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Urgency and Human Rights

The Protective Potential and Legitimacy of Interim Measures

Eva Rieter
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This book is dedicated to Prof. Theo C. van Boven whose incessant commitment to addressing urgent human rights cases continues to inspire.

Preface

This book aims to contribute to the ongoing discussion about how interim measures can be legitimate and well-functioning tools to address urgent human rights cases. Preventing irreparable harm in urgent situations requires a multifaceted approach by litigants, adjudicators and other official authorities at the international level. The book discusses urgency and human rights from the vantage point of various practitioners and scholars in international and regional adjudicatory systems. It does so with the aim of identifying how interim measures could be legitimate and protective and to single out obstacles to their implementation.

As the editors, we joined forces, first to organise an expert seminar on Urgency and Human Rights (29–30 May 2015), together with Rosa Möhrlein, and now to publish this book. Clara Burbano, Yves Haeck and Andrea Saccucci supported the venture. Several of the contributors to this book also took part in that seminar, with its call for papers. We thank Radboud University International Office, the Centre for State and Law of Radboud University and Ghent University Human Rights Centre for the funds provided, which enabled us to organise this seminar.

We very much appreciate the patience of the contributing authors throughout this project. They submitted (the new versions of) their chapters between Summer 2019 and the first half of 2020. We are now writing this preface in the awareness that worldwide crises, such as currently the COVID-19 pandemic and its impact on the enjoyment of human rights, only heighten the need to properly address urgent human rights situations. We see calls for urgent action from many quarters, including UN Special Rapporteurs. The question is what will be the role of international adjudicators. We already see interim measures requests specifically referring to COVID-19. The insights on judicial decision-making in urgent cases provided by the authors of the various chapters are directly relevant in this context. They show diverse perspectives on the protective potential and legitimacy of interim measures and other urgency mechanisms pending international proceedings.

We gratefully acknowledge the important support from Meryem Sayin and Lorin Derwish during the editorial process, with regard to the book as a whole, as well as the earlier input by Rosa Möhrlein and by Mary Dickson and Marc Veenbrink. We

also thank Jeske Jansen for preparing the book for publication. Furthermore, we thank Frank Bakker and Kiki van Gurp at Asser Press for their patience and trust in the project.

This book is dedicated to Theo van Boven, who has always shown his conviction that preventing and halting human rights violations and providing a substantive remedy for such violations are closely related. This is evident from his UN reports on the right to a remedy and reparation, his scholarly publications, his work as UN Special Rapporteur against Torture (including issuing urgent appeals) and earlier as the director of the human rights division in Geneva. It is also clear from the research projects he initiated, such as on interim measures and human rights. He was the thesis advisor for one of the editors and he gave one of the keynote speeches at the abovementioned expert seminar on urgency and human rights, where he actively engaged in critical discussion with the participants on their papers. He continues to be a motor for positive action.

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Chapter 1
Introduction: Perspectives on the Protective Potential of Interim Measures in Human Rights Cases and the Legitimacy of Their Use

Eva Rieter

Contents

Abstract In the face of time constraints, adjudicators have developed practices dealing with urgent cases, including through interim measures. Indeed, in urgent human rights cases, petitioners continue to request the use of interim measures. At the same time, at UN and regional level states have at times shown their displeasure with the use of interim measures and have sometimes done so in a concerted manner. Thus, there is a need to consider how these measures can be as persuasive as possible. This chapter explores the issues of legitimacy and the protective potential of interim measures and refers to obstacles undermining this potential, which are discussed further by different authors throughout this book. This chapter sets out the approach taken in this book, and introduces the subsequent chapters, where various practitioners and scholars further analyse the protective potential and legitimate use of interim measures and other practices dealing with urgent cases.

Keywords Interim measures · provisional measures · urgency · protective potential · legitimacy · normative legitimacy · social legitimacy · (quasi-)judicial proceedings · appropriateness criteria · plausibility · protection gaps · obstacles · compliance · time-sensitivity · Court of Justice of the European Union · European Court of Human Rights · International Court of Justice

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1.1 Contended Interim Measures: Time and Urgency

The issue of how international (and domestic) courts and quasi-judicial bodies deal with urgent human rights cases has been recurring since the first discussion on interim measures, or provisional measures, in human rights cases. Three examples illustrate certain interim measures practices in Europe. The Court of Justice of the European Union (CJEU) granted the European Commission's request for interim measures and ordered Poland to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges.[1] The European Court of Human Rights (ECtHR) granted interim measures in the 'Sea-Watch 3' case involving a vessel with 47 migrants. It ordered the Italian Government "to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary. As far as the 15 unaccompanied minors were concerned, the Government was requested to provide adequate legal assistance (e.g. legal guardianship)".[2] The ECtHR ordered the Hungarian government "to give food to migrants in detention in the transit zone at the southern Hungarian border". As the Hungarian Helsinki Committee put it, "Pending the enforcement of the expulsion, adults, unless they are pregnant or nursing women, are starved in detention". This interim measure Order by the ECtHR was not the first since August 2018.[3]

This book deals with urgency and human rights. Urgent is a word that is used often, in very different contexts. Yet together with a reference to human rights violations, the word "urgent" likely triggers images of people caught up in armed conflict, people facing terror from the state or from gangs, paramilitaries, terrorists. Or it triggers images of people fleeing terror and facing walls, fences and deadly seas. Or of people at risk of being returned to terror, or ignored, neglected, abused, deprived from access to justice and basic facilities, facing death, torture and cruel treatment. These are all cases/examples of ongoing violations. In this book examples of urgent situations are explored in the context of (quasi-)judicial proceedings. Increasingly, international tribunals and domestic courts are called upon to order interim measures or accelerate proceedings in such cases.

In the face of urgent human rights situations and threats to the rule of law, international courts are confronted with requests for interim measures, even if, or exactly because, the states addressed do not always respect them. Or because in response

[1] CJEU (Grand Chamber) Order in Case C-619/18 R Commission v Poland, 17 December 2018. On 19 October 2018, the Vice-President had already ordered Poland to suspend the effects of the Judiciary Reform Act and, in particular, to ensure that no sitting judge is removed as a result of the new retirement age. On the practice of the CJEU see Chap. 3 by Prechal and Pahladsingh.

[2] Council of Europe Special Representative of the Secretary General on migration and refugees, 'ECHR grants an interim measure in case concerning the Sea-Watch 3 vessel', Newsletter February 2019. On the interim measures practice of the ECtHR in the context of non-refoulement see Chap. 7 by Zwaan.

[3] The Hungarian Helsinki Committee, 'Hungary Continues to Starve Detainees in the Transit Zones, Information update by the Hungarian Helsinki Committee (HHC), 23 April 2019 https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf.

they may tackle the individual situation at issue, but at the same time fail to address the underlying situation. States are not fond of interim measures and they have at times shown so in a concerted manner. In this light, there is a need to consider how interim measures can be as persuasive as possible.

Time matters here. Firstly, proper decision-making takes time. Secondly, all the same, this decision-making must be quick to prevent (further) irreparable harm. Thirdly, there are urgent cases where time-sensitivity means that both the decision not to take interim measures *and* the decision to take them could result in an anticipation of the merits.[4] Fourthly, unfortunately, the discussion of urgency in this context is always timely. Based on popular elections there may be developments resulting in even greater human rights violations, in the name of security and of "own people first". Worldwide, established courts are under attack, judicial independence is undermined and the voice of "the other" is under attack. There have been political and practical overhauls in the different human rights systems which also have an impact on the use of interim measures.

The political willingness of the great powers to tackle ongoing violations is decreasing. At the same time, individuals and states concerned with a specific human rights situation invoke international law in their arguments to achieve change. They also invoke international law when time matters, when the human rights situation is urgent. Sometimes they do so simply to point out the dire situation and thereby hope to raise awareness and trigger action by the international community. They resort to international adjudicators in the hope that their decisions can be used as a tool to strengthen their case, and even if there will be no decisions in their favour, that the hearings will generate publicity and pressure.

In this setting, the use of interim measures becomes highly contentious. Are requests for interim measures legitimate? Is the decision by adjudicators to grant such a request legitimate? Do interim measures work? Thus, the enduring questions of legitimacy and effectiveness also arise in the context of urgent decision-making by international adjudicators.

This book concerns the protective potential of the tool of interim measures in international human rights cases and the legitimacy of its use. It discusses gaps in protection and obstacles to the persuasive use of the tool, to clarify how the legitimacy and protective potential of interim measures could be enhanced in the context of concrete legal cases. Examining this is especially pressing when courts and quasi-judicial bodies have used interim measures in response to requests by individuals and organisations in the context of issues that are unpopular with governments and/or controversial within society. It is in this context that states have used political pressure to limit the use of interim measures.

This introductory chapter explores the issues of legitimacy (Sect. 1.2), the protective potential of interim measures (Sect. 1.3) and obstacles to their use (Sect. 1.4), followed by references to existing literature and a discussion of the approach taken in this book (Sect. 1.5) and finally presenting the contributions by various scholars and practitioners (Sect. 1.6).

[4] See e.g. Shelton's contribution, Chap. 2.

1.2 Legitimate Use of Interim Measures

Legitimacy relates to the "quality or state of being legitimate". Here "legitimate" means "accordant with law or with established legal forms and requirements" or "conforming to recognized principles or accepted rules and standards".[5] There are discussions on the legitimacy of international governance as such,[6] and specifically of international adjudicatory bodies.[7] These discussions often relate to social legitimacy, the question of how these bodies are perceived. It is assumed that the protective potential of interim measures depends in part on their reputation and therefore is linked to their social legitimacy. Yet this does not exist without criteria for normative (internal) legitimacy. Normative (internal) and social (external) legitimacy are closely connected.[8] The scholarship on international judicial functions[9] and particularly on the legitimacy of decision-making by international adjudicators, is just starting and has not caught up yet with the scholarship on the legitimacy of international courts and tribunals as such. This book focuses on the legitimacy of the decisions made by international adjudicators rather than on the legitimacy of these adjudicators as such. The question is whether these decisions are taken in conformity with recognised principles.

Certain criteria must be met for appropriate decision-making.[10] In general, process matters for legitimacy of decision-making. The procedure followed in each case is relevant for the legitimacy of the outcome. Related to procedural fairness is also the question of the clarity of communication and access to information. Next to procedural fairness[11] and the way a decision is presented, what is central to normative legitimacy of decisions is obviously their substance and motivation.[12] Whether urgent intervention is in the form of interim measures or by way of informal 'diplomatic' (soft) inquiries, there is always a reference to international legal obligations. These international obligations are the first substantive element. The principled and binding nature of the law is invoked. Moreover, the choice whether to order interim measures must be based on criteria. The clarity of the criteria applied is crucial for the legitimacy of the decisions, both those decisions ordering interim measures and those denying requests for interim measures. The same applies for the consistency with which they

[5] Merriam-Webster Dictionary 2017, also noting that 'legitimate may apply to a legal right or status but also, in extended use, to a right or status supported by tradition, custom, or accepted standards.'

[6] See e.g. Bodansky 1999; Kumm 2004; Peters 2006; and Weiler 2004.

[7] See e.g. Keller and Ulfstein 2012; Grossman 2009, 2013; Dzehtsiarou and Coffey 2014; Føllesdahl 2013a; Helfer and Alter 2013; Thomas 2014; Ulfstein 2014; Voeten 2013; and Von Bogdandy and Venzke 2012a, b.

[8] See e.g. Franck 1990.

[9] See e.g. Hernández 2014; Von Bogdandy and Venzke 2012a, b, 2013; Petersen 2011; Tzanakopoulos 2011; and Ulfstein 2009.

[10] See e.g. Føllesdal 2013b.

[11] Thomas Franck focused on procedural legitimacy, 'generally accepted principles of right process'. Franck 1990.

[12] On motivation, see e.g. Ruiz Fabri and Sorel 2008.

are applied. Consistency is one of the properties identified by Thomas Franck in 1990. Determinacy is another property. The specificity and explanation of interim measures could be labelled elements of this determinacy. A third property is symbolic validation.[13] The ritual of calling for and ordering interim measures could be an example.

The ensuing chapters do not draw extensively from the practice of the International Court of Justice (ICJ), a matter discussed elsewhere,[14] yet when discussing appropriateness criteria, those developed by the ICJ over the years should be mentioned. These criteria are: prima facie jurisdiction on the main application, plausibility, link between the interim measures requested and the rights claimed on the merits, urgency and irreparable damage.[15] While the judicial function of the ICJ may differ from that of the human rights courts, most of the criteria[16] identified by the ICJ are applied by other international adjudicators as well. Only the ICJ's steep plausibility requirement introduced in *Ukraine* v *Russian Federation* (2017) is controversial and does not appear to be adhered to by the other adjudicators.[17] The unanimous ICJ Order three years later, in *Gambia* v *Myanmar* (2020), may indicate that it is not diverging from the approach taken by the other adjudicators after all.[18] In this Order, the ICJ did not expect the applicant state to meet steep plausibility requirements at the stage of provisional measures.[19]

Apart from meeting appropriateness criteria to enhance normative legitimacy, there are also other factors strengthening the persuasiveness of interim measures decisions, and thereby their protective potential. A convergence in approaches by various courts and quasi-judicial bodies can be one of them. A research concluded in 2008 found that there was a commonality in approaches by various human rights adjudicators and the ICJ. The conclusion reached was that there appeared to be a convergence in the practice of the human rights adjudicators in ordering interim measures in similar situations, and on the merits in identifying certain rights for their elevated status within the applicable treaty. Moreover, even the ICJ, as a Court of

[13] Franck 1990, 52, 94, 142.

[14] See e.g. Rieter 2019. On the approach by the ICJ to provisional measures in general see the contributions by Thirlway, Wittich, Sparks and Somos, Le Floch, Rieter, Tanaka, and Marotti in: Palombino et al. 2021. On the approaches of the ICJ, ITLOS and arbitral tribunals, see Miles 2017.

[15] See e.g. ICJ Order for provisional measures in 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), 19 April 2017, para 99.

[16] In the context of the ICJ now often referred to as conditions.

[17] On the controversy, see e.g. the individual opinions attached to the ICJ Order for provisional measures in 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), 19 April 2017. See further Rieter 2019 and the discussions on the ICJ in Palombino et al. 2021.

[18] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar), Order of 23 January 2020.

[19] See e.g. Rieter 2021.

general jurisdiction, seemed to confirm this convergence.[20] The argument was that this commonality of approaches strengthened the specific interim measures ordered, and enhanced their persuasiveness.[21]

Since 2008 the attitude of some states towards international human rights adjudicators has changed negatively and the ICJ sometimes appears to have reverted to a more statist approach. In 2016 another research, examining the practice of the ICJ, the International Tribunal on the Law of the Sea (ITLOS) and arbitral and investment tribunals, but not of the human rights adjudicators, nevertheless concluded that while there is "no uniform checklist" for interim measures, there is a convergence of approaches. It also suggested that "a commonality of approach" will improve the acceptance of interim measures by the parties. Moreover, it will "improve the prospects for the development of a harmonious system of international dispute settlement—to the benefit of international society as a whole".[22] In that sense convergence, too, plays a role in the legitimacy of interim measures decisions.

Public responses to interim measures decisions, questioning their normative legitimacy, may be a package of true concerns and arguments of convenience aimed at undermining their social legitimacy. In other words, there may be true concern about a specific decision or a specific decision-making process, involving the normative legitimacy also explored in this book, and/or about the standing of the decision-maker given its previous decisions, its proceedings and the judicial independence and expertise of its members.[23] Yet states (and other players) may also invoke these concerns to achieve other goals, for instance to diffuse attention away from states' unwillingness to respect international obligations.

1.3 The Protective Potential of Interim Measures

The criterion of effectiveness is often used by lawyers, but it has proven difficult to identify what constitutes effectiveness.[24] Often what is really meant by effectiveness is the compliance of states. In this respect, it is assumed that the measures taken by a state are indeed taken in response to the international decision examined.

The question of compliance with international decisions can be answered differently depending on the level of compliance required.[25] This book does not present empirical research on compliance and on causality between Orders for interim

[20] Rieter 2010.

[21] See also Rieter 2012.

[22] Miles 2017.

[23] E.g. Bodansky 1999.

[24] More closely, see e.g. Shany 2014; Shaw 2011; https://www.asil.org/blogs/idea-effective-international-law; Couvreur 2017.

[25] E.g. is the test whether a state has paid compensation? Or is the test whether it has taken concrete measures to help prevent similar violations in the future, and if so, how concrete should these measures be?

measures and their implementation in practice. Instead it presents approaches and ideas by legal scholars and practitioners on the question whether interim measures can be useful tools in the face of urgent human rights situations and, if so, how they can be the best possible tools.

There is obviously no single answer to this question. It may be that interim measures are most useful, or only useful in certain situations and if certain conditions are met. The participants at a 2015 expert meeting appeared to agree on the following:[26] interim measures should be geared to the situation at hand and the persons at risk should themselves consider worthwhile the efforts to obtain them. Interim measures must be sufficiently specific so that the state knows what is expected of it to address the urgent situation. They also must be sufficiently flexible to allow the state to properly meet its primary obligations. Other relevant factors or conditions that may determine their protective potential are the moment at which they are ordered in the first place, how closely they are followed up and what the strength of their wording is. Moreover, interim measures are only useful if they do not invite such serious backlash against the rights holders (the beneficiaries of the measures) that they would have preferred that the measures would not have been requested. They should also avoid backlash in terms of the attitude of the public towards human rights and towards the adjudicator.

[26]Expert seminar Urgency and Human Rights, Radboud University Nijmegen, 29-30 May 2015. The seminar was organised by Rosa Möhrlein and Eva Rieter (Research Centre for State and Law, Radboud University, in collaboration with Karin Zwaan (Centre for Migration Law, Radboud University), Yves Haeck and Clara Burbano Herrera (Ghent University) and Andrea Saccucci (Università della Campania "Luigi Vanvitelli") and with financial contribution from Radboud University International Office and Ghent University. Next to the contribution of scholars, well-known practitioners offered new and refreshing insights. Speakers were Clara Burbano Herrera & Yves Haeck (Ghent University); Oksana Chelisheva (journalist), Carla Ferstman (REDRESS; University of Essex)), Brian Griffey (OSCE Office for Democratic Institutions and Human Rights); Jelle Klaas (director Public Interest Litigation Program); Philip Leach (Middlesex University; European Human Rights Advocacy Centre); Placide Ntole (SOS Information Juridique Multisectorielle, South Kivu), Róisín Pillay (International Commission of Jurists), Sacha Prechal (judge at the Court of Justice of the European Union; Utrecht University), Andrea Saccucci (Università della Campania "Luigi Vanvitelli"; Saccucci & Partners; Doughty Street Chambers); Dinah Shelton (George Washington University; former President Inter-American Commission on Human Rights); Amrit Singh (Open Society Justice Initiative); Özlem Ülgen (Birmingham City University); Richard van Elst (Radboud University); Theo van Boven (Maastricht University, former UN Special Rapporteur against Torture); William Worster (Hague University of Applied Sciences). The participating scholars and practitioners argued from diverse perspectives but agreed on the need for further development of ideas to improve the tools available in urgent human rights cases importance arrived at a common understanding of the importance of improving the legitimacy and protective potential of interim measures. This book aims to contribute to the further discussion in this respect.

1.4 Protection Gaps and Obstacles in the Face of Urgency

There are protection gaps in international litigation involving urgent situations, sometimes because courts have not ordered interim measures, or because their interim measures were insufficiently specific for proper state compliance. There are also other obstacles to the effective implementation of interim measures. Many of these obstacles coincide with the increase in urgent situations. The causes triggering the urgent situations are also the obstacles hindering relief. Moreover, there are controversies on how to deal with societal problems. These play out within communities, states, regions and at international fora. There is a rise in populism worldwide, with fears and anger sometimes organised in specific directions, such as asylum-seekers, the internally displaced, minority religious or ethnic backgrounds, or simply the disenfranchised (including detainees). In the context of armed conflict, or "wars on terror", these are directed against those associated with the enemy, for instance through proximity (e.g. drone strikes) or otherwise guilty by association.

1.5 Existing Literature and the Approach Taken in This Book

A small selection of books has been published on interim measures in a range of international legal systems. Two cater for the French language market: Cohen-Jonathan and Flauss 2005; and Le Floch 2008; and one for the English language market: Bernhardt 1994, taking a system-by-system approach, some dealing with human rights and others not.

Two comprehensive monographs have been published concerning the use of interim measures in all human rights systems, as well as the International Court of Justice, and taking a thematic approach, integrating the case law of the various systems on a range of aspects of interim measures: Saccucci 2006; and Rieter 2010. Since the publication of the above-mentioned thematic books, there have been many political and practical overhauls in the different human rights systems which have had an impact on the use of interim measures, triggering questions regarding the legitimacy and protective potential of interim measures in human rights cases. Some of those are taken up in this volume. More recent works, focusing on the ICJ, ITLOS and arbitral tribunals, should also be noted here: Miles 2017; and Palombino et al. 2021.

Different from the above monographs on the concept of interim measures in human rights cases, this book discusses urgency and human rights in international adjudication from the vantage point of various practitioners and scholars. Moreover, this edited volume takes a thematic, rather than a system by system approach to urgency in human rights adjudication, exploring the legitimacy and protective potential of urgency tools applied in international adjudication.

The question when the use of interim measures is legitimate arises with regard to classic as well as newer themes, but there is also the question whether requesting interim measures is worth the effort from the perspective of civil society. This concerns the protective potential of interim measures. How does litigation in urgent cases work at the international level? The book zooms in on protection gaps and obstacles faced by human rights adjudicators in dealing with interim measures, especially in the context of systemic problems.[27] The issue is examined from various angles, from an academic and a practitioner's perspective.

A broad range of adjudicators has dealt with urgent cases.[28] They are courts of general jurisdiction, like the ICJ and the Court of Justice of the European Union (CJEU), as well as specific human rights courts and quasi-judicial bodies; and next to cases brought by individuals or groups against a state, there are also inter-state cases.[29]

The examination of the approach to urgency and human rights by courts of general jurisdiction provides different and very relevant perspectives, also on the question whether such courts deal differently with urgent human rights matters than human rights courts do. As to the ICJ, reference is made to recent studies providing a further discussion on the relevance of its provisional measures in human rights cases.[30] This volume devotes a chapter to the approach to urgent human rights cases by the Court of Justice of the European Union, a regional court that is not exclusively dealing with human rights. The approach of the CJEU is interesting because it increasingly faces rule of law issues and because, in addition to facing requests for interim measures, it also has to deal with the issue of urgency and human rights in the context of the preliminary ruling procedure, triggering a different type of legitimacy concerns.

As to human rights courts and quasi-judicial bodies, this book gives examples of the practice of a number of them. The selection of adjudicators from which practices are drawn is based on their relevance for the discussion on the legitimacy of decision-making and processes of legitimation.[31] The examples provided are often derived from the European context and the Americas, but either way they deserve wider attention. Moreover, the chapter discussing examples from the African system considerably adds to the existing legitimacy discussion. The book does not aim to be comprehensive, but instead to be illustrative, to consolidate some of the existing research and to invite further research on these issues.

Several contributions deal with elements of both legitimacy and protective function. As to the latter, certain difficult situations are singled out where there are protection gaps and where societal controversy and fears, or pressure by third parties,

[27] See e.g. Griffey (Chap. 8); Leach (Chap. 9); Zwaan (Chap. 7); Burbano Herrera and Haeck (Chap. 10).

[28] See the literature referenced above.

[29] See e.g. Griffey (Chap. 8).

[30] Recently on the ICJ, as a court of general jurisdiction, and its approach to provisional measures specifically in human rights cases, see Rieter 2019. In general on the ICJ's approach to provisional measures, see the contributions in Palombino et al. 2021.

[31] See e.g. Shelton (Chap. 2); Prechal and Pahladsingh (Chap.3); Pillay (Chap. 4); Ebobrah (Chap. 5); and Harrington (Chap. 6).

hinder the implementation of the urgent measures required to protect against (further) irreparable harm. The focus here is on the implementation of the obligations in the context of anti-immigration sentiments and of lack of interest in the situation of detainees as well as in the context of armed conflict.

1.6 The Contributions by Scholars and Practitioners

Preventing irreparable harm in urgent situations requires a multifaceted approach by litigants, adjudicators and other official authorities at the international level. This book aims to contribute to the ongoing discussion in this respect by offering the perspectives of several scholars and practitioners.[32]

In Chap. 2 **Dinah Shelton** posits that both the scope of the use of interim measures and the adherence to procedural rules may impact their legitimacy. The chapter discusses the inherent powers of the regional adjudicators, with a focus on the Inter-American Commission on Human Rights. It refers to specific violations that trigger urgent action, such as executions and disrespect for land rights of indigenous peoples. The author combines her scholarly insights on this type of urgent remedy and on the function of the various regional human rights tribunals with her experience as a member of the Inter-American Commission at a crucial time for the functioning of its precautionary measures.

She observes that urgent cases often concern sensitive matters in domestic law and politics, generating considerable internal resistance. She discusses the major reform of the Inter-American Commission's Rules of Procedure and observes that this has resulted in a more legitimate process. While this overhaul satisfied the states, Shelton expresses concern for the expansion in the subject matter of precautionary measures to situations without risk of irreparable harm.

In Chap. 3 **Sacha Prechal** and **Aniel Pahladsingh** discuss how the CJEU deals with urgent cases involving human rights. They discuss the European Union (EU) law and procedure in urgent human rights cases, especially as pending before domestic courts. The authors first address the practice of ordering interim measures in direct actions before the General Court and the Court of Justice Court of Justice of the European Union (CJEU). Then they show the relevance of European Union (EU) law for interim measures or other forms of provisional protection at the domestic level. Following this, they zoom in on the preliminary ruling procedure to secure rights of Union citizens. In urgent cases the CJEU has introduced tools for accelerating the proceedings. Depending on the area of law, these tools are the urgent preliminary ruling procedure (PPU), and the expedited or accelerated preliminary ruling procedure (PPA). The chapter focuses on a review of these tools. It deals with

[32]The contributors work in academia, with practical experience in the field, or are specialists in international organisations. Most of the contributors are both scholar and practitioner, most notably Dinah Shelton (former Commissioner with the Inter-American Human Rights Commission), Sacha Prechal (Judge at the Court of Justice of the European Union), Aniel Pahladsing (lawyer at the Dutch Council of State) and Philip Leach (director at the European Human Rights Advocacy Centre).

the criteria of serious and irreparable damage and gives examples involving immigration law (Return Directive and non-refoulement), criminal law (e.g. European Arrest Warrant) and civil law (e.g. child custody cases).

Róisín Pillay, in Chap. 4, zooms in on the politics of interim measures from the perspective of the international rule of law. She analyses the political resistance to effective interim measures and the consequences of this resistance. In this chapter the focus is on the European Court of Human Rights and UN treaty bodies, discussing the reform of the European system and the negotiation of protocols on individual petition to the Children's Rights Convention and the Convention on Economic, Social and Cultural Rights. She also discusses political developments with regard to the Inter-American Commission and touches upon urgent measures by the European Social Rights Committee. She argues that interim measures are not only a tool for applicants, but also have a wider purpose in the fair and proper administration of justice: preserving the factual situation of the parties pending consideration of the case to ensure the integrity and effectiveness of the adjudicator's eventual judgment. Moreover, interim measures can only be useful when "irreparable harm" is interpreted in light of the rule of law principle that the circumstances of the case must be preserved pending adjudication. Therefore, she argues, interim measures should not be limited by express or implied criteria of exceptionality.

In Chap. 5, **Solomon Ebobrah** presents a critical analysis of case law of the African Commission and Court on Human and Peoples' Rights on provisional measures, as well as archival documents of the African Union. Next to the legal foundation of provisional measures in the African system, he discusses a range of situations that have been submitted by complainants as urgent, of extreme gravity and carrying the risk of irreparable harm to persons. The chapter examines how the supervisory mechanisms have decided upon the use of provisional measures. The compliance situation is analysed in the light of legitimacy considerations. While the states do not question the legal foundation of provisional measures, he argues that certain other legitimacy concerns can be detected and suggests some strategies for addressing these, in order to enhance the protective value of the system.

Joanna Harrington, in Chap. 6, equally discusses the legitimacy of interim measures, as well as their protective potential. She does so from the perspective of a state, taking the example of Canada. While Canada has long been supportive of the international legal protection of human rights, it has refused to abide by interim measures requests. The author critically discusses the practice of Canada, including its courts, as well as its public record of objection before the Human Rights Committee and the Committee against Torture. She argues that while Committee Views on the merits are not generally considered legally binding, states cannot automatically assume that their interim measures requests have no legal force, making note of the important regulatory role these measures serve. Yet in order to encourage state compliance, she stresses that process matters. She suggests that the UN Committees look at the procedural reforms made by the Inter-American Commission as this would result in greater transparency and trust in the system. She also points out the need for making the format and terminology of UN documents more user-friendly

for the domestic context. Finally, as to the substance of interim measures, she argues in favour of providing detailed reasons for interim measures decisions.

In Chap. 7, **Karin Zwaan** focuses on the issue of urgency in expulsion cases. She analyses case law of the European Court of Human Rights, as well as the UN Human Rights Committee (HRCtee), UN Committee on the Elimination of Discrimination against Women (CEDAW), UN Committee on the Rights of the Child (CRC) and the UN Committee against Torture (CAT). The question is addressed how these bodies deal with evidentiary matters and how, within the time constraints, they deal with the requirements of elaboration and reasoning. Also—from a practitioner's perspective—the choice of forum will be dealt with. The chapter takes a thematic, rather than a system by system approach to urgency in human rights litigation. To discuss the legitimacy and protective potential of the tool of interim measures from the perspective of urgency in expulsion cases, a case study on Female Genital Mutilation (FGM) gives insight in different aspects of urgency, evidentiary matters, choice of forum and the protective potential of interim measures in expulsion cases. This contribution also seeks to address the question how the persuasiveness and effectiveness of these interim measures could be enhanced by improved coordination between treaty bodies.

One urgent situation specifically singled out in the book, is that of armed conflict. In Chap. 8, **Brian Griffey** provides an illustrative case study of a specific time period in the Ukraine and of individual as well as inter-state cases brought before the European Court of Human Rights.[33] The question addressed is whether the tool of interim measures is at all useful in this context.[34] The chapter discusses claims of potential abuses and violations that threaten irreparable harm and identifies practical challenges in the seeking and enforcement of interim measures and other forms of urgent intervention. Courts facing urgent questions in the context of armed conflict not only have to grapple with the interrelationship between human rights law and humanitarian law, but also with the question what should be the content of interim measures to have protective potential in the setting of an armed conflict. Through the Ukraine case study, Griffey discusses how protection gaps were (and were not) dealt with by the various international, governmental and nongovernmental actors in the region. He also identifies opportunities for further engagement by practitioners to seek and/or enforce interim measures.

In Chap. 9, **Philip Leach** also asks what role human rights courts could play in the face of urgent cases during, or immediately following, an armed conflict. He explores the question whether interim measures can be a useful instrument to preserve the Convention rights of applicants in such a context. Could they help ensure alleviation of a humanitarian situation? Could they order the preservation of evidence of serious violations of human rights law? Then he discusses the expanding scope of the interim

[33] As discussed elsewhere, the ICJ has also ordered provisional measures in the context of armed conflict, including in response to provisional measures requests by Ukraine. Specifically on ICJ Ukraine v Russia, see e.g. Rieter 2019. See also the discussions in Palombino et al. 2021. See further ITLOS Case concerning the detention of three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Order for provisional measures of 25 May 2019.

[34] See Griffey (Chap. 8).

measures by the European Court of Human Rights. In this contribution, other urgent cases than those involving non-refoulement are highlighted, such as detainees' access to a lawyer and the right to receive adequate medical treatment. In his analysis of the evolving practice he detects a broadening of the scope of situations in which interim measures are applied. Yet the question is whether this is sufficient. Moreover, the question is how compliance with interim measures should be assessed and what could be the role of the Court in this respect.

Subsequently, in Chap. 10, **Clara Burbano Herrera** and **Yves Haeck** equally discuss the detention context, and systemic issues. They reflect on the role that provisional measures have played, and may play in the future, in the context of detention. Their discussion of the legal basis of the provisional measures in the Inter-American system complements the discussions by Shelton (Chap. 2) and Harrington (Chap. 6) on the Commission's precautionary measures. Following this, they give a general overview of the current conditions of detention in Latin America. In particular, they analyse a specific provisional measures resolution: *Case of the Instituto Penal Placido de Sá Carvalho (IPPSC)* v. *Brazil* (2018). This resolution requires a close analysis for three reasons. Firstly, it outlines the current detention conditions in Brazilian prisons. Secondly, it is a clear example of an Order in which the Inter-American Court takes into account the case law of various national courts of OAS States and of the European Court of Human Rights when examining the Brazilian prison problem. Thirdly, in this resolution the Court clarifies what are, and what are not, appropriate measures to address overcrowding in detention.

In Chap. 11 **Eva Rieter** concludes the book. This chapter contains overall reflections on common threads between the various contributions. This chapter explores the different mechanisms and legitimacy aspects highlighted throughout the book, by reference to the various contributions. It reviews the range of urgent mechanisms used by regional and international (quasi-)judicial bodies and refers to mechanisms obstructing the protective potential, discussing situations of non-compliance and state pressure to control the practices developed by different adjudicators as well as measures enhancing the protective value. The capacity to protect against harm decreases when the (perceived) legitimacy of interim measures decreases. The contributions in this book show awareness of the importance of substantive legitimacy, of principled procedure, for social or external legitimacy. While often the criticisms expressed by states may in fact serve as excuses, rather than constitute real concerns, it is nonetheless important to discuss how adjudicators can enhance the substantive legitimacy of their interim measures decisions. Legitimacy aspects explored are the authority of adjudicators to take urgent measures and the consequences of non-compliance, the scope of interim measures and other urgency mechanisms, the fairness of the proceedings and differences and commonalities between the systems. While some of the observations were made before, what is new is the confirmation by the various authors, looking at these questions through different lenses, involving specific subject matter or systems.

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Chapter 2
Urgency and Human Rights: The Necessary and Legitimate Role of Regional Human Rights Tribunals

Dinah Shelton

Contents

Abstract This chapter explores the use and development of the power to grant interim measures of international human rights institutions. The legal basis of such judicial power is often not explicitly found in treaties. Therefore, some states do not consider themselves legally bound as such. The chapter argues that the two needs that give rise to implied powers to take urgent measures are the administration of justice, on the one hand, and effective protection of the fundamental rights of individuals and groups within the jurisdiction of member states, on the other hand. Thus, the legal authority for this power is inherent in the judicial function and applies also to quasi-judicial bodies such as the Inter-American Commission on Human Rights. Yet precautionary measures, as they are called by this Commission, often concern sensitive matters in domestic law and politics, generating considerable internal resistance. The chapter discusses the major reform of the Inter-American Commission's Rules of Procedure, resulting in a more legitimate process. While this overhaul satisfied the states, the chapter expresses concern for the expansion in the subject matters of precautionary measures without risk of irreparable harm. Yet the author concludes that the legal systems put in place by the agreements the states wrote, have given human rights bodies the mandate and the obligation to carefully and fairly respond to imminent threats of irreparable harm. They should continue to do so when the facts and the law justify action.

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2.1 Introduction

This chapter introduces the possibilities of, and challenges to, how international human rights institutions can act promptly when individuals claim to be threatened while exercising their fundamental rights. The comments are based on teaching and scholarship as well as being a member of the Inter-American Commission on Human Rights (IACHR) from 2010 to 2013. During this period, human rights claims in urgent situations became a public source of controversy among states, non-governmental organisations (NGOs), the Commission itself, and the Inter-American Court.

The controversy led to a major reform of the Commission's Rules of Procedure in March 2013,[1] enhancing transparency, instituting new procedural guarantees for states and petitioners, and imposing obligations on the IACHR to justify its decisions to issue, maintain, or lift requests for precautionary measures. The result is a more legitimate process, with which states are largely, but not unanimously, comfortable. Notably, the reform did not, as some expected, result in fewer requests for, or grants of, precautionary measures. Measures continue to expand, generating resistance and problems of compliance on the part of some governments.

It may seem somewhat mysterious that the development of human rights law has not been accompanied by a clear mandate for international and domestic tribunals to take action to prevent imminent and irreparable harm to human rights. Most international agreements omit all mention of urgent action. Governments have been reluctant to confer on human rights courts and tribunals the authority to restrain abuses by their agents and third parties, or the power to direct government conduct. Tribunals are criticised for overstepping their functions by interfering with executive or administrative decisions, often allegedly at the expense of economic development,[2] or national security. In this light, this chapter discusses several important questions that arise when there is a need for urgent action, especially:

– whether human rights bodies may rely on implied powers to issue such measures in the absence of a specific treaty provision on point;

[1] See Article 25, amended at the 147th Regular Period of Sessions, 8–22 March 2013, available at www.iachr.org/Rulesofprocedure.

[2] See e.g. the Belo Monte example discussed in note 34.

– what the circumstances are that justify preventive measures. In particular, whether these measures protect the litigation process (administration of justice) or protect the persons requesting the measures, allowing such measures to be granted even when no case is pending;
– what standards the human rights bodies should apply in deciding whether to ask states to adopt preventive measures;
– what procedures should be followed, including the question of whether the government should be given a chance to comment or respond to requests for preventive measures before they are issued;
– what the legal status is of such measures and the question if they impose binding obligations on the state to which they are addressed.

2.2 Legal Authority

All human rights bodies and certainly most domestic courts have faced requests for protection from individuals and groups threatened with what they perceive as an imminent menace of harm to their lives or well-being. By now, most such bodies have determined and analysed the scope of their authority to respond to requests for protection, whether in the context of pending proceedings or as an independent matter. Temporary restraining orders, injunctions, mandamus, interim measures, precautionary or provisional measures are all terms familiar to judges and human rights litigators. These kinds of measures are found to be of fundamental importance for two different reasons. On the one hand, measures are deemed necessary to preserve the subject matter of pending proceedings. Specifically, measures are ordered for the proper administration of justice in the interest of the tribunal. On the other hand, human rights tribunals and domestic courts see the issuance of such measures as an inherent part of their mandate to protect individuals from violations of law by state or non-state actors.

Since the creation of the first international tribunals, at the end of the nineteenth century,[3] debates have arisen about the scope of judicial mandates, with scholars and governments criticising or supporting activism and the independence of international bodies,[4] with particular attention given to questions of inherent and implied judicial powers.[5] States can delegate specific functions to international adjudicative bodies:

[3]The first such bodies were the Permanent Court of Arbitration and the short-lived Central American Court of Justice (1907–1918), followed later by the Permanent Court of International Justice ("PCIJ"), predecessor to the current International Court of Justice ("ICJ"). For an introduction to international courts and tribunals, see: Janis 1992.

[4]For general discussions of the powers of international tribunals, see Bilder 1986; Noyes 1995. On the nature of the international judicial function, see e.g. Amerasinghe 2007.

[5]See generally Gaeta 2003; Orakhelashvili 2005; Brown 2005.

dispute settlement and redress,[6] compliance assessment,[7] enforcement,[8] and legal advice (advisory opinions).[9] These functions in turn give rise to various inherent or implied powers. As a result of the complex and varied reasons that lead states to

[6]The function of the ICJ, as the principal judicial organ of the UN, "is to decide in accordance with international law such disputes as are submitted to it." Statute of the International Court of Justice (1945), Article 38(1) 59 Stat 1031 ("ICJ Statute"). The panels and Appellate Body of the World Trade Organization are also dispute settlement bodies, although the states parties declined to establish a court to decide trade disputes. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, reprinted in 33 ILM 1226, 1227 (1994) ("DSU"). The functions of the International Tribunal for the Law of the Sea include dispute settlement, but also include compliance monitoring. United Nations Convention on the Law of the Sea (1982), 1833 UN Treaty Ser 3, Annex VI (1994) ("ITLOS Statute").

[7]While international human rights courts have jurisdiction to redress violations of human rights, they are created "to ensure the observance of the engagements undertaken by the High Contracting Parties." European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 17, 213 UN Treaty Ser 221 (1953) ("European Convention on Human Rights"). Or, similarly, these courts "have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties" to the human rights treaty. American Convention on Human Rights (1969), Article 33, 1114 UN Treaty Ser 123 (1978).

[8]The Rome Statute of the International Criminal Court grants the court "the power to exercise its jurisdiction over persons for the most serious crimes of international concern" in order to ensure that they do not go unpunished and that their effective prosecution may put an end to impunity. Statute of the International Criminal Court (1998), Article 1 and preamble, 4–5, 2187 UN Treaty Ser 91 (2002).

[9]See, for example, Article 63(1) of the American Convention on Human Rights, supra n. 6, which gives the Inter-American Court of Human Rights (IACtHR) broad advisory jurisdiction in contrast to Articles, 47 and 48 of the European Convention on Human Rights and Fundamental Freedoms, id., which provides more limited ability for the European Court of Human Rights (ECtHR) to render advice. Yet see also Protocol 16, extending the jurisdiction of the ECtHR by enabling it to give advisory opinions in response to requests from the highest courts or tribunals of states parties to the Convention. It entered into force on 1 August 2018. The African Court of Human and Peoples' Rights (ACtHPR) "may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission." (Article 4(1) Protocol to the African Charter on

create international courts and tribunals,[10] controversy emerges over the institution's primary purpose or function and utilisation of implied and inherent powers. Current debates over further reform of the European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights (IACHR), as well as UN treaty bodies, in part, reflect these disagreements. In specific matters, the use of implied powers occasionally causes backlash from states which are subject to the exercise of those powers.

Extensive and long-standing jurisprudence supports the view that any institution that carries the name 'court' or 'tribunal' has certain inherent powers, [11] that are necessary to allow it to fulfil the judicial function, irrespective of limitations placed on the court's jurisdiction or the type of proceedings it conducts.[12] These inherent attributes extend to human rights commissions and committees when they are hearing and deciding cases or otherwise exercising their explicitly-conferred quasi-judicial or protective mandates. Human rights tribunals in general are created by, and have jurisdiction in respect to, a specific treaty or treaties, wherein the rights and obligations are set forth in detail and indications are given of the norms that the tribunal may apply.[13] Unlike the International Court of Justice (ICJ), the functions of human rights tribunals are not limited to, or even primarily about, dispute settlement. International human rights bodies are created expressly 'to ensure the observance of the engagements undertaken by the High Contracting Parties',[14] as stated in the European Convention on Human Rights (ECHR), or, in the language of the American Convention on Human Rights (ACHR), they 'have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties' to the agreement.[15] These functions centre on monitoring and promoting compliance.

Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entry into force 25 January 2004).

[10]On the multiple motivations behind the establishment of international criminal courts, see Caron 2006.

[11]For a more extensive discussion, see Shelton 2017.

[12]Inherent power is "[a] power that necessarily derives from an office, position or status." Black's Law Dictionary 1208 (West 8th edn. 2004). Inherent "[exists] in something as a permanent attribute or quality; forming an element, esp[ecially] a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of." 7 Oxford English Dictionary 969 (Clarendon 2nd edn. 1989).

[13]In some instances, human rights treaties give the commission or court an expansive list of normative sources they may apply in interpreting the guaranteed human rights. See, e.g., African Charter on Human and Peoples' Rights, Articles 60, 61. More generally, the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties, Article 31, especially para 3(c), call for taking into account "any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties (1969) Article 31, 1155 UN Treaty Ser 331. Human rights tribunals are increasingly utilizing this provision to place specific treaties in a broader legal context to interpret their guarantees or to reconcile conflicting international obligations. See, for example, Al-Adsani v UK, 34 Eur Ct HR 11 (2002).

[14]European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), Article 17, 213 UN Treaty Ser 221 (1953) ("European Convention on Human Rights").

[15]American Convention on Human Rights (1969), Article 33, 1114 UN Treaty Ser 123 (1978).