

THE BINDING NATURE OF PROVISIONAL MEASURES IN THE FIELD OF HUMAN RIGHTS



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Deadline for submission: September 1, 2008.

Number of words: 15. 251

26.08.2008

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1 Introduction

1.1 Presentation of the topic

International human rights bodies that are entrusted with the competence to monitor the compliance by states with international human rights are empowered to issue provisional measures of protection in order to protect the rights of individuals, victims of alleged human rights violations. The question to what extent these provisional measures are binding on states has been a subject of a long-time debate. However, in recent years the main international judicial and quasi-judicial bodies have expressed the view in their decisions that provisional measures are binding on states and that states have an international obligation to implement them. States have accepted the binding force of provisional measures issued by international courts and tribunals; however, there is not the same acceptance with regard to the provisional measures issued by quasi-judicial bodies.¹

This paper analyses the binding nature of provisional measures issued by international judicial and quasi-judicial bodies in light of the case law of these bodies regarding the issue. It reviews and compares the interpretations of the power to order binding provisional measures made by the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and People's Rights as well as quasi-judicial bodies such as the UN Human Rights Committee, the UN Committee against Torture, the Inter-American Commission of Human Rights and the African Commission of Human Rights.

International human rights law has developed rapidly in the recent years. Human rights have become a key principle crossing through and shaping the content of the other

¹ See Pasqualucci (2005) p. 2.

areas of international law. The numerous international human rights treaties, setting human rights standards and establishing the individual petition proceedings aimed at enforcing those standards, have increasingly restricted states' sovereignty and their behavior. The subject of the thesis was chosen in order to demonstrate that the development regarding the binding force of provisional measures in international law proves that the process is continuing.

1.2 The purpose of the thesis

The aim of the thesis is to analyze to what extent provisional measures issued by international judicial and quasi-judicial human rights bodies are binding on states. The thesis considers the purpose of provisional measures in international law and examines the decisions of the aforementioned international bodies with the aim to answer the question what the legal basis for the authority of the international bodies to order binding provisional measures is.

1.3 Sources and methodology

The main legal sources used in the thesis are international treaties establishing the international human rights bodies. The constituent treaties enshrine the tasks and functions of the international institutions and express the specific powers they can exercise in order to fulfill those tasks and functions.

Therefore the paper refers to UN Charter and The Statute of the International Court of Justice² which are the main international treaties establishing the International Court of Justice; the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11,³ which is the constituent treaty of the European

² Adopted 26 June 1945, in force 24 October 1945.

³ Adopted 4 November 1950, in force 3 September 1953. Protocol No. 11 entered into force on 1 November 1998.

Court of Human Rights; the American Convention on Human Rights⁴ establishing the Inter-American Court of Human Rights and providing the Inter-American Commission with further functions and responsibilities; the African Charter on Human and People's Rights⁵ which established the African Commission on Human Rights and the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights⁶; also the International Covenant on Civil and Political Rights⁷ which established the UN Human Rights Committee and the Optional Protocol⁸ to it which provided with individual petition procedure; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁹ which established the UN Committee against Torture.

For the discussion of the topic of the thesis, it is also important to refer to such internal decisions of these international organs as Rules of Procedure. Rules of Procedure provide the detailed specific procedures that are applicable to the daily operation and functioning of a certain organ.

The other legal source which is important in this thesis is the decisions of the international human rights bodies. According to article 38 § 1 of the Statute of ICJ which lists the sources of international law, judicial decisions may be applicable "as subsidiary means for the determination of rules of law". The provision contained in the aforementioned article is considered to be a rule of customary law. It means that it is applicable to the decisions of international judicial and arguably quasi-judicial bodies. Through the judicial practice the international bodies interpret their own provisions of constituent treaties, including the extent of their powers, rights and duties. They contribute to the interpretation and clarification of rules of international law. It is a significant source of law.

⁴ Adopted 22 November 1969.

⁵ Adopted 27 June 1981, in force 21 October 1986.

⁶ Adopted in June 1998 under the auspices of the Organization of African Unity (OAU), in force 25 January 2004.

⁷ Adopted 16 December 1966, in force 23 March 1976.

⁸ Adopted 16 December 1966, in force 23 March 1976.

⁹ Adopted 10 December 1984, in force 26 June 1987.

The thesis was conducted through the research of legal literature on the matter and the analysis of case law of the international bodies available on their official websites. The paper presents and analyzes the most important case law where the aforementioned international bodies have pronounced on the binding nature of provisional measures. The cases have been selected according to the relevance to the topic while reading the annual reports of the abovementioned international organs.

1.4 Demarcation of the thesis

The paper analyses the power to order provisional measures mainly of the bodies entrusted with considering individual petitions or communications from individuals alleging human rights violations. It comprehensively examines the powers on the matter of the European Court of Human Rights since the European system is the most advanced regional human rights protection system. It also examines the powers of the main competent bodies of Inter-American human rights protection system as provisional measures are a well established institution and the binding force of provisional measures is the least contentious issue. It also pays attention to the African Human Rights system and analyses the powers of the newly established African Court on Human and People's Rights. As an entitlement to order binding provisional measures by international quasi-judicial bodies is the most controversial issue to date, the paper reviews the powers and the jurisprudence regarding the issue of UN Human Rights Committee and UN Committee against Torture.

In addition, the paper pays considerable attention to the International Court of Justice. Although ICJ is a court entrusted with competence to adjudicate disputes between states, it is important to examine its jurisprudence on the matter since ICJ's decisions are an authoritative legal source having a great influence in the evolution of new rules in international law.

1.5 Terminology

Different international law sources or legal literature use various terms to express the same meaning: *provisional measures*, *interim measures*, *interim relief*, *interim protection*, *interim measures of protection* or *precautionary measures*. In this paper the term *provisional measures* will be used unless a reference source provides with another term.

1.6 Structure of the thesis

Following the introduction part, the second chapter presents the general concept of provisional measures in international law, their origin and historical background. It examines what conditions required by international law are necessary for an order of provisional measures to be issued. It also discusses the problems that arise with an immediate implementation of an order of provisional measures in national legal systems. The third chapter analyses the binding nature of provisional measures in the light of international organizations law and the jurisprudence of the aforementioned international bodies. The fourth part presents the conclusions of the thesis.

2 Provisional Measures in General

Provisional measures usually are granted by international courts or institutions in order to preserve the rights of the parties to a dispute from irreparable damage being caused to those rights which are the subject of the dispute pending a final decision in international proceedings.

2.1 Origin and Historical Development of Provisional Measures

Theoretically, provisional measures are derived from national law, from the requirement of procedural equality between the parties.¹⁰ This concept requires that both parties to a dispute would be treated equally and would have the same means and opportunities to defend their rights and interests during proceedings. If irreparable damage was done to the rights of one of the parties to such an extent that makes its restitution impossible, that party would be placed at a substantial disadvantage vis-à-vis the other side. The fair balance and the procedural equality between the parties would be injured. Hence provisional protection is an effective legal tool to prevent such damage.

The principles on which the institution of provisional measures is developed in modern law were borrowed from the Roman law.¹¹ In both Common law and Civil law systems provisional measures have been used in order to protect property rights or the *status quo* pending trial.¹²

¹⁰ Letsas (2003) p. 527-538.

¹¹ In the Roman law the interdicts *unde vi* and *uti possidetis* were provisional remedies used in order to assure the protection of possession rights. See: Elkind (1981) p. 30-31.

¹² See: Elkind (1981) p. 25-30.

In international stage first provision in regard with provisional measures had been included in the Convention for the Establishment of a Central American Court of Justice of 20 December 1907, which read:

From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the Parties fix the situation in which the contending Parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *status quo* pending a final decision.¹³

The subsequent international treaties that all contained identical clauses on provisional measures were the Bryan Treaties – the Treaties for the Advancement of Peace – of 1914 concluded by the United States with China, France and Sweden. The treaties provided:

In cases the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each party ought, in its opinion, to be taken provisionally and pending the delivery of its report.¹⁴

This provision served as an example for article 41 on provisional measures of the Statute of the Permanent Court of International Justice (further PCIJ), and later for article 41 of the Statute of International Court of Justice (further ICJ). It is not the purpose of this thesis to provide the drafting history of article 41 of the Statute of PCIJ or the Statute of ICJ. However, it is worth briefly mentioning that the proposal to include the relevant provisions from The Bryan Treaties into the Statute of PCIJ was made by the Brazilian lawyer Raul Fernandez. The proposed provision was subsequently adopted with no major amendments. During the drafting process of the Statute of ICJ, which mainly followed the Statute of PCIJ, the procedural matters, including the provision on provisional measures, had been approved without discussion.¹⁵ Consequently, the provision empowering ICJ to indicate provisional measures today reads as follows:

¹³ *The Statute of the International Court of Justice: a Commentary* (2006) p.925.

¹⁴ Elkind (1981) p. 41.

¹⁵ See: *The Statute of the International Court of Justice: a Commentary* (2006) p.925-927.

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. (Article 41 § 1)

Clearly, this provision subsequently was used as a model for similar provisions of the statutes or rules of procedure of other international courts or quasi-judicial organs in the human rights field or in other fields of international law.

2.2 Purpose of Provisional Measures

The next question that has to be answered in this thesis is what the purpose of provisional measures in international law is.

As ICJ put it in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case the purpose of provisional measures is “to preserve the respective rights of the parties pending the decision of the Court” and to ensure that “irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings”.¹⁶ Clearly, in order to preserve the rights of another party, the parties to a dispute have to refrain from any action that might cause prejudice to those rights and to maintain the *status quo*. This approach is also supported by the general principle of international law, recognized already by the PCIJ in the *Electricity Company of Sofia and Bulgaria* case, that “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”.¹⁷

Thus it is possible to conclude that provisional measures are ordered in international law with the aim:

- 1) to preserve the rights of the parties to a dispute;

¹⁶ The Order of Provisional Measures of 13 September 1993, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)* para. 35.

¹⁷ The Order of Provisional measures of 5 December 1939, in *Electricity Company of Sofia and Bulgaria*, p. 199.

- 2) to avoid irreparable damage to those rights by maintaining the *status quo*
- 3) generally to prevent the aggravation or extension of the dispute.

However the role of provisional measures ordered in human rights cases has a different nature. As the Inter-American Court of Human Rights (further IACtHR) stressed:

[I]n international human rights law, the nature of provisional measures is not only preventative in the sense that they preserve the judicial situation, but fundamentally protective, because they protect human rights. Provided the basic requirements of extreme gravity and urgency and the prevention of irreparable damage to persons are met, provisional measures become a genuine jurisdictional guarantee of a preventative nature.¹⁸

In international human rights law provisional measures are usually ordered to protect a potential victim from extradition or deportation to the countries where a person might face torture or death. It is also granted in the situations where applicants to international individual petition proceedings, their family members or legal representatives are in need of urgent protection because of the imminent danger to their lives or physical integrity. It is also granted in cases where victims are facing death sentences and at the same time the right to a fair trial is under consideration.

An order of provisional measures may require that states take positive action such as providing police protection to the authors of individual petitions and their family members or witnesses, like in the *Honduran Disappearance* cases the IACtHR ordered the government to protect the witnesses that had received death threats. On the other hand, provisional measures may require states to refrain from any action while a case is pending before an international body, like in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* the IACtHR ordered the government to stay the executions of persons sentenced to death.¹⁹

¹⁸ Pasqualucci (2003) p. 293, quoting the Order of Provisional measures of 6 December 2001, in *The La Nacion Newspaper Case*.

¹⁹ Pasqualucci (2003) p. 294.

2.3 Conditions for the Order of Provisional Measures

The adoption of provisional measures is a discretionary power of international courts and quasi-judicial bodies.²⁰ This means that an international body is not bound to issue an order of provisional measures every time it receives such a request from a party, but it enjoys the discretion to decide whether provisional measures need to be ordered in a case and what type of measures should be ordered in those particular circumstances. In every case an international organ has to consider all the facts and circumstances of the case in order to decide if provisional measures are needed. However, this discretionary power of international bodies is conditional on the existence of exceptional circumstances which make it necessary to adopt provisional measures. Those circumstances are the existence of imminent danger of irreparable damage and extreme urgency.

Irreparable damage means such a prejudice done to the rights of the parties to a dispute which makes the restoration of the situation prior to an unlawful act and enjoyment of those rights impossible. There is no generally applicable test in international law which would help to measure whether a threatening damage is irreparable or not.²¹ An international body has to determine this according to the circumstances of a case. However, a damage threatening the lives and the physical integrity of individuals is clearly of irreparable nature. For example, in the *LaGrand* case the irreparable damage was obvious since the imminent execution of convicted persons was at issue. Therefore, in human rights cases provisional measures is an effective tool to protect individuals from death or prejudice to their physical integrity.

Irreparable damage has to be of imminent danger. This means that the case becomes urgent. This criterion of urgency is a significant one to justify the adoption of any provisional measures. If a situation is not urgent, there is no need for provisional measures. However, in cases of executions, deportations and extraditions there is an element of urgency. This requires an international body to act quickly. The consideration of necessity

²⁰ Pasqualucci (2003) p.300; and *The Statute of the International Court of Justice: a Commentary* (2006) p. 930.

²¹ *The Statute of the International Court of Justice: a Commentary* (2006) p. 940.

of provisional measures becomes a matter of first priority. After provisional measures are ordered, they have to be implemented immediately by the authorities of a state.

2.4 Implementation of the Order of Provisional Measures

Imminent danger of irreparable damage and urgency in the situation require that states would be capable of implementing provisional measures immediately. Orders of provisional measures issued by international bodies are “general in nature”²² in the sense that they do not specify what concrete actions states’ authorities need to take, usually stating that a state “shall take all measures necessary to ensure”²³ the required result. This means that states are allowed a margin of appreciation²⁴ and can decide themselves how to implement provisional measures.

However, implementation of an international order has legal effects in national law. This entails that municipal legal systems have to be adjusted in such a manner that an international legal order of provisional measures would have a direct legal effect in national law. This situation arose in the *LaGrand* case (the facts of the case are presented below) where the order of provisional measures issued by ICJ was not implemented by the United States authorities because of, as the United States government argued, “extraordinarily short time between issuance of the Court’s Order and the time set for the execution” and because of “the character of the United States of America as a federal republic of divided powers”.²⁵ Indeed the urgency of a situation might require an immediate action of state authorities, since sometimes as witnessed in the *LaGrand* case, it can be a matter of hours. In addition, state authorities need to have legal means for making an order of provisional measures effective whatever the level of governance is. In the *LaGrand* case the Order of provisional measures of 3 March 1999 indicated two measures to the government of the United States, the first of which demanded the government to “take all measures at its

²² Pasqualucci (2003) p. 312.

²³ The Order of Provisional Measures of 5 February 2003 in *Avena (Mexico v. US)* para. 59.

²⁴ Pasqualucci (2003) p. 312.

²⁵ *LaGrand (Germany v. US)*, para. 95.

disposal to ensure that [the convicted person] is not executed pending the final decision in the proceedings”, while the second required to “transmit the Order to the Governor of Arizona”.²⁶ As ICJ concluded in the final judgment the mere transmission of the order of provisional measures to the Governor of Arizona was not sufficient action for the provisional measures to be implemented. There could have been done more in order to hinder the execution of the convicted individual. The case illustrates that problems may arise in implementing provisional measures in states where several levels of governance exist. Therefore states are obliged to implement the relevant amendments in their national legal systems in order to ensure that orders of international bodies are complied with.

²⁶ The Order of Provisional Measures of 3 March 1999, in *LaGrand (Germany v. US)*, para. 29.

3 The Binding Nature of Provisional Measures

The question to what extent provisional measures are binding on states has been a subject of a long-standing debate. In recent years the main international judicial and quasi-judicial bodies have expressed the view in their jurisprudence that provisional measures are binding on states and that states have an international obligation to implement them. States have accepted the binding force of provisional measures issued by international courts and tribunals; however, there is not the same degree of acceptance with regard to the provisional measures issued by quasi-judicial bodies.²⁷

International judicial or quasi-judicial bodies entrusted with competence to receive and examine individual complaints from individuals alleging human rights violations must have a right to order provisional measures binding on states which have accepted that competence. The aim of international individual petition proceedings is the protection of human rights. The right to petition international body is an international procedural right granted to individuals directly by international human rights treaties.²⁸ States that ratified those treaties have committed themselves to respect that right of individuals under its jurisdiction. Accordingly, as the European Court of Human Rights (further ECtHR) pronounced in its jurisprudence (discussed below), states have an obligation to refrain from any action that might hinder an individual from exercising that right. International bodies, on the other hand, must have a power to intervene by ordering binding provisional measures. This power is necessary for the effective functioning of international individual petition proceedings. The next question that will be discussed in this chapter is what the legal basis of the power to order binding provisional measures is. The issue will be examined in the light of law of international organizations and the jurisprudence of international bodies.

²⁷ See Pasqualucci (2005) p. 2.

²⁸ Cassese (2005) p. 147.

3.1 Express, Implied and Inherent Power to Order Provisional Measures

The power to order provisional measures may be expressly provided for in the treaty establishing international body. In such a case, the power is not disputed. Furthermore, orders of provisional measures are internal decisions of an international body and in accordance with the law of international organizations internal decisions made by organs of international organizations are binding on member states.²⁹ It is arguable whether orders of provisional measures are just procedural measures. They are more than procedural decisions because they provide for a new level of protection of human rights.³⁰ Still they are internal decisions and are binding on states that ratified the constituent treaties of those international bodies and in such a way accepted their jurisdiction. Thus the Statue of ICJ expressly empowers ICJ to order provisional measures, American Convention of Human Rights provide with such a power the IACtHR and the Protocol establishing the African Court on Human and People's Rights empowers it to order provisional measures. (The exact provisions are discussed below.)

In legal literature it is argued that international courts and tribunals that are bodies of judicial nature have an inherent power to order provisional measures. This power derives from the principle of effectiveness of judicial function.³¹ The Intern-American Court has expressed this view in one of its first contentious cases *Velasquez Rodriguez v. Honduras* where the IACtHR based its power to order provisional measures to the state of Honduras on its "character as a judicial body and the powers that drive therefrom".³² ICJ in the *LaGrand* case based the binding character of provisional measures on the effectiveness of judicial function,³³ which means that inherent powers of an international court or tribunal give a basis for issuance of binding provisional measures. This may be well applied by the ECtHR since its constituent treaty is silent about its right to order provisional measures and only its Rules of Procedure authorize it to take such action.

²⁹ White (1996) p. 87.

³⁰ See: *Developments of International Law in Treaty Making* (2005) p. 574.

³¹ See Pasqualucci (2005) p. 13-14.

³² *Ibid.* p. 14.

³³ ICJ's judgment in this case discussed in detail below.

Finally, the law of international organizations uses such a concept like implied powers doctrine. This means that an international organization and its organs must have those powers that, even though not expressly provided for in the constituent documents of the organs, are necessary for the fulfillment of organization's aims and tasks.³⁴ This doctrine was supported by ICJ in the *Reparation* case where it stated in regard to the UN that "under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".³⁵ Implied powers doctrine could be applied also to the quasi-judicial bodies such as the UN Human Rights Committee, the UN Committee against Torture, the Inter-American Commission of Human Rights and the African Commission of Human Rights since they lack competence to render binding decisions to its members states, however, at the same time they fulfill very important task that is protection of human rights through exercise of individual petition proceedings. In order to fulfill this task these bodies are in essential need to have a power to order binding provisional measures.

³⁴ White (1996) p. 129.

³⁵ *Reparation*, para. 182.

3.2 The Jurisprudence of International and Regional Tribunals

This part of the thesis presents and discusses the landmark decisions of the International Court of Justice (further the ICJ) and the main regional human rights courts such as the European Court of Human Rights (further the ECtHR), The Inter-American Court of Human Rights (further the IACtHR) and the African Court on Human and People's Rights (further the African Court) where they ruled that provisional measures are binding on states members and they have an international obligation to implement provisional measures.

3.2.1 International Court of Justice

ICJ's power to indicate provisional measures is enshrined in article 41 of the Statute of ICJ, which provides:

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

Further regulation is given in ICJ's Rules of Procedure, articles 73 to 78.

The not so strong wording of the provision in Article 41 § 1 has become a basic argument against the binding effect of provisional measures.³⁶ Another argument against it is that an order of provisional measures is not a *decision* within the meaning of Article 94 § 1 of the UN Charter³⁷, since the latter is understood as a *judgment* of ICJ. Although provisional measures are not judgments, they are procedural decisions of the Court that are obligatory; otherwise the Court would be hindered to work effectively. This view is also

³⁶ For the analysis of the wording of the provision and the preparatory work in favor of the binding effect see the Separate opinion of Judge Weeramanry. In the Order of Provisional Measures of 13 September 1993, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*.

³⁷ Article 94 § 1 of the Charter states: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

supported by article 78 of the Rules of Procedure, which empowers the Court to request information from states on the implementation of provisional measures that have been indicated.³⁸

While deciding on a state's request for provisional measures, ICJ need not satisfy itself that it has jurisdiction on the merits of the case. Since provisional measures require urgent action, ICJ can order provisional measures, if there is a *prima facie* basis for jurisdiction. It is possible that at the later stage the Court can find that it lacks jurisdiction on a case. If provisional measures are binding, a state would be bound by an order without its consent to the jurisdiction of the Court. This would mean an interference with the state sovereignty.³⁹ However, if the purpose of a provisional measure issued by ICJ is to protect human rights, states should be bound by it even before the findings on contested jurisdiction were taken.

The issue of the binding nature of provisional measures for the first time ICJ handled in the *LaGrand* case. Until then, ICJ did not address the question, except in the *Nicaragua* case where it more clearly stated that when the Court finds that the situation requires that provisional measures should be taken, "it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights".⁴⁰

3.2.1.1 The *LaGrand* case

In the *LaGrand* case the issue was addressed in the face of dramatic circumstances. Karl and Walter LaGrands were German nationals permanently residing in the United States. In 1982 they were arrested in the state of Arizona and charged with murder and attempted bank robbery. Later in trial they were found guilty and sentenced to death. In 1992 the brothers became aware that the United States was in breach of its obligation under

³⁸ *The Statute of the International Court of Justice: a Commentary* (2006) p. 954.

³⁹ *The Statute of the International Court of Justice: a Commentary* (2006) p. 953.

⁴⁰ Judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, para. 289.

the Vienna Convention on Consular Relations (further VCCR) to inform them of their rights to consular assistance. Subsequently, the LaGrands raised the issue in later appeal proceedings, but their claims were repeatedly rejected on the basis of the national “procedural default” doctrine, under which new issues can not be raised in federal criminal proceedings if they have not been raised in state’s proceedings. Despite Germany’s diplomatic efforts to prevent the execution of the LaGrands, Karl LaGrand was executed on 24 February 1999.

On 2 March 1999, the day before the scheduled execution of Walter LaGrand, Germany instituted the proceedings against the United States at the ICJ. In its application Germany claimed that the United States, by failing to inform the defendants of their rights under the Article 36 § 1(b) of the VCCR, violated its international obligations to Germany under the Convention. The application was followed by Germany’s urgent request for provisional measures to prevent the execution of the other brother. By an Order of 3 March 1999, after finding that the circumstances required an order of provisional measures as a matter of the greatest urgency and without any other proceedings, the Court indicated provisional measures where it stated that the United States “should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order”.⁴¹ It is important to mention that in the same order ICJ stressed that the Governor of Arizona “is under the obligation to act in conformity with international undertakings of the United States”.⁴² Despite the Court’s order, Walter LaGrand was executed the same day some hours later.

In its submissions on the merits Germany requested the Court to declare not only that the United States violated Germany’s rights under the VCCR, but also that the United States violated its international legal obligation to comply with the Court’s order of provisional measures. The United States argued that orders of provisional measures do not have binding effect.

⁴¹ The Order of Provisional Measures of 3 March 1999, in *LaGrand (Germany v. US)*, para. 29.

⁴² *Ibid.*, para. 28.

In order to determine this long-time controversial question, ICJ chose the interpretation of article 41 of the Statute in accordance with customary international law on interpretation of international treaties reflected in the Vienna Convention on the Law of Treaties (VCLT). After examining the English and the French equally authentic versions of article 41 and after reaching the conclusion that the two texts have different meaning and do not help in answering the question, the majority in the Court relied on article 33 § 4 of the VCLT, which reads “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.⁴³

ICJ stressed that the object and purpose of the Statute is to enable the Court to exercise its main function which is to settle international disputes by issuing binding decisions. It stated:

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.⁴⁴

ICJ also referred to the Article 94 § 1 of the UN Charter and noted that the word *decision* in the provision may be interpreted as any decision rendered by the Court, including orders of provisional measures. Such interpretation would confirm the binding nature of provisional measures. However, interpretation of the word *decision* as meaning only judgments rendered by the Court would in no way preclude orders made under article

⁴³ *LaGrand (Germany v. US)*, para. 101.

⁴⁴ *Ibid.*, para. 102.

41 from having a binding character.⁴⁵ Consequently, the Court held that the United States violated not only the VCCR, but also its international binding obligation to comply with the order of provisional measures.

Thus ICJ based the binding character of provisional measures on the effectiveness of judicial function. The effective exercise of judicial function is dependent on the prevention of irreparable damage to the rights of the parties to a dispute pending final decision.

3.2.1.2 The individual rights element in the *LaGrand* case

It is important to mention that ICJ has a competence to settle disputes between states.⁴⁶ In its practice ICJ has ordered provisional measures not only to protect rights of states, but also human rights of individuals when compliance with those human rights obligations was the subject of a dispute.⁴⁷ In some cases by ordering provisional measures, the Court took into account human rights of individuals which went beyond the scope of a dispute.⁴⁸ In this way ICJ widens the extent to which provisional measures can be indicated and departs from the strict scope of inter-state disputes.

The significance of the *LaGrand* case is that it dealt not only with state rights but also with individual rights. ICJ held that article 36 of the VCCR, in addition to a state's right to provide consular assistance to its nationals, also creates individual rights, which can be invoked in ICJ by the national state of an individual.⁴⁹ It is important to stress that the provisional measures in the case were ordered with the intention to protect the life of the individual sentenced to death. In its submissions in oral pleadings Germany argued that the

⁴⁵ *LaGrand (Germany v. US)*, para. 108.

⁴⁶ Article 34 and 36 of the Statute of ICJ.

⁴⁷ The Order of Provisional Measures of 8 April 1993 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*; the Order of Provisional measures of 15 December 1979 in *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*.

⁴⁸ See: *Interim Measures for the Protection of Human Rights* by Rosalyn Higgins. In: *Politics, Values and Functions: International Law in the 21st Century*. 1997. pp. 87-103.

⁴⁹ *LaGrand (Germany v. the United States)* para. 77.

right to information on consular assistance is an individual human right and constitutes one of the minimum guarantees for a fair trial in the sense of article 14 of the ICCPR. The compliance with it becomes mandatory in cases involving death penalties. Consequently, Germany argued that the violation of article 36 of VCCR as a guarantee for a fair trial followed by the execution would constitute the violation of the right to life as enshrined in article 6 of ICCPR.⁵⁰ Even though ICJ did not go so far as to recognize the right to information on consular assistance as a human right, it is no doubt that the link between the consular rights and the death penalty was the cause that made the Court to rule in favor of the binding effect of provisional measures. Clearly “the irreversible harm inflicted on an individual would hardly justify the view that the Court’s interim order was just an expression of a desire or recommendation to spare the life of an individual”.⁵¹ Therefore the individual rights element was the key issue in the Court’s holding.

Thus ICJ ruled that orders of provisional measures are binding on states. According to article 59 of the ICJ Statute, decisions of the Court have no binding effect except between the parties and in respect to that particular case. Even though ICJ has no power to make law, its decisions, including the *LaGrand* judgment, have a crucial importance in the evolution of new rules of international law.

⁵⁰ Tinta (2001) p. 365.

⁵¹ Letsas (2003) p. 527-538.

3.2.2 The European Court of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (further the ECHR) contain no explicit provision empowering the European Court of Human Rights (further the ECtHR) to order provisional measures. Rule 39 of the Rules of Court provides the ECtHR with such a power. According to the provision the competent Chamber or its President may indicate to the parties any provisional measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. The Chamber may request information from the parties on the matters concerning implementation of the interim measures. The provisional measures may be indicated at the request of a party or of any person concerned, or on the ECtHR's own motion.⁵² The use of the word *indicate* in stead of *order* and generally cautious language in the provision gives an assumption that initially the provision was not designed to give binding effect to the ECtHR's provisional measures.

In the European human rights system provisional measures mainly are granted in cases having the extraterritorial effect of the ECHR,⁵³ which means cases concerning deportation or extradition to third countries where an applicant may face death or ill-treatment in the sense of articles 2 and 3 of the ECHR. For example, the provisional measures were sought and granted in the case *Soering v. UK*, where the applicant was facing extradition to the United States, where he was sentenced to death for murder. Additionally, the ECtHR applies Rule 39 only if there is an imminent risk of irreparable damage.⁵⁴

In most cases provisional measures are indicated to respondent governments, although there were cases where the ECtHR indicated such measures to applicants. For example, in *Ilascu and Others v. Moldova and Russia* the provisional measure was addressed to the applicant to stop the hunger strike.⁵⁵

⁵² The Rules of Court (November 2003), Rule 39 (Interim measures).

⁵³ Letsas (2003) p. 527-538.

⁵⁴ *Mamatkulov and Askarov v. Turkey*, para. 104.

⁵⁵ *Ibid.*, para. 105.

From all regional systems for the protection of human rights the European convention system is the most advanced one. Firstly, the ECtHR has the compulsory jurisdiction, which means that after the Protocol 11 came into force the state parties to the ECHR can not choose whether or not to recognize the jurisdiction of the ECtHR to receive individual applications. Now the individual complaint process is compulsory to all European states that ratified the ECHR. Secondly, the individuals themselves appear before the ECtHR and participate in the proceedings as a party. This is also the result of the Protocol 11. Thirdly, the ECtHR's judgments are binding on states parties which undertake to comply with them. Under article 46 § 2 of the ECHR the Committee of Ministers has the supervisory function over the execution of the ECtHR's final judgments. In practice, all the judgments are transmitted to the Committee of Ministers and the respondent governments report on what measures they have been taking in response to judgments. The Committee of Ministers is concerned firstly if just satisfaction has been paid and individual measures have been taken that benefit the applicant. Subsequently, the Committee of Ministers monitors what general measures designed to prevent further violations have been taken.⁵⁶ Hence under the European convention system there is established an effective mechanism ensuring enforcement of judgments.

The ECtHR's requests of provisional measures are almost always complied with. In the *Mamatkulov and Askarov v. Turkey* case (discussed below), the ECtHR commented that cases where states parties fail to comply with provisional measures indications are very rare.

The binding effect of provisional measures was discussed by the ECtHR in *Cruz Varas and Others v. Sweden* case. The case concerned the former Commission's power to indicate binding provisional measures. The ECtHR had to decide whether Sweden's failure to comply with the Commission's indication had violated the obligation not to hinder the effective exercise of the right to individual application. The ECtHR ruled that in the absence of specific provision in the ECHR, such Commission's indications can not be

⁵⁶ Leach (2005) p. 101.

considered as giving rise to binding obligations to state parties⁵⁷ and therefore it found no violation of the Sweden's duty not to hinder the effective exercise of the right to individual petition. The same view was confirmed by the ECtHR on its own provisional measures in the case of *Conka v. Belgium*.⁵⁸

In the case of *Mamatkulov and Askarov v. Turkey* the ECtHR has taken a different approach on the issue.

3.2.2.1 The Mamatkulov and Askarov v. Turkey case

In this case the applicants were two Uzbek nationals and the members of an opposition party in Uzbekistan. Mr. Mamatkulov had entered Turkey on a tourist visa in March 1999 and Mr. Askarov on a false passport in December 1998. Uzbekistan requested their extradition in order to charge the applicants with homicide, causing injuries through the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan. The applicants were arrested by the Turkish police in March 1999. In the hearings in the Turkish Criminal Court it was held that the offences that the applicants were charged with were not political or military in nature but ordinary criminal offences. It was ordered to remand the applicants in custody pending the extradition. The applicants appealed against the extradition orders but the appeals were dismissed. The applicants filed petitions to the ECtHR. On 27 March 1999 the applicants were extradited to Uzbekistan despite the ECtHR's indications to the Turkish government under Rule 39 of the Rules of Court not to extradite the applicants to Uzbekistan. The Turkish government received the assurances from the Uzbek authorities that the applicants would not be sentenced to death or subjected to torture. On 28 June 1999 the Supreme Court of Uzbekistan had found the applicants guilty of the offences charged and had sentenced them to terms of imprisonment. The applicants maintained in their applications to the ECtHR that, *inter alia*, by extraditing

⁵⁷ *Cruz Varas and Others v. Sweden*, para. 98.

⁵⁸ Leach (2005) p. 42.

them to Uzbekistan despite the measure indicated by the ECtHR under the Rule 39, Turkey had failed to comply with its obligations under article 34 of the ECHR.

Article 34 of the ECHR embodies the right of individual petition. The second sentence of the provision imposes on states parties the obligation not to hinder the effective exercise of this right which means the duty to refrain from any act or omission that would hinder individuals to exercise their right to individual application.

The case first went to the Chamber, which in its judgment of 6 February 2003 held that by failing to comply with the interim measures Turkey was in breach of its obligations under article 34 of the ECHR.

The Grand Chamber of the ECtHR in its judgment of 4 February 2005 stated that the fact that the respondent government failed to comply with the measures indicated by the ECtHR under Rule 39 raises the question of whether the respondent state was in breach of its undertaking under article 34 of the ECHR not to hinder the applicants in the exercise of their right to individual application.

First of all, it recalled what the ECtHR previously stated that the provision concerning the right of individual petition is one of the fundamental guarantees of the effectiveness of the European convention system of human rights and fundamental freedoms. The right to individual application has “over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention.”⁵⁹ The undertaking not to hinder the effective exercise of the right of individual application precludes any interference with the individual’s right to present and pursue his complaint before the ECtHR effectively.⁶⁰

The Grand Chamber then paid attention to Rule 39 of the Rules of Court. It stressed that the ECtHR applies Rule 39 only in restricted circumstances. Provisional measures are being indicated only in limited spheres, where there is an imminent risk of irreparable damage. The provisional measure “is sought by the applicant, and granted by the Court, in order to facilitate the “effective exercise” of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject matter of the application when that

⁵⁹ *Mamatkulov and Askarov v. Turkey*, para. 122.

⁶⁰ *Ibid.*, para. 102.

is judged to be at risk of irreparable damage through the acts or omissions of the respondent State.”⁶¹ In this case, as the ECtHR put it, as a result of the applicants’ extradition to Uzbekistan the level of protection that the ECtHR could have afforded was irreversibly reduced.

While interpreting the ECHR, the Grand Chamber relied on the article 31 § 3 (c) of VCLT which states that consideration must be given to “any relevant rules of international law applicable in the relations between the parties.” It went on by viewing over the relevant decisions and orders of international courts and institutions that had stressed the importance and purpose of provisional measures. It also referred to the ICJ’s decision in the *LaGrand* case. Moreover, the Grand Chamber remembered the decision in *Cruz Varas and Others v. Sweden* and emphasized that the case dealt with not the Court’s but the former Commission’s power to issue provisional measures. Since the Commission had no power to issue binding decisions on states parties and its competence with regard to the merits of cases was only of preliminary nature, it neither had power to indicate binding provisional measures.⁶² Regarding the decision in *Conka v. Belgium* where the respondent government expelled Slovakian applicants of Roma origin despite the ECtHR’s indication of provisional measures, the Grand Chamber observed that the ECtHR had expressed the view by stating that the respondent government’s conduct was “difficult to reconcile with good faith co-operation with the Court”.⁶³

After reiterating the principles that the ECtHR should not depart, without good reason, from its own precedents and that the ECHR is a living instrument which must be interpreted in the light of present-day conditions, the Grand Chamber noted that “in the light of the general principles of international law, the law of the 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.”⁶⁴ It observed that international case law has confirmed that “the preservation of the asserted

⁶¹ *Mamatkulov and Askarov v. Turkey*, para. 108.

⁶² *Ibid.*, para. 119.

⁶³ *Ibid.*, para. 120.

⁶⁴ *Mamatkulov and Askarov v. Turkey*, para. 123.

rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law.”⁶⁵

Furthermore, the Grand Chamber ruled on the interpretation of article 13 of ECHR. It held that the right to an effective remedy in deportation and extradition proceedings requires those remedies to be with suspensive effect. “The notion of an effective remedy under Article 13 of the Convention requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.”⁶⁶ This principle of effectiveness of remedies for the protection of an individual’s human rights, being applied in domestic legal systems, the same way can be applied in the international proceedings before the ECtHR with provisional measures having binding effect.

Subsequently, the ECtHR held:

[...] interim measures [...] play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State’s formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.⁶⁷

Consequently, as the facts of the case showed, the extradition of the applicants to Uzbekistan by Turkey prevented the ECtHR from examining properly their complaints and affording them protection against the alleged potential violations of the Convention. As a result, the applicants were denied the effective exercise of their right of individual application.

Finally, the Grand Chamber concluded that “a failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively

⁶⁵ *Ibid*, para. 124.

⁶⁶ *Ibid*, para. 124.

⁶⁷ *Ibid*, para. 125.

examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.”⁶⁸ Thus, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey was in breach of its obligation under Article 34 of the ECHR.

Thus the ECtHR based the binding nature of provisional measures essentially on article 34 that is the right of individual application. The conclusion of the majority in the Grand Chamber has to be understood as recognizing that the mere fact that the responding state has failed to comply with an indication of provisional measures *per se* constitutes a violation of article 34 of the ECHR.

This decision of the majority raised some criticism within the Grand Chamber itself. It was criticized that since the states have always refused to attribute the binding force to provisional measures, the ECtHR is not able to impose on the states obligations without their consent. That being so, if a state's refusal to comply with provisional measures actually hindered the applicant to exercise his individual application effectively, it would constitute a violation of the state's undertaking not to hinder the exercise of the right of individual application. However, if, despite a state's refusal to comply with provisional measures, the applicant was still able to exercise his right of individual application effectively and the ECtHR was able to examine the application properly, it should be no violation of the article of the ECHR.⁶⁹ Additionally, it has been contended that article 34 of the ECHR can not serve as the basis for the binding force of provisional measures, since the deriving of binding character of provisional measures from the effective exercise of the individual application opens the question whether measures indicated in the inter-state complaints procedures according to article 33 of the ECHR would continue to be optional. It has also been said that the ECtHR can not rely on the decision of ICJ in the *LaGrand* case, since there ICJ interpreted its own constitutive treaty – article 41 of the Statute of the Court, meanwhile the constitutive treaty of the ECtHR is silent about the ECtHR's powers

⁶⁸ *Mamatkulov and Askarov v. Turkey*, para. 128.

⁶⁹ Concurring opinion of Judge Cabral Barreto. In *Mamatkulov and Askarov v. Turkey*.

in relation to provisional measures. In this sense, the Grand Chamber has been accused of exercising a legislative function instead of a judicial one.⁷⁰

It is true that reliance on article 34 of ECHR as a basis for the binding force of provisional measures raises legal inaccuracies in regard to inter-state complaints or provisional measures addressed towards applicants (like in the *Ilascu and Others v. Moldova and Russia* case). The ECtHR will have to clarify these matters in the future.

However, the argumentation that the failure to comply with provisional measures entails a violation of article 34 of ECHR only in cases where the effective exercise of applicants' right of individual application was actually hindered also raises some doubts. It has to be kept in mind that the ECtHR issues requests for provisional measures only in restricted circumstances and only if there is an imminent risk of irreparable damage.⁷¹ Usually the ECtHR grants provisional measures very rarely.⁷² In cases where they are granted, they have to be complied with without exception. A different approach opens the possibility for the state parties to choose whether to comply or not with provisional measures. At the same time the states are not in a position to foresee how the non-compliance with provisional measures will affect applicants' exercise of their right of individual application. This might only lead to additional breaches of the provisions of the ECHR. Whereas the awareness by the states that non-compliance with the ECtHR's indicated provisional measures entails a responsibility over violations of the ECHR provisions would exclude further contravening practices and would increase the effectiveness of the international individual application proceedings.

Meanwhile, the ECtHR's ruling in the *Mamatkulov and Askarov v. Turkey* case made a significant turn in the case-law on the matter and was cited many times in the subsequent cases.

⁷⁰ Joint Partly Dissenting Opinion of Judges Caflisch, Turmenand and Kovler. In *Mamatkulov and Askarov v. Turkey*.

⁷¹ *Mamatkulov and Askarov v. Turkey*, para. 103-104.

⁷² Between 1974 and 2002 there were a total of 2,219 requests for provisional measures, of which only 321 were granted (14.5 %). See: Leach (2005) p. 40.

3.2.2.2 Subsequent case-law and the *Olaechea Cahuas v. Spain* case

Following the *Mamatkulov and Askarov v. Turkey* case the ECtHR on several occasions ruled that the responding governments by failing to comply with provisional measures had violated article 34 of the ECHR.

The *Shamayev and Others v. Georgia and Russia* case concerned the extradition by Georgia of the five applicants of Chechen origin to Russia. In that respect, the ECtHR noted that due to the applicants' extradition the effective exercise of their right of individual application was "seriously obstructed." "The fact that the Court was able to complete its examination of the merits of the complaints against Georgia does not mean that the hindrance to exercise of that right did not amount to a breach of Article 34 of the Convention."⁷³

In the *Aoulmi v. France* the applicant was deported to Algeria notwithstanding the ECtHR's indication of provisional measure not to expel him. The ECtHR stressed that "in the present case, even though the binding nature of measures adopted under Rule 39 had not yet been expressly asserted at the time of the applicant's expulsion, Contracting States were nevertheless already required to comply with Article 34 and fulfil their ensuing obligations."⁷⁴

In all the above-mentioned cases the ECtHR concluded the fact that the applicants by their expulsion to the distant countries were hindered in the effective exercise of their right of individual application guaranteed by article 34 of the ECHR. However, in the *Olaechea Cahuas v. Spain* case where the ECtHR had a chance to answer the question whether the non-compliance with provisional measures entails a violation of article 34 even in cases where applicants were not actually hindered in the exercise of their right of individual application, the ECtHR had to conclude the opposite.

The case concerned a Peruvian national, a suspected member of a terrorist organization in Peru with an aim to transform Peru's political system by armed force into a communist proletarian regime. The applicant was arrested in Spain under an international

⁷³ *Shamayev and Others v. Georgia and Russia*, para. 478.

⁷⁴ *Aoulmi v. France*, para. 111.

arrest warrant issued by Peruvian authorities and taken into custody pending a ruling on his extradition. In a decision of 18 July 2003, the Spanish court authorized the applicant's extradition for trial in Peru on the charge of terrorism after receiving guarantees from the Peruvian authorities that the applicant would not be subjected to punishment causing physical harm or to inhuman or degrading treatment. On 6 August 2003, the applicant lodged an application to the ECtHR and requested for the application of the provisional measures to have his extradition suspended. On the same day, the ECtHR indicated provisional measure to the Spanish government not to extradite the applicant while the case is pending before the ECtHR. However, the applicant was extradited to Peru the next day. The ECtHR asked the Spanish government to indicate what steps had been taken to ensure the implementation of the provisional measure, but received no reply. In its final observations the applicant relied on article 34 of the ECHR alleging that the failure to comply with the provisional measure indicated in accordance with Rule 39 of the Rules of Court had prevented the ECtHR from effectively examining his application. He based his arguments on the case of *Mamatkulov and Askarov v. Turkey*. The ECtHR was unable to conclude that the applicant was hindered in the exercise of his right of individual application since the applicant had been released from the Peruvian prison three months later and had been constantly in touch with his counsel in London. However, the ECtHR stated that "that fact, which became known after the decision to apply the interim measure had been taken, does not mean that the Government complied with their obligation not to hinder in any way the effective exercise of the right enshrined in Article 34."⁷⁵ After reiterating the principles established in the aforementioned cases the ECtHR held:

An interim measure is provisional by nature and the need for it is assessed at a given moment because of the existence of a risk that might hinder the effective exercise of the right of individual application protected by Article 34. If the Contracting Party complies with the decision to apply the interim measure, the risk is avoided and any potential hindrance of the right of application is eliminated. If, on the other hand, the Contracting Party does not comply with the interim measure, the risk of hindrance of the effective exercise of the right of individual application remains, and it is what happens after the decision of the Court and the government's failure to apply the measure that

⁷⁵ *Olaechea Cahuas v. Spain*, para. 80.

determines whether the risk materialises or not. Even in such cases, however, the interim measure must be considered to have binding force. The State's decision as to whether it complies with the measure cannot be deferred pending the hypothetical confirmation of the existence of a risk. Failure to comply with an interim measure indicated by the Court because of the existence of a risk is in itself alone a serious hindrance, at that particular time, of the effective exercise of the right of individual application.⁷⁶

To that extent, the ECtHR found that by failing to comply with provisional measure indicated in accordance with Rule 39 of the Rules of Court, Spain violated article 34 of the ECHR.

Thus, the ECtHR ruled that a failure by a state party to comply with provisional measures *per se* constitutes a violation of article 34 of the ECHR. A provisional order of the ECtHR imposes a binding obligation on states to stay an extradition or deportation while a case is pending before the ECtHR. This obligation can not be conditional and dependent on the subsequent evaluation of the conduct of a state party.

As it was mentioned before, a relevant Chamber can request from the respondent state information concerning the implementation of provisional measures indicated. Additionally, according to the Rule 39 § 2 notice of any provisional measure has to be given to the Committee of Ministers. In accordance with this provision, it is the Committee of Ministers that could be empowered to supervise the enforcement of provisional measures. On the other hand, provisional measures require urgent action: in some cases it is a matter of several hours. To that extent, this recourse to the Committee of Ministers would not be particularly helpful. Hence the compliance with provisional measures depends only on the good will of a respondent state. The awareness among states that orders of provisional measures are binding should be sufficient and the lack of a special enforcement mechanism should not be argued as a problem.

⁷⁶ *Olaechea Cahuas v. Spain*, para. 81.

3.2.3 The Inter- American Court of Human Rights

Article 63 § 2 of the American Convention on Human Rights (further ACHR or American Convention) authorizes the Inter-American Court of Human Rights (further IACtHR) “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons” to issue “such provisional measures as it deems pertinent in matters it has under consideration”. According to article 25 of the Rules of Procedure the IACtHR may issue provisional measures on its own motion or at the request of a party. In cases which are at the stage of being examined in the Inter-American Commission (further the Commission), the IACtHR can act at the request of the former.

Provisional measures are a well-established institution in the Inter-American system of human rights. First of all, the American Convention embodies this institution of provisional measures as one of the main functions of the IACtHR. Therefore the IACtHR adopts them quite often, almost in every case. Secondly, according to article 25 § 8 of the Rules of Procedure the IACtHR is obliged in its annual report to the General Assembly of the Organization of American States (further the OAS) to report on provisional measures that have been ordered and on the compliance with these measures by the state parties. This means the IACtHR itself has a task of monitoring the implementation of provisional measures by the state parties.

The IACtHR usually adopts provisional measures in situations where it is necessary, for example, to protect witnesses who testify before the Commission or the IACtHR or to protect human rights activists and organizations. In the *Honduran Disappearance* cases the IACtHR ordered the Honduran government to take all necessary measures to protect two witnesses who had received death threats. Subsequently, although the two mentioned witnesses were not harmed, the other three witnesses in the case were assassinated.⁷⁷ In the *Girardo Cordona* case where the president of a Colombian human rights organization was assassinated the IACtHR ordered Colombian authorities to take measures to protect other human rights workers in the organization and the family of the

⁷⁷ Pasqualucci (2003) p. 320.

deceased.⁷⁸ The IACtHR has adopted provisional measures in the death penalty cases, for example, in the *James et al.* case Trinidad and Tobago was ordered to stay executions of several persons convicted with the death penalty while the case was pending in the Commission, and in cases where it was necessary to provide protection to allow victims to return to their homes, for example, in the *Loayza Tamayo* case the IACtHR ordered the Peruvian government to guarantee to the victim all the necessary security conditions for her safely to return to Peru.⁷⁹

In comparison with the European human rights system, the Inter-American system is limited. First of all, the IACtHR can exercise compulsory jurisdiction only over states parties to the ACHR that have accepted its jurisdiction in accordance with article 62 § 1 of the ACHR. Secondly, only the states parties and the Commission have a right to submit a case to the IACtHR. This means that individuals do not have *locus standi* to participate in a case before the IACtHR.⁸⁰ Although considering the limitations of the system, the Inter-American Commission and the American Court play a vital role in the promotion of human rights in the region.

The binding force of the provisional measures is not so arguable issue in the Inter-American system of human rights. The provision empowering the IACtHR to adopt such measures is enshrined in the American Convention itself and uses the words *shall adopt* rather than *indicate* which suggests that the drafters of the ACHR intended provisional measures to be binding. However, the compliance with provisional measures by states parties has not been uniform.⁸¹ The reason for this might be not the lack of awareness that provisional measures are binding, but the lack of respect for human rights in Latin American countries in general and a lack of resources to ensure the protection to the beneficiaries of provisional measures. That is why the IACtHR has been compelled to stress repeatedly in its orders that states have to comply with their international obligations in good faith – *pacta sunt servanda*.

⁷⁸ *Ibid.*, p. 323.

⁷⁹ *Ibid.*, p. 324-325.

⁸⁰ In accordance with article 44 of the ACHR any person or a group of persons may lodge a petition to the Commission.

⁸¹ State parties comply with 80 % of the IACtHR's orders of provisional measures. See: *Narrative Report: Introducing the New African Court on Human and People's Rights* (2006) p. 25.

In the *James et al.* case the IACtHR noted that the state parties to the American convention should comply with all the provisions of the ACHR including those relative to the operation of the Commission and the IACtHR. To that extent “in view of the Convention’s fundamental objective of guaranteeing the effective protection of human rights [...], State parties must refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims.”⁸²

In the *Giraldo-Cordona v. Colombia* case the IACtHR pronounced that:

pursuant to the provision set forth in Article 63 (2) of the Convention, the adoption of provisional measures which have been ordered by the Court is binding upon the State, as the fundamental principle underlying the law on the responsibility of the State, supported by international case law, sets forth that the States must comply with the conventional obligations thereof in good faith (*pacta sunt servanda*).⁸³

Thus the IACtHR derived the binding character of provisional measures from the general principle of international law *pacta sunt servanda*, which means that state parties by ratifying the American Convention and by accepting the IACtHR’s jurisdiction have committed themselves to fulfilling the obligations deriving from this international treaty, including the obligation to comply with provisional measures ordered by the IACtHR.

It is important in this respect to discuss the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* concerning the mandatory death penalties. In this case thirty two alleged victims had been sentenced to death penalties for committing murders in Trinidad and Tobago pursuant to *1925 Offences Against the Person Act* “without analyzing the individual characteristics of the offender and the crime and without considering whether the death penalty was the appropriate punishment for that case”.⁸⁴ Their appeals were dismissed by the Trinidad and Tobago Court of Appeal and subsequently by the Judicial Committee of the Privy Council. None of the alleged victims had a possibility to apply for amnesty or pardon of the death penalty. After the victims filed petitions to the Commission, the IACtHT had repeatedly issued orders of provisional

⁸² The Order of Provisional Measures of 27 may 1999 in *James et al. v. Trinidad and Tobago*, para. 9. Also: Pasqualucci (2003) p. 317

⁸³ The Order of Provisional Measures of 29 November 2006 in *Giraldo-Cordona v. Colombia*, para. 8.

⁸⁴ Judgment of 21 June 2002 in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 90.

measures to stay executions of the convicted persons while the case was pending before the Commission or the IACtHR itself. Additionally, in its decision of 27 January 1999 the Judicial Committee of the Privy Council held that all the executions of death penalties in Trinidad and Tobago should be stayed if the persons under the death penalties lodged petitions to an international human rights body whether it would be the supervisory bodies of the Inter-American system or the UN Human Rights Committee.⁸⁵ However, despite the order of 25 May 1999 where the IACtHR instructed Trinidad and Tobago “to take all necessary measures to prevent the life of Joey Ramiah, among others [...], so that his case could continue being processed before the inter-American system”,⁸⁶ the respondent state executed the victim on 4 June 1999. The IACtHR found that the execution constituted an arbitrary deprivation of the right to life since the victim was protected by the provisional measures order. The IACtHR stated that “the State of Trinidad and Tobago has caused irreparable damage to the detriment of Joey Ramiah, by reason of its disregard of a direct order of the Court and its deliberate decision to order the execution of this victim”.⁸⁷ It also stressed “the seriousness of the State’s non-compliance in virtue of the execution of the victim despite the existence of Provisional Measures in his favour, and as such finds the State responsible for violating Article 4 of the American Convention”⁸⁸, which embodies the right to life.

⁸⁵ *Thomas and Hilaire v. Baptiste et al.* Also: Judgment of 21 June 2002 in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 84(q).

⁸⁶ Judgment of 21 June 2002 in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 196.

⁸⁷ *Ibid.*, para. 199.

⁸⁸ *Ibid.*, para. 200.

3.2.4 African Court on Human and People's Rights

The Protocol to the African Charter on Human and People's Rights on the Establishment on the African Court on Human and People's Rights (further the Protocol) empowers the African Court on Human and People's Rights (further the African Court) to issue provisional measures. According to article 27 § 2 of the Protocol "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons", the African Court "shall adopt such provisional measures as it deems necessary". The wording of the provision is very similar to the one authorizing the Inter-American Court to order provisional measures.

The African Court is just newly established court⁸⁹, which has not had a chance to rule on a case yet. According to article 2 of the Protocol, the African Court has a complementary protective mandate to the African Commission. Only the state parties to the African Charter on Human and People's Rights (further the Charter), the African Commission and the African Intergovernmental Organizations can submit a case to the African Court. Individuals can institute cases directly before it only if the state party to the Protocol have declared in accordance with article 36 § 6 that it accepts the African Court's jurisdiction to receive cases from individuals. Knowing the constant difficulties of the African countries in ensuring human rights standards, this is a significant limitation of the African Court's competence and its effectiveness in terms of increasing the protection of human rights in the continent. However, according article 30 of the Protocol judgments of the African Court are binding on states parties, which undertake "to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".⁹⁰ According to article 29 § 2 the execution of judgments is monitored by the Committee of Ministers, while according to article 31 the African Court is also obliged to report to the Assembly of the African Union on the cases in which a state

⁸⁹ See the first *Activity Report of the Court for 2006*.

⁹⁰ Article 30 of the Protocol.

party has not complied with its judgments. In this way supervision of compliance with judgments of the African Court is ensured.

Clearly, the African Court will have to rule on the binding force of provisional measures in its future case-law. It is most plausible that it will follow the practice of the other international courts and will hold that provisional measures are obligatory. In its Rules of Procedure it will have to determine who will have a right to request provisional measures and how the African Court will exercise the power to grant them. The other question is whether the African Court will follow the example of the Inter-American Court and will consider adopting provisional measures not only when a case is transferred to it but also when a case is still pending before the African Commission and the Commission is requesting for provisional measures. In such a case, provisional measures would be ordered “with the full authority of the Court at an early stage of the proceedings”.⁹¹ It also has to be determined what institution, whether the African Court itself or the Committee of Ministers (since it is committed to monitor the implementation of judgments), will be obligated to ensure the supervision of compliance with provisional measures. Such a supervision mechanism would enhance the effectiveness of provisional measures.

⁹¹ Naldi (2002) p. 9.

3.3 The Jurisprudence of International and Regional Quasi-judicial Bodies

The human rights bodies that are discussed in this chapter are treaty monitoring bodies entrusted with the task to supervise the compliance with the human rights standards set by specific treaties which is primarily conducted through the examination of periodic reports submitted by states on their implementation of a given treaty guarantees. The treaty bodies also have competence to consider individual petitions or communications submitted by individuals alleging human rights violations. However, since their decisions in the individual complaint procedure are referred to as *views* or *reports*, they are considered as non-binding. Although, the fact that their constituent treaties lack the provisions describing *views* or *reports* binding does not mean that states parties are free to choose whether to comply with them or to ignore them. They nevertheless include obligations that states parties have accepted that is to ensure human rights enshrined in the certain treaties.

However, since the treaty bodies lack competence to render binding final decisions, it is accepted by states that these bodies also lack competence to issue binding provisional measures. Nonetheless, the treaty organs themselves stated in their case law that states are bound by requests of provisional measures on the basis of their obligation to cooperate in good faith with the treaty organs.

3.3.1 The UN Human Rights Committee

The Human Rights Committee is a monitoring body of the International Covenant on Civil and Political Rights (further ICCPR). According to the Optional Protocol to the ICCPR the Committee has a competence to consider communications from individuals subject to the jurisdiction of states that ratified the Optional Protocol. The Committee after considering the communication adopts *views* which do not have legally binding effect. The Optional Protocol establishing the Committee contains no provision empowering it to issue provisional measures. However, the Committee assumed the power while drafting its Rules

of Procedure. Rule 92 (old Rule 86) of Rules of Procedure⁹² entitles the Committee to “inform of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation”.

Since the Committee’s views have “rather a persuasive quasi-legal authority”⁹³ the binding nature of provisional measures becomes a questionable issue. Nevertheless, the Committee itself has repeatedly stated in its jurisprudence that failure to comply with Committee’s request for provisional measures is a breach of obligations under the Optional Protocol.⁹⁴

In the *Sultanova et al. v. Uzbekistan* case the victims, the sons of the author of the communication, were sentenced to death for a number of crimes as alleged against the constitutional regime in Uzbekistan. The Committee, in accordance with Rule 92 (old Rule 86), requested the state party to stay the execution pending the determination of the case by the Committee. The author of the communication alleged that her sons were executed after the provisional measures request. The Committee received no reply from the state party on the request of provisional measures and no explanations in relation to the allegations that the executions were carried out after the communication was sent to the Committee and after the provisional measures were issued.

The Committee reiterated the principles that it elaborated in its earlier decisions. It stated that:

[...] by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant [...]. 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 [...]. 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.⁹⁵

⁹² Revised Rules of Procedure of the Human Rights Committee adopted 22 September 2005, renumbered some of the rules. Rule 86 is renumbered to Rule 92.

⁹³ Naldi (2004) p. 446.

⁹⁴ See: *Piandiong et al. v. The Philippines*; *Weiss v. Austria*; *Khalilov v. Tajikistan*.

⁹⁵ *Sultanova et al. v. Uzbekistan*, para. 5.2.

The Committee added that “interim measures pursuant to rule 92 of the Committee’s rules of procedure 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 victims, undermines the protection of Covenant rights through the Optional Protocol”.⁹⁶

3.3.2 The UN Committee against Torture

The UN Committee against Torture is a body monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (further CAT) by its state parties. According to the CAT the Committee considers individual complaints or communications from individuals claiming that their rights under the CAT were violated. Rule 108 § 1 of the Rules of Procedure of the Committee enables it to adopt provisional measures in the individual complaint proceedings. According to the provision the Committee, its working group or the Rapporteur for new complaints and interim measures “may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations”.

Article 3 of the CAT prohibits the state parties to expel, return or extradite a person to a third country “where there are substantial grounds for believing that he would be in danger of being subjected to torture”. The complainants to the Committee invoke this provision and request for provisional measures in a large number of cases in order to contest imminent extradition or deportation.⁹⁷

⁹⁶ *Ibid.* para. 5.2

⁹⁷ Annual Report of the Committee against Torture of 1 November 2006.

In the case of *Cecilia Rosana Núñez Chipana v. Venezuela*, where the Peruvian national was extradited to Peru despite the fact that the stay of extradition had been requested, the Committee stated:

[...] the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.⁹⁸

3.3.3 The Inter-American Commission on Human Rights

The American Convention, entrusting the Inter-American Commission with the competence to consider individual petitions, contains no provision empowering it to issue provisional measures. Although in accordance with article 25 § 1 of the Commission's Rules of Procedure, the Commission can "request that the State concerned adopt precautionary measures to prevent irreparable harm to persons". The Commission has a discretion to request such measures "in serious and urgent cases, and whenever necessary according to the information available".

In the case of *Juan Raul Garza v. United States* in relation to the United States' submissions on the non-binding nature of the Commission's precautionary measures, the Inter-American Commission stated that "OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.". It stated that member state's failure to preserve life of a victim in capital cases while a case is pending before the Commission deprives the victim of his right

⁹⁸ *Cecilia Rosana Núñez Chipana v. Venezuela*, para. 8.

of individual petition to the Inter-American human rights system and is inconsistent with the state's basic human rights obligations.⁹⁹

3.3.4 The African Commission on Human and People's Rights

The African Commission established under the African Charter on Human and People's Rights has a mandate "to promote human and people's rights and ensure their protection in Africa".¹⁰⁰ According to article 55 of the ACHPR the Commission has a competence to receive communications from individuals, groups of individuals and NGOs alleging violations of the Charter. The Commission is a relatively more monitoring body lacking competence to render binding decisions that are the final result of the individual complaint procedure. Similarly, the Commission has no competence to enforce its decisions and lacks resources to monitor the compliance with its decisions.¹⁰¹

The African Commission's constituent treaty, the Charter, contain no provision empowering it to issue provisional measures. However, article 111 of its Rules of Procedure does. Article's § 1 allows the Commission to "inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation". In accordance with Rule 111 § 2 the Commission "may indicate to the parties any interim measures, the adoption of which seems desirable in the interests of the parties or the proper conduct of the proceedings before it." When the Commission is not in session its Chairman can take a decision to indicate provisional measures or in case of urgency may take any necessary action on behalf of the Commission.¹⁰²

Even though the African Commission lacks effective judicial tools in order to become a successful human rights protection and enforcement body, in its jurisprudence

⁹⁹ Pascualucci (2005) p. 24 (citing the *Juan Raul Garza v. United States* case).

¹⁰⁰ Article 30 of the ACHPR.

¹⁰¹ Pityana (2004) p. 126.

¹⁰² Rule 111 § 2 and § 3 of Rules of Procedure.

the Commission has made it clear that state parties are obliged to comply with Commission's decisions on provisional measures. In the *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria* case the Commission had to deal with the situation where the victim, Ken Saro-Wiwa, writer and activist, was executed despite the Commission's indicated provisional measures to stay the execution. The Commission noted that since Nigeria was a party to the African Charter it was bound by article 1 which embodies the general obligation of the state parties to respect and to ensure the rights, duties and freedoms enshrined in the Charter. The Commission's task was to assist state parties to implement their obligations under the Charter. It stated:

Rule 111 of the Commission's Rules of Procedure [...] aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the Government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.¹⁰³

Therefore the Commission held that "in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1".

¹⁰³ *International Pen and Others v. Nigeria*, p. 114. Also: Naldi (2002) p. 7.

4 Conclusions

The international human rights bodies that are entrusted with the competence to monitor the compliance by states with international human rights standards through the exercise of individual complaint procedure are entitled to issue provisional measures of protection in order to safeguard the rights of individuals, victims of alleged human rights violations, from irreparable damage.

In international human rights law provisional measures have a fundamentally protective purpose. They are designed to protect potential victims from human rights violations and to deter states from breaching human rights.

Individual complaint procedure is a crucial international mechanism designed for the protection of human rights at an international stage. The right to petition international human rights bodies is an international procedural right granted to individuals directly by international law, regardless of whether or not this right is established by national laws of states. The substantive human rights, in contrast, may be exercised only within national legal systems. If a state is not willing to ensure substantive human rights to individuals in its jurisdiction, the victims of human rights violations are left with the only legal remedy that is the exercise of their international right to lodge a complaint to international human rights body in order to seek justice. In this case individuals are dependent on that the international legal remedy would be effective.

The binding nature of provisional measures issued by international judicial and quasi-judicial bodies is necessary to the effectiveness of international individual complaint proceedings. This was confirmed by the ECtHR in its decision in the *Mamatkulov and Askarov v. Turkey* case where the ECtHR stated that its requests for provisional measures are binding on states as it is essential to the effectiveness of the right to individual petition.

In recent years the main international courts have pronounced in their decisions that provisional measures are binding on states and that states have an international obligation to implement them. The most authoritative decision on the issue is the ICJ's decision in the *LaGrand* case where the Court based the binding nature of provisional measures issued by it on the effective exercise of the judicial function. Additionally, the IACtHR in its decision in the *Velasquez Rodriguez v. Honduras* case stated that its power to order provisional measures derives from its inherent character as a judicial body. This means that inherent judicial powers of an international court or tribunal give a basis for issuance of binding provisional measures. ICJ and the IACtHR are entitled to issue provisional measures by their constituent treaties, while the ECtHR's power to make requests of provisional measures is enshrined in its procedural rules. Nonetheless, the ECtHR is an international court and its judgments are binding on states parties. Its inherent character as a judicial body gives basis for its power to issue binding provisional measures. Consequently, it can be concluded that to date in accordance with international law provisional measures ordered by international courts and tribunals have a binding effect on states and create for states a binding international obligation to implement them.

The human rights bodies such as the UN Human Rights Committee, the UN Committee against Torture, the Inter-American Commission of Human Rights and the African Commission of Human Rights are treaty monitoring bodies. They lack competence to render binding decisions that are the final result of international petition proceedings exercised under their competence. In their jurisprudence these treaty monitoring bodies have pronounced that their requests for provisional measures are binding on states parties on the basis of their international obligation to cooperate with them and that failure by states parties to comply with them constitutes a violation of that obligation. It has been argued by states that provisional measures issued by quasi-judicial bodies do not have binding effect because they have no competence to render binding final decisions.

However, if a treaty body lacks competence to render binding final decisions, it does not mean that it also lacks competence to issue binding provisional measures. Provisional measures in international law are of fundamentally protective nature and are aimed at preventing the rights of individuals from irreparable damage. Provisional

measures are interrelated to the procedural right of individual petition. States that accepted the right of individual petition to individuals in their jurisdictions have committed themselves not to hinder individuals to exercise that right. The treaty bodies' task is to ensure that the individual petition proceedings would be effective and to prevent individuals from human rights violations by affording them specific protection. Provisional measures are applied by human rights bodies in the individual petition proceedings only under extreme circumstances, in cases that require specific protection. The treaty bodies' competence to order binding provisional measures is interrelated to the competence to exercise effective individual petition proceedings. Therefore, the competence of a human rights body to issue binding provisional measures is different from the competence to render binding decisions and they are not correlated. Consequently, it can be suggested that provisional measures issued by quasi-judicial bodies are binding on states.

In their future jurisprudence the discussed treaty organs will need to continue to develop the question and to state more clearly that states parties have an obligation to implement requests for provisional measures. The binding effects of provisional measures issued by treaty monitoring bodies would strengthen their judicial nature and would increase their legal authority in international human rights adjudication.

In the future, the binding nature of provisional measures has a potential to develop into the general principle of law applicable as an integral part of international individual complaint proceedings. It requires that the main human rights bodies – international human rights tribunals and treaty monitoring bodies- would continue consistently rule on the binding character of provisional measures in international adjudication.

The binding nature of provisional measures in international law gives basis for the development of a new level of protection in international human rights law that is protecting specific individuals under specific circumstances by specific means.

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