Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication

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Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication

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To my mother
Ella Verhamme
(1943-1990)

To Mark

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PART IV: RESPONSES

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
AI	Amnesty International
CAT	UN Committee against Torture
CEDAW	UN Committee on the Elimination of All Forms of Discrimination against Women
CEJIL	Center for Justice and International Law
CERD	UN Committee on the Elimination of all Forms of Racial Discrimination
CIDH	Inter-American Commission on Human Rights (Comisión Internacional de Derechos Humanos)
CoE	Council of Europe
ECHR	European Convention on Human Rights
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
Fed. BiH	Federation of Bosnia and Herzegovina
HRC	UN Human Rights Committee
IACHR	Inter-American Court of Human Rights
ICAT	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ITLOS	International Tribunal on the Law of the Sea
JCPC	Judicial Committee of the Privy Council
PCIJ	Permanent Court of International Justice
State of BiH	State of Bosnia and Herzegovina
UNHCR	United Nations High Commissioner for Refugees
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

GENERAL INTRODUCTION

1 TAKING URGENT ACTION IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION

This book aims to clarify and further develop a legal concept of provisional measures as used by international adjudicators dealing with individual complaints about human rights violations. Various international adjudicators take action on behalf of individuals facing imminent or ongoing human rights violations. Often the need arises to take action as fast as possible. Such urgent action is particularly necessary when the imminent or ongoing violation would cause irreparable harm to persons. Examples of irreparable harm are disappearances, torture or executions.

An urgent action to prevent such irreparable harm generally takes place in the form of a message, sent as quickly as possible, to the State concerned, calling upon it to prevent the alleged imminent violation. If a United Nations (UN) Special Rapporteur, such as the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions (hereinafter: Special Rapporteur on Executions),[1] sends such a message, it is usually called an 'urgent appeal'. On the other hand, if it is sent during the course of judicial or quasi-judicial proceedings, it is called an interim or provisional measure. Such measure may traditionally be defined as a measure taken (or 'indicated')[2] by an adjudicator and sent to the State concerned in order to safeguard the rights of the petitioner pending the final determination of the case. In international law the terms 'interim measures' and 'provisional measures' are used interchangeably,[3] but the Statute of the International Court of Justice (ICJ) speaks of provisional measures (Article 41) and this is the term generally used in this book. An exception is made only when discussing the practice of the Inter-American Commission on Human Rights because this Commission uses the term 'precautionary measures' to distinguish its own provisional measures from those of the Inter-American Court of Human Rights.[4]

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1 Such Rapporteurs are independent experts appointed by the Chairperson of the UN Commission on Human Rights, a body of State representatives. They are appointed as part of the thematic proceedings based on the UN Charter. In relation to complaints sent to these Rapporteurs by individuals or NGOs reference is often made to more 'humanitarian', 'Charter-based proceedings' in order to distinguish them from the 'treaty based' individual complaint proceedings, based on specific treaties such as the International Covenant on Civil and Political Rights.

2 This term is found in Article 41(1) of the Statute of the International Court of Justice. Several other adjudicators have copied its use. Generally the term 'indicate' is used to refer to the process of communicating a provisional measure to the State concerned. The meaning of this term in the context of provisional measures has been controversial. In its *LaGrand* decision (*Germany* v. *United States*) of 27 June 2001, the International Court of Justice has now clarified its own use of the term. See Chapter I on the ICJ's provisional measures to protect persons.

3 The 1978 Rules of the International Court of Justice use the term provisional measures (articles 73-78), but the title of the subsection relating to Article 41 Statute is 'Interim Protection': Part III, Section D (Incidental Proceedings), Subsection 1.

4 See Chapter II, section 4 on provisional measures in the Inter-American system. The 'precautionary measures' taken by the Inter-American Commission on Human Rights during the course of adjudication are simply provisional measures by another name. They do not refer to the

The idea of provisional measures is based on a procedure used in national jurisdictions where an individual may, pending litigation, request a court to provide for preventive measures, injunctions, or other relief. A decision to take such measures does not prejudice the eventual legal determination of the conflict. It is relief *pendente lite*.

Various international adjudicators have the power to 'indicate', 'take', 'issue' or 'use' provisional measures during their proceedings. It can be necessary to use them pending international proceedings in order to preserve the respective rights of the parties or to prevent aggravation of the dispute. The most prominent international adjudicator making use of provisional measures is the ICJ.[5] Although individuals cannot appeal to that Court, its procedures are nevertheless relevant for conceptual reasons. Furthermore, some of the ICJ's case law on provisional measures, such as the *Hostages* case,[6] the *Genocide Convention* case[7] and *Armed activities on the territory of the Congo* (*Congo* v. *Uganda*),[8] has dealt with the issue of irreparable harm to persons,[9] an issue directly relevant to human rights law. The Court has even indicated provisional measures in order to postpone the execution by one State of a national of another State.[10] Other adjudicators with no specific human rights competence taking provisional measures are the International Tribunal on the Law of the Sea (ITLOS),[11] the European Union's European Court of Justice (ECJ)[12] and international (arbitral) tribunals in commercial law.[13]

The Inter-American Court of Human Rights (IACHR) and European Court of Human Rights (ECtHR) and supervisory bodies to human rights treaties,[14] such as the Human Rights Committee (HRC) to the International Covenant on Civil and Political Rights (ICCPR), can indicate provisional measures in order to avert a deterioration of the alleged victim's position.[15] Human rights courts as well as other supervisory bodies to human rights treaties with an individual complaint mechanism are adjudicators determining a legal conflict between an individual and a State on the basis of law and rules of procedure.[16] They have used provisional measures as part of their judicial function.[17]

'precautionary principle'. See Chapter I, section 5.3.3 and Chapter XV (Immediacy and risk), discussing the relationship between provisional measures and the precautionary principle.

5 See Article 41 of the Statute of the International Court of Justice.

6 ICJ *Case concerning United States Diplomatic and Consular Staff in Tehran* (*US* v. *Iran*), Order of 15 December 1979.

7 ICJ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Yugoslavia* (*Serbia and Montenegro*), Orders of 8 April 1993 and 13 September 1993; see further Higgins (1997).

8 ICJ *Armed activities on the territory of the Congo* (*Congo* v. *Uganda*), Order of 1 July 2000.

9 The various reasons for provisional measures given by the ICJ are discussed more closely in Chapter I.

10 ICJ *Case concerning the Vienna Convention on Consular Relations* (*Paraguay* v. *United States of America*), Order of 9 April 1998; *LaGrand* (*Germany* v. *United States*), Order of 5 March 1999 and Judgment of 27 June 2001 and *Avena and other Mexican Nationals* (*Mexico* v. *US*), Order of 5 February 2003 and Judgment of 31 March 2004.

11 See Article 290 UN Convention on the Law of the Sea and Article 25 of Annex VI.

12 See Articles 242 and 243 EC Treaty.

13 The case law of the ECJ and of international tribunals in commercial law falls outside the scope of this book.

14 These are often called quasi-judicial bodies.

15 This research will show that provisional measures can be used also to protect others than the petitioner.

16 By analogy, according to the European Court of Human Rights (ECtHR) a 'tribunal' is a body exercising judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner, see e.g. ECtHR *Sramek* v. *Austria*, Judgment of 22 October 1984, §36 and *Le Compte, Van*

The first urgent decisions of human rights adjudicators provide the historical background of the practice by human rights adjudicators. The HRC used so called 'informal provisional measures' in the 1970s and 1980s, requesting information on medical treatment in detention or on the whereabouts of alleged victims without explicitly invoking its rule on provisional measures, as well as a formal provisional measure to halt an expulsion, dating from 1977.[18] In the 1970s and 1980s the Inter-American Commission on Human Rights intervened informally on behalf of disappeared persons.[19] Since 1988, virtually as of its first case, the Inter-American Court has ordered provisional measures to protect against death threats.[20] The European Court of Human Rights (ECtHR) initially did not often use provisional measures because the Commission (when it was still active) normally did so. The earliest known occasion on which the European Commission on Human Rights used (informal) provisional measures was to prevent the execution of Nicolas Sampson in 1958. The European Court did use them to halt the extradition of *Soering* in January 1989.[21]

For one of the systems discussed in this book, the Inter-American human rights system, Professor Buergenthal, President of the Inter-American Court between 1985 and 1987[22] has expressed the importance of provisional measures as follows:

> "It is quite clear that the power of the Court to grant provisional measures has proved to be a very useful enforcement tool in the inter-American system. In a region of the world where serious violations of human rights are by no means a thing of the past, provisional measures can save lives, and they have done so on a number of occasions".[23]

Professor Cançado Trindade, President of the Inter-American Court between 1999 and 2003,[24] has referred to provisional measures as a 'procedural remedy of crucial importance to the protection of the fundamental rights of the human person'.[25]

Leuven and De Meyere v. *Belgium*, 23 June 1981, §55. This reasoning may apply to international adjudicators such as the Human Rights Committee as well. See further Chapter XVI (Legal status).

17 While the theoretical issue of what should be the role of the judiciary and what powers it should have in a democracy is relevant, its discussion would require a separate study, especially in relation to the specific nature of the international system with its additional legitimacy problems. This study is based on the premise that the international system of supervision of human rights treaties – with all its flaws – is a given for those States that have accepted it.

18 See Chapters V (Expulsion), VI (Disappearances) and VII (Health in detention).

19 Interview by the author with Juan Méndez, Washington D.C., 17 October 2001. See further Chapters II (Systems) and VI (Disappearances).

20 IACHR *Velásquez Rodríguez, Fairén Garbi and Solís Corrales, and Godínez Cruz Cases*, Orders for provisional measures of 15 and 19 January 1988.

21 ECtHR *Soering* v. *UK* Judgment of 7 July 1989. See further Chapter IV (Part 2), discussing the early case of *Bönisch* v. *Austria*, Judgment of 6 May 1985.

22 Member of the Court from 1979 to 1991.

23 Buergenthal (1994), p. 93.

24 Member of the Court from 1995 to 2006.

25 Cançado Trindade, preface by the President of the Inter-American Court of Human Rights to Provisional Measures Compendium II (2000), p. XVII, §29. See further, e.g., Cançado Trindade (2003), pp. 162-168 and Pasqualucci (1993), pp. 803-864, in particular pp. 844-846.

2 PROVISIONAL MEASURES IN HUMAN RIGHTS ADJUDICATION: CHANGING THE TRADITIONAL CONCEPT?

This book examines the legal concept of provisional measures in human rights adjudication. Apart from the conceptual questions raised by these provisional measures, there is their evident practical significance. Yet, a systematic analysis of the situations in which they may be relied on is currently lacking.[26] Such analysis of the nature of the various types of provisional measures is of importance to alleged victims,[27] to organisations representing them, as well as to the adjudicators themselves.

The question arises whether the concept of provisional measures has been adapted to fit the context of international human rights law or is generally the same as under traditional international law. The purposes of provisional measures as used under the UN and the regional human rights systems may differ from the traditional purposes of provisional measures as used by the ICJ. It is assumed, for instance, that one traditional purpose, preventing irreparable harm, is more relevant in human rights cases than are other purposes such as preventing aggravation of the dispute or preserving the respective rights of the parties.

Thus Chapter I examines the concept as applied by two international tribunals with no specific human rights mandate: the ICJ (and its predecessor) and ITLOS. The subsequent chapters analyse the practice with regard to specific aspects of provisional measures (set out in section 4 of this introduction) of certain international and regional human rights adjudicators (mentioned in section 5). This is done in order to determine whether it is possible to identify a core to the concept of provisional measures that the human rights systems have in common and, if so, what this common core entails. Clearly the book does not only deal with the similarities and differences between the various systems that are immediately apparent from the treaty texts and Rules of Procedure but also discusses common developments, a certain convergence of approaches towards the concept of provisional measures in human rights cases. At the same time the scope of application, or outer limits, of provisional measures could vary from system to system. The exigencies of the situation in a specific region or the particular task of an adjudicator in a given system may require the use of provisional measures that go beyond the core common to all systems.

This book discusses the extent of the convergence or divergences in the approaches of the adjudicators. It examines not only the core common to provisional measures in the human rights systems, but also the outer limits of such measures. In this respect it may contribute to the ongoing discussion about the proliferation of international adjudicators and the risk of fragmentation of international law.

The outer limits are assumed to be wider in a regional rather than in an international system, due to the greater interest in mutual compliance displayed by other States parties and because in a regional system the adjudicator is geographically and culturally somewhat closer to the situations pending before it. Often a regional adjudicator may be able to apply mechanisms for fact-finding, monitoring and conciliation in a more focused way as well.

To the extent that there is a difference between the concept of provisional measures in human rights adjudication and in other situations the book discusses whether the concept as used by human rights adjudicators could also be relevant to adjudicators with a general competence, not limited to human rights issues, when they are dealing with issues involving irreparable harm to

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[26] The secondary literature on provisional measures in international adjudication that does exist, deals mostly with the ICJ. See Chapter I. There are some articles dealing with the practice of using provisional measures in some of the human rights systems. See Chapter II.

[27] In practice the term ‘alleged victim’ is used also in the context of potential victims. Obviously, in the context of an impending violation, if the provisional measure works as intended, the violation does not take place at all or at least is not continued.

persons. In this sense this book is part of the discussion about the humanization of international law.[28]

3 PUBLICATION AND MOTIVATION

Most human rights adjudicators do not publish or motivate their provisional measures.[29] In this light the phenomenon that scholars sometimes read more into decisions than may have been intended by adjudicators[30] applies even more to decisions on provisional measures than to decisions on jurisdiction or merits.[31] Even if the adjudicator would publish and motivate them, there is obviously little time for contemplation. The urgency of the situation does not allow for exhaustive study and discussion. Still, in order to interpret the concept, potential petitioners, States, the adjudicator itself in later cases, other adjudicators as well as commentators depend on the information made available on the use of provisional measures. Consequently, their interpretations, actions and submissions could improve if adjudicators would include reasoning in their decisions on provisional measures, as sent to the State and the petitioner. It would also be useful if they would make available to the public more information on their use of provisional measures.

It may be argued that provisional measures in human rights cases do not have to be reasoned and the practice of using them does not need to be coherent because they are by definition adopted to address a situation of urgency. In that sense they would have a character that would be more humanitarian than judicial. Such an argument could explain why provisional measures are used in a certain situation vis-à-vis a certain State but not in similar situations vis-à-vis another State. The adjudicator may have envisaged something could be achieved exactly in that State but not in other States. Apart from the lack of time for elaboration, the wish to maintain maximum flexibility may also account for the lack of transparency in the decision-making on provisional measures by human rights adjudicators.

Evidently the above argument is not the approach taken in this book. While the aim of using provisional measures is not as such to proclaim the law or have general application, but rather to help one or more specific individuals,[32] explaining their use and increasing their accessibility is likely to make them more persuasive and to enhance their credibility. States and petitioners are now often unclear about the types of cases in which they are used. Some flexibility for the adjudicator would indeed remain necessary, but this does not rule out clarification of the use of provisional measures. The aim of flexibility does not justify secrecy and lack of explanation.[33]

Sometimes States (including domestic courts) are uncertain about the concept of provisional measures. States may invoke arguments applicable not just in the context of provisional measures. They may argue that domestic courts are better placed to assess risk of irreparable harm, for

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28 See e.g. Van Boven (1982); Simma (1993); Buergenthal (1997); Higgins (1998); Flinterman (2000); Kamminga (2001); Seiderman (2001); Meron (2003/2006); Cançado Trindade (2004) and Kamminga (2008).

29 See Chapter II on the human rights systems.

30 Secretariat staff of the European Commission on Human Rights in Strasbourg (October 1997), the HRC in Geneva (October 1998) and the Inter-American Commission on Human Rights in Washington D.C. (September/October 2001) have also stressed this.

31 Thirlway (1994), p. 6 points out with regard to the provisional measures by the ICJ: "Provisional measures Orders are prepared under pressure of time and in order to deal with the immediate situation". As a result, he considers that the 'texts of such Orders should not be put under the magnifying glass on the assumption that every word has been weighed'. See also Sztucki (1983), p. 278.

32 See Conclusion Part II (Purpose).

33 See further Chapter II.

instance in expulsion or extradition cases or cases involving indigenous peoples and the environment. They may also argue that international adjudicators should not interfere in democratic decisions, for instance in death penalty cases, or that domestic resources do not allow for certain expenditures to be made, for instance in cases involving protection against death threats or access to health care.

Substantiation of the use of provisional measures and making the decisions ordering them accessible to the public would help increase their coherence and credibility for everyone involved.[34] In the face of a particular threat, information about the use of provisional measures in similar cases would provide States and petitioners with some idea about the concept of irreparable harm employed by the adjudicator and about the way risks are assessed. It could also be useful to know, for instance, the number of times provisional measures are requested by petitioners and the number of times they are granted. Knowing in what type of situations adjudicators will intervene urgently could be equally useful to NGOs and to State authorities so that they could already anticipate this domestically, making recourse to an international adjudicator unnecessary because the situation would already be addressed. This would allow the State to be pro-active in the protection of human rights. After all, that is what is explicitly required under the respective provisions involving the undertakings of State parties to respect and ensure the rights and provide effective remedies and reparations[35] and implicitly in the requirement to exhaust domestic remedies.[36] Thus, the State would avoid the situation that many similarly situated persons would have to resort to international complaint proceedings in urgent cases.

The relevant information on the practice of the respective systems used for this book is presented in the subsequent Chapters. The practice of the various human rights adjudicators shows that they often do not indicate the criteria for the use of provisional measures, let alone the order in which they deal with these criteria, and that their approach is not always coherent. Still, at a more abstract level some underlying principles and ideas can be found in the human rights systems. These have been used to clarify and develop a legal concept of provisional measures in human rights cases. These principles and ideas are linked to the existing doctrine on provisional measures in general international law.[37] Thus, based on more abstract principles that seem to be common in the approach of the adjudicators, this book aims to fill gaps in the doctrine.[38]

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34 See further Chapter II on transparency and Chapter XVII on the official responses of States.

35 See e.g. Article 2 ICCPR, Articles 2 and 6 ICERD, Article 24 CEDAW, Article 2 ICAT, Articles 1, 13 and 50 ECHR, Articles 1, 2 and 63(1) ACHR and Article 1 ACHRPR.

36 See e.g. Article 2 OP to the ICCPR, Article 11(3) ICERD, Article 4 OP to the CEDAW, Article 22(4)(b) ICAT, Article 35(1) ECHR, Article 46(1)(a) ACHR, Articles 50 and 56 ACHRPR and Article 6 Protocol African Court.

37 Several scholars have contributed to the interpretation and development of this doctrine in non human rights law. See e.g. Guggenheim (1931 and 1933); Dumbauld (1932); Mendelson (1972-1973); Oellers-Frahm (1975); Elkind (1981); Sztucki (1983); Collins (1992); Thirlway (1994), Merrills (1995); Rosenne (2005) and Brown (2007), pp. 119-151. As noted, within the constraints of this book it was not feasible to deal with the extensive case law of arbitral tribunals and the European Court of Justice. For an account of the latter see, e.g. De Schutter (2005), pp. 93-130; Tridimas (1999); Jacobs (1994), pp. 37-68 and Collins (1992). For an account of the case law of arbitral tribunals see e.g. Collins (1992). See Chapter I for a discussion of approach by the PCIJ, ICJ and ITLOS.

38 Given the lack of information available on the practice of the human rights adjudicators with regard to provisional measures, in particular their reasoning, the subsequent chapters sometimes refer to the arguments of the parties, on the assumption that these played a role in the adjudicator's decision-making. As ICJ Judge Shahabuddeen has observed, it is indeed 'not proper mechanically to impute to the Court the position taken or assumed by counsel, particularly where

4 ASPECTS OF PROVISIONAL MEASURES IN HUMAN RIGHTS ADJUDICATION

As this book aims to clarify and further develop a legal concept of provisional measures, used by international human rights adjudicators, it analyses the choices made by these adjudicators with regard to the use of provisional measures. Since the existing records of their decisions to take provisional measures, as well as the responses by Addressee States are mostly found in case law, it is case law that is used as the main source. This is complemented by some information derived from secondary literature, visits of the secretariats/Registries in Washington D.C., San Jose, Geneva and Strasbourg[39] and, for the HRC, information from the case files in Geneva.[40] The approach of the various adjudicators is compared, among others as to type of cases in which provisional measures are used. Exhaustive discussion is neither possible – most provisional measures are not published – nor necessary as this book takes a qualitative rather than a quantitative approach.

The cases discussed have been selected because they are informative about a particular aspect of provisional measures.[41] The book discusses typical cases providing insight into the features of provisional measures that the various systems have in common. In addition, it mentions similar cases in which other adjudicators indeed confirm the approach taken in these typical cases or choose to take a different approach. The book also examines atypical cases (Chapter XI) to explore the outer limits of the concept.

Certain aspects of provisional measures have been selected that seem pertinent both with regard to the concept of provisional measures in general and in the context of human rights adjudication. These are: the protection required and the relationship with reparation and the (group of) beneficiaries; the relevance of admissibility and jurisdiction on the merits, assessment of temporal urgency and risk, legal status, the official responses of addressee States and the follow-up by adjudicators. The discussion focuses on irreparable harm, an aspect of the concept that may help explain the other aspects as well. Thus, the emphasis is on the situations in which human rights adjudicators have used provisional measures. Implicitly or explicitly an adjudicator facing a request for provisional measures not only determines the applicable purpose of provisional measures, but also the protection required, the relationship between provisional measures and forms of reparation and the group of beneficiaries involved.

At the same time the adjudicator assesses temporal urgency and risk. Obviously, without the competence to use provisional measures it would be a fruitless exercise to consider whether they are warranted. In that sense the competence or jurisdiction to use provisional measures is a prerequisite rather than a criterion for the use of provisional measures. With regard to the ICJ the relevance of admissibility and jurisdiction on the *merits* has sometimes been considered to be not just an aspect, but a prerequisite as well. Some human rights adjudicators have discussed non-exhaustion of domestic remedies, (non-)admissibility of the claim and the duration of provisional measures as well as the role of reservations in cases in which provisional measures were used.

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the Court has not spoken'. 'On the other hand', he noted 'it is equally not right to seek to appreciate the positions taken by the Court abstracted from their forensic context'. "As is well known, it is frequently the case that recourse to the arguments of counsel is necessary for an understanding of what in fact a court was doing". Separate Opinion of Judge Shahabuddeen in *Passage through the Great Belt* (*Finland* v. *Denmark*), Order of 29 July 1991.

39 Washington D.C., September-October 2001; San José Costa Rica, October-December 2001; Geneva, October 1998, April and October 2002; and Strasbourg, October 1997. See also Chapter II (Systems).

40 A reason to pay particular attention to the practice of the HRC lies in the special difficulty of obtaining information on the use of and rationale for its provisional measures. Much information was derived from the case files rather than from publicly available documents. See Chapter II.

41 See about purposive sampling Patton (2002), pp. 230-243.

While these discussions have some bearing on the concept of provisional measures, it is obvious from the practice that admissibility and jurisdiction on the merits are not a prerequisite for the use of provisional measures in human rights cases.[42]

In addition, the adjudicator considers the legal status of provisional measures, the responses of the Addressee State in the past and the best ways to monitor compliance. A separate discussion of each of these aspects is important in order to understand the concept of provisional measures in human rights adjudication. Yet in practice they obviously must be taken into account simultaneously. After all, in the concept of provisional measures procedural and substantive law are intertwined.[43]

A question that sometimes arises is whether the adjudicator is the appropriate body to deal with the situation on an urgent basis.[44] If a request for provisional measures is made the adjudicator itself probably cannot avoid taking this policy question into account, at least to some extent. Individual petitioners could take it into account in order to find out what would be the most appropriate course of action to avoid irreparable harm and whether this includes resorting to international adjudicators. Petitioners could take into account as well the anticipated impact of the adjudicator's use of provisional measures on future cases and the responses of States.[45]

In addition to examining the choices by the adjudicators with regard to the use of provisional measures, classical legal research is applied: finding and analysing relevant law with regard to provisional measures (case law as well as the applicable standards and rules of procedure), comparing the jurisprudence in order to find the underlying rationale for the use of provisional measures. This is then put in a conceptual framework interpreting the convergence and divergence of the practice of the various adjudicators with regard to provisional measures. This framework is based, on the one hand, on the factual question whether two or more adjudicators have used provisional measures in a given context (e.g. halting executions) and on the other hand on the underlying rationale that the provisional measures of the various adjudicators appear to have in common.

5 HUMAN RIGHTS SYSTEMS

The Human Rights Committee (HRC) is the only adjudicator in a system that is applicable to States in various regions of the world.[46] Its practice serves as a basis for the discussion of the common core of provisional measures. Apart from the HRC the most important UN adjudicator whose cases are discussed is the Committee against Torture (CAT). A discussion of the practice of CAT as well as that of the European Court of Human Rights (ECtHR) helps clarify the assess-

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42 See Chapter I (in Part I 'Setting') on this aspect of the general concept and Chapter XIV (in Part III 'Consequences') with regard to human rights adjudication.

43 The Inter-American Court considers its provisional measures jurisdictional rather than procedural. Maybe the point where substantive and procedural law meet in order to prevent irreparable harm could be called a 'jurisdictional guarantee'.

44 See also Part II on the purpose of provisional measures and the discussion in Chapter I on non-aggravation of the dispute including the relevance of simultaneous diplomatic activities.

45 Sometimes NGOs are themselves the petitioner, but not the victims, as in the Inter-American and African systems, see Chapter II.

46 Of the international treaties the ICCPR is the only one comparable to the regional conventions in the range of rights involved. The only other international human rights adjudicator with an established practice of using provisional measures is the Committee against Torture, but this involves a single-issue treaty. As of yet there is no (extensive) practice of using provisional measures by the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women.

ment of risk before using provisional measures in non-refoulement cases.[47] The ECtHR, moreover, has recently elaborated on the legal status of provisional measures, making reference to the practice of some other adjudicators as well.[48] The most important regional system, however, is the Inter-American system. This is the only system with a clearly developed practice of dealing with urgent cases. The practice of the Inter-American Commission and Court helps clarify the group of beneficiaries of provisional measures, the specificity of these measures – ordering to refrain from action or instead to take positive action – their purpose as well as their relationship to obligations on the merits and reparation.[49]

To the extent information is available, a few references are made to the African human rights system and its provisional measures.[50] As noted, the case law of the ECtHR and the former European Commission is mainly relevant with regard to the legal status of provisional measures and assessment of risk in non-refoulement cases, although some atypical cases are discussed as well (Chapter XI). Finally, a brief reference is made to the approach of the Bosnia Human Rights Chamber, established under the Dayton Peace Agreement, particularly in relation to forced eviction and cultural rights. In its application of provisional measures this Chamber interprets the European Convention on Human Rights (ECHR) in a different way than the European Court of Human Rights (ECtHR).[51]

Apart from an occasional reference to the urgent actions by UN thematic mechanisms, such as the Special Rapporteur against Executions and the Special Rapporteur on Human Rights Defenders, an examination of other types of urgent actions not constituting provisional measures is beyond the scope of this book.[52] Thus, the urgent actions by the UN High Commissioner on Human Rights, by country mechanisms, by the ILO, preventive action (or preventive diplomacy) by the UN Secretary-General, urgent actions by the Security Council in individual cases,[53] and EU, Commonwealth and OSCE actions, most of them more 'humanitarian' than adjudicatory, will not be discussed. Urgent procedures before national courts, such as summary proceedings and injunctions, have likewise been excluded from this research.[54]

For several of the human rights systems, the lack of direct information necessitates an approach drawing information from the rights claimed, the decisions on the merits and reparations in the cases in which the adjudicators took provisional measures. In other words, information on

47 See Chapter XV (Immediacy and risk).

48 See Chapter XVI (Legal status).

49 See Chapters XII and XIII.

50 This necessarily is brief given the lack of information on the individual petitions dealt with by the Commission supervising the African Convention on Human and People's Rights (ACHPR).

51 Within the scope of this book the specific human rights procedures of international governance applicable to Kosovo are not discussed.

52 The independent experts based their activities on international rules, but they often use more diplomatic methods than the treaty monitoring bodies to convince States to respect these rules. Regularly they request governments to act in a certain way, or abstain from action, 'for humanitarian reasons'. It can be inferred from their yearly reports to the United Nations Human Rights Commission that (thematic) Special Rapporteurs and Working Groups often receive more, and more positive replies from governments to their urgent appeals than to their normal communications. See Van Boven (1994), pp. 72-73 referring to the 1990 and 1992 reports by several Charter-based mechanisms. See also, e.g., Decaux (2005), pp. 241-275 and debate, pp. 277-281; Rodley (2001), pp. 279-283 and Van Boven (1995), pp. 98-105.

53 For instance in relation to imminent executions of anti-apartheid activists in South Africa.

54 Obviously provisional measures ordered by international adjudicators find their way back to domestic courts, which may implement them through injunctions, etc. See also Chapter XVII (Official responses).

the rationale of their provisional measures often is construed from the case law, rather than taken directly from it.

6 THE COMMON CORE AND OUTER LIMITS OF PROVISIONAL MEASURES: AN OUTLINE OF THE BOOK

While some theoretical works are available on provisional measures in general, writings on the theory of provisional measures in human rights cases are scarce. Part I of this book consists of two chapters. The first Chapter discusses the concept of provisional measures in traditional international law, as used in adjudication of conflicts between States. In this respect the current practice of the ICJ and the International Tribunal on the Law of the Sea (ITLOS) may already show how the traditional concept has evolved. This Chapter distinguishes those situations in which provisional measures aim to protect individuals, with a focus on their use to halt executions. Subsequently, Chapter II briefly sets out the use of provisional measures by human rights adjudicators in the context of the different human rights treaties. While this book is based on the premise that the possibility to resort to provisional measures is part of the judicial function,[55] this Chapter discusses the competence of each adjudicator to use provisional measures, based on the relevant treaty text and Rules of Procedure. For each system it also refers to promptness and transparency of decision-making. It briefly notes the types of situations in which provisional measures are used in each system (Chapter II). Parts II and III are organised by aspect (situations in which provisional measures have been used and the concept of irreparable harm; protective measures and relationship obligations on the merits and with reparation; beneficiaries; admissibility and jurisdiction; assessment of temporal urgency and risk; legal status; official responses of addressee States and follow-up) in order to find the common core and outer limits of provisional measures in human rights adjudication.

Part II focuses on the situations in which provisional measures are used, culminating in a conclusion on the purpose of provisional measures in human rights adjudication. There are situations that have triggered provisional measures in most of the systems. In other situations only one or two adjudicators have, thus far, used provisional measures. An attempt is made to assess the relevance of these cases for the practice of the other human rights adjudicators. Chapters III-XI discuss the following situations: halting executions, halting corporal punishment, halting expulsion or extradition, timely intervention in disappearance cases, timely intervention in detention situations involving risks to health, timely intervention to deal with death threats and harassment, ensuring procedural rights to protect the right to life and personal integrity, protecting cultural rights of indigenous peoples, halting mass expulsion, halting internal displacement or forced eviction and other, more incidental, cases that may help establish the outer limits of the concept of provisional measures. Chapter XII on protection deals with the substantive obligations of States. It is based on the situations discussed in the previous chapters. On the one hand it focuses on the specificity of the provisional measures and the question whether action (positive obligations) or abstention is required. On the other hand it discusses the relationship between provisional measures and obligations on the merits as well as forms of reparation. It also deals with the beneficiaries of provisional measures, representation and consultation and the addressees of provisional measures. Part II concludes with a substantive discussion of the purpose of provisional measures.

Part III deals with what could be seen as the consequences of the findings regarding the purpose of provisional measures in human rights adjudication. Chapter XIV discusses jurisdiction on the merits and admissibility. Chapter XV deals with assessment of temporal urgency and risk

[55] See also Chapter XVI (Legal Status).

and Chapter XVI with the legal status of provisional measures. Recent case law has drawn international attention to the latter aspect of the concept.[56]

Another question with regard to provisional measures in human rights adjudication is whether (and how) they actually work. This is a question of causality that falls outside the scope of this research. Nevertheless, the available case law provides some information on the official responses of addressee States (discussed in Chapter XVII) and the follow-up by adjudicators (Chapter XVIII). Rather than analysing causality as such this book simply discusses this information, as this may help clarify the legal concept of provisional measures in human rights cases.

Exactly because provisional measures in human rights adjudication concern the fate of human beings at risk, their individual situations and narratives have been the points of departure in this book. Still, for the sake of presenting the concept of provisional measures, the stories of the people involved have sometimes been split up over different Chapters. Nevertheless, the course of some of these stories may be followed throughout the Chapters, discussing various aspects of the concept.

By way of conclusion this book presents the common core of provisional measures in human rights adjudication and their outer limits and discusses what steps could be taken to improve the functioning of provisional measures in human rights adjudication. The latter is based, among others, on the best practices found in the various systems. It does this by taking into account, where relevant, the following criteria to determine how provisional measures could best assist a beneficiary: accessibility, motivation and consistency, responsiveness to the specific situation, consultation and follow-up. The criteria of accessibility, motivation and consistency have been selected for use in this study as they are thought to make provisional measures more convincing vis-à-vis addressee States. Responsiveness to the specific situation and consultation are considered necessary for the effectiveness of these measures in protecting the individual and follow-up by the adjudicators is used as a criterion because it has generally been regarded essential in treaty monitoring.[57]

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56 See e.g. ICJ *LaGrand* (*Germany* v. *US*), Judgment of 27 June 2001 and ECtHR (Grand Chamber) *Mamatkulov and Askarov* v. *Turkey*, Judgment of 4 February 2005. This confirmed the first section's Judgment of 6 February 2003 in *Mamatkulov* v. *Turkey*, reversing *Cruz Varas and Others* v. *Sweden*, Judgment of 20 March 1991.

57 On the general importance of follow-up in human rights cases see e.g. Boerefijn (1999), pp. 101-112.