and are therefore dealt with elsewhere in this article (pp. 99–102, below).

42 *ICJ Reports*, 1986, p. 574, para. 39. The authentic French text is perhaps clearer: 'une déclaration unilatérale privée de tout destinataire précis'.

43 The Chamber included two Members of the Court who had taken part in, and voted in favour of, the *Nuclear Tests* decisions.

44 *ICJ Reports*, 1986, p. 571, para. 36.

45 Ibid., 1986, p. 573, para. 39.

46 Ibid., p. 574, para. 40.

47 Ibid., p. 574, para. 40.

48 *ICJ Reports*, 1988, pp. 105–6, para. 94.

49 This *Year Book*, 27 (1950), pp. 12–13; *Collected Edition*, I, pp. 12–13.

50 *ICJ Reports*, 1969, p. 46, para. 85.

51 Ibid., pp. 46–7.

52 Ibid., p. 47, para. 85.

53 In this sense, Zoller, op. cit. above (n. 10), pp. 62–3.

54 24 ILR 101.

55 This approach was criticized by some Members of the Court, and its justification will be examined in a later article.

56 *ICJ Reports*, 1974, p. 31, para. 73.

57 Ibid., p. 33, para. 78.

58 Ibid.

Annex 10

Paolo Palchetti, *Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function*, RIVISTA DI DIRITTO INTERNAZIONALE (2017)

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Paolo Palchetti

RESPONSIBILITY FOR BREACH OF PROVISIONAL MEASURES OF THE ICJ: BETWEEN PROTECTION OF THE RIGHTS OF THE PARTIES AND RESPECT FOR THE JUDICIAL FUNCTION

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RESPONSIBILITY FOR BREACH OF PROVISIONAL MEASURES OF THE ICJ: BETWEEN PROTECTION OF THE RIGHTS OF THE PARTIES AND RESPECT FOR THE JUDICIAL FUNCTION

1. When a State party to a dispute before the International Court of Justice breaches provisional measures, its conduct amounts to an internationally wrongful act. The consequences that arise by virtue of this wrongful conduct involve in the first place the relations between the State party responsible for the breach and the other State party — or States party — to the case. As provisional measures are taken "to preserve the respective rights of either party" (1), a breach of such measures by one party may be regarded as affecting the rights of the other party (2). The injured party would therefore be entitled to invoke responsibility for such conduct.

However, it seems reductive to regard lack of compliance with provisional measures as a matter exclusively affecting the rights and interests of the contending parties. The Court itself has an interest in ensuring respect for provisional measures. In order to justify its conclusion that provisional measures have binding force, the Court noted that "[t]he context in which Article 41 has to be seen within the Statute is to prevent the Court *from being hampered in the exercise of its functions* because the respective rights of the parties to a dispute before

(1) According to Article 41 of the Statute, "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

(2) As suggested by GUGGENHEIM, *Les mesures conservatoires dans la procédure arbitrale et judiciaire*, *Recueil des cours*, vol. 40 (1932-II), p. 115, a party has a "droit d'exiger l'exécution des mesures conservatoires".

the Court are not preserved" (3). Failure to comply with obligations laid down in provisional measures not only offends against the authority of the Court; it undermines the effective administration of justice in a particular case. To borrow from the Court's language in *United States Diplomatic and Consular Staff in Tehran*, such conduct "is of a kind calculated to undermine respect for the judicial process in international relations" (4).

It might be argued that in the judicial process before the Court the "institutional dimension" can hardly be disentangled from the "interstate dimension" and that the fact that the injured party is offered the possibility of invoking the responsibility of the other party is in itself an adequate and sufficient means for vindicating the Court's institutional interest in ensuring respect for the judicial process (5). No doubt, there is merit in this view. The application of the general regime of responsibility to the relations between the parties may be regarded as both a sanction and a deterrent. In this respect, by contributing to the effectiveness of the Court's power to indicate provisional measures, it performs a wider function than that of simply restoring the legal relations between the parties. Yet, it may be asked whether, in addition to the interstate dynamics based on the general regime of responsibility, there is also scope for a more proactive role of the Court itself in responding to breaches of provisional measures. Two issues appear to be particularly significant in this respect. The first concerns the Court's power to determine lack of compliance with provisional measures irrespective of the claims of the parties. While the general rules on State responsibility leave to the injured party the right to invoke responsibility, the question is whether the Court may determine by its own initiative whether provisional measures have been complied with, possibly also in the absence of jurisdiction on the merits of the dispute. The other issue relates to the consequences of a breach of provisional measures. In particular, one may ask whether the legal consequences

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(3) *I.C.J. Reports*, 2001, p. 503, para. 102 (italics added).

(4) *I.C.J. Reports*, 1980, p. 43, para. 93. Interestingly, in censuring the United States' conduct, the Court also noted that such conduct amounted to a breach of the provisional measures indicated in the order of 15 December 1979.

(5) On this dual dimension inherent in the regime of responsibility for breach of provisional measures, see Mendelson, *State Responsibility for Breach of Interim Protection Orders of the International Court of Justice*, in: *Issues of State Responsibility before International Judicial Institutions* (Fitzmaurice and Sarooshi, eds), Oxford, 2004, p. 42, and Marotti, *"Plausibilità" dei diritti e autonomia del regime di responsabilità nella recente giurisprudenza della Corte internazionale di giustizia in tema di misure cautelari*, *Rivista*, vol. 97 (2014), pp. 777-778.

provided under the general rules on State responsibility exhaust the range of legal consequences available against the responsible party.

It is on these two issues — the Court's power to determine non-compliance with provisional measures and the legal consequences stemming from non-compliance — that the next paragraphs will focus. By taking stock of the Court's case law after the *LaGrand* judgment, the purpose is, more comprehensively, to identify the main features of the legal regime of responsibility for breaches of provisional measures.

2. The question of non-compliance with provisional measures is generally brought to the Court's attention at the request of one of the parties. In particular, in all cases since the *LaGrand* judgment in which the Court has addressed non-compliance, this issue was raised by a party through a specific claim included in its submissions. This practice should not be taken as implying that an independent judicial action would not be admissible. The fact that the parties have not included the issue of non-compliance in their submissions would not prevent the Court from addressing it on its own motion. While the jurisdiction of the Court on the merits of the dispute is limited by the *ne ultra petita* rule, this rule does not apply in relation to provisional measures (6). In this area, considerations based on the need to protect the effectiveness and integrity of the judicial function plead in favour of a greater role of the Court. Significantly, the power of the Court to indicate provisional measures under Article 41 of the Statute is not dependent upon a request from one of the parties. Moreover, Article 75, para. 1, of the Rules provides that the Court "may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures"; Article 75, para. 2, adds that "the Court may indicate measures that are in whole or in part other than those requested". It is submitted that the same considerations of effectiveness and integrity of the judicial function come into play in relation to the Court's power to determine a party's breach of provisional measures (7). This the more so if one considers that provisional

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(6) As observed by D'Argent, *Juge ou policier: les mesures conservatoires dans l'affaire du* Temple de Préah Vihear, *Annuaire français de droit int.*, vol. 57 (2011), p. 161, "ainsi que le rappelle l'article 75 du règlement, le contentieux de l'urgence n'est pas régi par le principe dispositif qui domine le contentieux sur le fond en cas de différend au sens de l'article 36 du statut". See also Kolb, *General Principles of Procedural Law*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 899.

(7) This view has been defended by some Judges. According to Judge Cançado Trindade "contemporary international tribunals have, in my understanding, an inher-

measures are indicated while the case is pending before the Court: it seems quite reasonable that the Court, when it is seized of a case, is also empowered to determine whether the parties are complying with binding orders indicating provisional measures (8).

So far, the Court has not taken a position on the possibility of raising *proprio motu* the issue of non-compliance with provisional measures. In its judgment in *LaGrand*, the Court emphasized the importance of a party's claim for indemnification as a condition for the Court to rule upon such issue. In particular, it refrained from considering whether Germany had the right to be indemnified by noting that, while Germany had asked the Court to ascertain the breach of provisional measures, it had not included a claim for indemnification in its submissions (9). The Court's refusal to address the issue of indemnification can hardly be taken as a denial of its power to determine *proprio motu* a party's lack of compliance with provisional measures. A distinction is to be drawn between the Court's power to determine a party's right to obtain redress and its power to determine non-compliance with provisional measures. It is for the party seeking redress to include a claim for reparation in its submissions (10). In the

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ent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences". See his separate opinion attached to the Court's judgment in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, para. 36. According to Judge *ad hoc* Verhoeven, since non-compliance with provisional measures "is in effect a challenge to the authority of the Court", it is "understandable that the Court should condemn, even *proprio motu* where appropriate, violations of ordered measures evidenced by acts within its cognizance". *I.C.J. Reports*, 2005, p. 358. See also Kolb, *The International Court of Justice*, 2012, p. 649. For a contrary view, see Rosenne, *The Law and Practice of the International Court, 1920-2005*, The Hague, p. 206 ("non-compliance with a decision indicating provisional measures of protection, although itself an internationally wrongful act occasioning the international responsibility of the recalcitrant State, does not enable the Court to impose sanctions *proprio motu*").

(8) It might be objected that, since Article 76 of the Rules provides that the Court may revoke or modify provisional measures "at the request of a party", the same restriction would apply to the Court's power to determine non-compliance with provisional measures. However, it seems excessive to infer from this provision a more general limitation. Moreover, as noted by Gaja, *Requesting the ICJ to Revoke or Modify Provisional Measures*, *The Law and Practice of International Courts and Tribunals*, vol. 14 (2015), pp. 2-3, despite the letter of Article 76, "the Court must be considered to be entitled also to modify or revoke on its own motion the measures it has indicated".

(9) *I.C.J. Reports*, 2001, p. 508, para. 116.

(10) With regard to the possibility that a request of indemnification is submitted by the respondent party, the Court has clarified that "the question of compliance by both Parties with the provisional measures indicated in this case may be considered by the Court in the principal proceedings, irrespective of whether or not the respondent State raised that issue by way of a counter-claim". See the order of 18 April 2013 in

absence of such claim, the *ne ultra petita* rule seems to prevent the Court from ruling upon the party's right to be indemnified (11). By contrast, such rule does not limit the Court's competence to determine *proprio motu* a party's non-compliance with provisional measures.

Admittedly, when confronted with the possibility of raising the issue of non-compliance *proprio motu*, the Court refrained from making such step. In *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, while provisional measures had been addressed to both parties, only the DRC asked the Court to ascertain that Uganda had breached such measures. In its judgment the Court, after finding that Uganda had not complied with such measures, took care to stress that its finding on Uganda's non-compliance was "without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court" (12). This "without prejudice" statement is rather unfortunate. Instead of alluding to the possibility that the DRC itself could have breached the provisional measures, the Court should have addressed directly such issue in its judgment (13).

One of difficulties that the Court may face in raising *proprio motu* the question of non-compliance is that of proving that a breach had occurred without the assistance of the parties. The assessment of a party's compliance may require an in-depth investigation of complex factual situations. In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court did not uphold Cameroon's claim that Nigeria had breached provisional measures, finding that Cameroon had not put forward evidence demonstrating Nigeria's lack of compliance. The Court placed particular emphasis on the parties' duties in this respect; it observed that "in the present case it is for Cameroon to show that Nigeria acted in violation of the provisional measures indicated in the Order of 15 March 1996" (14). This statement must be read in context.

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the joined cases *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, *I.C.J. Reports*, 2013, p. 215, para. 40. On the possible implications of this statement, see Marotti, *op. cit.*, p. 785.

(11) See Oellers Frahm, *Article 41*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 1068.

(12) *I.C.J. Reports*, 2005, p. 259, para. 265.

(13) In his dissenting opinion, Judge *ad hoc* Kateka maintained that the DRC had committed grave violations of human rights and international humanitarian law amounting to a breach of the provisional measures indicated by the Court. *I.C.J. Reports*, 2005, p. 379, para. 61.

(14) *I.C.J. Reports*, 2002, p. 453, para. 321.

It is clear that the parties bear the burden of proving their claims. At the same time, however, the Court is free to rely on facts within its own knowledge in order to rule upon the question of compliance with provisional measures (15). For the determination of the relevant facts, the Court may also ask for the parties' assistance, for instance by addressing questions from the bench (16).

Should the Court find that a party failed to comply with provisional measures, the problem may be raised whether such finding is to be reported in the operative part of the judgment or in its reasons. The practice of the Court after *LaGrand* has been to include such finding in the operative part (17). As we have seen, this practice refers to cases where the Court was called upon to give an answer to a specific claim included in the submission of one of the parties. There is no reason why the same solution should not be followed also in cases where the Court raises the issue of compliance with provisional measures on its own motion. The fact that the issue is not raised by the parties in their submission should not preclude this possibility, as the Court enjoys a certain discretion in formulating the operative part (18). By recording a party's non-compliance in the operative part, the Court would put greater emphasis on its finding; it would also allow individual judges to express their views on this issue (19).

3. As the Court has repeatedly stated, the indication of provisional measures is not conditional upon the prior determination of the Court's jurisdiction over the case. It is sufficient that the requesting

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(15) In *Armed Activities in the Territory of the Congo (DRC v. Uganda)* the Court noted that "the DRC put forward no specific evidence demonstrating" a breach of the provisional measures. However, the Court, by relying on other findings made in the judgment, was able to conclude that Uganda had not complied with its obligations under the provisional measures. *I.C.J. Reports*, 2005, pp. 258-259, para. 264.

(16) On the importance of this practice in cases where the Court raises issues *ex officio*, see FORLATI, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?*, Heidelberg, 2014, p. 162.

(17) In the case law prior to *LaGrand* the Court had sometimes included a reference to a party's non-compliance in the reasons. For an overview, see STEIN, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, *American Journal of Int. Law*, vol. 76 (1982), p. 528.

(18) See BROWN, *Article 59*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 1431.

(19) For the implications of addressing a certain finding in the operative part rather than in the reasons see the declaration of Judge Gaja, annexed to the Court's order of 7 December 2016 in *Immunities and criminal proceedings (Equatorial Guinea* v. *France)*.

party shows the existence of a *prima facie* jurisdiction. If, after having indicated provisional measures, the Court finds that it has no jurisdiction, the question arises as to whether the Court would in any case be empowered to decide upon a party's lack of compliance with such measures.

The Court has not yet taken a clear view on this question. In its judgment in *LaGrand* it observed that "[w]here the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with" (20). This appears to suggest that the basis of the Court's jurisdiction to determine non-compliance with provisional measures is the same basis upon which the Court relies for exercising its jurisdiction over the merits of the dispute. If this is the case, it would follow that, if the Court does not have jurisdiction to adjudicate a case, it would also lack jurisdiction to decide upon a party's non-compliance. In a subsequent judgment, however, the Court seems to have taken a different view. In *Request for Interpretation of the* Avena *Judgment*, although on the principal issue it found that there was no dispute between the parties, it determined that the United States had breached its obligations under the provisional measures. By a unanimous vote, it included its finding on this issue in the operative part of its judgment. According to the Court, "[t]he Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures", and "[t]hat is still so even when the Court decides, upon examination of the Request for interpretation, [...] not to exercise its jurisdiction to proceed under Article 60" (21). Since Article 60 of the Statute provides jurisdiction only on disputes over the interpretation of a judgment, it is noteworthy that the Court, while deciding not to exercise its jurisdiction to interpret the *Avena* judgment, relied upon its incidental jurisdiction for ruling upon the United States' non-compliance with provisional measures. By this decision the Court appears to recognize that its incidental jurisdiction, even if based only on a *prima facie* assessment of its jurisdiction on the merits of the dispute, is sufficient to justify its power to determine non-compliance with provisional measures (22).

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(20) *I.C.J. Reports*, 2001, p. 484, para. 45.

(21) *I.C.J. Reports*, 2008, p. 19, para. 51.

(22) According to THIRLWAY, *The International Court of Justice 1989-2009: At the Heart of the Dispute Settlement System?*, *Netherlands Int. Law Review*, vol. 57 (2010),

Following the Court's approach in *Request for Interpretation of the* Avena *Judgment*, it is submitted that the Court's jurisdiction to make findings about breaches of provisional measures is to be regarded as being implicit in its incidental jurisdiction to indicate such measures under Article 41 of the Statute (23). This view relies on the distinction between jurisdiction in relation to provisional measures, which is based on Article 41 of the Statute, and jurisdiction over the merits of the dispute, which is based on the consent of the parties. Article 41 would not only justify the Court's power to indicate binding provisional measures; it would also provide a basis for the Court's power to determine non-compliance with such measures. As provisional measures produce effects until the principal judicial proceedings are terminated, the Court would be empowered to include a finding of non-compliance in the judgment establishing its lack of jurisdiction or the non-admissibility of the claim. It is only with that judgment that provisional measures cease to be operative (24).

While this approach is based on a wide interpretation of the Court's power under Article 41, there are sound reasons supporting it. The breach of a binding order of the Court causes damage to the authority of the Court irrespective of whether the Court could later find that it has no jurisdiction over the case. If the Court were denied the possibility of censoring such conduct by including a finding of non-compliance in its judgment, there would be no response against the non-complying State. It would be tantamount to considering that provisional measures cease to produce effect retroactively, from the moment they were indicated, and, as a consequence, that no wrongful act had been committed. Such a solution risks to undermine the effec-

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p. 385, the indication that one should draw from this precedent is that provisional measures "must be complied with, at least during the currency of the proceedings, even if the claim on the merits turns out to be unsubstantiated, and even if it proves that the Court has in fact no jurisdiction over the merits". This view is shared by LEE-IWAMOTO, *The Repercussions of the* LaGrand *Judgment: Recent ICJ Jurisprudence on Provisional Measures*, *Japanese Yearbook of Int. Law*, vol. 55 (2012), p. 258, and by TRANCHANT, *L'arrêt rendu par la Cour internationale de Justice sur la Demande en interprétation de l'arrêt* Avena *(Mexique c. États-Unis d'Amérique)*, *Annuaire français de droit int.*, vol. 55 (2009), p. 216.

(23) For this view, see MENDELSON, *op. cit.*, p. 45, and TRANCHANT, *op. cit.*, p. 217. *Contra* THIRLWAY, *The Law and Procedure of the International Court of Justice 1960-1989 (Part Twelve)*, *British Yearbook of Int. Law*, vol. 72 (2001), p. 124.

(24) See *Anglo-Iranian Oil Company Case*, *I.C.J. Reports*, 1952, p. 114.

tiveness of provisional measures pending the Court's judgment on jurisdiction and admissibility (25).

While the Court's jurisdiction to make findings of non-compliance with provisional measures may be based on Article 41, it is more doubtful whether the power granted by Article 41 also provides jurisdiction to rule over claims for reparation for non-compliance put forward by a party (26). When a party invokes the responsibility of the other party for breaches of provisional measures, its claims are an integral part of the dispute that the Court is called upon to adjudicate. Lack of jurisdiction over the merits of the dispute seems to prevent the Court from ruling upon these claims. This limitation would also alleviate the concern about the risk of undermining the principle of consensual jurisdiction. This principle prevents the Court from ruling upon a dispute, and assessing the respective claims of the parties, in the absence of specific consent. It does not prevent the Court from assessing the parties' conduct in the judicial process.

4. The primary consequence of a breach of provisional measures is the possibility for the injured party to claim the responsibility of the non-complying party. Such responsibility entails in the first place that the injured party may ask the Court to ascertain its right to obtain reparation for the injury suffered. It is more doubtful whether it also entails the entitlement to take countermeasures against the responsible party.

Resort to countermeasures appears to be scarcely compatible with the principle — frequently reasserted by the Court also through the indication of provisional measures — according to which "the parties to a case must [...] not allow any step of any kind to be taken which might aggravate or extend the dispute" (27). Moreover, Article 52,

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(25) On this risk, see LEONHARDSEN, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when non-Compliance Is to Be Expected*, *Journal of Int. Dispute Settlement*, vol. 5 (2014), p. 322.

(26) See also D'ARGENT, *op. cit.*, p. 160, note 74, and TRANCHANT, *op. cit.*, p. 217.

(27) *Electricity Company of Sofia and Bulgaria*, Series A/B, No. 79, p. 199. According to OELLERS FRAHM, *op. cit.*, p. 1068, it is "questionable whether States may take reprisals although admissible under general international law, because this may contravene the duties of a party *pendente lite*". See also FROWEIN, *Provisional Measures by the International Court of Justice - The* LaGrand *Case*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 62 (2002), p. 60. For an examination of the Court's practice with regard to the indication of non-aggravation measures, see PALCHETTI, *The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute*, *Leiden Journal of Int. Law*, 2008, pp. 623-642.

paragraph 3, of the Articles on State responsibility provides that countermeasures may not be taken if "the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties". It is to be noted, however, that the Articles do not rule out entirely the possibility of resorting to countermeasure in this kind of situation. Article 52, paragraph 4, specifies that "[p]aragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith". In its commentary, the International Law Commission refers to "non-compliance with a provisional measures order" as a ground justifying the non-application of this limitation to the taking of countermeasures (28). If one follows this view, it cannot be excluded that, under certain circumstances, the injured party is entitled to resort to countermeasures (29). The real issue then becomes that of determining the conditions under which resort to countermeasures may be regarded as being justified. In this respect, two remarks are in order. First, failure to comply with provisional measures does not, as such, give rise to the entitlement to take countermeasures; what matters is the lack of good faith of a party in complying with the dispute settlement procedure, an element which must be assessed by taking into account more comprehensively the conduct of the responsible party during the proceedings. Moreover, the determination of the breach of provisional measures cannot be left entirely to the subjective assessment of a party; before reacting unilaterally, the injured party should at least bring the issue of non-compliance to the Court, for instance through a new request for provisional measures.

As regards reparation for the injury caused by the breach of provisional measures, the only form of reparation so far granted is a declaration of non-compliance included in the operative part of the judgment. The Court treated this declaration as a form of satisfaction for the non-material injury suffered on this account (30). When the

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(28) *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 137.

(29) STEIN, *op. cit.*, p. 517, argued that "a prohibition on countermeasures even in the face of disregard of an interim measures order would impose so grossly unfair a burden on an applicant state that resort to judicial remedies would itself be discouraged".

(30) See, for instance, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports*, 2007, p. 236, para. 469: "The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures". See also the judgment in the joined cases *Certain activities carried out by*

breach of provisional measures causes material harm, the injured party has the right to restitution or compensation (31). In a few cases, requests for compensation had also been advanced. While in principle recognizing the possibility of awarding such form of reparation, the Court, for different reasons, invariably rejected these requests.

In cases of material harm, it may at times be difficult to separate the damages ensuing from the breach of provisional measures and those ensuing from the breach of the substantive obligations on the merits. This is so, in particular, when, as it frequently happens (32), the obligations under the provisional measures have substantially the same content as the obligations to be examined in the judgment on the merits. In its judgment in *Bosnian genocide*, the Court was confronted with a situation of this kind. In addressing a request for compensation relating to Serbia's breach of provisional measures, it approached the matter by considering that, "for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention" (33). This approach appears to be justified. In this situation, if the injured party receives compensation for the material harm caused by the breach of the substantive obligation, it would be inappropriate to award compensation also for the breach of provisional measures. The injured party would otherwise obtain double recovery.

It has been noted that this "merging" approach reduces the significance to be attached to the binding effect of provisional measures: if damages are awarded only in respect to the breach of the substantive obligations considered on the merits, it would make little

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Nicaragua in the border area and *Construction of a road in Costa Rica along the San Juan river*, para. 139: "The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration of the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures".

(31) As noted by Marotti, *op. cit.*, p. 778, the possibility of awarding restitution appears highly unlikely.

(32) For an overview, see Eisemann, *Quelques observations sur les mesures conservatoires indiquées par la Cour de La Haye*, in: *International Courts and the Development of International Law. Essays in Honour of Tullio Treves* (Boschiero *et al.*, eds), The Hague, 2013, p. 121 ss.

(33) *I.C.J. Reports*, 2007, p. 236, para. 469. The Court also observed that "the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention". *Ibid.*, p. 231, para. 458.

difference that provisional measures had been disregarded (34). Admittedly, if one attaches importance exclusively to the possibility of obtaining compensation, the consequences flowing from the breach of provisional measures appear to be limited in this kind of cases. However, there may be other consequences. In particular, it cannot be excluded that such breach may indirectly have an impact on the amount of compensation to be awarded for the breach of the substantive obligations on the merit. A breach of provisional measures may reveal wilful intent or gross negligence, which the Court may take into account when assessing the extent of the reparation to be due for the breach of the substantive obligations (35). Indeed, as observed by the International Law Commission, the quantification of the amount of compensation depends, *inter alia*, on "an evaluation of the respective behaviour of the parties" (36). The Court itself appears to take into account the conduct of the parties during the judicial proceedings for the purposes of assessing the amount of compensation. In its judgement in *LaGrand*, when considering the consequences stemming from the United States' breach of the provisional measures, the Court recognized that "the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings", finding that it would have taken this factor into consideration "had Germany's submission included a claim for indemnification" (37). Apart from its impact on the amount of compensation to be awarded, non-compliance with provisional measures may also be relevant for assessing whether other consequences are appropriate, such as, for instance, the offering of assurances and guarantees of non-repetition (38).

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(34) MENDELSON, *op. cit.*, p. 52; LEE-IWAMOTO, *op. cit.*, p. 256.

(35) This possible implication of the breach of provisional measures was highlighted by BARILE, *Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti alla Corte internazionale di giustizia*, *Comunicazioni e studi*, vol. 4 (1952), p. 154, and by VILLANI, *In tema di indicazione di misure cautelari da parte della Corte internazionale di giustizia*, *Rivista*, vol. 57 (1974), pp. 676-677. Similarly, LAUTERPACHT, *The Development of International Law by the International Court*, Cambridge, 1957, p. 254, observed that "a party disregarding an Order indicating provisional measures acts at its peril and that the Order must be regarded at least as a warning estopping a party from denying knowledge of any probable consequences of its action".

(36) *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 100.

(37) *I.C.J. Reports*, 2001, p. 508, para. 116.

(38) See the judgment in the joined cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan river*, para. 141.

In case of non-compliance with provisional measures, the non-complying party remains under a duty to provide reparation even if it ultimately prevails on the merits. However, it may be expected that the Court will take this circumstance into account when considering the form and extent of reparation. This the more so when the rights that the provisional measures aimed at protecting were later discovered to be non-existent. When the non-complying party is awarded compensation for the injury caused by the breach of the substantive obligations on the merits, the Court may consider to "merge" the opposing claims of the parties. In particular, it may assess whether, by not complying with the provisional measures, the party may have materially contributed to the damage it suffered (39).

5. The party which breaches provisional measures might face adverse consequences outside the sphere of State responsibility. In particular, being the guardian of its judicial integrity, the Court itself may have an interest in sanctioning the conduct of the non-complying party, irrespective of the claim for reparation of the injured party.

The Statute offers little in terms of measures available to the Court to protect the judicial process against the harmful conduct of the contending States. In the absence of an explicit basis in the Statute, the possibility of levying penalties or awarding punitive damages is to be ruled out (40). It has been suggested that in case of grave breaches of provisional measures by the applicant State, withholding the judgment could be an appropriate remedy (41). In principle, a response of this kind would not be precluded to the Court. Particularly when the breach of provisional measures seriously undermines the orderly administration of justice in the case, the Court might find that judicial propriety requires it to refrain from exercising its jurisdiction over the claims of the applicant. As it observed in its judgment in *Northern Cameroons*, " [i]f the Court is satisfied, whatever the nature of the relief

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(39) Article 39 of the Articles on State responsibility provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or of any person or entity in relation to whom reparation is sought".

(40) See MENDELSON, *op. cit.*, p. 42. However, according to SCHACHTER, *International law in theory and practice: general course in public international law*, *Recueil des cours*, vol. 178 (1982), p. 223, the Court has the authority to levy damages against the non-complying State. See also STEIN, *op. cit.*, p. 527. According to KOLB, *op. cit.*, p. 649, "[f]rom the legal point of view, it [the Court] would even have the right to require reparation to be made to the Court itself".

(41) SCHACHTER, *op. cit.*, p. 223.

claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so" (42). However, while it cannot be excluded that the breach of provisional measures may give rise to an issue of propriety, this could be regarded as a possible remedy only in very exceptional circumstances. In principle, the need to sanction the non-complying party should not divert the Court from its primary function, namely to decide the dispute in accordance with international law. Moreover, even if admissible, this form of sanction appears of little practical utility, if one considers that normally it is the respondent party who breaches provisional measures: in this case, it would make no sense for the Court not to exercise its jurisdiction as this would only affect the applicant party.

As it has already been mentioned, in its case law after *LaGrand* the ordinary remedy for breaches of provisional measures has taken the form of a finding of non-compliance recorded in the operative part of the judgment. This remedy seems to have a dual function. On the one hand, it amounts to a form of reparation, by way of satisfaction, for the non-material injury caused to the other party. On the other hand, it also expresses the Court's censure of the non-complying conduct and may therefore be regarded as a form of sanction for the harm caused to the judicial process. This also justifies that the Court may make such finding irrespective of any specific request to that effect by the injured party.

A finding of non-compliance recorded in the operative part of the judgment may appear as a rather mild response to a breach of provisional measures. To a certain extent, this reflects the particular environment in which the Court operates. For a Court whose jurisdiction is based on the consent of the parties and whose judgments are not backed by effective mechanisms of enforcement, in most cases it would be difficult to go beyond expressing its censure of the non-complying conduct. Moreover, the effectiveness of this sanction should not be underestimated, as it inflicts significant reputational costs on the responsible party (43).

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(42) *I.C.J. Reports*, 1963, p. 37.

(43) See STEIN, *op. cit.*, p. 524, who maintained that "[i]n a context where rectitude is the primary value at stake, censure by the Court is a significant sanction". See also LEONHARDSEN, *op. cit.*, p. 325 ff. *Contra* ZYBERY, *Provisional Measures of the International Court of Justice in Armed Conflict Situations*, *Leiden Journal of Int. Law*, vol. 23 (2010), p. 581, who maintained that a finding of non-compliance "does not seem to address properly the damage caused to the Court's own standing by a lack of compliance with its provisional measures orders". However, this author does not indicate what remedy the Court should order to address the damage to its authority,

In its judgment in the joined cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan river*, the Court observed that "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" (44). When a breach of provisional measures occurs at an early stage of the proceedings, a significant length of time may pass between the breach and the final determination of the Court. Pending the principal proceedings, the Court could address a situation of non-compliance by means of a new order on provisional measures (45). This is what the Court did in *Certain activities carried out by Nicaragua in the border area.* In its order on provisional measures of 22 November 2013, the Court, while not stating it expressly, recognized that Nicaragua's conduct was not in compliance with the provisional measures indicated in its order of 8 March 2011. A finding of non-compliance made at the provisional measures stage, while in principle "only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings" (46), may serve the purpose of warning the responsible party of the legal consequences stemming from its conduct. It may also justify the adoption of a more severe sanction at the stage of the merits should the party persist in its conduct.

Among these more severe sanctions, the imposition of costs, or part of costs, relating to the proceedings should be taken into consideration (47). The Statute does not rule out the possibility of using the award of costs as a form of sanction against the non-complying party. Article 64 provides that the general rule, according to which each party shall bear its own costs, is to be applied "[u]nless otherwise decided by

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limiting himself to indicate measures that the Court should indicate to repair the harm caused by the non-complying party to the other party.

(44) Para. 126 of the judgment.

(45) For the view that the Court, pending the principal judicial proceedings, should proceed promptly, and even *proprio motu* to assess compliance with provisional measures by means of another order of provisional measures, see Judge Cançado Trindade, separate opinion attached to the Court's judgment in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River*, paras 34-46. According to LANDO, *Compliance with Provisional Measures Indicated by the International Court of Justice*, *Journal of Int. Dispute Settlement*, vol. 8 (2017) (forthcoming), the Court should consider to create an expedite procedure through which it could establish non-compliance with provisional measures by way of a decision having the form of a judgment.

(46) Para. 126 of the judgment.

(47) In the past, this possibility was advocated by some commentators. See for instance BARILE, *op. cit.*, p. 154.

the Court". In the abovementioned joined cases between Costa Rica and Nicaragua, Costa Rica included in its submission a request aimed at imposing on Nicaragua all costs and expenses incurred by Costa Rica in requesting and obtaining the order on provisional measures of 22 November 2013. Significantly, Costa Rica justified its request by relying on the existence of a causal link between Nicaragua's failure to comply with the provisional measures indicated in 2011 and the incidental proceedings which led to the 2013 order. "[T]aking into account the overall circumstances of the case", the Court found that "an award of costs [...] would not be appropriate" (48). In a joint declaration, four judges held the view that the "exceptional circumstances" of the case warranted the exercise by the Court of its power under Article 64 of the Statute. In particular, they emphasized that the costs incurred by Costa Rica "were a direct consequence of Nicaragua's breach of the obligations imposed by the 2011 Order" (49).

In the context of an interstate dispute, the award of the costs of the proceedings may have adverse implications, as it may hinder the acceptance of the final judgment, as well as its implementation, by the affected party. For this reason, it seems justified to confine this measure only to serious cases of non-compliance with provisional measures. This does not mean that it should be resorted to only when non-compliance has led the injured party to request new provisional measures. More broadly, there seem to be no reasons for requiring a causal link between the non-complying conduct of one party and the costs incurred by the other party (50). The imposition of costs relating to the proceedings should not be regarded as a form of compensation for the additional costs incurred by the injured party. It should rather be used as a means for sanctioning grave cases of non-compliance. The fact that levying costs against the non-complying party benefits the other party does not deprive this measure of its preeminently punitive character and deterrent purpose. Moreover, since it is intended to sanction the non-complying party, the Court is to be regarded as being empowered to take it irrespective of a request to that effect by the injured party.

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(48) Para. 144 of the judgment.

(49) Joint declaration of Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard, para. 7.

(50) See Lando, *The Road along the San Juan River is paved with Good Intentions: Provisional Measures and the Quest for Compliance in the* Costa Rica/Nicaragua *Joined Cases*, *Rivista*, vol. 99 (2016), p. 182.

6. In its judgment in *LaGrand* the Court, while devoting ample attention to the question of the binding effect of provisional measures, said little about the principles governing the responsibility in case of non-compliance. Its case law after that judgment does not provide greater clarity about this issue. When confronted with the question of non-compliance, the Court's approach has been characterized by a narrow focus on the specific problems raised in each case. Given the limited and fragmented indications coming from the Court, it is hard to define the principles at work in this area by elaborating a coherent system which is capable to shed light on some unresolved questions.

In an attempt to systematize the regime of responsibility for breaches of provisional measures, the distinction between the "institutional dimension" and the "interstate dimension" may provide a useful analytical tool for assessing the content and scope of the Court's power in this field. On the one hand, there are the powers conferred upon the Court by its Statute. On the other, there is the Court's power based on the jurisdiction conferred upon it by the parties. Relying on its Statute, the Court can determine non-compliance with provisional measures, possibly also *proprio motu* or in the absence of jurisdiction over the merits; it can also impose certain forms of sanction on the non-complying party. Basing itself on the jurisdiction conferred by the parties, it can assess the claims of responsibility advanced by the injured party, as well as awarding reparation for the injuries eventually caused to that party.

Admittedly, in practice the "interstate dimension" appears to be largely prevailing. The Court has been very cautious about exercising the powers that appear to be implicit in Article 41 or in other provisions of the Statute, the sole exception being perhaps its bold affirmation of jurisdiction in *Request for Interpretation of the* Avena *Judgment.* Its findings in cases of non-compliance have been generally prompted by the specific request of a party. It might well be that the Court's cautious attitude is partly dictated by the need to attenuate the impact of the very innovative stance taken in 2001, and that in the future the Court might be more willing to take a proactive role in this area (51). More probably, however, the prevalence of the "interstate dimension" is destined to remain a distinctive feature of this regime of responsibility, being more in keeping with the Court's function as an instrument for securing the settlement of disputes between the parties.

PAOLO PALCHETTI

(51) For this observation see MENDELSON, *op. cit.*, p. 47.

Abstract. — After its judgment in *LaGrand*, the Court has had several occasions to deal with cases where one of the parties had breached provisional measures indicated on the basis of Article 41 of the Statute. While recognizing that this conduct entails the responsibility of the non-complying party, so far the Court has said little about the principles governing such responsibility. The main purpose of this article is to attempt to systematize the regime of responsibility for breaches of provisional measures. The point of departure is the consideration that non-compliance with provisional measures is not a matter exclusively affecting the rights and interests of the contending parties and that the Court itself has a distinct and autonomous interest in ensuring respect for provisional measures. This distinction between an "institutional dimension" — involving the relations between the non-complying party and the Court — and an "interstate dimension" — involving the relations between the non-complying party and the other party — is then used as an analytical tool for assessing the content and scope of the Court's power in this field. In particular, it is used to assess two main issues. The first is whether the Court may determine by its own initiative whether provisional measures have been complied with, possibly also in the absence of jurisdiction on the merits of the dispute. The other is whether the legal consequences provided under the general rules on State responsibility exhaust the range of legal consequences available against the responsible party. The article's main conclusions are that: (*a*) Relying on its Statute, the Court can determine non-compliance with provisional measures, possibly also *proprio motu* or in the absence of jurisdiction over the merits; (*b*) the Court can also impose certain forms of sanction on the non-complying party, even if, in practice, the only sanction available to the Court seems to be that of expressing its censure of the non-complying conduct; (*c*) basing itself on the jurisdiction conferred by the parties, the Court can assess the claims of responsibility advanced by the injured party, as well as award reparation for the injuries eventually caused to that party.

Annex 11

Karin Oellers-Frahm & Andreas Zimmermann, *Article 41*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmermann et al., eds., Oxford University Press 2019)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Part Three Statute of the International Court of Justice, Ch.III Procedure, Article 41

Karin Oellers-Frahm, Andreas Zimmermann

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Protective measures — Interim and provisional measures

(p. 1135) Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.	**1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.**
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.	**2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.**

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not provisional measures may be indicated in proceedings on a request for advisory opinion'.[289]

92 The question thus remains unresolved. It seems, however, that provisional measures have no place in the advisory procedure for three reasons: first, Article 41 refers to the preservation of the rights 'of either party', and there are no 'parties' in the strict sense of this term in the advisory procedure; second, advisory opinions do not provide for a final settlement of the underlying dispute, and thus, third, advisory opinions do not have binding force. The final settlement lies with the requesting organ and therefore it would be for that organ[290] to require some conservatory action within the limits of its powers.[291]

F. Binding Effect of Provisional Measures

I. Introductory Remarks

93 Perhaps the most controversial question concerning provisional measures had for a very long time been whether an order indicating provisional measures had binding effect upon the parties. As interim protection requires urgent action and as, therefore, the Court need not satisfy itself that it has jurisdiction to decide the case but may indicate such measures if there is a *prima facie* basis for its jurisdiction, it may be possible that it later finds that jurisdiction is lacking.[292] If provisional measures were binding, this would—it was argued—mean that States may be bound by an order without having consented to the Court's jurisdiction, which would constitute an interference with State sovereignty. If interim orders were, however, not binding, the effectiveness—so the argument of the supporters of the binding character—of the final decision might be jeopardized.

94 Until the *LaGrand* case, neither the PCIJ nor the ICJ ever touched upon this intricate question. The clearest statements until that time, which, however, did not support the binding effect of provisional measures, are to be found in the *Nicaragua* case, where the Court stated that when it is of the opinion that the situation requires that provisional (p. 1183) measures 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'.[293] The Court was somewhat more explicit in its Order indicating provisional measures in the *LaGrand* case, where it underlined in the reasoning that the Governor of Arizona 'is under the obligation to act in conformity with the international undertakings of the United States'.[294] This statement, however, concerned only the general international responsibility of a State and its territorial entities, but not the legal effect of provisional measures.[295] The question was finally decided in the *LaGrand* case in the judgment on the merits so that, with regard to the development of the issue, it will be sufficient to retrace briefly the preparatory work on Article 41, the jurisprudence of the Court and the arguments for and against the binding character of provisional measures advanced in legal literature before considering the reasoning of the Court in the *LaGrand* case.[296]

II. Relevant Provisions and Preparatory Work

95 The main argument against the binding force of provisional measures referred to the terms of Article 41, where the French version reads 'pouvoir *d'indiquer …* quelles mesures conservatoires … *doivent être prises* à titre provisoire', while the English version uses the words 'power to *indicate …* provisional measures which *ought to be taken*'.[297]

The preparatory work, which was done in French, underlines the non-binding effect of provisional measures since the proposal to use the term 'ordonner' instead of 'indiquer' was deliberately dismissed.[298] The explanation for this was twofold: on the one hand, it was argued that 'great care must be exercised in any matter entailing the limitation of sovereign powers'[299] and on the other, it was underlined that the Court did not have the means to assure execution, equating thus binding character and execution. The significance of the

following terms, namely measures which 'doivent être prises'/'ought to be taken' was not given particular weight as the term 'indiquer'/'indicate' was considered decisive.[300] Thus, the preparatory work rather supports the view that provisional measures were not intended to be binding upon the parties.

96 The Rules were also strictly kept in the frame set by Article 41. Although proposals had been made again in the context of the revision of the Rules in 1931 to replace the term 'indicate' by 'prescribe' or 'order', the Court was of the opinion that this would transgress the powers accorded to it under Article 4l.[301]

97 In a similar manner, reference to Article 94, para. 1 of the Charter, which contains the obligation 'to comply with the *decision* of the International Court of Justice'[302] was (p. 1184) considered as an argument against the binding effect of provisional measures because the term 'the decision' in para. 1 was understood as synonymous with the term 'judgment' in para. 2.[303] This view is, however, not altogether convincing, since 'orders' are, in fact, 'decisions' of the ICJ, although they are not judgments, which alone may be the object of recourse to the Security Council in order to reach performance of the obligations resulting therefrom.[304] The term 'decision', used in Article 94, para. 1 of the Charter, was said simply to repeat the language of Article 59 of the Statute, which also has generally been understood as referring only to final decisions, namely judgments. But also Article 59 need not necessarily be seen in this way, although the surrounding Articles 56–61 are a strong argument in this sense.[305] However, there are decisions other than judgments which have binding force, as, *e.g.*, procedural orders of the Court under Article 48, as otherwise the Court could not work efficiently.[306]

98 Article 78 of the Rules, which was introduced by the 1978 amendment, providing that the Court 'may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated', suggested rather that provisional measures have to be complied with and are, thus, binding, although it remains questionable whether non-compliance with a request under Article 78 of the Rules may lead to any consequences at all.[307]

III. The Jurisprudence of the Court

99 The jurisprudence of the Court up to the *LaGrand* case lead no further than the drafting history of the relevant provisions.[308] The Court never made a clear statement concerning the legal effect of provisional measures,[309] but it took positive note of the implementation of its orders in the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases,[310] and explicitly cited the letter addressed by Australia to the Court in the *Nuclear Tests* cases reproaching a breach of the provisional measures by France.[311] The statements of the Court in the *Tehran Hostages* case are inconclusive as well, since the Court only expressed its disapproval of the parties' conduct, in particular the rescue action by the United States, without touching on the question of the legal effect of provisional measures.[312] The most explicit statement was the one made in the *Nicaragua* case cited earlier,[313] according to which 'it is incumbent on each party to take the Court's indication seriously into account'.[314] Dissenting judges did, however, plead emphatically (p. 1185) for the binding effect of provisional measures, the most impressive and comprehensive opinion being the dissenting opinion of Judge Weeramantry in the *Bosnian Genocide* case.[315]

IV. Doctrine

100 Legal writers have always been divided on the question of the binding effect of provisional measures. The different lines of opinion are summarized very roughly in the following remarks.[316] Those who denied that provisional measures are binding relied strongly on the texts of the drafting history and were rather reluctant to restrict the sovereignty of States in the absence of specific consent.[317] Furthermore, these writers referred to the fact that Article 41 is part of Chapter III of the Statute dealing with the

procedure before the Court.[318] However, this argument seems rather weak because Chapter III contains not only provisions for procedural orders of the Court—which, by the way, are binding upon the parties[319]—but also the central provision on binding decisions, namely Article 59.

101 Those writers who argued that provisional measures are binding started from a functional approach. They argued on the one hand with the prestige of the Court stating that:

> It cannot be lightly assumed that the Statute of the Court—a legal instrument—contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.[320]

On the other hand, these authors referred in particular to a general principle of law, according to which interim protection is inherent in the judicial function[321] and to the theory of institutional effectiveness.[322] The latter view in particular has gained increasing support.

V. State Practice

102 Even if provisional measures are binding this would not imply that States would always act accordingly and therefore State practice may only be taken into account as an (p. 1186) additional, however not as the decisive, element.[323] Since the *Anglo-Iranian Oil Co.* case, compliance with provisional measures has been rather unsatisfactory.[324] Only where both parties to a case favoured the judicial settlement of their dispute was compliance with provisional measures probable; however, interim protection is only rarely requested in such cases and in exceptional circumstances.[325] In cases brought by unilateral application and mostly against an unwilling State, the record of compliance is poor, what might rather support the non-binding effect of provisional measures, although non-compliance and binding effect are two completely different aspects of international jurisdiction. In particular in cases involving armed activities[326] and the imminent execution of persons,[327] non-compliance with provisional measures can undermine the effectivity of the Court's decision on the merits, which might be seen as one of the reasons for the Court to take the opportunity in the *LaGrand* case to decide the question, although it could have rejected a decision on that request with good reason. Although compliance with provisional measures would not be guaranteed by reason of the binding character of the measures, this would at least entail state responsibility in case of non-compliance.[328]

VI. The Judgment in the *LaGrand* Case

103 In its application in the *LaGrand* case Germany had explicitly requested the Court to adjudge and declare that 'the United States … violated its international legal obligation to comply with the Order … of 3 March 1999'.[329] The United States countered by stating that 'it would be anomalous—to say the least—for the Court to construe this Order as a source of binding legal obligations'.[330] In deciding this question, the Court had to interpret Article 41 according to 'customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties'.[331] With a view to the differing terms of Article 41 in the French version ('quelles mesures *doivent* être prises') and in the English one ('measures which *ought* to be taken')[332] the Court applied Article 33, para. 4 of the Vienna Convention on the Law of Treaties. The Court stated that the object and purpose of Article 41 is to preserve the Court's ability to fulfil its function of judicial settlement of international disputes. This implied that provisional measures:

> should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[333]

(p. 1187) **104** The Court found that this decision was also confirmed by the preparatory work of Article 41 which did not preclude the conclusion that provisional measures are binding, because the term 'indiquer' instead of 'ordonner' had been chosen with regard to the fact 'that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters.'[334]

105 Finally, the Court tested its findings with regard to Article 94 of the Charter, finding that, whether the term 'decision' in para. 1 included orders indicating provisional measures or not, it would in any case not preclude the binding effect of provisional measures.

106 This decision of the Court[335] which terminated the long-lasting discussion on the binding effect of provisional measures was, however, surprising in its unambiguous clarity, as it plainly stated that provisional measures are binding without even mentioning at all the question of jurisdiction. Whether this meant that provisional measures are binding in any case irrespective of whether the jurisdiction on the merits was contested or not, was not clear. According to Article 59, the judgment in the *LaGrand* case, as any judgment, has binding force only between the parties and in respect of that particular case, and in that case the jurisdiction of the Court on the merits was not in question. However, this seems to be a weak argument because in practice the interpretation of a treaty provision given by the Court in a particular case has de facto, although not *de jure, erga omnes* effect, although it could, of course, be overruled in a later decision.[336] Therefore, concern has been advanced that the statement on the binding effect of provisional measures could lead States to withdraw their acceptance of the Court's jurisdiction.[337] But it cannot be supposed that the Court was not aware of the problem concerning jurisdiction, all the more because Germany in its Memorial pleading for the binding effect of provisional measures argued on the basis of established jurisdiction on the merits.[338] The findings on the binding character of provisional measures do not, in any case, prevent the Court from *recommending* provisional measures in a concrete case with contested jurisdiction, following the example of the ITLOS in the *M/V 'Saiga'* case.[339]

107 The task of the Court in indicating provisional measures has not become easier following the statement of their binding effect, because the question of jurisdiction remained and with it the danger of imposing binding provisional measures in cases where, eventually, a lack of jurisdiction has to be stated. In contrast to other international courts and tribunals which have the power to indicate provisional measures with binding effect, *e.g.*, in particular (p. 1188) the ITLOS or the CJEU, but also, after the decision in *Mamatkulov and Abdurasulovic v. Turkey*,[340] the ECtHR, the question of jurisdiction is more complicated for the ICJ.

The reason is that these other courts or tribunals, in contrast to the ICJ, have compulsory jurisdiction (ECtHR, CJEU) or provide, like the UNCLOS, for mandatory judicial settlement of disputes even if not necessarily by the ITLOS itself.[341] It may, therefore, be supposed that the fact that newly created international courts and tribunals, and in particular the ITLOS, have the power to *prescribe* provisional measures, but not the principal judicial organ of the United Nations, was a reason for the ICJ to decide as it did in the *LaGrand* case.[342]

In practice, the jurisprudence of the ICJ ever since the *LaGrand* case confirms that the Court considers that any provisional measures ordered by it are binding independent of whether the jurisdiction was contested or not. This view is completely in line with the distinction between jurisdiction in relation to provisional measures which is based on Article 41 of the Statute, and jurisdiction over the merits of the dispute, which is based on the consent of the parties, namely Article 36, para. 1 or para. 2 of the Statute. Although the Court did not make an explicit statement in this context, its position can *inter alia* be deduced from its arguments made with regard to the non-compliance with provisional measures in the *Avena (Request for Interpretation)* case[343] which supports the view that the phase of provisional measures is governed by an autonomous legal regime.

VII. Consequences of Non-Compliance with Provisional Measures

108 In assessing the legal consequences of non-compliance with provisional measures a distinction has to be drawn between the power conferred upon the Court by the parties, *i.e.*, the inter-State level, on the one hand, and the institutional power conferred upon the Court by its Statute, *i.e.*, the institutional level, on the other.

1. Inter-State level

109 On the inter State level the fact that provisional measures possess binding character signifies that any instance of non-compliance with such measures constitutes a breach of (p. 1189) an international obligation entailing the international responsibility of the State not abiding by such order. It is, however, not clear what are the concrete consequences following therefrom. A first issue is whether States may take countermeasures, while a case is pending before the Court, since this may contravene the duties of a party *pendente lite*. Such duties were defined by the PCIJ in the *Electricity Company of Sofia and Bulgaria* case, where it found that Article 41:

> applies the principle universally accepted by international tribunals and likewise laid down in many conventions … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[344]

According to this statement, the taking of countermeasures could be problematic and a State, party to a case might have to leave a decision on the consequences of non-compliance with provisional measures to the Court, which may take such non-compliance into account in the judgment on the merits as indicated in the *LaGrand* case.[345] Such attitude would be in line with Article 52, para. 2 of the ILC ASR which provides that countermeasures may not be taken if 'the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'. Nevertheless, countermeasures in case of non-compliance with provisional measures would be justified if the prerequisites set out in Article 52, para. 4 of the ILC ASR are met, namely if the responsible State fails to implement the dispute settlement procedures in good faith.[346] This raises the issue whether such an assessment of a lack of good faith of the party in complying with the order on provisional measures should or could be made by the Court itself. In any case, countermeasures have so far not played any practical role.[347]

110 As the Court had emphasized in the *LaGrand* case, however, the injured party may ask for redress by bringing a claim for indemnification. That is not to say that the Court may not *proprio motu* react to non-compliance;[348] yet reparation can only be granted if a claim to this effect is made, since otherwise the Court would be in breach of the *non ultra petita* rule.[349] This raises the question whether material compensation or only symbolic reparation, *i.e.*, satisfaction, can be imposed by the ICJ, given that restoration of the *status quo ante* is not possible with regard to irreparable damage inherent in the very concept of provisional measures at the first place. As regards material compensation the Court stated

that ‘the question of compensation for the injury caused to the Applicant by the Respondent’s breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations’.[350] This approach seems to constitute the only viable (p. 1190) attitude, because it will be difficult to identify what difference it makes that, apart from the violation of the underlying substantive obligation, interim measures have also been disregarded.[351]

So far, findings by the Court as to non-compliance with provisional measures orders were always included in the operative part of the respective judgment putting greater emphasis on such findings of non-compliance and furthermore allowing judges to express their personal view in separate or dissenting opinions.[352]

111 The question whether non-compliance with provisional measures may also be sanctioned in form of a decision on the costs of the proceedings was raised in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*. There, Costa Rica had asked the Court to impose on Nicaragua all costs and expenses incurred by Costa Rica in requesting and obtaining an order on provisional measures of 22 November 2013 which Nicaragua had disregarded. The Court, however, dismissed this request finding that ‘an award of costs … would not be appropriate’,[353] while several judges underlined that the exceptional circumstances of the case should have warranted a decision by the Court under Article 64.[354]

2. Institutional Level

112 Although since the *LaGrand* case the issue of non-compliance of provisional measures was always raised by a party through a specific claim included in its submissions, the Court is not prevented from addressing the matter *proprio motu* thereby sanctioning the disregard of its judicial function by the non-complying party.[355] The Court seems to have confirmed this inherent power when stating that ‘the question of compliance by both Parties with the provisional measures indicated in this case may be considered by the Court in the principal proceedings’.[356] While the Court may thus *proprio motu* raise the issue of non-compliance, it is disputed whether the Court may only determine the occurrence of a breach of provisional measures as such, or whether it may even *proprio motu* impose sanctions.[357] Yet, in line with the principle of *ne ultra petita*, if the party is seeking redress it has to include a formal claim for reparation in its submissions. In any case, until now the Court did not raise the issue of non-compliance *proprio motu* and it may be supposed that it would be reluctant to make use of this power because it (p. 1191) might be difficult for the Court to prove non-compliance without the assistance of the parties.[358]

3. Autonomy of the Legal Regime on Non-Compliance with Provisional Measures

113 The Court may make a finding on non-compliance with an order on provisional measures regardless of the outcome of the main case.

Thus, for example, in the *Bosnian Genocide* case the Court despite the dismissal of the main requests of the party nevertheless included in the operative part of its judgment a declaration on non-compliance with its provisional measures.[359] This confirms the autonomous character of responsibility for non-compliance with provisional measures. Shortly afterwards, in the *Avena (Request for Interpretation)* case, the Court even censured non-compliance with provisional measures although it by the same token dismissed the claim on the merits for lack of jurisdiction.[360] This position stands in line with the Court’s inherent jurisdiction under Article 41 which implies the possibility of a finding on non-compliance even in a judgment establishing the lack of jurisdiction, and the Court’s jurisdiction over the merits of the case under Article 36. Accordingly, as provisional measures are binding upon the parties until the judgment has been delivered, non-

compliance with such measures entails the responsibility of the non-complying party even if *ex post facto* the Court finds that it lacks subject-matter jurisdiction.[361]

4. Security Council and Non-Compliance with Provisional Measures

114 The fact that provisional measures are binding, but not delivered in the form of a judgment, makes it clear that the State concerned has to comply with them (Article 94, para. 1 UN Charter), but that recourse to the Security Council in case of failure to perform the obligations resulting from the decision according to Article 94, para. 2 UN Charter is not possible as such recourse is limited to non-compliance with judgments only.[362] Redress under Article 94, para. 2 was, however, sought in two cases of non-compliance with provisional measures even at a time when the Court had not yet confirmed that provisional measures are binding. In the *Anglo-Iranian Oil Co*. case,[363] the United Kingdom referred the issue of non-compliance with the provisional measures to the Security Council which did, however, not take a position on the question.[364] In the *Bosnian Genocide* case Bosnia had sent a letter to the Security Council requesting it to take measures under Chapter VII of the Charter *inter alia* in order to enforce the provisional measures order of the Court.[365] The Security Council then passed a resolution relying in particular on the Chapter VII aspects of the situation, mentioning the provisional measures issue only in the preamble (p. 1192) of Res. 819 (1993). This practice confirms that Article 94, para. 2 UN Charter cannot be invoked in case of non-compliance with provisional measures.[366] As a matter of fact, provisional measures are indicated in the form of an order, not a judgment to which Article 94, para. 2 UN Charter explicitly refers. The term 'judgment' implies that the Security Council should be involved only if *final* decisions are not complied with. Thus, the Security Council can play a role with regard to the implementation of an order on provisional measures provided non-compliance with such an order were to constitute a threat to international peace and security. Yet, any such action by the Security Council would then not constitute action under Article 94, para. 2 UN Charter.

115 Another consequence flowing from the binding character of provisional measures is that the effect of provisional measures in cases of armed conflict ordering the immediate end to any armed action would be the same—at least for the parties to the case—as that of a Security Council Resolution under Chapter VII of the Charter,[367] although with a different underlying motivation: political in the Security Council and legal in the ICJ. This aspect was highly relevant in the *Preah Vihear (Request for Interpretation)* case where the request for interpretation combined with a request for provisional measures might be considered to have aimed rather at reaching the stopping of armed activities than an interpretation of the 1962 Judgment.[368]

G. The Role of the Security Council

I. Parallel Seisin of the Security Council and the ICJ

116 There is, in principle, no obstacle to the simultaneous seisin of the Security Council and the ICJ, because dispute settlement through political and legal bodies are complementary, not exclusive processes, unless special rules provide otherwise.[369] Thus, a State is entitled not only to bring a case to the Court but also to ask for interim protection, at the same time as other means of dispute settlement are explored; this is demonstrated by a number of precedents of the ICJ.[370] In the phase of interim protection, the parallel (p. 1193) activity of a political organ of the United Nations, the Security Council, and its judicial organ, the ICJ, may, however, become relevant with regard to the 'circumstances' in relation to Article 41, in that the action of the Security Council may affect the urgency or the 'irreparable damage' required for granting interim relief. However, the ICJ has never to date dismissed a request for provisional measures for reasons relating to the simultaneous

seisin of the Security Council or another political body, such as regional organizations, but has rather confirmed the necessity of its action under Article 41.[371]

117 Where the Security Council is acting under Chapter VI of the Charter, the parties are bound only by the Court's order on provisional measures. If the Security Council has taken a resolution under Chapter VII of the Charter, that is a binding resolution, the parties are facing two parallel binding obligations under Article 103 UN Charter given that the Statute forms an integral part of the Charter. So far, both the Court and the Security Council have attempted to avoid any friction between orders under Article 41 and action taken by the Security Council. On the one hand, the Court has so far always refrained from indicating provisional measures with regard to the action taken by the Security Council,[372] In the context of the *Bosnian Genocide* case the Security Council vice-versa took note in the preamble of its Resolution 819 (1993) of the action of the ICJ while adding some more specific measures. In the *Preah Vihear (Request for Interpretation)* case the Security Council in its resolution only 'called upon the two sides to display maximum restraint and avoid action that may aggravate the situation'.[373]

118 A particular situation regarding the practice just outlined was, however, present in the *Lockerbie* case, where the parallel seisin of the ICJ and the Security Council led to 'competing' action of both organs. In this matter, a resolution under Chapter VI was taken by the Security Council before the case was brought before the Court,[374] which was not complied with by Libya, so that it became probable that the Security Council would take action under Chapter VII. In order to prevent such further action of the Security Council, Libya instituted proceedings in the ICJ against the United States and the United Kingdom in separate applications and, on the same day, 3 March 1992, requested the indication of provisional measures, asking the Court to enjoin the United States and the United Kingdom from taking any action against Libya in order to compel or coerce it to surrender the accused individuals to any jurisdiction outside Libya. After the hearing on the request for provisional measures was closed and while the Court was deliberating, the Security Council adopted Res. 748 (1992) under Chapter VII of the Charter, imposing a series of sanctions against Libya including the surrender for trial of those accused of having committed the terrorist attack on the aircraft. As Security Council resolutions under Chapter VII prevail over obligations of Member States under any other international agreement,[375] the Court only stated in its orders on provisional measures that 'the rights claimed by Libya under the Montreal Convention cannot now be regarded (p. 1194) as appropriate for protection by the indication of provisional measures'.[376] The highly controversial question whether the Court, in its final judgment, would comment on the action of the Security Council with regard to its compatibility with Article 36, para. 3 of the Charter according to which the Security Council 'should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice' as well as on the aspect of the legality of Resolution 748 had become moot, since on 9 September 2003 all parties notified the Court that they had agreed 'to discontinue with prejudice the proceedings'.[377]

119 These examples show that an enhanced cooperation between the Security Council and the ICJ might be helpful, as was proposed by the President of the ICJ in the *Preah Vihear (Request for Interpretation)* case,[378] in particular as far as the increasing number of cases involving questions of peace and security are concerned. Whether such cooperation would then take the form of an inter-organic agreement or arrangement or whether the Rules of Court should be amended in order to give the Security Council an opportunity to request reconsideration of those aspects of an Order that relate to the maintenance of peace and security remains an open question. There is, however, a need to enhance the cooperation

between these two organs as the Court is increasingly seized with cases involving questions of international peace and security.

II. The Security Council and Provisional Measures

120 According to Article 41, para. 2, notice of the provisional measures indicated has to be given to the Security Council. Article 77 of the Rules, which is a new provision adopted in 1978, further specifies this obligation according to the established practice. What is striking is that according to Article 77 of the Rules, provisional measures indicated by the Court *proprio motu* under Article 75, para. 1 of the Rules are not mentioned. However, since Article 41, para. 2 speaks of provisional measures in general without differentiating whether they had been requested or made *proprio motu* by the Court, transmission to the Security Council via the Secretary-General is always required.[379]

(p. 1195) **121** The transmission to the Security Council does not automatically imply any action of the Security Council. The Security Council will take action according to its Rules of Procedure, namely if it considers that international peace or security is threatened or if a State brings a dispute to the attention of the Security Council. It did so in connection with the provisional measures indicated in the *Anglo-Iranian Oil Co.* case, where it was seised by a complaint, not under Article 94, para. 2 of the Charter, but under Articles 34 and 35 of the Charter, and where its action was rather reluctant.[380] In the *Bosnian Genocide* case the Security Council was also addressed, and acted not on the basis of Article 94, para. 2, but on the basis of Chapter VII, although Bosnia had also relied on the non-compliance with the provisional measures.[381]

122 In the case that provisional measures are indicated in a dispute relating to a matter already on the agenda of the Security Council, the Council may adopt a resolution urging, *inter alia*, compliance with the order of the Court, which occurred in several cases[382] and which constitutes an important example of the cooperation between the Security Council and the ICJ.

123 Furthermore, it is undisputed that the Security Council may act in case of non-compliance with provisional measures whenever a threat to the peace or the security results therefrom. In such situations, the Security Council may be called upon or may act *proprio motu* under Chapter VI or Chapter VII of the Charter, but not under Article 94, para. 2 of the Charter.[383]

H. Evaluation

124 The institution of provisional measures has undergone a significant development in the two World Courts during their nearly 100 years of existence. The provision in Article 41 of the Statute which needed precision with regard to several fundamental aspects, *e.g.*, the question of jurisdiction on the merits, the irreparability of the damage and the effect of the decision, has been fleshed out so that States are now better able to assess requests for provisional measures. This state of affairs is certainly a reason for the increasing use of provisional protection. However, the fact that compliance with the measures indicated by the Court is still not the rule gives rise to the question as to why States more frequently than ever before have recourse to provisional protection. There are certainly several reasons, one of the most important of which seems to be what has been called ‘litigation strategy’.[384] There is little doubt that States make use or sometimes rather abuse of the interim protection procedure for tactical reasons: be it in order to have a kind of psychological advantage in the litigation, be it to reach some first stage in the procedure which can take a long time, or be it, and this seems clearly to be an abuse of interim protection, to instrumentalize the Court as a forum to advance a State’s opinions on a disputed situation even if it is evident that the Court is not competent to decide the case (p. 1196) on the merits for lack of jurisdiction.[385] However, misuse or even abuse of international procedures—and these are not restricted to provisional measures—should not

lead one to call into question the whole instrument or the advantages it implies. It is for the Court to react to such abuses as it has done, *e.g.*, in striking off the list cases already in its order dismissing provisional measures or in applying the limits set by the Statute and the Rules with utmost strictness, and as it has done with regard to very strict time limits for the oral arguments on provisional measures.[386] Possibly, the Court could be even more strict in reacting to misuses,[387] but in general, the increase in the use of interim protection and the development of this instrument by the Court can be evaluated in a more positive manner, namely as reflecting the development of international law in general and the status and acceptance of international jurisdiction in particular.

125 There is, however, a further aspect to be considered in evaluating interim protection, which refers to the fact of using interim protection as a factor in maintaining or restoring international peace. In cases such as the *Tehran Hostages* case,[388] the *Nicaragua* case,[389] the *Bosnian Genocide* case,[390] the *Legality of Use of Force* cases,[391] the *Armed Activities* case (DRC v. Uganda),[392] the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case,[393] and the *Georgia v. Russia* case,[394] and, to a certain extent, also the *Preah Vihear (Request for Interpretation)* case,[395] the subject-matter of interim protection did not merely concern the preservation of a right claimed by a party to the case, but related to the maintenance or restoration of international peace. In these cases, the Court was invoked to act in parallel to the Security Council, which is, in principle, not problematic,[396] but requires the Court to be careful not to trespass on the authority of the Security Council and to keep within the limits of Article 41 of the Statute. As the Court is one of the principal organs of the United Nations, it is also called upon to contribute to the maintenance and restoration of international peace and security. In this respect, the indication of interim measures of protection has become an important instrument since States increasingly submit to the Court cases involving questions of peace and security. As the Court only has to be satisfied that there is a *prima facie* basis for its jurisdiction and as orders indicating provisional measures have binding force, it is by the indication of provisional measures that the Court is able essentially to contribute to the maintenance of international peace and security,[397] perhaps (p. 1197) sometimes even more effectively than the Security Council, namely in situations where the Security Council would be prevented from acting by the exercise of the veto power. Thus, by indicating interim measures of protection in such borderline cases—and by using its broad discretion with regard to the assessment of the 'circumstances' requiring the indication of provisional measures—the ICJ is able not only to contribute to the peaceful settlement of international disputes but also to the maintenance of international peace and security, thus strengthening its position as a principal organ of the United Nations as well as the United Nation's prime objective, which is the maintenance of international peace and security.

Finally, it is also worth mentioning that not only the text of the Statute, but also the very institution and procedure of provisional measures, as developed by the PCIJ, and in particular by the ICJ, have been successfully transposed to almost all other international courts, tribunals and dispute settlement organs, so that interim protection may by now be considered as an example of uniformity of international law which otherwise is often criticized—rightly or wrongly—as suffering from fragmentation.[398]

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285 *Ibid*., p. 40.

286 *Cf.* Goodrich, 'The Nature of the Advisory Opinions of the Permanent Court of International Justice', *AJIL* 32 (1938), pp. 738–58, who found that seventeen out of twenty-one advisory opinions rendered by the PCIJ related to pending disputes. *Cf.* also Kaufmann, *Die Gutachten des Ständigen Internationalen Gerichtshofs als Mittel zwischenstaatlicher Streitschlichtung* (1939).

287 *Obligation to Arbitrate*, Order of 9 March 1988, ICJ Reports (1988), pp. 3 *et seq*.

288 This resolution indicated in its preambular paragraphs that 'the constraints of time require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement' and that account should be taken of 'the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof', *ibid*., p. 4.

289 *Ibid*.

290 In connection with the *Question concerning the Acquisition of Polish Nationality*, the Council of the League adopted, prior to its request for advisory opinion, a resolution with the nature of provisional measures, *cf*. PCIJ, Series B, No. 7, pp. 5, 10.

291 *Cf.* in this context Sztucki (1983), pp. 136 *et seq.*; Hudson, *PCIJ*, p. 453; Jenks, *The Prospects of International Adjudication* (1964), p. 215.

292 *Cf. supra*, MN 36.

293 *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 144, para. 289.

294 *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 16, para. 28.

295 *Cf.* also Tams on Art. 94 UN Charter MN 19.

296 In this context, the Memorial of Germany, Part four, paras. 4.121–4.176, as well as the oral argument presented by Dupuy are worth reading.

297 Emphasis added.

298 The preparatory work on Art. 41 was done in French; Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 609; *cf.* Sztucki (1983), pp. 263 *et seq*.

299 Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 735; *cf.* also Hudson, *PCIJ*, p. 423.

300 *Cf.* Manouvel, *RGDIP* (2002), pp. 114 *et seq*.

301 von Stauffenberg, pp. 313–4; for the drafting history *cf.* also Sztucki (1983), pp. 267 *et seq*.

302 Emphasis added.

303 Sztucki (1983), pp. 285 *et seq*., in particular p. 289.

304 *Cf.* Tams on Art. 94 UN Charter MN 14–15, 52; Shaw, *Rosenne's Law and Practice*, vol. I, p. 204.

305 *Cf.* Brown on Art. 59 MN 35–40 and Tams on Art. 94 UN Charter MN 2.

306 *Cf.* Torres Bernárdez/Mbengue on Art. 48 MN 6–7, and also Brown on Art. 59 MN 36.

307 *Cf. supra*, MN 84.

308 For an overview *cf.* Sztucki (1983), pp. 270 *et seq.*, and Szabó, 'Provisional Measures in the World Court: Binding or Bound to be Ineffective?', *Leiden JIL* 10 (1997), pp. 475–89, pp. 481 *et seq*.

309 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 501, para. 98.

310 *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 3, 17–8, para. 33 and pp. 175, 188, para. 32, respectively.

311 *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 258–9, para. 19 and pp. 457, 462, para. 19, respectively.

312 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 34, para. 75, and 42, para. 93.

313 *Supra*, MN 94; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 144, para. 289, cited in the *Bosnian Genocide* case, Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 58.

314 This statement was repeated in later cases, *cf. e.g., Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 58.

315 *Ibid*., Sep. Op. Weeramantry, ICJ Reports (1993), pp. 370, 373 *et seq*. with an overview of the Court's jurisprudence and doctrinal opinions; *cf.* also Sztucki (1983), pp. 272 *et seq*.

316 For a more detailed analysis *cf.* Oellers-Frahm (1975), pp. 107 *et seq.*; Sztucki (1983), pp. 272 *et seq*.; Elkind (1981), pp. 153 *et seq*.

317 *Cf.* as an example Hammarskjöld, 'Quelques aspects de la question des mesures conservatoires en droit international positif', *ZaöRV* 5 (1935), pp. 5–33; Hudson, *The Permanent Court of International Justice: A Treatise* (1934), p. 415, who changed his view, however, in the 1943 edition of his Treatise (Hudson, *PCIJ*, pp. 425–6); Lauterpacht, *The Function of Law in the International Community* (1966), p. 208; Mendelson, 'Interim Measures of Protection and the Use of Force by States', in *The Current Legal Regulation of the Use of Force* (Cassese, ed., 1986), pp. 337–60, 343; Gross, *supra*, fn. 57, *passim*; Goldsworthy, 'Interim Measures of Protection', *AJIL* 68 (1974), pp. 258–77, 274.

318 *E.g.*, Hammarskjöld, *supra*, fn. 317, pp. 25–7.

319 *Cf. LaGrand*, German Memorial, para. 4.126.

320 Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254; Niemeyer (1932), p. 41; Hambro, 'The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice', in *Rechtsfragen der Internationalen Organisation, Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Schätzel/Schlochauer, eds., 1956), pp. 152–71, 165.

321 Collier/Lowe, *Settlement of Disputes*, p. 175; Elkind (1981), p. 162; Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures', in Damrosch, *ICJ at a Crossroads*, pp. 323–54, 332; Mani, 'Interim Measures of Protection; Article 41 of the ICJ Statute and Article 94 of the UN Charter', *IJIL* 10 (1970), pp. 359–72, 367.

322 Fitzmaurice (1958), p. 122; Oellers-Frahm (1975), p. 110; Dubisson, *CIJ*, pp. 228–9.

323 *Cf.* also Elkind (1981), p. 164.

324 *Cf.* Manouvel, *RGDIP* (2002), pp. 127 *et seq*.

325 *Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment, ICJ Reports (1986), pp. 554 *et seq*.

326 *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.; Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169 *et seq.; Bosnian Genocide*, Orders of 8

April 1993 and 13 September 1993 (Provisional Measures), ICJ Reports (1993), pp. 3, 24 *et seq.*, and 325 *et seq*.

327 *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248 *et seq.; LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.; Avena*, Provisional Measures, ICJ Reports (2003), pp. 77 *et seq. Cf.* also Szabó, *supra*, fn. 304, pp. 475, 485–6.

328 *Cf. infra*, MN 108 *et seq*.

329 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 473–4, para. 12.

330 *Ibid*., p. 501. para. 97.

331 *Ibid*., para. 99.

332 Emphasis added.

333 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, p. 503, para. 102.

334 Ibid., p. 505. para. 107.

335 For comments on the decision *cf.* Kammerhofer, 'The Binding Nature of Provisional Measures of the International Court of Justice: the "Settlement" of the Issue in the LaGrand Case', *Leiden JIL* 16 (2003), pp. 67–83; Manouvel, *RGDIP* (2002), *passim*; Spiermann, 'The LaGrand Case and the Individual as a Subject of International Law', *Zeitschrift für Öffentliches Recht* 58 (2003), pp. 197–221; Frowein, 'Provisional Measures by the International Court of Justice—The LaGrand Case', *ZaöRV* 62 (2002), pp. 55–60; Tams/Mennecke, 'The LaGrand Case (Germany v United States of America)', *ICLQ* 51 (2002), pp. 449–55; Oellers-Frahm, 'Die Entscheidung des IGH im Fall LaGrand—Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht', *EuGRZ* 28 (2001), pp. 265–72; Rosenne, 'The International Court of Justice: The New Form of the Operative Clause of an Order Indicating Provisional Measures', *LPICT* 2 (2003), pp. 201–3; Ben Hammadi, 'La question du caractère obligatoire des mesures conservatoires devant la Cour Internationale de Justice, L'arrêt LaGrand (Allemagne c. Etats-Unis d' Amérique) du 27 Juin 2001', *Revue québécoise de droit international* 114 (2001), pp. 53–81.

336 *Cf.* Brown on Art. 59 MN 71, 81–87; Miron/Chinkin on Art. 63 MN 4.

337 Manouvel, *RGDIP* (2002), p. 135.

338 *LaGrand*, German Memorial, para. 4.129.

339 *M/V 'Saiga' (No. 2)* (Saint Vincent and the Grenadines v. Guinea), ITLOS Reports (1998), pp. 24 *et seq.; cf.* on this issue in particular Oellers-Frahm, *GLJ* (2011), *passim*.

340 Appl. Nos. 46827/99 and 46951/99, Judgment of the First Section of 6 February 2003, affirmed by the Grand Chamber on 4 February 2005 *sub nom*. *Mamatkulov and Askarov v. Turkey* (it appears that the First Section had misunderstood the second applicant's last name), ECtHR 2005-I; *cf.* Tams, 'Interim Orders by the European Court of Human Rights—Comments on Mamatkulov and Abdurasulovic v. Turkey', *ZaöRV* 63 (2003), pp. 681–92. As the ECtHR had missed the opportunity to prescribe the binding force of provisional measures in the context of Protocol 11, it must be welcomed that it followed the findings of the ICJ in the *LaGrand* case. That the provision on interim measures was not amended when the new Rules were adopted is all the more astonishing because problems of contested jurisdiction cannot arise after the entry into force of Protocol No. 11. *Cf.* also Oellers-Frahm, 'Verbindlichkeit einstweiliger Maßnahmen: Der EGMR vollzieht—endlich—die erforderliche Wende in seiner Rechtsprechung', *EuGRZ* 30 (2003), pp. 689–92 and Oellers-Frahm, 'Verbindlichkeit einstweiliger Andordnungen des EGMR—Epilog', *EuGRZ* 32 (2005), pp. 347–50, with reference to the statements of the UN Human Rights Committee, which cannot even take binding final decisions, in the case of *Dante Piandiong et al. v. the Philippines*, UN Doc. CCPR/C/70/D/869/1999 (2000), paras. 5.1 *et seq. Cf.* furthermore in favour of the binding character of provisional measures the—non-binding—decision of the

UN Committee against Torture in the case of *Mafhoud Brada v. France*, UN Doc. CAT/C/34/D/195/2002 (2005), para. 13.4.

341 *Cf.* Part XV UNCLOS. In particular, the fact that the ICJ, which is one of the dispute settlement organs to be chosen under Part XV UNCLOS, could not give binding provisional measures while ITLOS could, was certainly felt to be unacceptable.

342 *Cf.* Frowein, *supra*, fn. 335, p. 60; *cf.* also Orrego Vicuña, in Ballesteros/Arias (2010), *passim*.

343 Judgment, ICJ Reports (2009), pp. 3, 18, para. 51

344 *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194, 199.

345 Judgment, ICJ Reports (2001), pp. 466, 508, para. 116.

346 *Cf. ILC Yearbook* (2001-II), Part Two, p. 137, where the ILC explicitly referred to non-compliance with provisional measures.

347 *Cf.* Lando, *JIDS* (2017), pp. 22 *et seq*., 28–9.

348 *Cf. infra*, MN 113.

349 *Cf.* also Al-Qahtani, 'The Role of the International Court of Justice in the Enforcement of its Judicial Decisions', *Leiden JIL* 15 (2002), pp. 781–804, 788.

350 *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 231, para. 458.

351 Mendelson, in Fitzmaurice/Sarooshi (2004), p. 52; Lee-Iwamoto, *Japanese YIL* (2013), pp. 251 *et seq*.

352 *Cf.* in this context *Immunities and Criminal Proceedings*, Provisional Measures, Decl. Gaja, ICJ Reports (2016), pp. 1175 *et seq*.

353 *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 718, para. 144.

354 *Ibid*., Joint Decl. Tomka, Greenwood, Sebutinde, and Dugard.

355 Palchetti, *Riv. di Diritto Internaz.* (2017), p. 17.

356 *Cf. Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Provisional Measures, Order of 22 November 2013, ICJ Reports (2013), pp. 354, 368–9, para. 57.

357 *Cf.* on the one hand Judge Cançado Trindade, who seems to support that the Court may also determine the legal consequences of non-compliance with provisional measures (*ibid*., Judgment, Sep. Op. Cançado Trindade, ICJ Reports (2015), pp. 665 *et seq*., para. 36), while Judge ad hoc Verhoeven only confirmed the Court's power to '*condemn*, even *proprio motu* where appropriate, violations of ordered measures' (*Armed Activities* (DRC v. Uganda), Judgment, Decl. Verhoeven, ICJ Reports (2005), pp. 355, 358 (emphasis added)).

Cf. also Shaw, *Rosenne's Law and Practice*, vol. I, p. 204, denying such possibility, as well as Mendelson, in Fitzmaurice/Sarooshi (2004), p. 42.

358 Palchetti, *Riv. di Diritto Internaz.* (2017), p. 9, referring to the *Land and Maritime Boundary* case, Judgment, ICJ Reports (2002), pp. 303, 453, para. 321.

359 Judgment, ICJ Reports (2007), pp. 43, 238, para. 471 (7), operative part.

360 *Cf. Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 21, para. 61 (2); *cf.* also Marotti, *Riv. di Diritto Internaz.* (2014), p. 780.

361 *Cf.* Leonhardsen, *JIDS* (2014), p. 322; d'Argent, *AFDI* (2011), p. 160 and Tranchant, *AFDI* (2009), pp. 216, 217.

362 *Cf.* Oellers-Frahm, in Simma, *UN Charter*, Art. 94 MN 20; *cf*. also Lando, *JIDS* (2017), p. 29.

363 ICJ Reports (1951), pp. 81, 93.

364 *Cf*. Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *AJIL* 54 (1960), pp. 1–24, 23; *cf*. also Shaw, *Rosenne's Law and Practice*, vol. I, pp. 252 *et seq*.; Oellers-Frahm, in Simma, *UN Charter*, Art. 94 MN 17 *et seq*.

365 *Cf*. UN Doc. S/25616 (1993).

366 *Cf.* Mani, *supra*, fn. 321, pp. 359, 367 *et seq*.; 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—Negotiating for Peace, Liber Amicorum Tono Eitel* (Frowein *et al*., eds., 2003), pp. 169–91 with further bibliographical indications.

367 Cf. Frowein, *supra*, fn. 335, p. 59.

368 *Cf. supra,* MN 22.

369 Klein, 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Hermann Mosler* (Bernhardt *et al*., eds., 1983), pp. 467–91; Eisen, *Litispendence between the International Court of Justice and the Security Council* (1988); Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', *AJIL* 88 (1994), pp. 643–77; Ciobanu, 'Litispendence between the I.C.J. and the Political Organs of the U.N.', in Gross, *The Future of the ICJ*, vol. I, pp. 209–75; Rosenne (2005), pp. 196–201; Kaikobad, *Australian YIL* (1996). pp. 152 *et seq*.; Papa, *I rapporti tra la Corte Internazionale di Giustizia e il Consiglio di Sicurezza* (2006); *cf.* also Gowland-Debbas/Forteau on Art. 7 UN Charter MN 51–56; Gaja, in Gaja/Grote Stoutenburg (2014), *passim*.

370 *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89 *et seq.; Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 11–2, paras. 36–41; *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.; Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169 *et seq.; Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3 *et seq.* and pp. 114 *et seq.; Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3 *et seq*. and pp. 325 *et seq*.; and *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.; Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6 *et seq*.

371 *Cf. Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 127–8, paras. 39 *et seq.; cf.* also Savadogo, 'Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): The Court's Provisional Measures Order of 1 July 2000', *BYIL* 72 (2002), pp. 357–412, 365 *et seq*.; Merrills, *ICLQ* (1995), pp. 90, 125 *et seq*.

372 *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 11–2; *Armed Activity* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.; cf.* Gaja, in Gaja/Grote Stoutenburg (2014), p. 89 *et seq*.

373 *Cf.* UN Doc. SC/10174 (2011).

374 SC Res. 731 (1992).

375 Art. 103 UN Charter.

376 *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3, 15, para. 40 and pp. 114, 126–7, para. 43, respectively; *cf.* also Gowlland-Debbas, *supra*, fn. 369, *passim*; Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences', *Max Planck UNYB* 1 (1997), pp. 91–109; Franck, 'The "Power of Appreciation": Who is the Ultimate Guardian of UN Legality?', *AJIL* 86 (1992), pp. 519–23; Watson, 'Constitutionalism, Judicial Review and the World Court', *Harv. ILJ* 34 (1995), pp. 1–45; Greenwood, 'The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice', in *International Law and The Hague's 750th Anniversary* (Heere, ed., 1999), pp. 81–6; *cf.* also the literature cited by Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 21, fn. 14. The five dissenting judges in the *Lockerbie* (Libya v. UK; Libya v. USA) cases, considered that the Court could have used its power to indicate provisional measures *proprio motu* to prevent an aggravation or extension of the dispute; Diss. Op. Bedjaoui, ICJ Reports (1992), pp. 33, 48, para. 31, Diss. Op. Weeramantry, ICJ Reports (1992), pp. 50, 65–66, Diss. Op. Ranjeva, ICJ Reports (1992), pp. 72, 73, para. 7, Diss. Op. Ajibola, ICJ Reports (1992), pp. 78, 87–8, Diss. Op. El-Kosheri, pp. 94, 97–100, paras. 10 *et seq.; cf.* also Merrills, *ICLQ* (1995), pp. 90, 130.

377 *Lockerbie* (Libya v. UK; Libya v. USA), Orders of 10 September 2003, ICJ Reports (2003), pp. 149, 150 and pp. 152, 153, respectively; *cf.*, however, in this context Diss. Op. Weeramantry to the order dismissing the request for provisional measures, ICJ Reports (1992), pp. 160, 163 *et seq.* and Kaikobad, *Australian YIL* (1996), pp. 93 *et seq*.

378 *Cf.* Statement by Judge Owada, President of the International Court of Justice, to the Security Council of 25 October 2011; further details in Gaja, Gaja/Grote Stoutenburg (2014), p. 92.

379 In the only case where the Court based its order on Art. 75, para. 1 of the Rules, the *LaGrand* case, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq*., the procedure of transmission was followed as usual.

380 *Cf.* in more detail Shaw, *Rosenne's Law and Practice*, vol. I, pp. 252 *et seq*.; *cf. supra*, MN 114.

381 *Cf. supra*, MN 114.

382 *Tehran Hostages*, SC Res. 461 (1979); *Bosnian Genocide*, SC Res. 819 (1993); *Land and Maritime Boundary*, UN Doc. S/1996/391 (1996).

383 *Cf. supra*, MN 114.

384 *Cf.* Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (1989).

385 *E.g.*, in the *Legality of Use of Force* cases, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.; cf.* in this context the critical remarks by several participants of the discussion in *Les procédures incidentes devant la Cour internationale de Justice: Exercice ou abus de droits?* (Sorel/Poirat, eds., 2000), pp. 38–44 and pp. 63–84 ('mesures conservatoires'), and Oellers-Frahm, in Hestermeyer (2011), point B; *cf*. also Leonhardsen, *JIDS* (2014), *passim*.

386 In this context reference has to be made to Practice Direction XI which reminds the parties to limit their oral pleadings to what is strictly necessary for the indication of provisional measures; *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1463.

387 Remark by Pellet, in Sorel/Poirat, *supra*, fn. 385, pp. 70–1.

388 Provisional Measures, ICJ Reports (1979), pp. 7 *et seq*.

389 Provisional Measures, ICJ Reports (1984), pp. 169 *et seq*.

390 Provisional Measures, ICJ Reports (1993), pp. 3 *et seq*., 325 *et seq*.

391 *Legality of Use of Force*, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq*.

392 Provisional Measures, ICJ Reports (2000), pp. 111 *et seq*.

393 Provisional Measures, ICJ Reports (2002), pp. 219 *et seq*.

394 Provisional Measures, ICJ Reports (2008), pp. 353 *et seq*.

395 Provisional Measures, ICJ Reports (2011), pp. 537 *et seq*.

396 *Supra*, MN 116–119.

397 Rosenne (2005), pp. 224–5; Oellers-Frahm, in Hestermeyer (2011), point B; Oellers-Frahm, in Jalloh/Elias (2015); Lee-Iwamotu, in Byrnes *et al*. (2013), pp. 89 *et seq*.

398 *Cf.* Miles, in Adenas/Bjorge (2015), *passim*.

Annex 12

Sienho Yee, *Article 40*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmermann et al., eds., Oxford University Press 2019)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Part Three Statute of the International Court of Justice, Ch.III Procedure, Article 40

Sienho Yee

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> ‘I personally wonder, in the light of the increasing number of unilateral applications, whether the offhand or casual unilateral referral of cases by some States (which would simply appear to be instigated by ambitious private lawyers in certain developed countries), without the Government of the State concerned first exhausting diplomatic channels, is really consistent with the purpose of the International Court of Justice as the principal judicial organ of the United Nations. I see what may be termed an abuse of the right to institute proceedings before the Court. Past experience appears to indicate that irregular procedures of this nature will not produce any meaningful results in the judiciary.’[316]

On the other hand, a private person may be able to devote more attention to the proceedings than a busy official, and thus may be in a better position to receive communications from the Court and to coordinate preparations of the case. Perhaps in such a situation, it is advisable to appoint a private person as a co-agent.[317]

100 As has been pointed out elsewhere,[318] the Court’s treatment of an agent as the final decision-maker for a State during the course of proceedings before the Court is in tension with the principle codified in Article 46 VCLT, although States do not appear to have complained about this yet.

6. Further Complications in the Proceedings: Modification of Claims, New Claims, ‘Subject of the Dispute’, or ‘Subject of the Application’?

a) Current Treatment of the Court as Exemplified in *Nauru* and its Progeny: A Critique

101 The preliminary and tentative exposition of the subject of the dispute and the nature of the claim and the succinct statements of facts and legal grounds in the application or special agreement are provided for in such a manner under Article 40 and the provisions of the Rules with the expectation that they will be supplemented and elaborated in the further proceedings.[319] The claims can be reformulated in the process and the submissions can be amended up to the end of the oral proceedings.

(p. 1078) However, according to the current case law of the Court, amendments to the submissions must not go beyond the limits of the ‘dispute’ as set out in the special agreement or the application so as to transform the existing dispute into a new one. The same concerns may arise when counter-claims are presented, according to the rules, in the memorials.[320] Normally no controversy in this regard arises in a special agreement case. More problematic are cases instituted by application. Potentially similar concerns may also arise in the application of *forum prorogatum* to expand the scope of the Court’s jurisdiction.[321]

102 The PCIJ first discussed these concerns in several cases. The ICJ subsequently dealt with them in *Nicaragua*,[322] *Nauru*,[323] and *Oil Platforms*.[324] The most comprehensive treatment is found in *Nauru*, which subsequently has been applied in several cases. For this reason, *Nauru* can be taken as representative of the Court’s jurisprudence.

In that case, Nauru filed an application against Australia for violation of various obligations under international law regarding the administration of Nauru under a Trusteeship Agreement. Australia, New Zealand, and the United Kingdom were administrators who set up a board of British Phosphate Commissioners in whom title to the Nauruan phosphate deposits was vested. The Commissioners held assets in Nauru as well as overseas. Without specifically mentioning in its application the overseas assets of the Commissioners, Nauru asked in its memorial for Australia’s share of those overseas assets. Australia argued that this claim was inadmissible because it was a new claim and would transform ‘the dispute brought before the Court into a dispute that would be of a different nature’.[325] Nauru argued that it was not new, and even if it was new, it should still be entertained, because ‘the claim is closely related to the matrix of fact and law concerning the management of the phosphate industry during the period from 1919 until independence; and that the claim is

“implicit” in the claims relating to the violations of the Trusteeship Agreement and “consequential on” them’.[326]

The Court first found that the claim was ‘formally’ a new one. The Court then recalled its traditional policy of not giving the same weight to form as does a national court, and proceeded to consider whether the overseas assets claim could be considered ‘as included in the original claim in substance’.[327] Acknowledging that it would be difficult to deny that links may exist between the overseas assets claim and the ‘general context of the Application’,[328] the Court proceeded to say:[329]

> 67. The Court, however, is of the view that, for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 36) or must arise ‘directly out of the question which is the subject-matter of that (p. 1079) Application’ (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974*, p. 203, para. 72). The Court considers that these criteria are not satisfied in the present case.
>
> 68. Moreover, while not seeking in any way to prejudge the question whether there existed, on the date of the filing of the Application, a dispute of a legal nature between the Parties as to the disposal of the overseas assets of the British Phosphate Commissioners, the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application. To settle the dispute on the overseas assets of the British Phosphate Commissioners the Court would have to consider a number of questions that appear to it to be extraneous to the original claim, such as the precise make-up and origin of the whole of these overseas assets; and the resolution of an issue of this kind would lead it to consider the activities conducted by the Commissioners not only, *ratione temporis*, after 1 July 1967, but also, *ratione loci*, outside Nauru (on Ocean Island (Banaba) and Christmas Island) and, *ratione materiae*, in fields other than the exploitation of the phosphate (for example, shipping).
>
> 69. Article 40, paragraph 1, of the Statute of the Court provides that the ‘subject of the dispute’ must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires ‘the precise nature of the claim’ to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Article 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Article 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:
>
> ‘under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein … ’*(P.C.I.J., Series A/B,* No. 52, p. 14).

In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:

> It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute … it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute.' *(P.C.I.J., Series A/B*, No. 78, p. 173. …)
>
> 70. In the light of the foregoing, the Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim.

103 Thus the Court's judgment, especially para. 67, made clear that the decisive factors for deciding whether a new claim is admissible are the links between the new and the original claim, while links of a general nature are not sufficient; it further developed two alternative tests for admissibility: in order to be admissible, a new claim must either be implicit in the application or arise directly out of the question which is the subject-matter of the application. These points subsequently exerted great influence.

(p. 1080) Several points can be made about these tests and their application in the *Nauru* case by the Court. First, the Court seemed to be concerned with the lack of notice of the 'new claim' to the outside world. One may argue that such a problem can be solved by ordering the Registrar to provide the same kind of notification as required under Article 40 of the Statute. The Court did just that when it decided to admit the counter-claims in several cases already.[330] This is no reason not to extend this approach from the counter-claim context to the 'new' claim context. This cure will be effective only if there is sufficient time for the interested parties to attempt to intervene.

104 Second, to the extent that this concern with notice is not coterminous with, or can be considered only part of, the Court's reference to 'legal security and the good administration', other aspects of the latter may also militate against perpetual amendments and expansions. These aspects may only affect the parties themselves, such as whether one should tolerate a case being amended all the time so that there would be no end to it. However, to the extent that Article 40 grants the parties the latitude to amend and supplement their pleadings, such latitude must be restricted to some extent. Otherwise the judicial process would be unseemly. Accordingly, the ultimate decision would depend on the proper interpretation of Article 40 of the Statute and Article 38, para. 2 of the Rules, which implements Article 40.

105 As alluded to earlier, the treatment of the terms 'dispute', 'subject of the dispute', and 'claim' in the Statute, the Rules of Court and the case law seem to have in mind everything in the singular.[331] The relationship between them is made clear in *Nauru*. According to the Court, for an 'additional' claim to be considered included in the original claim so as to be admissible, it must be implicit in or consequential on the original claim, or, put slightly differently, it must arise directly out of the question which is the subject-matter of the Application. Such a relationship can be characterized as some sort of specific vertical linear relationship. As a result, some general connection between the 'additional' claim and the

original claim would not be sufficient. Obviously, these tests are tools for implementing the central mission, mentioned several times, of not allowing a dispute brought before the Court by application to be transformed by amendments in the submissions into another dispute which is different in character.

106 Furthermore, the Court seemed to have adopted a kitchen sink approach by citing all its relevant cases together, without discrimination. The *Preah Vihear* case appeared to support the Court's view, but that case was one about sovereignty, and the additional claim presented by Cambodia addressed the restitution of certain sculptures and other items, a right incident to sovereignty.[332] Extended to all types of cases, this holding would unduly restrict the scope of other types of cases. In addition, the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases as quoted by the Court, used 'subject-matter of the *application*' rather than 'subject of the *dispute*', and some of the cases do not treat the case as having 'one original claim'. The Court did not explain why the cases would support its analysis, beyond the isolated phrases. One (p. 1081) would say that the subject-matter of the application may be broader than the original claim.[333]

107 The Court's approach in the context of the *Nauru* case is really blind to the realities of life. As a matter of normal business realities, good businessmen would have sent assets overseas for security and greater profit, which all resulted from the violations of international obligations back home in Nauru, obligations already dealt with in the application. Shielding overseas assets from Nauru's reach would be to shield the fruits of all violations from their vindication, leading to unjust enrichment.

108 One wonders then whether other approaches to interpreting Article 40 of the Statute and Article 38, para. 2 of the Rules may be possible. First, it would seem that, all else remaining the same, at least the term 'claim' could be considered to include the plural as long as they are all within the same 'dispute'. As a result, whether a claim is 'new' or not is immaterial; the important point is whether the new claim would 'transform' the existing dispute into a new one. The relationship between the original claim and a new claim can be horizontal and the connection need not be specific but should be a close one between the new claim and the dispute or the subject of the dispute. On this view, the Court's use of terms in *Nauru* is incorrect, or inconsistent with its own use of terms in the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases, or at least confusing. Although several paragraphs of the Court's judgment were not necessary on this view, para. 68 dealt with this point, even if one may disagree with its requirement of a close or specific connection or with its ultimate decision.

Another approach, which seems to be better, is to read both 'subject' and 'dispute' in Article 40 of the Statute as including the plural—a normal reading because written provisions often allow this—so that 'disputes' can be added after the application has been filed, but the 'subject' of the disputes, which can be better described as 'subject of the application', cannot be changed. Under this approach, not only new claims would be admissible, but also new disputes too, if all are within the subject of the disputes or the application. Whether a dispute is new or not is immaterial; what is important is whether it is within the subject-matter of the original application. The relationship between the original dispute and the new dispute can be horizontal. Usually the subject-matter of the application may be broader than the original claim and therefore may be considered capable of including more than the original claim or one that is clearly labelled as such.[334]

109 Such an approach follows from the 'micro' approach to defining the concept of 'dispute' often adopted by the Court, as discussed earlier, and also by Sir Robert Jennings,[335] leaving the 'subject' of the disputes or the application as the overarching factor encompassing all relevant issues. It is also consistent with Rosenne's view of the relationship between 'case' and 'dispute';[336] if the term 'case' is used to denote the entire set of proceedings. More importantly, this approach is also more faithful to the Court's

decision in the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases. There, in addition to the validity of certain law of Iceland, (p. 1082) Germany made a new submission raising questions of compensation for alleged acts of harassment of its fishing vessels by Iceland. The Court held that it was within the jurisdiction of the Court:[337]

> The Court cannot accept the view that it would lack jurisdiction to deal with this submission.
>
> The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961.

It is notable that the Court used here 'dispute' instead of 'claim'; 'the subject-matter of that Application' instead of 'the subject of the dispute'. This latter use of phrases may have resulted from the language of Article 40, somewhat awkward for the Court in this case. However, such a use of terms is consistent with the Statute if the term 'dispute' is read to include 'disputes'. To some extent, para. 68 of the *Nauru* judgment seems to have this in mind, but the analysis is confused.

Finally, either of the two approaches proposed here is more consistent with the spirit of Article 40 of providing an easy and simple mechanism for instituting proceedings and with the admonition of the drafters of the PCIJ Statute that: 'The demands, however are not yet set out in their final form; a general indication is all that is required, sufficient to define the case and to allow the proceedings to be commenced.' The Court's 'rigorous' approach narrows the scope of Article 40 and is inconsistent with the tenor of the statement of the drafters.

Under either of these two approaches, it would seem that the overseas assets claim by Nauru would be admissible, but judged from the Court's decision, neither seems to have been pressed meaningfully, and therefore not passed upon by the Court. It remains to be seen whether either may hold any attraction in the future.

110 Whatever force these concerns might have, the Court has continued to stick to its *Nauru* tests[338] consistently and rigorously in evaluating 'new' claims in subsequent cases, accepting as well as rejecting them. During this process, the alternative tests have been quoted many times and have taken on a formulaic dimension: in order to be admissible, a new claim must either be implicit in the application or arise directly out of the question which is the subject-matter of the Application. In *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*,[339] Nicaragua at first asked, in its application as well as its memorial, the Court to draw a single maritime boundary in a disputed maritime area. At the end of the oral hearings, Nicaragua also asked the Court to decide sovereignty over some islands in the disputed area. The Court recapped the criteria stated in *Nauru* and other cases and noted the inherent relationship between land and maritime entitlements (the land dominates the sea) and proceeded to say, essentially, that sovereignty over disputed maritime features would have an impact (p. 1083) on the delimitation line and must be decided first. It then held that the new claim was admissible 'as it is inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea'.[340] The Court then also noted that

Honduras did not object to either the Court's jurisdiction over or the admissibility of the new claim.

In the *Diallo* case,[341] although Guinea's application stated that Mr Diallo had been 'unjustly imprisoned … despoiled … and then expelled', neither the application nor the memorial had made any reference to the arrest and detention of Mr Diallo in 1988–1989; rather, Guinea presented claims in respect of violations of Mr Diallo's rights resulting from events in 1995–1996 only. While these events were mentioned for the first time in Guinea's written observations on the Democratic Republic of the Congo's preliminary objections, in the context of incidental proceedings, the Court considered the mention made could not be interpreted as presenting a claim based on the 1988–1989 events. Guinea first presented its claim in respect of violations of his rights resulting from the events in 1988–1989 in its reply, filed on 19 November 2008, after the Court had handed down its judgment on the preliminary objections. Recalling its jurisprudence and applying the *Nauru* tests, the Court held:

> 43. The Court finds itself unable to consider this claim as being 'implicit' in the original claim as set forth in the Application. … [T]he initial claim concerned violations of Mr. Diallo's individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995–1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as 'implicit' in the Application concerned with the events in 1995–1996.
>
> …
>
> 46. For similar reasons, the Court sees no possibility of finding that the new claim 'arises directly out of the question which is the subject-matter of the Application'. Obviously, the mere fact that two questions are closely related in subject-matter, in that they concern more or less comparable facts and similar rights, does not mean that one arises out of the other. Moreover, as already observed, the facts involved in Mr. Diallo's detentions in 1988–1989 and in 1995–1996 are dissimilar in nature, the domestic legal framework is different in each case and the rights guaranteed by international law are far from perfectly coincident. It would be particularly odd to regard the claim concerning the events in 1988–1989 as 'arising directly' out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented.[342]

The joint declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, and Yusuf criticized the Court's analysis as being 'formalistic'.[343] These Judges argued that: 'In terms of substance, however, the arbitrary arrests which Mr Diallo suffered in 1988–1989 and 1995–1996 reflect the continuity of the action taken against him by the Democratic Republic of the Congo whenever he brought more pressure to bear on the authorities in order to recover the debts owed by that State and Congolese companies to (p. 1084) his two companies (of which he had become the sole associé).'[344] One may have sympathy for this view; indeed both sets of events were all connected or even resulted from Mr Diallo's debt-collection efforts and can be considered to form part of the 'dispute complex', falling within the subject-matter of the application. One may even see some asymmetry between this ruling and the Court's adoption of a macro view of the dispute in *Legality of Use of Force*, as discussed previously.[345]

However, the *Nauru* tests may not have the same force in cases based on *forum prorogatum*. In such cases, their application is impacted by the specific limitations that the respondent may place on its *ad hoc* acceptance of the Court's jurisdiction as well as the Court's apparent recent extra care in ascertaining consent. In the *Certain Questions of Mutual Assistance in Criminal Matters* case,[346] these limitations were 'intended to prevent Djibouti from presenting claims at a later stage of the proceedings which might have fallen within the subject of the dispute but which would have been new claims'.[347] The analysis called for in such a situation is a combination of interpreting the consent of the parties on a holistic approach and isolating and identifying the real subject of the dispute and the justiciable claims. The two components may influence each other, but the Court in *Certain Questions of Mutual Assistance in Criminal Matters* placed greater emphasis on the former, leading to the non-application of the *Nauru* tests. Such an approach may have a lot to commend it in the context of *forum prorogatum* and the particular circumstances of the case.[348]

Subsequently in its 2012 judgment in the *Territorial and Maritime Dispute*, the Court applied the same test, and recognized the inter-relatedness of the various issues in a delimitation claim and did not consider a change in the legal basis for the claim and the solution being sought as detrimental to the admissibility of a 'new' claim in formal terms:

> The Court notes that the original claim concerned the delimitation of the exclusive economic zone and of the continental shelf between the Parties. In particular, the Application defined the dispute as 'a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation'. In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute. What has changed is the legal basis being advanced for the claim (natural prolongation rather than distance as the basis for a continental shelf claim) and the solution being sought (a continental shelf delimitation as opposed to a single maritime boundary), rather than the subject-matter of the dispute. The new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds.[349]

b) *LaGrand*: A Problematic Lack of Notice of the Claim Based on the Order Indicating Provisional Measures

111 Regarding modification of claims and notice, the *LaGrand* case presents an interesting special case. Germany filed on 2 March 1999 an application against the United States originally making claims based on the alleged violations of the Vienna Convention on (p. 1085) Consular Relations with respect to Mr LaGrand, and requested provisional measures on the same day. The Court indicated provisional measures on 3 March 1999. The United States did not carry out the provisional measures and Mr Walter LaGrand was executed as scheduled earlier. Germany then in its memorial presented a new claim that the United States incurred State responsibility for its non-compliance with the order for provisional measures made under Article 41, which Germany claimed was binding. The Court held for Germany. The judgment did not disclose any attempt by the Registrar to provide separate notice of the new claim to the world at large or specially to the parties to the Statute of the Court, thus potentially bringing into play the concerns expressed in *Socobel*, and addressed in the several orders on counter-claims, as well as the requirements under Article 63.

112 Is the lack of notice of the new claim in *LaGrand* a serious defect? If analysed as whether an impermissible expansion of the proceedings was effected, the question would be whether the provisional measures claim was a new claim, or a new dispute so as to transform the case beyond the subject-matter of the disputes or the application. One may argue that issues relating to the interpretation of the Statute as a rule need not be notified

informed those States of the filing of the Application and of its subject-matter, and of the filing of the request for the indication of provisional measures.')

312 *Cf. supra*, MN 29–31, 84, and *infra*, MN 115–133.

313 See, e.g., ICJ Press Release No. 2006/1 of 10 January 2006 ('The Republic of Djibouti seises the International Court of Justice of a dispute with France'), on such a naked attempt; ICJ Press Release No. 2014/18 of 24 April 2014, The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament, at p. 2 ('With respect to the six […] States (China, the Democratic People's Republic of Korea, France, Israel, the Russian Federation and the United States of America), the Republic of the Marshall Islands seeks to found the Court's jurisdiction, pursuant to Article 38, paragraph 5, of the Rules of Court, on the consent of those States').

314 *Cf.* Guyomar, *Commentaire*, p. 256.

315 *Cf.* von Mangoldt/Zimmermann on Art. 53 MN 1–2.

316 *Armed Activities* (DRC v. Uganda), Provisional Measures, Decl. Oda, ICJ Reports (2000), pp. 131, 132–3, para. 8, quoting Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?—A Statistical Analysis of Contentious Cases', *ICLQ* 49 (2000), pp. 251–77, 265. But note also that Liechtenstein's agent in the *Certain Property* case was Mr Goepfert of Freshfields Bruckhaus Deringer Düsseldorf.

317 See *infra*, MN 124. For further discussion on agents and representation, *cf.* Berman/Hernández on Art. 42 MN 6–11.

318 Yee, *GYIL* (1999), pp. 184–8.

319 *Cf.* Kawano, 'The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes', *Rec. des Cours* 346 (2009), pp. 89–98.

320 *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 213–4, paras. 117–8. For fuller discussion, *cf. infra*, MN 137 and Murphy, Counter-Claims, *passim*.

321 *Cf. The Mavrommatis Palestine Concessions*, Jurisdiction, PCIJ, Series A, No. 2, pp. 6, 27–8. Yee, *GYIL* (1999), pp. 153–4. *Cf. infra*, MN 116.

322 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 426–7, para. 80.

323 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 266–7, paras. 67–70.

324 *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 213–4, paras. 117–8.

325 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 264, para. 62.

326 *Ibid*.

327 *Ibid*., pp. 265–6, para. 65.

328 *Ibid*., p. 266, para. 66.

329 *Ibid*., pp. 266–7, paras. 67–70.

330 *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 259, para. 39; *Oil Platforms*, Order of 10 March 1998, ICJ Reports (1998), pp. 190, 205, para. 42, stating: '[I]n order to protect the rights which third States entitled to appear before the Court derive from the Statute, the Court instructs the Registrar to transmit a copy of this Order to them'.

331 *Cf. supra*, MN 61.

332 *Preah Vihear*, Merits, ICJ Reports (1962), pp. 6, 10–11, 36.

333 The problem with this confusion also manifested itself in the *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177 *et seq*.

334 *Ibid*., pp. 206–13.

335 *Cf. supra*, MN 40.

336 Rosenne, *ICJ Procedure*, p. 12.

337 *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 203, para. 72.

338 These alternative tests have also found their way into the jurisprudence of the International Tribunal for the Law of the Sea, see *M/V "Louisa"* (Saint Vincent and the Grenadines v. Spain), Judgment, ITLOS Reports (2013), pp. 4, 44–6, paras. 142–55.

339 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659 *et seq*.

340 *Ibid*., p. 697.

341 *Diallo*, Merits, ICJ Reports (2010), pp. 639 *et seq*.

342 The Court also noted that such late presentation of a new claim would violate the fundamental procedural right of the respondent to present preliminary objections. *Ibid*., pp. 658–9, para. 46.

343 *Ibid*., Joint Decl. Al-Khasawneh, Simma, Bennouna, Cançado Trindade, and Yusuf, ICJ Reports (2010), pp. 695, 698, para. 12.

344 *Ibid*., p. 697, para. 7.

345 *Cf. supra*, MN 43–44.

346 *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177 *et seq*.

347 *Ibid*., p. 210, para. 83.

348 See *infra*, MN 124.

349 *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 665, para. 111.

350 On the first impression nature of the issue, *cf. LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 501, para. 98. *Cf., e.g.*, Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (2005), pp. vii, 34–40. He reported, however, that diplomatic practice showed some impatience with the idea that orders indicating provisional measures could not be binding on the parties and some treaties provided otherwise. *Ibid*., p. vii.

351 *Cf. supra*, MN 89.

352 This section draws significantly upon Yee, *Leiden JIL* (2003), pp. 701–13; and Yee, *GYIL* (1999), pp. 147–91. See also Shaw, *Rosenne's Law and Practice*, vol. II, pp. 697–724; Quintana, *ICJ Litigation*, pp. 109–25; Kolb, *ICJ*, pp. 280–4; Rosenne, *Law and Practice*, 2006, vol. II, pp. 672–99.

353 In the *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 203–6, paras. 60–4, the Court gives a rather detailed account of the doctrine. For the Court's practice, see *ICJ Yearbook* (2015–2016), Annex 8, pp. 132–4.

354 The PCIJ Statute did not contain paragraph numbers, but for the sake of convenience, they will be used herein.

Annex 13

Pierre d'Argent, *Preliminary Objections and Breaches of Provisional Measures*, RIVISTA DI DIRITTO INTERNAZIONALE (2021)

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PRELIMINARY OBJECTIONS AND BREACHES OF PROVISIONAL MEASURES

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PRELIMINARY OBJECTIONS AND BREACHES OF PROVISIONAL MEASURES

Abstract. — *This paper explores the interplay between preliminary objections and provisional measures. It argues that assessing compliance with obligations created by provisional measures is not a merits issue and that it can be addressed by the Court pursuant to its inherent power under Article 41 of the Statute, even in the judgment upholding preliminary objections.*

1. *Introduction.* — Many current proceedings before the International Court of Justice (ICJ) are characterized by the accumulation of two incidental proceedings: provisional measures and preliminary objections. More often than not, the request of the former by claimant is followed by the raising of the latter by respondent. If both parties are consecutively successful in their respective use of incidental proceedings, the case does not proceed to the merits. However, before reaching that end, the legal relations between the parties would have been transformed by the provisional measures indicated by the Court. Such measures being binding, claims concerning their violations may arise between the order indicating them and the judgment upholding preliminary objections. So

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far, the Court has not yet addressed a situation where the case does not proceed to the merits while allegations of breaches of provisional measures exist. On the contrary, the Court has affirmed that "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" [1].

May allegations of provisional measures' breaches be presented to the Court by claimant at the preliminary objections stage, in the alternative that such objections are not rejected nor joined to the merits? May the Court address claims concerning the violation of provisional measures at that stage if the case does not proceed to the merits [2]?

This paper addresses those issues by unpacking the obligations under provisional measures (para. 2) and by recalling some basic tenets concerning preliminary objections (para. 3). It then argues that the power of the Court under Article 41 of the Statute is not limited to the indication and supervision of provisional measures but entails the inherent power to adjudicate upon their alleged breaches, i.e. to sanction those breaches; that power can eventually be exercised in the judgment upholding preliminary objections (para. 4). The paper ends by making some procedural suggestions aiming at safeguarding the adversarial principle (para. 5) and concludes by briefly reflecting on the nature of the preliminary objection stage (para. 6).

2. *Unpacking provisional measures obligations*. — The cumulative conditions that must be fulfilled for the Court to exercise its power under Article 41 of the Statute are well-known and need not be rehearsed here [3]. However, it is important to recall that, while the finding of *prima facie* jurisdiction to entertain the merits of the case is a condition for the

[1] International Court of Justice, Judgment of 16 December 2015 in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *I.C.J. Reports*, 2015 (II), p. 713, para. 126; International Court of Justice, Order of 14 June 2019 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates*), Provisional Measures, *I.C.J. Reports*, 2019, p. 370, para. 26.

[2] The question is not new and has been identified as a conundrum resulting from the *LaGrand* case and as one of the reasons why the Court would have erred in that judgment: Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Twelve*, *British Yearbook of Int. Law*, 2002, p. 123 f. and footnote 309 at p. 120.

[3] See e.g. International Court of Justice, Order of 3 October 2018 in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, *I.C.J. Reports*,

indication of provisional measures, the power of the Court to examine a request for the indication of such measures stems directly from Article 41 of the Statute which constitutes an independent title of jurisdiction from the one(s) asserted on the merits, as Judge Abraham recently underscored [4].

It is also undisputed that an order indicating provisional measures "create[s]" new binding legal obligations, which are distinct and autonomous from the obligations challenged between the parties in the case [5]. In fact, the issue addressed in this paper would not arise if the measures indicated provisionally by the Court were mere recommendations [6]. The new obligations created by an order indicating provisional measures can be best ascertained *ratione materiae*, *ratione personae* and *ratione temporis*.

2018, p. 623 ff.: *prima facie* jurisdiction; plausible rights whose protection is sought; link with the measures requested; risk of irreparable prejudice and urgency.

[4] See International Court of Justice, Order of 14 June 2019 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates*), Opinion individuelle de M. le Juge Abraham, *C.I.J. Recueil*, 2019, p. 379, para. 9. In French, Judge Abraham characterizes the basis of provisional jurisdiction as "autonome" (rather than "independent" as translated in the English version of his opinion) from the basis relied upon in the principal proceedings. For the proposition that the jurisdiction of the Court to indicate provisional measures derives directly from the Statute and the consent to it, while *prima facie* jurisdiction over the merits is only one of the conditions for the exercise of such power, see also Thirlway, *The Law and Procedure of the International Court of Justice, Fifty Years of Jurisprudence*, vol. II, Oxford, 2013, p. 1643 with reference to the *Legality of the Use of Force* cases; Thirlway, *The International Court of Justice*, Oxford, 2016, p. 155, with reference also to the interpretation request in the *Avena* case.

[5] International Court of Justice, Judgment of 27 June 2001 in the *LaGrand Case (Germany v. United States of America)*, *I.C.J. Reports*, 2001, p. 506, paras. 110 and 109 respectively; among many cases since, notably International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports*, 2005, p. 258, para. 263, and more recently, International Court of Justice, Order of 23 July 2018 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, *I.C.J. Reports*, 2018, p. 433, para. 77, and International Court of Justice, Order of 3 October 2018 in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, cit., p. 652, para. 100, both reaffirming that provisional measures orders create binding international legal obligations.

[6] In the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, the Court indicated on 5 July 1951 extensive provisional measures but ruled on 22 July 1952 that it had no jurisdiction over the case, making clear that the Order "ceases to be operative upon the delivery of this judgment and that the Provisional Measures lapse at the same time" (*I.C.J. Reports*, 1952, p. 114). The Court refrained from drawing any other conclusion, which was "consistent with the view which was commonly held at the time that the measures could never be more than a non-binding indication" (Thirlway, *The Law and Procedure of the International Court of Justice, Fifty Years of Jurisprudence*, vol. II, cit., p. 1809).

Ratione materiae, the new obligations contained in an order indicating provisional measures aim at "preserv[ing] ... the respective rights of the parties in a case, pending [the] decision on the merits thereof" [7]. The measures provisionally indicated must therefore aim at preserving "the rights which may subsequently be adjudged by [the Court] to belong to either party" [8]. In other words, the new obligations created provisionally protect at the same time the rights that form the subject-matter of the dispute and the authority of the Court in settling the dispute about those rights [9]. However, it does not follow from the very purpose of provisional measures that the obligations so created must be identical to the obligations that form the subject-matter of the dispute. On the contrary, orders that simply recall those existing obligations without adding to them are fairly innocuous and lightly protective. This being said, even when the obligations ordered are similar or identical to those that form the subject-matter of the dispute, they exist normatively as separate obligations from those that are disputed on the merits — provisional measures obligations are autonomous in terms of their source, and their source is Article 41 of the ICJ Statute as applied by the Court in the case. Provisional obligations are autonomous from the substantive obligations disputed on the merits "in the sense that a State may be held responsible for violation of a provisional measure notwithstanding that it prevails on the merits" [10].

[7] International Court of Justice, Order of 14 June 2019 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, cit., p. 367, para. 17.

[8] *Ibid*.

[9] International Court of Justice, Judgment of 27 June 2001 in the *LaGrand Case (Germany v. United States of America)*, cit., p. 502 f., para. 102: "The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article".

[10] International Court of Justice, Order of 3 March 2014 in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Dissenting opinion of Judge Greenwood, *I.C.J. Reports*, 2014, p. 196,

When an order indicating provisional measures incorporates as such substantive obligations in dispute or imposes additional obligations that, although related to those substantive obligations, are stricter than them by going beyond what they require, the same conduct will constitute simultaneously a violation of the substantive obligations in dispute in a case and a violation of the order indicating provisional measures [11]. Although they stem from the same facts, those violations are nevertheless distinct because the provisional obligations are legally distinct and autonomous from the substantive obligations that form the subject-matter of the dispute. If the obligations provisionally ordered are stricter than the substantive obligations, a violation of the order indicating provisional measures may conversely occur independently from a violation of the substantive obligations in the case. This may also be the case when the order imposes new obligations that have no correspondence in the substantive obligations in dispute but are necessary to protect the rights stemming from them. The provisional obligations created in the context of an Article 60 request can notably be very different from the obligations under the judgment to be interpreted, as exemplified by the Order of 18 July 2011 in the *Temple of Preah Vihear* case [12].

Ratione personae, the new and autonomous provisional obligations are binding on "any party to whom the provisional measures are addressed" [13], in favour of the other party in the case. In other words, those obligations are bilateral in character [14]. Such is the case even when they

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para. 6. For an illustration of such situation, International Court of Justice, Judgment of 26 February 2007 in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports*, 2007, p. 238, para. 471(7).

[11] See International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 714, para. 129.

[12] See D'ARGENT, *Juge ou policier? Les mesures conservatoires dans l'affaire du Temple de Preah Vihear*, *Annuaire français de droit int.*, 2011, pp. 147-163.

[13] International Court of Justice, Order of 23 July 2018 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, cit., p. 433, para. 77.

[14] International Law Commission, *Report to the General Assembly on the work of its fifty-third session*, *Yearbook of the Int. Law Commission*, 2001, vol. II, part 2, p. 118, para. 7. See draft Article 40, paragraph 2 (*b*) adopted on first reading according to which " 'injured State' means ... [i]f the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right" (International Law Commission, *Report to the General Assembly on the work of its forty-eighth session*, *Yearbook*

are similar to *erga omnes (partes)* obligations they seek to protect. Therefore, States that are not party to the case have no standing to invoke the responsibility of the State that fails to comply with the provisional measures addressed to it, even if third States may draw from the same facts in order to invoke its responsibility for the violation of identical or related substantive obligations.

Despite the bilateral character of provisional obligations, there is unquestionably an institutional interest in seeing them duly respected: "[t]he Court itself has an interest in ensuring respect for provisional measures" [15]. Such institutional interest in seeing the parties comply with orders indicating provisional measures is manifested by reporting obligations included in such order [16], but also by the notification of such measures to the Security Council pursuant to Article 41, paragraph 2, of the Statute. Whether the Court may, on its own motion, assess compliance with the provisional measures it indicated is a question that goes beyond the ambit of this short paper but to which it will briefly revert [17]. Suffice it to say here that ongoing breaches of provisional measures can be addressed *proprio motu* by the Court through an additional Article 41 order if the conditions for the indication of new provisional measures are met [18].

Ratione temporis, the new provisional obligations are immediately binding on the parties to which they are addressed, from the issuance of

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of the Int. Law Commission, 1996, vol. II, part 2, p. 62, and see the commentary of that provision in *Yearbook of the Int. Law Commission*, 1985, vol. II, part 2, p. 25.

[15] PALCHETTI, *Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function*, *Rivista*, 2017, p. 6.

[16] See lately International Court of Justice, Order of 23 January 2020 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, para. 86 (4), *Rivista*, 2020, p. 588.

[17] See PALCHETTI, *op. cit*., arguing in favour of such power and also KOLB, *The International Court of Justice*, Oxford, 2013, p. 649. See also International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, cit., Declaration of Judge *ad hoc* Verhoeven, p. 358, para. 3; International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., Separate Opinion of Judge Cançado Trindade, p. 770, par. 36; TRANCHANT, *L'arrêt rendu par la CIJ sur la demande en interprétation de l'arrêt Avena (Mexique c. États-Unis d'Amérique)*, *Annuaire français de droit int.*, 2009, pp. 212-218, who describes the power of the Court in that regard as being properly administrative.

[18] Article 75, paragraph 1, of the Rules: "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken *or complied with* by any or all of the parties"; emphasis added.

the order and according to its terms. Pursuant to the general principles on intertemporal law [19], provisional obligations cannot serve as a basis to impugn conduct that occurred prior to their issuance, even if they are identical to the substantive obligations disputed on the merits. The temporality of the breaches that form the merits of a case is thus strikingly different since they must always concern a conduct that allegedly violated international law (at least) prior to the application instituting proceedings. However, if such conduct continues after the issuance of the order [20], responsibility under the provisional obligations may (also) ensue, depending on the similarity between the provisional and substantive obligations.

Provisional obligations remain in effect "pending the final decision in the case" [21], unless the Court revises them by another order prior to such decision. As indicated earlier, and as a result of the continuing binding character of the provisional measures until the case is resolved, the Court considers that the merits judgment is the "appropriate place ... to assess compliance with the provisional measures" [22]. Such is the case even if violations of the order were to cease before the judgment of the Court,

[19] Permanent Court of Arbitration, Award of 4 April 1928 in the *Island of Palmas Case (Netherlands/United States of America)*, *Reports of International Arbitral Awards*, vol. II, p. 829 ff. at p. 845 ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."). See also, e.g., International Court of Justice, Judgment of 12 April 1960 in the *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Merits, *I.C.J. Reports*, 1960, p. 35; International Court of Justice, Advisory Opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports*, 1971, p. 16, para. 53.

[20] International Law Commission, *Draft Articles on State Responsibility*, Commentary on Article 14, para. 12: "conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can *continue* and give rise to a continuing wrongful act *in the present*" (*Yearbook of the International Law Commission*, 2001, vol. II, part two, p. 61); emphasis added.

[21] International Court of Justice, Order of 23 July 2018 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, cit., p. 432, para. 75; International Court of Justice, Judgment of 22 July 1952 in the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, *I.C.J. Reports*, 1952, p. 114.

[22] International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 713, para. 126; International Court of Justice, Order of 14 June 2019 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, cit., p. 370, para. 26.

because "what may have ceased is the breach, not the responsibility arising from the breach" [23].

The lifespan of provisional obligations may be cut short by a judgment upholding preliminary objections as it would constitute the "final decision in the case". In such an event, the order indicating provisional measures "ceases to be operative upon the delivery of [the] Judgment" finding the Court without jurisdiction to entertain the application [24]. In other words, from the judgment upholding its preliminary objection(s), the respondent State is relieved of the obligation to comply with the order indicating provisional measures. However, the respondent is not relieved retrospectively from the obligations created by such order. Therefore, its conduct, that occurred between the issuance of the order and the judgment upholding preliminary objections, can be impugned and be the object of violation claims by the party to whom the new obligations are owed. In that regard, it is legally irrelevant that the measures indicated were aimed at protecting rights over which the Court finally decided it lacked jurisdiction because the finding of a breach of provisional measures "is independent ... [of the fact] that the same conduct [would] also constitut[e] a violation of the [obligations disputed on the merits]" [25].

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3. *Some basic tenets of preliminary objections*. — Objections to the jurisdiction of the Court or the admissibility of a case possess a "preliminary" character in so far as "the Court is required to rule on [them] before the debate on the merits begins" [26]. In other words, the effect of raising preliminary objections is to suspend the proceedings on the merits [27], to bifurcate the case and open an incidental procedural phase

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[23] International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 713, para. 126.

[24] International Court of Justice, Judgment of 1 April 2011 in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, *I.C.J. Reports*, 2011, p. 140, para. 186. See also, *supra*, note 6 on the *Anglo-Iranian Oil Co*. case.

[25] International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 714, para. 129.

[26] International Court of Justice, Judgment of 30 November 2010 in the *Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, *I.C.J. Reports*, 2010, p. 658, para. 44.

[27] Article 79-*bis*, paragraph 3, of the Rules of Court (former Article 79, paragraph 5).

that needs to be decided first by the Court. Every respondent in a case has a "fundamental procedural right" [28] to raise preliminary objections in order to avoid that its impugned conduct be scrutinized by a court it considers lacking jurisdiction or being improperly seized. As a result, according to the formulation retained in Article 79, paragraph 9, of the Rules before their amendment in October 2019, the judgment of the Court on preliminary objections should only "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character".

The newly amended version of the Rules stands for the same three possibilities, except that it adds that the Court may also "decide upon a preliminary question" at that stage [29]. This addition is the logical consequence of the new Article 79 that now inaugurates the subsection of the Rules relating to preliminary objections by recalling the power of the Court to decide *proprio motu* that "questions concerning its jurisdiction or the admissibility of the application shall be determined separately" [30]: a preliminary "question" is raised by the Court itself, in contrast to a preliminary "objection" which is a procedural act of a party to the case.

The automatic suspension of the merits resulting from the filing of preliminary objections means that the Court may not decide on any merits issue before having decided on the objections. It is thus well established that a judgment on preliminary objections (or preliminary questions) is squarely limited to issues of jurisdiction or admissibility, and that it should not prejudge in any way the merits of the case [31]. If an

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[28] International Court of Justice, Judgment of 30 November 2010 in the *Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, cit., p. 658, para. 44.

[29] Article 79-*ter*, paragraph 4: "After hearing the parties, the Court shall decide upon a preliminary question or uphold or reject a preliminary objection. The Court may however declare that, in the circumstances of the case, a question or objection does not possess an exclusively preliminary character". The French version of that provision specifies that the Court "tranche *la* question préliminaire" which clearly refers to the preliminary question raised by the Court itself.

[30] See previously Article 79, paragraphs 2 and 3.

[31] "It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved" (International Court of Justice, Judgment of 18 July 1966 in the *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, *I.C.J. Reports*, 1966, p. 37, para. 59). This finding is difficult to

objection is upheld, and such objection is entirely dispositive of the case, the case does not proceed any further and the merits are never addressed by the Court [32].

Should it be inferred from the prohibition to address the merits of the case at the preliminary objections (or questions) stage that the Court may not assess the compliance with the provisional measures if the objection upheld is entirely dispositive? When the Court affirmed that the "appropriate place ... to assess compliance with the provisional measures" is the merits judgment, it was in order to make clear that having already ascertained the same facts in order to indicate additional provisional measures had no bearing in that regard [33]. Moreover, such assertion reflects the fact that provisional obligations are normally binding until the case is decided on the merits — if it is decided on the merits. However, the Court did not rule that the merits judgment was the "only" or "exclusive" place to do so, nor that the assessment of compliance with provisional measures was a merits issue properly understood. In fact, as recalled above, obligations under an order indicating provisional measures are not obligations on the merits: they are distinct and autonomous obligations, even if only created by the Court for protecting the rights vindicated on the merits. Therefore, because provisional obligations have an autonomous and distinct legal existence from the substantive obligations that form the subject-matter of the dispute brought before the Court, assessing compliance with provisional obligations is not a merits issue as such. The fact that a judgment on preliminary objections may not prejudge any merits issue is thus not decisive for the issue here explored. Another matter concerns the procedural aspects of the submission, at the preliminary objection stage, of a provisional measures' violation claim; it will be addressed *infra* in para. 5.

4. *The power to assess compliance with provisional measures*. — Does the power of the Court to adjudicate on alleged breaches of provisional obligations depend on and derive from its jurisdiction over the merits of the case?

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dispute, even if its application by the Court to its 1962 judgment rejecting preliminary objections on the issue of the legal right or interest of the applicants in the subject-matter of their claims raised serious criticism.

[32] See D'ARGENT, *Preliminary Objections: International Court of Justice (ICJ)*, *Max Planck Encyclopedia of Int. Procedural Law*, http://opil.ouplaw.com.

[33] See *supra*, note 1.

In the *LaGrand* case, where compliance with provisional obligations was first discussed, the Court appeared to tie its power to adjudicate on that issue with its jurisdiction over the merits of the case. Germany argued that because the provisional measures were indicated by the Court two years earlier in order to preserve the rights under the 1963 Vienna Convention pending a judgment on the merits, the dispute as to whether the United States were obliged to comply with the order and whether they did comply "necessarily ar[ose] out of the interpretation or application of the Convention and thus f[e]ll within the jurisdiction of the Court". Germany also contended that the issue of compliance with the order was "an integral component of the entire original dispute between the parties" while its submission in that regard implicated "in an auxiliary and subsidiary manner ... the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case" [34]. To which the Court opined that the issue of compliance with the provisional measures "ar[ose] directly out of the dispute between the Parties before the Court over which ... it has jurisdiction". Rejecting the inadmissibility argument put forward by the United States, the Court affirmed that despite the fact that the German submission was based on facts subsequent to the filing of the application, it arose directly out of a question which was the subject-matter of the application. Therefore, the Court concluded that, "[w]here the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with" [35].

In the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, the Court ruled in essence that its ability to assess compliance with provisional measures is not contingent on the actual outcome of a case in light of the jurisdictional basis on which it was seized. Mexico seized the Court on the basis of Article 60 of the Statute and also requested provisional measures. The Court ordered that several identified Mexican nationals be not executed "pending judgment on the Request for interpretation submitted by the United Mexican States" unless and until they had

[34] International Court of Justice, Judgment of 27 June 2001 in the *LaGrand Case (Germany v. United States of America)*, *cit*., para. 44, p. 483.

[35] *Ibid.*, para. 45, p. 484.

received the review and reconsideration prescribed by the *Avena* 2004 merits judgment [36]. The United States failed to comply with the order and proceeded with the execution of one of the Mexican nationals. Later, the Court concluded that Mexico's request for interpretation was "outside the jurisdiction specifically conferred upon the Court by Article 60" because the matters on which Mexico required an interpretation had not been decided by the Court in the prior judgment [37]. In other words, the Court found that it could not exercise its interpretative power under Article 60 of the Statute; i.e. that such jurisdictional basis was misplaced in light of Mexico's request. However, the Court found that it was nevertheless competent to adjudicate upon the alleged violation of the provisional measures order, stating that:

"There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60" [38].

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In all other cases so far, when assessing compliance with provisional measures at the merits stage, the Court failed to indicate any jurisdictional basis for doing so: judgments simply proceed in assessing compliance, assuming the Court's power in that regard [39].

The case-law is thus conflicting. It does not provide a clear answer on whether the power of the Court to assess compliance with provisional

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[36] International Court of Justice, Order of 16 July 2008 on the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, *I.C.J. Reports*, 2008, p. 331, para. 80.

[37] International Court of Justice, Judgment of 19 January 2009 on the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, *I.C.J. Reports*, 2009, p. 18, para. 45.

[38] See *ibid.*, para. 51.

[39] See e.g. International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, cit., p. 258, para. 264; International Court of Justice, Judgment of 26 February 2007 in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia)*, cit., p. 231, para. 456; International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., pp. 712-714.

measures obligations depends on, and derives from, the basis of jurisdiction to entertain the merits of the case. The standard view is that it does: because, pursuant to Article 36 of the Statute, its jurisdiction over a case rests on consent, the Court would not be entitled to assess compliance with provisional measures if it lacks jurisdiction on the merits [40]. Despite its apparent obviousness, this claim deserves to be questioned.

First, the excerpts from the *LaGrand* judgment reproduced above can be understood as essentially relating to the scope of matters that can be adjudicated by the Court when it addresses the merits of a case, rather than as definitive pronouncement concerning the legal basis of its power to assess compliance with provisional measures: the Court may "deal with submissions", i.e. those submissions are admissible at the merits phase. In that sense, the *LaGrand obiter* should not be read *a contrario* for the proposition that where the Court has no jurisdiction to decide a case on the merits, it would also lack jurisdiction to assess compliance with provisional measures.

Second, the *Avena* finding reproduced above "is based on, or implies, an interpretation of the Court's jurisdiction under Article 41 of the Statute as so far unrelated to, or independent of, the merits jurisdiction (or, in this case, the incidental jurisdiction under Article 60) that the exercise of the Court's powers under Article 41 is not invalidated if it is subsequently established that the merits jurisdiction, or special incidental jurisdiction invoked, was lacking" [41]. By underscoring that its "incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures" was entailed by the jurisdictional title on the basis of which it was seized, the Court clearly differentiated between those titles. The reference to the "incidental" character of its jurisdiction to assess compliance with provisional measures inescapably refers to incidental proceedings under Article 41. For the rest, one shall not fail to note *en passant* that this case also stands for the distinct legal existence of provisional obligations, because, while the Court found that the United States breached them, it declined for lack of jurisdiction to declare that they also violated the judgment on the

[40] Lando, *Compliance with Provisional Measures Indicated by the International Court of Justice, Journal of International Dispute Settlement*, 2017, pp. 22-55.

[41] Thirlway, *The Law and Procedure of the International Court of Justice*, cit., p. 1650.

merits, "even though, logically, the two propositions must simultaneously both hold true" [42].

Third, and indeed because provisional obligations are legally distinct from the obligations that form the subject-matter of the dispute, the jurisdiction of the Court over the latter cannot properly serve to adjudicate about the former. For instance, if the Court is seized of a dispute on the basis of a compromissory clause conferring jurisdiction over disputes concerning the interpretation or application of a specific treaty, such compromissory clause is not adequate to afford jurisdiction *ratione materiae* over provisional obligations, because such obligations are, as such, distinct from the treaty obligations: they have been created by the Court and can be very different in content from the treaty obligations they tend to preserve. Such is the case, for instance, of the fairly usual obligation to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" [43], which is regularly imposed on the parties [44]: assessing breaches of the obligation not to aggravate the dispute may require to look at acts that would otherwise not necessarily fall within the Court's *ratione materiae* jurisdiction in the case, even if, admittedly, those acts must somehow negatively impact the subject-matter of the pending dispute [45].

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Fourth, as recalled at the very beginning of this paper [46], the finding of *prima facie* jurisdiction to entertain the merits of the case is only a condition for the indication of provisional measures. Indeed, the power of the Court to examine a request for the indication of such measures and to order them stems directly from Article 41 of the Statute, which

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[42] International Court of Justice, Judgment of 19 January 2009 on the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, cit., Declaration of Judge Abraham, p. 28 (in the French text: "alors même que logiquement les deux propositions ne peuvent être que simultanément vraies.").

[43] International Court of Justice, Order of 23 July 2018 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, cit., p. 434, para. 79.

[44] Oellers-Frahm, Zimmermann, *Article 41*, in *The Statute of the International Court of Justice*[3] (Zimmermann and Tams eds.), Oxford, 2019, pp. 1145-1149.

[45] In that sense, there must exist a "link to the merits ... since the dispute which the parties are required not to aggravate or extend is the dispute on which the Court is being asked to rule at the merits phase" (International Court of Justice, Order of 3 March 2014 in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Dissenting opinion of Judge Greenwood, *I.C.J. Reports*, 2014, p. 196, footnote to para. 6).

[46] See *supra*, note 4.

constitutes an independent title of jurisdiction from the one(s) asserted on the merits. It is uncontroversial that, pursuant to Article 41, the Court may indicate provisional measures *proprio motu*, that it can also indicate measures different from the ones requested, and eventually order them to both parties.

Fifth: the power of the Court under Article 41 of the Statute is not limited to the indication of provisional measures, but also extends to their supervision. As recalled earlier, the Court may create provisional reporting obligations and it may also address, even *proprio motu*, non-compliance with provisional measures through an additional Article 41 order if the conditions for the indication of new provisional measures are met [47]. Arguably, this is the case when the measures needed to protect the rights in dispute are not complied with.

In December 2020, the effectiveness of the authority of the Court to supervise compliance with provisional measures was strengthened by the addition of a new Article 11 in the Resolution concerning the internal judicial practice of the Court, which reads as follows:

"(i) Where the Court indicates provisional measures, it shall elect three judges to form an *ad hoc* committee which will assist the Court in monitoring the implementation of provisional measures. This committee shall include neither a Member of the Court of the nationality of one of the parties nor any judges *ad hoc*.

(ii) The *ad hoc* committee shall examine the information supplied by the parties in relation to the implementation of provisional measures. It shall report periodically to the Court, recommending potential options for the Court.

(iii) Any decision in this respect shall be taken by the Court." [48]

It remains to be seen if monitoring *ad hoc* committees will be established each time the Court indicates provisional measures, or only when such measures include a reporting obligation. Considering the wording of the first paragraph of the new provision, the former view is probably the better. Moreover, the Court "may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated" [49], even if the order indicating provisional measures does not include a (periodical) reporting obligation. In that sense, the second paragraph of the new Article 11 applies to

[47] See *supra*, notes 16-18.
[48] See ICJ Press release No. 2020/38 of 21 December 2020.
[49] Article 78 of the Rules.

any information supplied by the parties, be it pursuant to a provisional reporting obligation or not. The third paragraph of the new Article 11 confirms that the Court has the power to *decide* about compliance with provisional measures. Such power rests on Article 41 of the Statute, not on the title of jurisdiction over the merits of the case. Of course, the Court may only use its power under Article 41 if such title appears, *prima facie*, to exist. However, as recalled earlier, such appearance is only a condition for the exercise of the power that the Statute confers to the Court.

The power of the Court under Article 41 of the Statute is thus not limited to the issuance and supervision of the implementation of provisional measures but extends to assessing breaches thereof [50]. Indeed, the power of the Court to assess compliance with provisional measures complements its authority to order such measures under Article 41 and flows from it; it is implicit but necessarily contained in that statutory provision which not only allows for the protection of the rights in dispute pending a decision in the case, but also of the Court's judicial function itself. If the conditions for the exercise of the Court's power to indicate provisional measures are met, the Court may indicate provisional measures; as soon as those are issued and as long as they are binding, the Court has the inherent power to assess compliance with them, which also entails the power to interpret them if need be [51].

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Therefore, the power of the Court to assess compliance with provisional measures does not depend on whether preliminary objections are successfully raised or not. The circumstance that the case does or does not proceed to the merits only affects the moment when such assessment is best made, not whether it can be the object of a decision by the Court. If the assessment of compliance with provisional measures could only be made when and if the case proceeds to the merits, the binding character of obligations under an order indicating provisional measures would actually depend on the jurisdiction of the Court to entertain the merits of the case. This is however not the case: the binding character of provisional measures rests solely on the authority of the Court under Article 41 of the Statute [52]. The absence of jurisdiction on the merits cannot

[50] See PALCHETTI, *op. cit.*, p. 12 and references; also KOLB, *op. cit.*; OELLERS-FRAHM, ZIMMERMANN, *op. cit.*, p. 1191.

[51] D'ARGENT, *Juge ou policier?*, cit., p. 160.

[52] See *supra*, note 5.

mean that the provisional measures would be retrospectively not binding from the day they were indicated. Indeed, as recalled above, the absence of jurisdiction to entertain the merits of the case only brings to an end the binding character of the order on provisional measures for the future, without prejudice to the past [53]. Non-compliance with provisional measures entails responsibility "even if *ex post facto* the Court finds that it lacks subject-matter jurisdiction" [54].

Pursuant to Article 79-*bis*, paragraph 3, of the Rules, the effect of raising preliminary objections is only to suspend the proceedings on the merits. It does not affect the nature or force of the substantive obligations in the case, or of the obligations under the order indicating provisional measures. The raising of preliminary objections has also no effect on the power of the Court under Article 41 of the Statute: provisional measures may be requested after the filing of preliminary objections while the Court may continue monitoring compliance with existing provisional measures pending the suspension of the proceedings on the merits and throughout the preliminary objection phase. Therefore, preliminary objections cannot deprive the beneficiary of provisional measures from requesting the Court to assess compliance with them. The power of the Court under Article 41 remains unaffected and can be exercised at all stages of the proceedings. If the case proceeds to the merits, the Court will exercise at that procedural stage its power under Article 41 to assess compliance with its order indicating provisional measures; if the case does not proceed to the merits, nothing prevents the very same power from being exercised at the preliminary objections stage.

The case-law suggests that the Court abstains from exercising its power under Article 41 to assess compliance with provisional measures in the absence of a party's specific request [55]: here again, the power to adjudicate is subordinated to the existence of a dispute, or at least of a claim. *Non ultra petita* is the Court's elegant straight jacket and it is revealing that judgments have always carefully recorded the existence or

[53] See *supra*, note 23.

[54] Oellers-Frahm, Zimmermann, *op. cit.*, p. 1191 with references.

[55] International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, cit., para. 265, p. 259; International Court of Justice, Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 712, para. 122.

the absence of a specific request for a finding in that regard by a party [56]. Because provisional measures aim at protecting, on the one hand, the rights that form the subject-matter of the dispute and, on the other hand, the authority of the Court in settling the dispute about those rights, it is only if the latter is jeopardized or rendered moot by non-compliance with the provisional obligations that a *proprio motu* determination of their breach would be institutionally justified. However, such could never be the case in the setting here explored, i.e. a situation where the Court upholds preliminary objections and is thus deprived of any authority in settling the dispute on the merits.

If the Court is seized of a request to assess compliance with provisional measures at the preliminary objection phase, its power to do so under Article 41 exists, so long as the measures are binding. As recalled earlier, a finding of no jurisdiction brings to an end the binding character of provisional measures [57]. Therefore, nothing prevents the Court, in its reasoning and in the operative part of its judgment, from finding breaches of provisional measures *prior* to upholding preliminary objections.

132 So far, the decisions of the Court on alleged violations of provisional measures took the form of declarations to that effect in the operative part of judgments on the merits [58]. In the *Bosnia v. Serbia* case, the Court declined to entertain a "symbolic compensation" request for the reason that "the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention" [59]. It goes indeed without saying that no double

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[56] See the difference noted by the Court between Costa Rica and Nicaragua in International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, cit., p. 712, para. 121 f.

[57] See *supra*, note 24.

[58] See International Court of Justice, Judgment of 27 June 2001 in the *LaGrand Case (Germany v. United States of America)*, cit., p. 516, para. 128 (5); International Court of Justice, Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, cit., p. 281, para. 345(7); International Court of Justice, Judgment of 19 January 2009 on the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, cit., p. 21, para. 61(2).

[59] International Court of Justice, Judgment of 26 February 2007 in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia)*, cit., p. 231, para. 458.

recovery should be awarded for the same injury resulting from a conduct that simultaneously breaches the substantive obligations and the provisional obligations. This being said, this finding appears to suggest that no reason of principle stands in the way of awarding reparation for the injury resulting from the violation of provisional measures, in addition to a declaration of breach [60]. A distinct claim of reparation could notably be justified if the provisional obligations are stricter than the substantive obligations protected. If that is the case, it seems here again unjustified to distinguish between a situation where the case proceeds to the merits and where preliminary objections are upheld. This is because neither the entitlement to reparation as a result of the breach of provisional obligations, nor the power to award reparation for such a breach, depends on the jurisdiction of the Court to entertain the merits of the case. The power of the Court to indicate provisional measures and to assess their breaches being based on Article 41, consent to the Statute entails consent to such power [61].

5. *Procedural issues*. — The power of the Court under Article 41 to assess compliance with provisional obligations, while immediately thereafter upholding preliminary objections, should only be exercised with due respect for the adversarial principle. Even if the Court were to have the power to assess compliance *proprio motu*, it should not do so at any stage of the proceedings without hearing the arguments of the parties. However, as they stand, the Rules specifically direct the parties to confine their pleadings with respect to preliminary questions or objections "to

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[60] In a previous paper, I wrote in a footnote that "la compétence de la cour pour connaître de violations d'ordonnances en indication de mesures conservatoires au titre de l'article 60 du statut paraît devoir être limitée à la possibilité de constater d'éventuelles violations, sans qu'elle puisse englober un contentieux de réparation à proprement parler" (D'ARGENT, *Juge ou policier?*, *op. cit.*, p. 160, note 74). However, there seems no reason to generalize such consideration beyond the interpretative title of jurisdiction on the basis of which the Court was specifically seized in the *Avena* case that was incidentally commented in that paper.

[61] Another matter of responsibility may arise in the context of provisional measures. It is when the party to which the measures are addressed complies with them — instead of breaching them —, that such compliance entails significant public expenditures but that the Court later upholds preliminary objections. As indicated by THIRLWAY, *The International Court of Justice*, cit., p. 164 f., this issue nearly arose in the *Passage through the Great Belt* case. It is also discussed by Judge Greenwood in its Dissenting opinion under the Order of 3 March 2014 in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, cit., p. 197, para. 7.

those matters that are relevant to [them]" [62]. The Rules also confine the judgment on preliminary objections to the three well-known possibilities of upholding, rejecting or declaring that "in the circumstances of the case, a question or objection does not possess an exclusively preliminary character" [63]. The Court has underscored that, because the incidental proceedings on preliminary objections are opened by respondent's filing of such objections, claimant "could not present any submission other than those concerning the merit of the objections and how the Court should deal with them" [64].

However, it is entirely possible for the applicant to include in its memorial a claim relating to the violation of provisional obligations. As indicated earlier, the raising of preliminary objections cannot have the effect of erasing any responsibility in that regard, if it exists, nor of depriving the Court of its power under Article 41. If claimant's memorial alleges that the provisional measures indicated in the case are violated, respondent should be invited to rebut such claim with its preliminary objections. If the Rules are amended in order to provide for such possibility, they should also make clear that, even in such a case and for the sake of equality of arms, claimant's written observations should only address issues of jurisdiction or admissibility. Whether the Rules should provide for the possibility of a second round of written pleadings limited to the issue of compliance with provisional measures is an open question.

If the memorial does not claim breaches of provisional measures, the automatic suspension of the merits resulting from the filing of preliminary objections implies that "no modification of the case may be made by either party — no amendment of the claim itself and no counter-claim at that stage are examples" [65]. However, if breaches of provisional measures occur after the filing of preliminary objections but before claimant responds to the preliminary objections, it should be authorized to include such claim in its written statement filed pursuant to Article 79-*bis* of the Rules. In that case, equality of arms again commands that respondent be

[62] Article 79-*ter*, paragraph 1, Rules.

[63] Article 79-*ter*, paragraph 4, Rules; see above.

[64] International Court of Justice, Judgment of 30 November 2010 in the *Case Concerning Ahmadou Siado Diallo (Guinea v. Democratic Republic of the Congo)*, cit., p. 654, para. 31.

[65] Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. II *Jurisdiction*, chapter 13, para. II.232, Leiden, 2006, p. 890, reproduced also in the 5th revised edition by Shaw (2016).

authorized to rebut by filing observations specifically limited to that issue.

If violations of provisional measures occur for the first time after the filing of claimant's written observations on preliminary objections, the Rules should likewise provide for specific procedural ways allowing for the filing of a claim and a response before the Court decides to uphold any objection.

These procedural adjustments may seem more complex than they actually are. In the absence of any amendment to the Rules, the Court may nevertheless face in the future a situation where claimant's final submissions on preliminary objections include in the alternative a specific claim concerning the violation of provisional measures. If the memorial had articulated such claim, and that had been repeated in the written observations and during the oral proceedings, it would be a very legitimate alternative claim, even if respondent never addressed it substantively [66]. If the Court upholds any of the preliminary objections, it should nevertheless address first such claim in its judgment. In the absence of a meaningful debate between the parties about it, it should then apply Article 53 of its Statute in that regard.

6. *Conclusion*. — Ever since the *LaGrand* case affirmed the binding character of provisional measures, commentators have expressed the fear that the Court would either refrain from indicating significant provisional measures or prejudge the merits of the case by such measures. The risk of seeing cases brought to the Court solely for the purpose of striking early political gains through provisional measures has also been identified. Every case being different, it is difficult to conclude that any of those pitfalls materialized. The additional requirement that the rights whose protection is sought must be at least plausible appears to be a useful safeguard in that regard [67], even if it somehow brings provisional measures orders closer to interim judgments [68].

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[66] In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Qatar alleged in its Memorial and Written Observations that the United Arab Emirates had failed to comply with the Order of 23 July 2018.

[67] International Court of Justice, Order of 28 May 2009 on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, *I.C.J. Reports*, 2009, p. 151, para. 57; International Court of Justice, Order of 8 March 2011 on *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional

As such, this slow but unaccomplished transformation would be unproblematic if preliminary objections were not hanging over the dispute and the Court's authority as a Damocles sword. The "fundamental procedural right" [69] to contest the Court's jurisdiction over the merits of the case and so trigger its duty not to prejudge them in any way should however not affect the Court's inherent statutory powers.

If the Court finds that the conditions for the indication of provisional measures are met, including *prima facie* jurisdiction, and exercises its power under Article 41, it must be deemed to have also the inherent power to adjudicate on alleged breaches of the new provisional obligations so created, so long as the finding of *prima facie* jurisdiction is not reversed by a finding upholding preliminary objections. Consent in that regard ultimately rests on consent to the Statute. While the function of the Court is to settle disputes, it would be paradoxical that it be deprived of the power to adjudicate upon the violation of obligations it has itself created — thereby adding to the dispute grievances resulting from its own intervention — for the reason that it finally decides not to address the merits of the case. It would also be quite paradoxical that the hope of prevailing on preliminary objections could lead the respondent to disregard the provisional measures it is bound to respect.

The rather exceptional procedural setting explored in this paper investigates the nature of issues that the Court is entitled to decide upon in a judgment, which upholds preliminary objections. The paper has argued that those issues are not necessarily limited to matters of jurisdiction and admissibility and that the Court may exercise its inherent power to assess breaches of provisional obligations at the preliminary objection stage if the case does not proceed any further and immediately prior to deciding so. To that extent, *compétence de la compétence* also means *compétence* des *compétences*, in the sense that the Court may exercise at that stage all its inherent competences in order to address the parties' submissions as long as they do not concern the merits of the case as such. Compliance with the autonomous

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Measures, *I.C.J. Reports*, 2011, p. 18, para. 53. The plausibility of rights requirement was first introduced by judge Abraham in his separate opinion in International Court of Justice, Order of 13 July 2006, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, *I.C.J. Reports*, 2006, p. 137.

[68] See HERNÁNDEZ, *The International Court of Justice and the Judicial Function*, Oxford, 2014, p. 58.

[69] See *supra*, nota 28.

obligations created by an order indicating provisional measures is not a merits issue; it rather belongs to the very administration of justice when a litigant seeks and obtains protection from the Court. It is not because justice cannot be done on the merits, that it should not be delivered provisionally in full.

Annex 14

UNIAN, *Russian-Speaking Ukrainians Suffered the Most from the Actions of Russia – Poroshenko* (11 October 2014)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Russian-Speaking Ukrainians Suffered the Most from the Actions of Russia - Poroshenko

15:39, 11.10.14

Reuters

As the UNIAN correspondent reports, this was emphasized by the President of Ukraine, Petro Poroshenko, during a meeting with the Kharkiv Oblast activist, commenting on the decision of the investigative bodies of the Russian Federation to open a criminal case against the military leadership of Ukraine for the alleged genocide of the Russian-speaking population of Donbas.

“I am sure that the blow to the Russian speakers was inflicted by the northern neighbor. That's where the war came from,” Poroshenko said.

He emphasized that after the invasion by Russia, the Russian-speaking population of Donbas lost their jobs, some citizens of Ukraine became refugees, and industrial enterprises were destroyed.

“Their (Russian leadership - UNIAN) opinion that the restoration of the empire requires sacrifices even justifies their actions,” Poroshenko said and emphasized that the main task of the Ukrainian government is to restore order and peace in Donbas.

In the east of Ukraine, a bloody conflict started by Russian-backed militants has been going on for six months. According to the UN, 3,660 people died in Donbas during the conflict, and 8,756 were injured.

Despite the declared truce, militants continue shelling the ATO forces and residential areas. At least 55 people died in Donbas during the last week alone.

Annex 15

VGOLOS, *It Was Russia Who Dealt a Blow to the Russian-Speaking Population – Poroshenko* (11 October 2014)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

It Was Russia Who Dealt a Blow to the Russian-Speaking Population - Poroshenko

11 October 2014 / 17:11 / Editorial office

President of Ukraine Petro Poroshenko emphasized this during a meeting with activists of Kharkiv region, commenting on the decision of investigative bodies of the Russian Federation to open a criminal case against the military leadership of Ukraine for the alleged genocide of the Russian-speaking population of Donbas, reports UNIAN.

“I am sure that the blow to the Russian-speaking people was inflicted by the northern neighbor. That’s where the war came from,” Poroshenko said.

He emphasized that after the invasion by Russia, the Russian-speaking population of Donbas lost their jobs, some citizens of Ukraine became refugees, and industrial enterprises were destroyed.

“Their opinion that the restoration of the empire requires sacrifices even justifies their actions,” Poroshenko said and emphasized that the main task of the Ukrainian authorities is to restore order and peace in Donbas.

In the east of Ukraine, a bloody conflict started by Russian-backed militants has been going on for six months. According to UN data, 3,660 people died in Donbas during the conflict, and 8,756 were wounded. Despite the declared ceasefire, militants continue shelling the ATO forces and residential areas. At least 55 people were killed in Donbas during the last week alone.

IA “Vgolos”: NEWS

Annex 16

Korrespondent.net, *Poroshenko's Officials Accused the Russian Federation of Preparing Provocations* (12 November 2015)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Poroshenko's Officials Accused the Russian Federation of Preparing Provocations

Korrespondent.net, 12 November 2015, 1:16 p.m

Photo: Getty Images
The Kremlin is preparing a provocation against Ukraine in order to withdraw from the Minsk process, the Presidential Administration said

Russia is preparing documents about the killing of 500 people by the military to appeal to the Hague Court against Ukraine, Lysenko said.

The leadership of Russia is preparing a provocation with the aim of filing a lawsuit against Ukraine at the Hague Court, said Andriy Lysenko, the speaker of the Presidential Administration on the issues of anti-terrorist operations.

"In order to divert attention from the tragic events in Syria, where cases of civilian deaths caused by the actions of the Russian army have been already recorded, the leadership of the Russian Federation is preparing a provocation of an international scale against Ukraine. Its purpose is to discredit the Ukrainian leadership, to obtain grounds for applying to the International Criminal Court in The Hague with a lawsuit against Ukraine, as well as to create grounds for Russia's withdrawal from the Minsk process," he said.

According to him, currently pseudo-evidence of the so-called "genocide of the Russian-speaking population of Donbas by Ukraine" is being fabricated.

In particular, documentary materials are being produced about the alleged destruction by the Ukrainian military of about 400 houses and 500 people (including women, children and the elderly) in the village of Sokilnyky in the Slavyanoserbskyi district of the Luhansk region, which is currently located in the temporarily occupied territory near the demarcation line.

Employees of the Federal Security Service, the Main Intelligence Directorate of the General Staff of the Armed Forces of the Russian Federation, the Investigative Committee of Russia, as well as representatives of the LPR enforcement are involved in this work.

“The real facts of the destruction in the village of Sokilnyky and the deaths of its residents who suffered at the hands of separatists and Russian troops during hostilities in late 2014 - early 2015 are used,” Lysenko said.

“On the basis of these facts, information and propaganda materials for the mass media and lawsuits are already being prepared. In order to incite an atmosphere of hysteria and hatred, it is planned to draw historical parallels with the tragic events in Khatyna during the Second World War and the Yugoslav wars of the 1990s,” - says the message of the speaker of the ATO.

Psychological brainwashing of the local population is also being carried out in an effort to persuade them to provide the “testimony” necessary for Russia.

As reported by Korespondent.net, Ukrainian military personnel were fired at from mortars in the Luhansk region near the border village of Bolotene in the Stanychno-Luhansk district.

Annex 17

Tatiana Tkachenko, *Russia is Going to Accuse Ukraine of "Genocide" of the Russian-Speaking Population in The Hague – Presidential Administration's Speaker*, ZU.UA (12 November 2015)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Russia is Going to Accuse Ukraine of “Genocide” of the Russian-Speaking Population in The Hague – Presidential Administration’s Speaker

12 November 2015, 13:18

The law enforcement of the Russian Federation is involved in the fabrication of data on the alleged destruction by the Ukrainian military of about 400 houses and 500 people in the village of Sokilnyky.

The Russian Federation is preparing a provocation in order to appeal to the Hague Court against Ukraine
© *Chetvertaya vlast*

The leadership of the Russian Federation is preparing a provocation of an international scale against Ukraine with the aim of appealing to the Hague Court, said Andriy Lysenko, the Speaker of the Presidential Administration on the issues of anti-terrorist operations.

“In order to divert attention from the tragic events in Syria, where cases of civilian deaths caused by the actions of the Russian army have been already recorded, the leadership of the Russian Federation is preparing a provocation of an international scale against Ukraine. Its purpose is to discredit the Ukrainian leadership, to obtain grounds for applying to the International Criminal Court in The Hague with a lawsuit against Ukraine, as well as to create grounds for Russia's withdrawal from the Minsk process,” he said.

According to Lysenko, the Russian side is fabricating data about Ukraine's alleged genocide of the Russian-speaking population in Donbas. In particular, the Russian Federation is preparing to submit “documentary materials” to The Hague about the alleged destruction by the Ukrainian military of about 400 houses and 500 people, in particular women, children and the elderly in the village of Sokilnyky of Luhansk region.

At the same time, the speaker of the ATO noted that the Federal Security Service, the Main Intelligence Directorate of the General Staff of the Armed Forces of the Russian Federation, the Investigative Committee of Russia, and representatives of the so-called “LPR” enforcement are involved in the fabrication of data. “Propagandists are using the real facts of the destruction of the village of Sokilnyky and the deaths of its residents, who suffered at the hands of militants and Russian troops during hostilities in late 2014 - early 2015. These facts will be presented as an alleged investigation,” Lysenko added.

Lately the militants are carrying out armed provocations against Ukrainian forces more frequently. As a result, the Ukrainian side of the Joint Center for Control and Coordination announced about the risk of disruption of the withdrawal of weapons due to the actions of militants.

Earlier the President of Ukraine, Petro Poroshenko, said that the Armed Forces of Ukraine will open targeted fire in the ATO zone. The President also informed that the Ukrainian authorities are holding consultations with European countries and transatlantic partners regarding the continuation of pressure at the aggressor country though sanctions.

BASED ON MATERIALS OF INTERFAX-UKRAINE

Prepared by: Tatiana Tkachenko