Note on New International Case-Law Concerning the Binding Character of Provisional Measures

KOLB, Robert


DOI: 10.1163/1571810054300979

Available at: http://archive-ouverte.unige.ch/unige:44841

Disclaimer: layout of this document may differ from the published version.
Note on New International Case-law Concerning the Binding Character of Provisional Measures

ROBERT KOLB*

Abstract. Three recent judicial or quasi-judicial cases deal with the question as to if provisional measures indicated by the respective body are binding on the parties to the dispute or not. In all three cases, the constitutive instruments under which the body acted were silent on the question of the binding nature of the measures at stake. Traditionally, the point as to the bindingness of such measures, in the absence of any special provision granting them a binding force, was extremely controversial. Now, through these three recent cases, the jurisprudence forcefully affirmed such bindingness. The reasoning on which the three cases are based is similar: according to the case-law, teleological reasons compel to consider that the provisional measures indicated are binding, since to hold otherwise would allow one party to frustrate the object and purpose of the whole proceeding while the matter is pending. It may thus well be that these three recent precedents established a new (procedural) customary presumption, by a sort of quick speed customary law. Thus, in the absence of special provision to the contrary, provisional measures indicated by an international judicial or quasi-judicial body would be binding, at least when such measures are taken in order to safeguard the respective rights of the parties.

1. The New Situation: Three Recent Cases

In the space of only three years, from 2000 to 2003, three international tribunals or quasi-judicial bodies established that, even in the absence of any clear provision to that effect, the provisional measures which they were empowered to indicate had a legally binding effect for the parties to the pending case.

Most remarkably, it is the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (1966) which opened suit. This is remarkable because the Committee has only quasi-judicial functions. Its views in response to individual communications are not binding upon States; there is only a quite strict follow-up procedure, in which States must inform the Committee on the steps taken to enforce the decisions and also must state reasons for not having done so. In its decision of 19 October 2000 in the Piandiong et al. v. The Philippines case,1 the Committee said:

* Professor of International Law at the Universities of Neuchâtel, Berne and Geneva (University Centre on International Humanitarian Law).
“5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State’s adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile . . .

5.4 Interim measures pursuant to rule 86 of the Committee’s rules adopted in conformity with article 39 of the Covenant, are essential to the Committee’s role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.”

It is then a major international judicial body, which, after a long jurisprudence of hesitation and avoidance, stated quite boldly that the provisional measures it indicates are binding. In the LaGrand case (2001), the International Court of Justice affirmed that:

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

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

‘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’ (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79, p. 199).


104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court
would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force."

Finally, in 2003, it was time for the European Court of Human Rights, which up to that point had astonishingly hesitated to take the step, to follow suit. In the Mamatkulov v. Turkey case, it said:

"104. The Court points out that in the aforementioned case of Cruz Varas and Others, in which it had to decide whether the Commission had power under former Article 25 § 1 to order interim measures, it noted that that Article applied only to proceedings brought before the Commission and imposed an obligation not to interfere with the right of the individual to present his or her complaint to the Commission and to pursue it. Article 25 conferred upon an applicant a right of a procedural nature distinguishable from the substantive rights set out under Section I of the Convention or its Protocols. It may thus be seen that in that case the Court did not consider its own power to order interim measures but confined itself to examining the Commission’s power. It considered the indication that had been given in the light of the nature of the proceedings before the Commission and of the Commission’s role and concluded: “Where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 . . . would have to be seen as aggravated by the failure to comply with the indication” (Cruz Varas and Others cited above, § 103).

The Court emphasises in that connection that the Commission was not empowered to issue a binding decision that a Contracting State had violated the Convention, whereas the Court and the Committee of Ministers were. The Commission’s task with regard to the merits was of a preliminary nature and its opinion on whether or not there had been a violation of the Convention was not binding.

105. While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents.

---

(see, among other authorities, *mutatis mutandis*, Chapman *v.* the United Kingdom [GC], no. 27238/95, § 70, ECHR 2001–I; and Christine Goodwin *v.* the United Kingdom [GC], no. 28957/95, § 74, 11 July 2002). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (Stafford *v.* the United Kingdom [GC], no. 46295/99, § 68, 28 May 2002). In the circumstances of the present case, the Court notes that in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect.

106. The Court will now re-examine this problem. It would stress that although the Convention right to individual application was intended as an optional part of the system of protection, it has over the years become of the highest importance and is now a key component of the machinery for protecting the rights and freedoms set out in the Convention. Under the system in force until 1 November 1998, the Commission only had jurisdiction to hear individual applications if the Contracting Party issued a formal declaration recognising its competence, which it could do for a fixed period. The system of protection as it now operates has, in that regard, been modified by Protocol No. 11, so that the right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoy at the supranational level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.

107. In the light of the foregoing considerations, it follows from Article 34 that, firstly, applicants are entitled to exercise their right to individual application effectively, within the meaning of Article 34 *in fine* – that is to say, Contracting States must not prevent the Court from carrying out an effective examination of the application – and, secondly, applicants who allege a violation of Article 3 are entitled to an effective examination of the issue whether a proposed extradition or expulsion will entail a violation of Article 3. Indications given by the Court, as in the present case, under Rule 39 of the Rules of Court, permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus
enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention.

Consequently, the terms of an indication given by the Court under Rule 39 must be interpreted against that background.

108. In the instant case, compliance with the indication given by the Court would undoubtedly have helped the applicants to argue their case before the Court. The material in the case file shows that the fact that Mr Mamatkulov and Mr Abdurasulovic were unable to take part in the proceedings before the Court or to speak to their lawyers hindered them in contesting the Government’s arguments on the factual issues and in obtaining evidence.

109. In view of the duty of State Parties to the Convention to refrain from any act or omission that might undermine the authority and effectiveness of the final judgment (see Article 46), and in the light of the foregoing considerations, the Court finds that the extradition of Mr Mamatkulov and Mr Abdurasulovic, in disregard of the indications that had been given under Rule 39, rendered nugatory the applicants’ right to individual application.

The Court reiterates in that connection that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness. That rule applies also to regulatory provisions which must be interpreted in the light of the provisions of the treaty to which they relate.

110. The Court accordingly concludes that any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.

111. Consequently, by failing to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention.”

2. Legal Analysis

a. The basis of these three holdings is the indication of provisional measures based on a provision allowing the judicial body to adopt such measures but
refraining from stating what effect they shall have. If the constitutive instrument of the tribunal, or any other treaty under which it may act, stipulate that the measures shall have a specific effect, in particular that they shall be binding, the problem does not arise. Such cases of express provisions are not rare: thus, a series of Mixed Arbitral Tribunals constituted after World War I had the power to indicate binding measures by virtue of their constitutive instruments;\(^3\) moreover, Article 33(1) of the General Act of Geneva (1928), or Article 280(6) of the Montego Bay Convention on the Law of the Sea (1982), give the tribunals acting under their aegis the power to issue binding provisional measures. The problem rather arises when the texts are silent on this point. This is the case, amongst others, of the Statute of the International Court of Justice. Article 41 limits itself to attribute to the Court the power to issue such measures. It reads: “The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party” (§ 1). What effect shall the measures indicated have in such cases?

There are some isolated precedents for the three cases mentioned. The Algiers Convention instituting the Iran/US Claims Tribunal (1982) did not contain any provision on the issuing of provisional measures (even if Article 26 of the ICSID Rules was applicable by renvoi). However, the Iran/US Claims Tribunal did consider that it had the implied power to indicate provisional measures\(^4\) and that these measures were binding on the parties.\(^5\) In this case, as is apparent, the tribunal took two distinct steps by way of an interpretation based on implied effectiveness of adjudication: first, to imply a right to issue such measures; second, to imply the binding character of the measures indicated.

b. If one looks closer at the chain of arguments presented in the three aforementioned cases, it is apparent that it rests entirely on a dynamic and teleological foundation. The starting point is not the intention of the drafters in now remote times. By the same token, the text itself, which is usually privileged by international jurisprudence when a question of interpretation arises, does not provide any services in this context. By hypothesis, there is silence of the text; thus, nothing can be inferred from it. Consequently, the entire argument is framed around the ‘object and purpose’-element.

---

\(^{3}\) See P. Guggenheim, Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens, (Sirey, Paris, 1931) pp. 23 et seq.


\(^{5}\) Aeronautic Overseas Services v. Iran (1985), Interim Award, ibid., vol. 8, p. 78; Linen e.a. v. Iran (1985), Interim Award, ibid., vol. 8, p. 87; Component Builders v. Iran (1985), Interim Award, ibid., vol. 8, p. 227.
The axiological starting point is the effectiveness of the judicial function entrusted to the tribunals in their respective field of activity. From there, the object and purpose of the provisions on the indication of provisional measures is inferred: according to the case-law, it is to preserve the rights of the parties while the dispute is pending, in order that the final judgment of the tribunal not be frustrated. The tribunals should not be hampered in the exercise of their functions because the respective rights of the parties to a dispute are not preserved. Otherwise, a party, by destroying the very basis of the subject matter in dispute while the case is pending (or aggravating it to a point where the basis of the judgment would be radically altered) could render the final judgement largely nugatory. The conclusion is that the provisional measures shall be binding, lest the function of the tribunals be frustrated.

One will note the dynamic reach of the argument, which is, however, based on the most evident grounds of effet utile. There is a clear limitation of the sovereignty of States, brought about by judicial practice, independent of formal or informal State consent.

It may be noted that this purely teleological chain of argument reproduces to a large extent what had been said by the British representative at the Security Council, when the question of the respect of provisional measures indicated by the ICJ in the Anglo-Iranian Oil Cy. came to that fore. Sir Gladwyn Jebb said on that occasion:

The whole object of interim measures . . . is to preserve the respective rights of the parties pending the final decision; in other words, to prevent a situation from being created in which the final decision would be rendered inoperative or impossible of execution because of some step taken by one of the parties in the meantime with the object of frustrating that decision. Now it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by Articles 59 and 60 of the Statute and Article 94, paragraph 1, of the Charter. But, clearly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.6

c. What is the precise object of provisional measures? It is a common error to assume that they contain only orders not to take measures which cause an irreparable prejudice to the object of the dispute. This "irreparable harm"-test

is certainly the most common grounds for indicating such measures; but it is not the only one. Thus, in Article 12 of the Rules of the German/French Mixed Arbitral Tribunal it is written that the tribunal shall have the power to order “toute mesure conservatoire ou provisioire qui lui paraît équitable et nécessaire pour garantir les droits des parties.” This is broader than the mere conservation of the status quo pending the decision or than any device against inflicting irreparable harm. Equitable measures in order to facilitate the unfolding of the proceedings could thus be indicated under such a rule as the quoted one.

In the same vein, the ICJ issued provisional measures intended to ask the parties not to “aggravate” the dispute, i.e. measures preventing an escalation; sometimes it issued two types of provisional measures in parallel, some of a purely conservative nature (irreparable prejudice test), others more generally provisional (no aggravation test). Sometimes the Court does indicate such larger provisional measures proprio motu; and sometimes it is criticized by dissenting judges for not having dared to indicate such autonomous measures directed at easing the general relations of the parties and contributing to the non-aggravation of the dispute.

Now, it could be asked if the effet utile argument presented above suits equally well both types of provisional measures. It is clear that the necessary implication argument fits ideally the “irreparable harm”-test. In such a case, there is indeed a necessity to imply binding provisional measures, lest the object of the dispute be effectively destroyed before the final judgment is rendered. In such a case, the binding effect of the final judgement itself would thereby be called in question. Formally, the binding effect of the final judgment would be preserved; but materially it would be rendered useless. In the ‘non escalation’-test, however, that necessary link does not any more exist. The provisional measures are not any more indispensable to protect the final result. On the contrary, they are only useful in order to keep on a better level the global achievement of the proceedings. But there is a neat difference between what

---

8 This seems to have been done for the first time in the Electricity Company of Sofia and Bulgaria 5 December 1939, PCIJ, ser. A/B, no. 79, p. 199. For the jurisprudence of the ICJ on this point, see H. Thirlway, ‘The Law and Procedure of the International Court of Justice . . . ’, 72 BYIL (2001) pp. 91 et seq.
9 Thirlway, supra note 8, pp. 99 et seq.
10 Ibid., pp. 107 et seq.
11 See e.g., the dissenting opinions in the so-called Lockerbie (Provisional Measures) case, 1992), IJC Reports, 14 April 1992, pp. 48–9 (Diss. op. Bedjaoui); pp. 67–70 (Diss. op. Weeramantry); pp. 74 et seq. (Diss. op. Ranjeva); pp. 88 et seq. (Diss. op. Ajibola); p. 112 (Diss. op. El-Kosheri).
is necessary and what is useful. The teleological implication test (implied powers) seems suitable only for necessary aspects, not for useful supplements.

What is remarkable in our three cases is that the teleological argument is stretched beyond the necessary implication to such usefulness-related arguments. In effect, the three courts do not say that the only measures, which are binding, are those which are based on the "irreparable harm"-test. Quite on the contrary, they affirm that the provisional measures as such, as legal category, are binding once they are indicated. Thus, the implication argument is used with a great reach, in order to say that the "global effectiveness" of the adjudication system warrants the bindingness of the measures. This induction is remarkably large. Moreover, it is not that the implication test is applied only to the first type of measures (irreparable harm) and then surreptitiously extended to the second (non aggravation); it is from the starting point that the implication is not limited to necessity but to a degree of global effet utile.

d. What was the legal situation before these three holdings? If one envisions that situation, the step made by the three tribunals appears in its full importance. During the whole 20th century, the question of the binding nature of provisional measures was a hotly debated theme. Legal writings were almost equally split, eminent authors being situated on both sides of the line. If one takes the situation of Article 41 of the ICJ Statute, the most important text in that respect, opinion was split on the following lines. These authors were for admitting the binding nature of the measures: Schindler,12 Beckett,13 Rolin,14 Niemeyer,15 Dumbauld,16 Hudson,17 Elias,18 Fitzmaurice,19 Hambro,20

The following authors took the opposite view, i.e. that the measures were not binding:

43 L. Henkin, ‘Provisional Measures, United States Treaty Obligations, and the States’, 92
Anzilotti, Schücking, Guggenheim, Venturini, Cocâtre-Zilgien, Malintoppi, Toraldo-Serra, Sztucki, Thirlway, Hammarskjöld, Cot, and probably Cahier. As can be seen, it is thus wrong to say that opinion was prevalently against the binding nature of such measures – quite the opposite. But it is correct to say that the question was highly controversial.

Sometimes, it was from the principle of good faith that some element of bindingness was derived. This derived bindingness could then be total or partial, e.g. a duty to take into account the measures indicated seriously and in good faith. In any case, it was the principle of good faith that offered the support for the teleological arguments already mentioned.

e. The new situation created by the three judicial or quasi-judicial holdings has been severely criticized by some authors. The most prominent and clear-cut of them is H. Thirlway. In his view the ICJ in the *LaGrand* case arrogated itself legislative powers. The interpretation of Article 41 of the Statute should not have been conducted on the basis of an object and purpose-test, directed
autonomously at the maximum efficiency of judicial proceedings as the Court sees it. On the contrary, it should have been based on the will, and on the object and purpose, as the States parties to the Statute saw it in 1920. At that time the provisional measures were not considered binding; thus, that was the result the Court should have reached. Moreover, the subsequent practice of States shows a lack of legal conviction in the bindingness of these measures. In sum, the Court invented an entirely new (and doubtful) obligation, through a piece of naked judicial legislation. And he adds the following extremely harsh phrase: "The LaGrand case, with its ruling that provisional measures create a binding obligation, will perhaps be hailed as a progressive step in the system of international judicial jurisdiction. On the contrary, it is submitted that it could well prove to have been a disaster for that system".

This view is here presented in order to show the other side of the doctrinal spectrum. For the 'State-sovereignists', any abandonment of any State power without formal and manifest consent of the State is a profound attack on the most hailed temple of safe and reassuring legal positivism. Between the efficiency of the proceedings and the preservation of State rights, they have no doubt to which side they give preference. This is obviously a perfectly respectable view. But it may be asked where we would stand in international law if such a strict approach had been followed since 1920; almost any decisive legal and moral progress was obtained through some legal innovation, which initially did not square completely the traditional system.

3. Legal Conclusions

What conclusions can be drawn from the foregoing? It appears that a new judicial customary rule has emerged in the short time of some three years by virtue of which, in case of silence of the constitutive instruments, it will be presumed that a power to indicate binding provisional measures is granted to the judicial body at stake. There is thus a sort of reversal of the presumption: in the 20th century, in case of silence of the texts, it was hard to presume a binding effect of the measures. Now, it appears that such a binding effect can indeed be presumed. This is the major breakthrough, reached through the three aforementioned cases.

\[\text{Ibid.}, \text{pp. 115–122.}\]

\[\text{Ibid.}, \text{p. 126. For a completely different view, and in my view more convincingly: K. Oellers-Frahm, 'Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht', 28 Europäische}\]