2023, Vol. 12, Issue 2

Sava Jankovic

Institute of Law Studies, Polish Academy of Science
ORCID 0000-0001-9960-3087

Ewa Salkiewicz-Munnerlyn *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* **(T.M.C. Asser Press 2022, pp. 151)**

In 2022, a monograph by Dr. Ewa Sałkiewicz-Munnerlyn on the jurisprudence of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) on interim measures of protection was published. It is also available in Polish, published by the Adam Marszałek publishing house (2021, pp. 191).

The interim measures issued by the PCIJ and the ICJ *pendente lite* on the basis of Article 41 of the Statute of the PCIJ /ICJ are considered to be one of the most important instruments of international litigation, which are essential for the protection of the rights of the parties to the proceedings, the prevention of irreversible consequences (which is extremely important in the field of human rights) and for the avoidance of the deterioration of a dispute between the parties, which is also crucial for maintaining peace in the world. Therefore, any contribution to consolidating, updating and expanding knowledge on this important topic is welcome in the literature.

The author of the monograph has been fascinated by international organizations and international judiciary for a long time, with a particular interest in interim measures of protection.[1] As the author points out in the preface to the monograph, she has been interested in this research question since 1976, when, as a law student in Geneva, she visited the ICJ. 14 years later, in 1990, Dr Sałkiewicz-Munnerlyn defended a doctoral thesis on this very subject at the Jagiellonian University of Kraków.

1 Sałkiewicz-Munnerlyn, "Interim Measures of Protection in the Two Orders of the ICJ – Genocide Cases (Bosnia and Herzegovina v. Serbia and Montenegro)", 53-71 or "Interim Measures of protection in the International Court of Justice order of 23 January 2020 in Case Gambia v Myanmar", 12-27.

The reviewed monograph is a classic compendium on the interim measures issued by the main judicial body of the United Nations and its predecessor, while its undoubted merit is its timeliness. Indeed, the scope of requests for interim measures reaches the year 2020, including *The Gambia v. Myanmar*, a milestone case. Later, the ICJ issued only four orders on the requests for provisional measures: three in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* at the request of Armenia and Azerbaijan (7 December 2021 and 22 February 2023)[2] and one in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* at the request of Ukraine against the Russian Federation of 16 March 2022, where as many as 32 states intervened.[3]

The text is dominated by the references and analysis of the orders issued by the ICJ, one may say for obvious reasons: so far they outnumber those issued by the PCIJ ten times (ratio 56 to 5 as of today). It is, however, without prejudice to the author's skillful referral to the PCIJ's orders, such as *The Sino-Belgian Treaty Case* or *Electricity Company of Sofia and Bulgaria*, which the author uses to describe and compare issues and, consequently to draw conclusions.

The monograph consists of twelve chapters describing: interim measures of protection in the jurisprudence of international courts from a historical perspective (Chapter 1); the purpose of provisional measures (Chapter 2); *prima facie* competence (Chapter 3); urgency (Chapter 4), irreparable damage (Chapter 5); the plausibility test (Chapter 6); the correlation between interim measures and the merits of the case (Chapter 7); the procedure for the indication of measures (Chapter 8); the binding force of the measures (Chapter 9); two cases before the ICJ where the measures were not imposed, *Guinea-Bissau v. Senegal* (Chapter 10) and *Gambia v. Myanmar* respectively

2 The Court in its Orders of 12 October 2022 and 6 July 2023 rejected Armenian requests for the modification of the orders of 7 December 2021 and 22 February 2023, respectively.

3 In its Orders in the *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)* of 10 May 2022, and the *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France)* of 21 October 2022, the World Court noted the withdrawal of the Request for the indication of provisional measures by the interested parties. On the other hand, the case (and the request for provisional measures) initiated by Canada and the Netherlands against the Syrian Arab Republic concerning the *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* under Article 36(1) of the Statute of the ICJ and Article 30(1) of the Convention against Torture promises to be extremely interesting.

(Chapter 11); and the final conclusions (Chapter 12). The book, although quite readable and clear in its current state, would be more systematic in structure if it was additionally divided into parts (e.g. substantive and procedural aspects, problems and perspectives or by categories of cases breakthrough/ military invasion, human rights etc.). In particular, Chapters 3 to 7, which in principle deal with the criteria for the admissibility of interim measures, should be taken together. On the other hand, elaborating on the two cases before the ICJ in separate chapters (10-11) would require rather a specific rationale, supported by the explanation. But it might be that the author just preferred to single out two cases for illustrative purposes, which corroborate the outlined processes and rules governing provisional measures rather than serve as a source of those processes and rules (as opposed to the 2001 *LaGrand* or the 2009 *Belgium v Senegal* cases affirming the binding force of provisional measures and introducing the plausibility of rights criterion, respectively).

When discussing the Court's order in *Guinea-Bissau v. Senegal* of 2 March 1990, the author's attention is directed to the facts of the case, the parties' applications before the Court (including those concerning the request for interim measures) and the specificity of the Court's order itself, embracing separate opinions and its main theses. The author pertinently observed the Court's *locus classicus* recollection of the purpose and admissibility interim measures (the determination of *prima facie* jurisdiction over the merits of the case before the adoption of interim measures) as well as the Court's failure to refer to irreparable damage (also reflected in Judge Thierry's dissenting opinion). On the other hand, one may argue that such a reference, as well as other conditions relating to the application of measures, appear superfluous after the observation that Guinea's request for interim measures concerned the protection of the rights of the parties in the disputed area, which were not the subject of the proceedings before the Court, hence a rejection.

Conversely, while assessing the ICJ's decision on the request for the indication of provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) of 23 January 2020, the author devoted more time to progressive aspects in the domain, such as the possibility of initiating proceedings against another state due to the breach of a peremptory norm of international law, in this case the prohibition of genocide in which every country has an interest. Still, it must be borne in mind that the very basis of jurisdiction stems from Myanmar's failure to lodge a reservation to Article IX of the Convention, which

allows any party to the agreement to refer a case to the ICJ on issues relating to the interpretation or application of the Convention. Afterwards, the author scrutinizes the established conditions for the admissibility of the request for provisional measures (risk of irreparable harm and urgency, finding of prima facie jurisdiction and correlation between interim measures and the merits of the case, as well as non-deterioration of the dispute). Finally, four interim measures imposed by the Court on Myanmar are discussed, namely its obligation to prevent acts of genocide, to ensure that the military and police and other forces under its control do not commit acts of genocide, to preserve all evidence of acts of genocide and to report compliance with these measures. Myanmar's first report to the ICJ was to be drawn up within four months upon the order of interim measures (23 May 2020), with subsequent reports every six months, pending the Court's final decision on the case. This approach represents a significant step in the application of provisional measures, complements their interpretation and strengthens their enforceability. The decision has been welcomed by the international and academic community, which is monitoring its implementation and befits a broader canon of preventing and sanctioning crimes against humanity: in 2019 the International Criminal Court (ICC) opened proceedings on alleged crimes against the Rohingya people, despite the fact that Myanmar is not a party to the Rome Statute. Jurisdiction was established on the basis of Bangladesh being a party to the Rome Statute and is likely to be expanded, as in the Georgia/Ossetia-Abkhazia and Palestine/Israel cases. Yet, it is regretful that six years after the violence in Rakhine State (2016/2017), little has been done institutionally, in contrast to the political impetus seen in Ukraine, where the ICC precipitately issued an arrest warrant against President Putin and Maria Lvova-Belova, the Commissioner for Children's Rights, for the deportation and transfer of Ukrainian children to Russia.

An unquestionable advantage of the publication is a broader than strictly institutional approach towards the interim measures. Thus, in addition to the standpoints taken by the PCIJ/ICJ, the positions of states and commentaries of doctrine on the ordering of provisional measures as well as their binding force and enforcement by the addressees (or lack thereof) are presented (e.g. chapters 3, 5, 6 and 9). However, the publication does not to a sufficient degree analyze the provisional measures applied by other international tribunals and courts, such as the International Tribunal for the Law of the Sea, and, in particular, the European Court of Human Rights, whose principal role is to safeguard the fundamental rights and freedoms of the individual or, if one prefers, the basic substrate of the state. Such

an intersection could, for example, appear in the analysis of *The Gambia v. Myanmar* or in Chapter 9, where the binding force of interim measures, their implementation and proposals for increasing their enforceability are discussed (p. 107). A comparison of the theoretical and practical assumptions of the ICJ's interim measures could be made with regard to the recent measures taken by the Strasbourg Court in interstate cases between Ukraine and Russia or Armenia and Azerbaijan in the Nagorno-Karabakh conflict, particularly in terms of efficiency. Dr. Sałkiewicz-Munnerlyn's monograph also leaves quite to be desired as far as some related issues debated in the doctrine are concerned, like the monitoring of the indicated measures, which strengthen their effect (e.g. the adoption of Article 11 into the Resolution of the Internal Judicial Practice of the Court), or the concept of an in-depth plausibility test of the rights invoked by the applicant.[4] Admittedly, the author does not completely omit these issues: the first is discussed in Chapter 12 (the role and powers of the UN Security Council) and the second in Chapter 11 (where the author joins Judge Cançado Trindade in the criticism of the indeed unclear concept of the plausibility of rights as a condition for the indication of provisional measures).[5] An exhaustive polemic could, however, impinge on the clarity of the illustration of the basic assumptions of interim measures, and perhaps such issues are better discussed in scientific articles or, as at present, in online blogs.

Finally, the two main conclusions drawn by the author with regard to provisional measures warrant a comment. Firstly, the author notes that compliance with them is *generally* an expression of the goodwill of the parties. Arguably, this is due to the wording of Article 41 of the ICJ Statute positing the 'indication' of orders, leaving aside their legal character (as opposed to Article 59 stating clearly that judgements of the Court are legally binding between the parties) and the Court's inability to react (enforce) in the event of non-compliance with the order by the party to whom the proceedings are addressed. That is a valid thesis in the realist sense, *ergo*, in the end, states will decide whether to comply with the ICJ order or any

4 Kontogiannis, "Provisional Measures of the International Court of Justice: Recapturing the Plausibility Test Foreshadowed", 31-75; Kolb, "Digging Deeper into the 'Plausibility of Rights' – Criterion in the Provisional Measures Jurisprudence of the ICJ", 365-387.

5 *Cf. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (separate opinion Judge Cançado Trindade), I.C.J. Reports 169 ff.

other verdict of an international court (cf. China's position on the 2016 ruling of the Permanent Court of Arbitration on the islands in the South China Sea), but the acceptance of a 'realist' approach is detrimental to international law. It invites *jus voluntarium* precepts through the backdoor and is not in line with the ongoing process of the *interpretation* of provisional measures as 'decisions' of the Court, binding under Article 94(1) of the UN Charter, a trend also visible in other judicial bodies (ICSID arbitral tribunals tend to perceive the 'recommendatory' value of provisional measures contained in the Rules of Arbitration (2006) as binding on the parties). One can only imagine what would have happened if the *LaGrand* case repeated, where the LaGrand brothers lost their lives on the assumption that the provisions were not binding and their rights could not be properly presented in a subsequent trial. Since that case, the ICJ has strongly emphasized the binding force of interim measures and they should be interpreted rigorously, with international liability as a consequence of their breach. Accordingly, the author is right in pointing out the empirical 'optional' regard of provisional measures by states, but not quite right in their normative assessment, claiming that they are not binding (pp. 88, 94). In truth, the author envisages two hypotheses when provisional measures might be considered binding; first in the case of an *ad hoc* agreement between the parties on the application of these measures and second if a situation has been dealt with by the UN Security Council under Chapters VI and VII of the UN Charter, i.e. the mandate to ensure peace and security in the world, notwithstanding the lack of competence of the Security Council to enforce the orders of the Court – such competences has the Council only in relation to judgments under Article 94(2) of the Charter (pp. 94, 134). However, the Council can likewise take the necessary measures after the indication of an order, could, then, the binding effect be inferred *post factum*? With regard to the second aspect of the book's conclusions, namely jurisdiction, the author should be commended for noting that the Court should, in principle, be satisfied with the minimum criteria for its establishment and that the absence of a party's counsel in the dispute cannot affect the issuance of an order. Moreover, the author rightly claims, in line with most legal scholars, that irreparable damage cannot be remedied financially. Indeed, interim measures play a preventive role and are part of the conventional wisdom that prevention is better than cure, or in the legal language: compensation or restitution.

To sum up, it can be stated that the monograph by Dr. Ewa Sałkiewicz-Munnerlyn, both in the English and Polish language versions describes in a fairly comprehensive way the essence and trends of interim measures

of protection in the practice of two international tribunals: the PCIJ and the ICJ. It should therefore become indispensable reading for anyone interested in international law, the law of international organizations, and the peaceful resolution of international disputes.

Bibliography

1. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 558.
2. Kolb, Robert. "Digging Deeper into the 'Plausibility of Rights' – Criterion in the Provisional Measures Jurisprudence of the ICJ." *The Law & Practice of International Courts and Tribunals* 2020, Vol. 19, 365-387.
3. Kontogiannis, Dimitris. "Provisional Measures of the International Court of Justice: Recapturing the Plausibility Test Foreshadowed." *Annuaire de La Haye de Droit International* 2020, Vol. 33, 31-75.
4. *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy)*, Order of 10 June 2022, I.C.J. Reports 2022, 467.
5. *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France), Withdrawal of the Request for the Indication of Provisional Measures*, Order of 21 October 2022, I.C.J. Reports 2022, 610.
6. Sałkiewicz-Munnerlyn, Ewa. "Interim Measures of Protection in the Two Orders of the ICJ – Genocide Cases (Bosnia and Herzegovina v. Serbia and Montenegro)." *Strani Pravni Zivot* 2009, Vol. 53, 53-71.
7. Sałkiewicz-Munnerlyn, Ewa. "Interim Measures of protection in the International Court of Justice order of 23 January 2020 in Case Gambia v Myanmar." *Głos Prawa. Przegląd Prawniczy Allerhanda* 2020, Vol. 3, 12-27.