The Practice of the International Court of Justice on Provisional Measures: The Recent Development

Bernhard Kempen/Zan He***

This study examines the practice of the International Court of Justice on provisional measures. It takes account of the circumstances considered by the judges in entertaining the requests for provisional measures. Putting close attention on the recent development of the Court's case law, it is observed that the development of the Court's function within the United Nations system plays an important role for the development of the Court's practice on provisional measures.

Introduction

As one of the most important instruments in legal proceedings, provisional measures are frequently requested before the International Court of Justice.[1] Article 41(1) states that the Court has 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] (emphasis added). Which circum-

* Prof. Dr. jur., University of Cologne.
** Dr. jur., Research Assistant, University of Cologne.

1 During the jurisprudence of the Permanent International Court of Justice, there were 6 requests for provisional measures. Two of the requests were granted. The International Court of Justice, from 1947 to October 2009, has received 40 such requests, 20 were rejected, 16 were granted, 1 was withdrawn by the applicant, 2 were removed from the list and 1 was lapsed. The procedure has been much more frequently triggered since the *LaGrand* case. During the nine years from 1999 (excluding the *LaGrand*) to September 2008, 18 requests were raised comparing to 23 requests during the 52 years from 1947 to 1999 (including the *LaGrand*). This is partly because more states are willing to accept the legal approach of settlement of disputes and accede to the jurisdiction of the Court. On the other hand, it is due to the encouraging effects on the requesting parties when the requests for provisional measures are granted. Besides, the recognition of the binding force of provisional measures in *LaGrand* might be another important reason. However, we could also find that a very limited number of requests have been granted since 1999 despite of the greatly increased number of requests. This might reflect the Court's even more prudential attitude due to the possible risk of bringing more inappropriate restraints upon the Respondent's rights.

2 Article 41(2) provides that the notice of provisional measures must be given to the UN Security Council. Articles 73-78 under Part III (Proceedings in Contentious Cases), Section D (Incidental Pro-

stances justify provisional measures? As the article does not give any further indication on that it is left to the Court to develop the law. As Shabtai Rosenne observes, in fact, it can be said that the whole of the substantive law of the International Court on provisional measures of protection and its procedure is judge-made law, with minimal outside interference.[3] Since the recognition of its binding force in the *LaGrand* case, more and more attention has been shifted to the interpretation and application of the Court's power to indicate provisional measures due to its discretionary character. This article will focus on the case-law of the International Court of Justice.[4] Its main purpose is to examine how the Court exercises its power and which elements influence its decisions. Moreover, some authors believe that the way in which the Court exercises its power sheds some "light on the manner in which the Court has come to conceive and discharge its judicial function, a subject which is central to the future role of the Court."[5] This article will try to examine how the Court's view on its role in the UN system influences its practice on provisional measures. It is expected to contribute to the study of the future role of the Court.

Let us first look at the "circumstances" for the indication of provisional measures. The statutory purpose of Article 41 reads as follows: "… any provisional measures *which ought to be taken to preserve the respective rights of either party*" (emphasis added). An important paragraph of the Court's reasoning for the indication of provisional measures in the *Fisheries Jurisdiction* case reads as follows: "Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are at issue".[6]

"Preserve the respective rights of either party" in the context of provisional measures is to some extent deviated from its usual meaning, as "preserve the rights" is itself too general a concept as for the exceptional character of provisional measures. Under Article 41 of the Statute, the provisional measures are justified only in very extreme cases. The harm to the right is so great that, without the pro-

ceedings), Subsection 1, Interim Protection in the Rules of the Court articles provide the procedural rules on provisional measures.

[3] Rosenne, Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea, 2005, 33.

[4] As the predecessor of the present Court, the jurisprudence of the PCIJ is significant for the study of the present Court. Therefore, although the article will focus on the study of the present Court, the statute of PCIJ and the jurisprudence concerning provisional measures before the PCIJ will also be referred to in this article.

[5] Gross (ed.), The Future of the International Court of Justice, 1976, 739.

[6] *Fisheries Jurisdiction* case (*Federal Republic of Germany v. Iceland*), Order of 17 August 1972, ICJ Rep. 1972, 34, para. 22; *Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland v. Iceland*), Order of 17 August 1972, ICJ Rep. 1972, 16, para. 21.

visional measures, it is going to disappear, or that the right would not have any genuine value when the judgment in favor of the applicant is rendered. "Irreparable prejudice" and "urgency" could be taken as the abstract conclusion of the "circumstances" requiring provisional measures, to invoke the terms adopted by the Court's Orders. The gravity of the prejudice sought to be prevented and the urgency of the issue are usually assessed by the Court case by case. Although "irreparable prejudice" and "urgency" are separate criteria in the Court's orders, it is difficult to find the Court separately examining these two concepts. This is due to the fact, that in the circumstances the gravity of the prejudice is so great that immediate action is necessary to protect the rights, urgency is undoubtedly proved at the same time.[7]

I. At which Point Does the Prejudice Reach a Degree of "Irreparability"?

At first glance, it appears that damages to property might be reparable while the loss, the threat to life or health seem to be irreparable, appearing to constitute the typical rights preserved by provisional measures. In the jurisprudence of the ICJ, infringements of human rights are the most frequently invoked cause for the indication of provisional measures.[8] Besides, the growing proportion of disputes concerning natural resources and environment protection are susceptible of calling for interim protection.

The test of "absolute irreparability" once advocated by President Huber has been abandoned nowadays.[9] More recently and more frequently it was stated in

[7] Rosenne stated that "the state of the proceedings when the request is made, and the estimated period likely to elapse before the decision of the court or tribunal on the principal claim, is thus also an element relevant to the determination of the urgency of the matter. In this connection, urgency has become linked to the gravity of the harm sought to be avoided by a provisional measure. Only if the Court finds that potential damage would be irreparable, will urgency come to the forefront.", *supra* note 3, 135.

[8] There are example cases such as *Tehran*, *Vienna Convention on Consular Relations*, *Military and Paramilitary Activities in and against Nicaragua* and *Legality of Use of Force*.

[9] In the presidential order in the *Sino-Belgian Treaty* case before the PCIJ, President Huber explained that interim protection was indicated because possible infraction of certain rights in question "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form", *Sino-Belgian Treaty* case, PCIJ Series A, No. 8, 7. This test is challenged because provisional measures would have been granted in rare cases because even in cases concerning human rights or environmental protection, it is possible for the Court to adjudge pecuniary damages, not to mention the financial losses. Sztucki Jerzy observes, "to say that provisional measures should not be indicated when the prejudice in question might be capable of reparation by some appropriate means would amount to the proposition that such measures should not be indicated at all, except when it is shown with substantial credibility that the magnitude of the prejudice in a given case would exceed the respondent's resources available for reparation or would cause a total collapse and disappearance of the actual beneficiary of the prospective reparation. Such a criterion of granting interim protection would be clearly at variance with the principle of sovereign equality of States and of their equality before the law.", Interim Measures in the Hague Court, 1983, 109-110.

the Orders that "the Court was concerned to preserve … the performance of acts likely to prejudice … the respective rights which may be subsequently adjudged … to belong either to the Applicant or to the Respondent".[10] The Court is more inclined to interpret the "irreparability" as "impossibility of full execution of the final judgment". Even if the infringement could be alleviated by appropriate means, the Court could grant the provisional measures if otherwise it would prejudice the full execution of the final judgment.

It is noteworthy that there are some *preconditions* to be satisfied before the Court actually considers whether the *circumstances* in the present request *require* provisional measures. First, there must be an established case before the Court because provisional measures are indicated in proceedings before the Court. Second, a link must be established between the alleged rights the protection of which is the subject of the provisional measures being sought and the subject of the main claim submitted to the Court.[11] Furthermore, the prevailing view is that the existence of *prima facie* jurisdiction over the merits should also be established before the Court entertains the other circumstances.[12] This is strongly confirmed by the Court's

[10] *Anglo-Iranian Oil Company* case (provisional measures), ICJ Rep. 1951, 93. See also *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (provisional measures), ICJ Rep. 2008, 33, para. 118; Also *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (provisional measures), ICJ Rep. 2008, 15, para. 58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro*), ICJ Rep. 1993, 19, para. 34; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), ICJ Rep. 1996 (I), 22, para. 35, etc.

[11] The Court explicitly stated its position in one of the most recent Orders, Order of 16 July 2008, in the case *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals*. "Whereas the Court, when considering a request for the indication of provisional measures, 'must be concerned to preserve … the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent' (*Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), (provisional measures), Order of 15 March 1996, I.C.J. Reports 1996(I), 22, para. 35); whereas a link must therefore be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principle request submitted to the Court", *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals* (*Mexico v. United States of America*), Order of 16 July 2008, ICJ Rep. 2008, 15.

[12] For the prevailing view, please refer to Rosenne, *supra* note 3, 91-94. A different view represented by Judge Shahabuddeen is: "in considering whether it has prima facie jurisdiction over the merits, the Court is not considering whether it has power to indicate provisional measures (for this rests on another basis), but is rather considering whether the case is a fit and proper one for exercising that power", *Passage through the Great Belt*, (separate opinion), ICJ Rep. 1991, 30. This view is shared by Thirlway in "The Indication of Provisional Measures by the International Court of Justice", Interim Measures Indicated by International Courts, Rudolf Bernhardt (ed.), 1994, 19. Another different view is held by Judge Sir Gerald Fitzmaurice, he regards the power to indicate provisional measures as an inherent part of the Court's judicial function, namely the incidental jurisdiction. The Court is able to entertain the requests for provisional measures "independently at that stage of whether it has substantive jurisdiction to determine the merits", The Law and Procedure of the International Court of Justice, 1986, 534, 774-777.

practice of rejecting the request on the basis of lack of *prima facie* jurisdiction over the merits, without any examination of other elements.[13]

II. Non-aggravation: An Independent Basis for the Indication of Provisional Measures?

In the *Anglo-Iranian Oil Co.* case[14] the present Court faced the request for measures to prevent the aggravation of the dispute for the first time. A series of cases seemed to follow this approach.[15] It is also representative of the cases in which the Court indicated non-aggravation measures along with the preservative measures.

In the *Aegean Sea Continental Shelf* case, Greece requested provisional measures "in order to prevent the aggravation or extension of the dispute", along with its request for measures to protect its rights. Before this request could be entertained, the Court would have to determine whether, under Article 41 of the Statute, the Court has such an *independent* power to indicate interim measures having that object; whereas, however, for the reasons then to be explained, the Court did not find it necessary to examine the point.[16] Here the Court explicitly raised the question of the position of the "non-aggravation" measures for the first time.[17]

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[13] *Armed Activities in the Territory of the Congo*, ICJ Rep. 2003, 4-36.

[14] The United Kingdom and Northern Ireland filed a request for interim measures with three main parts. The first part consisted of five specific measures ensuring the Anglo-Iranian Oil Company from interference by the Iranian government. Then there came two general clauses, one was to ensure that no further steps of any kind are taken capable of prejudicing the right of the UK to have a decision of the Court in its favor on the merits of the case executed, should the Court render such a decision. The other was to ensure that no steps of any kind are taken by both governments capable of aggravating or extending the dispute. The Court provided little reasoning and had a rather quick conclusion that the provisional measures shall be granted as the United Kingdom and Northern Ireland requested. In the operative clause of the Order, the Court firstly indicated that both parties should "ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision on the merits which the Court may subsequently render", both parties should each "ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court". Then the Court listed the specific preservative measures, Anglo-Iranian Oil Company case, Order of 5 July 1951, ICJ Rep. 1951, 93.

[15] Such as the 1972 *Fisheries Jurisdiction* cases, *Fisheries Jurisdiction* case (*Federal Republic of Germany v. Iceland*), Order of 17 August 1972, ICJ Rep. 1972, 35; *Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland v. Iceland*), Order of 17 August 1972, ICJ Rep. 1972 17; the 1973 *Nuclear Tests* cases, *Nuclear Tests* case (*New Zealand v. France*), Order of 22 June 1973, ICJ Rep. 1973, 142; *Nuclear Tests* case (*Australia v. France*), Order of 22 June 1973, ICJ Rep. 1973, 106; also the *Military and Paramilitary Activities* case, Order of 10 May 1984, ICJ Rep. 1984, 186-187, para.41; the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1993, 24, para. 52(B).

[16] *Aegean Sea Continental Shelf* case, Order of 11 September 1976, ICJ Rep. 1976, 12, para. 36.

[17] However, the Court found it unnecessary to probe into this question in this case because of the recommendation by the Security Council and the willingness of the parties to accept them, Ibid., 14, para. 41.

In the *Frontier Dispute* case, the Chamber found that the incidents asserted by the parties could not affect the existence or value of the rights claimed and rejected to indicate any measures to preserve the specific rights claimed.[18] However, the Chamber believed that these incidents that were likely to aggravate the dispute would nevertheless justify the granting of provisional measures.[19]

This approach was adopted again by the Court ten years later in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*.[20] The Court maintained and reinforced its dictum in the *Frontier Dispute* case. The Court's similar practice in these two cases suggested a trend of shifting away from its past practice.[21]

However, this apparent tendency established ever since the 1986 *Frontier Dispute* case seemed to be contradicted by the Court's restrictive view on the position of the non-aggravation measures in the case concerning *Pulp Mills on the River Uruguay*.[22] Uruguay requested three provisional measures, the first being a specific measure directing Argentina to take all steps at its disposal to prevent the interruption of transit. The other two were general measures directing Argentina to abstain from any measures which might aggravate the dispute and to refrain from any other measures that might prejudice the rights of Uruguay at issue. The Court refused to grant the first measure on the basis that there was no threat of irreparable prejudice to the rights of Uruguay. As for the second measure requested, the Court observed that, in all cases in which it issued provisional measures directing the par-

[18] After recognizing the rights at issue in the proceedings as "the sovereign rights of the Parties over their respective territories on either side of the frontier as eventually defined by the judgment which the Chamber is called upon to give", the Chamber invoked the principle established in the Legal Status of South-Eastern Greenland and stated that the incidents likely to aggravate the dispute in the Frontier Dispute case "cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by either of the Parties over the territory in question". That meant the incidents which gave rise to the request did not cause any risks of irreparable prejudice to the rights of either party, and the traditional basis for indication of provisional measures seemed not to exist.

[19] The Court stated in the Order: "considering that, *independently* of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require.", *Frontier Dispute* case, Order of 10 January 1986, ICJ Rep. 1986, 9, para. 18.

[20] Judge Ranjeva in his declaration in the *Land and Maritime Boundary between Cameroon and Nigeria* case recognized that the Order "does not confine itself to the indication of measures preserving rights in the traditional sense". He regarded the decision as "a contribution by the Court to ensuring the observance of one of the principal obligations of the United Nations and of all its organs in relation to the maintenance of international peace and security". Judge Ajibola, in his separate opinion, considered that "the purpose and content of Article 41 of the Statute is not and cannot be restricted only to the preservation of the rights of the parties in a matter like the one before the Court", *Land and Maritime Boundary between Cameroon and Nigeria* case, Order of 15 March 1996, ICJ Rep. 1996, 29, 53.

[21] Thirlway observed that "recent developments in the practice of indication of provisional measures suggest that there has been some shift of thinking within the Court away from the intentions of the Statute in this respect", *The Law and Procedure of the International Court of Justice 1960-1989 (Part Twelve)*, The British Yearbook of International Law 2001, 99.

[22] *Pulp Mills* case, Order of 23 January 2007, ICJ Rep. 2007, 1-14.

ties not to take any conduct which would aggravate or extend the dispute, other measures were also indicated. Therefore it stated that since it had not found any necessity to grant provisional measures to preserve the respective rights of the parties, it could not indicate the "non-aggravation" measures either. The Court refused to grant the third measure requested for the same reason.

Turning back to the two cases *Frontier Disputes* and the *Land and Maritime Boundary between Cameroon and Nigeria*, the rights at issue in these proceedings are sovereign rights which the Parties claimed over territory. However, the dispute of territorial integrity threatened to escalate into a military conflict due to its special character. The Court seemed to break through the traditional approach of the indication of provisional measures and indicated measures independently to refrain both parties from any actions that might aggravate the dispute. The Court (Chamber) thus broadened the original scope of the application of non-aggravation measures in these two cases. The reasoning of the Order shows that the Court acquired a role of maintaining international peace by reacting on the necessity to prevent the parties from military actions against each other. Although the Court's concern of international peace is quite understandable, it is noteworthy that the Court's jurisdiction is limited by the parties rather than by the Court itself. The Court's practice to indicate measures solely on the basis of prevention of aggravation of the dispute while the subject matter of the dispute, which is to some extent not directly relevant to that aim, seems to be inconsistent with the passive character of the Court's judicial function. Besides, the Court will face difficulties if it continues this sole non-aggravation approach.[23] Moreover, the non-aggravation measures may not be as effective as expected due to the uncertainty they bring in.[24] The Court's restrictive attitude in the *Pulp Mills* case seemed to be a turning-back to the prior case law after the shift in the *Frontier Dispute* case and the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. It might be reasonable to assert that non-aggravation is one of the circumstances that the Court should take into consideration. However, "non-aggravation of the dispute" can not be regarded as an independent basis of the indication of provisional measures. Only the possible aggravation of the rights of the parties that have been found under the imminent risk of irreparable prejudice can be considered.

[23] In the case of preservative measures, the measures are requested to protect the rights of the parties which are at issue before the Court. Therefore it is clear that the *prima facie* jurisdiction required under Article 41 is the jurisdiction to settle the dispute over those rights. But if we recognize that the non-aggravation measures could be granted even when there are no preservative measures granted, it would be difficult to identify the *prima facie* jurisdiction because the provisional measures on the sole basis of non-aggravation are by their nature too general to define.

[24] The scope of the actions which might aggravate or extend the dispute seemed to be too subtle and general to be defined. Some authors hold that the non-aggravation measures are mainly subject to military actions. Others emphasized the extrajudicial coercive action such as economic coercion, as Judge Buergenthal observed in his Declaration in *Pulp Mills*.

III. Irreparable Prejudice to Human Life Other than the Subject Matter of the Main Claim

In *Maritime Boundary between Cameroon and Nigeria*, the Court concluded that "the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula; whereas persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage …".[25] It is a question worth noting whether the "irreparable prejudice" to the property and life other than the subject matter of the dispute in the main claim could be considered as one of the circumstances justifying provisional measures. To be more specific, can the prejudice to life on the disputed territory justify the indication of provisional measures in a case in which the sovereignty of the territory is in dispute? Could the "irreparable prejudice" to the related loss of life other than the subject matter of the dispute in the main claim also be considered as one of the circumstances justifying provisional measures? If the answer is yes, then to what extent can it be considered?

This point was proposed by Judge Oda in his declaration. He drew attention to the principle that provisional measures should be directed to the rights at issue in the case, and those of the State Parties to the case. He then held that the loss of life in the disputed area itself was without doubt distressing, however, it seemed not to be within the scope of the respective rights of the present case.[26] This question is also relevant to the issue discussed above, namely whether the Court has the power to indicate provisional measures purely to prevent the aggravation of the dispute. The Court seemed to admit that the right to protect the population in the disputed area was not the right it was primarily concerned with by stating that "the rights at issue in these proceedings are sovereign rights which the Parties claim over territory", however, it was quite concerned about the safety of the life in the disputed area. The Court conceded that irreparable prejudice did not threaten the rights at issue and tried to base the indication of provisional measures on the necessity to prevent an aggravation or extension of the dispute.

Interestingly, the Court apparently tried to alternatively build the indication of provisional measures upon the criterion of "irreparable prejudice". It stated that "the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, while these rights also concern persons; and armed actions have regrettably occurred on territory which is the subject of proceedings before the Court". The Court seemed to be liberally interpreting the link that was required between the right sought to be protected by provisional measures and the subject of the main claim, by adopting the diction phrase "these rights also concern per-

[25] *Land and Maritime Boundary between Cameroon and Nigeria*, Order of 15 March 1996, ICJ Rep. 1996, 23, para. 42.

[26] Declaration of Judge Oda in the case *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Rep. 1996, 27.

sons". The danger to human life was directly caused by the breach of the right at issue in the case, namely the breach of the sovereignty over the territory in dispute. Moreover, it is still arguable that the right to protect its population from any military attacks could be regarded as an important part of the state's sovereignty rights over the territory. The great concern on the human life might be one of the important factors that influence the Court's decision.

IV. Security Council Resolution and the Provisional Measures

How does the Court exercise the power to indicate provisional measures when the same dispute is simultaneously before the Security Council? In the Order indicating provisional measures in the *U.S. Diplomatic and Consular Staff in Tehran* case, the Court stated that there was no provision of the Statute or Rules contemplating that it should decline to take cognizance of one aspect of a dispute merely because that dispute had other aspects, however important.[27] It was also recognized in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) (Provisional Measures) that "Security Council Resolution 1304 (2000), and the measures taken in its implementation do not preclude the Court from acting in accordance with its Statute and with the Rules of the Court."[28] The position was confirmed in similar contexts.[29]

The *Lockerbie* cases presented a new problem, namely as to the question that, if the provisional measures sought are inconsistent with the Security Council Resolution, how shall the Court deal with the situation?[30] The Court presumed the *prima facie* validity of the Security Council Resolution under Chapter VII of the Charter at the stage of proceedings on provisional measures. It observed that the right claimed by Libya under the Montreal Convention was not appropriate to be protected because it was overwhelmed by the Security Council Resolution under Chapter VII. It is widely recognized by the academic world that some sort of judicial review would be necessary of the actions of the Security Council as the power

[27] ICJ Rep. 1979, 15, para. 24.

[28] ICJ Rep. 2000, 126, para. 36.

[29] *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) case, ICJ Rep. 1984, 434, para. 95; *Application of the Genocide Convention* (Provisional Measures) case, ICJ Rep. 1993, 19, para. 33; *Armed Activities on the Territory of the Congo* (Provisional Measures) case, ICJ Rep. 2000, 126, para. 36.

[30] Libya requested provisional measures to enjoin the United Kingdom (the United States) from taking any actions against Libya's right of not surrendering the two accused nationals, as alleged to be the recognized under the 1971 Montreal Convention. The Security Council adopted Resolution 748 (1992) three days after the Court's hearing, determining that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitutes a threat to international peace and security. Acting under Chapter VII of the Charter, it delivered some measures. In accordance with Article 103 of the Charter, the Charter obligations prevail over their obligations under any other international agreement, including the Montreal Convention.

of the Security Council should also be limited by the UN Charter and general international law.[31] However, the Court has not been endowed expressly with the power of judicial review and it does not stand as a hierarchically superior organ of judgment upon the other organs of the United Nations.[32] The jurisprudence so far has only shown the Court's pronouncement of the validity of the Security Council's action in very rare occasions – in advisory proceedings to review the constitutionality of the UN Resolution; or during the course of the contentious proceedings where the validity of the Security Council Resolution was to be investigated as the basis of the decision of the case. As observed by Judge Bedjaoui, the Court might be right not to allow itself at any time to be tempted to pronounce on the validity of the Security Council Resolution here since the judicial review would only be taken when the Court is seized with the dispute of the Security Council.[33] Even if Libya had proposed the proceedings on the basis of "violation of general international law", the Court would not have reviewed the validity of the Resolution at the provisional measures stage.[34] Although the Security Council's decision of extradition is challenged on creating an overlap of the Court's scope of judicial power by the judges and the commentators, it would be beyond the statutory purpose and function of the provisional measures to investigate and analyze the Security Council's action which constitutes a substantive issue at this stage.[35] The Security Council Resolution would be presumed in case it is inconsistent with the provisional measures requested.

[31] Fitzmaurice notes that the limits on the powers of the Security Council "are necessary because of the all too great ease with which any acutely controversial situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended". Diss. Op. of Judge Fitzmaurice in the *Namibia* case, ICJ Rep.1971, 294; See also Brownlie, The Decisions of Political Organs of the United Nations and the Rule of Law, in: MacDonald (ed.), Essays in Honour of Wang Tieya 1994, 95, 101, 102.

[32] The political framework within which the International Court operates and the institutional status that it has are in no way similar to such domestic courts and the drawing of parallels is more likely to emphasize such differences than act as a source from which to infer increased institutional powers. See Reisman, The Constitutional Crisis in the United Nations, AJIL 87 (1993), 83 et seq.; and Herdegen, The "Constitutionalisation" of the UN Security System, Vanderbilt Journal of Transnational Law 27 (1994), 145.

[33] Judge Bedjaoui observed that "it seems that the Court was right not to allow itself at any time to be tempted to pronounce on the validity of the way the Security Council had intended to deal with the case of the international responsibility of a state for terrorist activities, which is wider than the dispute here".

[34] Several judges observed that the validity of the Resolution should be reviewed at the later proceedings.

[35] The power of the Security Council could be supervised within the SC mechanism itself and the Court's review in advisory proceedings or contentious proceedings (at the merits stage).

V. Conclusion

Besides the examination of "irreparable prejudice" and "urgency", the Court's conception and implementation of its function in the United Nations system is the underlying element influencing the Court's decisions on provisional measures. The maintenance of international peace and security is greatly impacting on the Court's indication of provisional measures, as shown in the Orders indicated to prevent the aggravation of the dispute and those indicated to prevent irreparable prejudice to human life other than the subject-matter of the main claim. However, as reflected by the Court's recent practice, the tendency seems to be reexamined and restrained. The *Lockerbie* cases reflect that the Court does not regard it appropriate to exercise its supervisory function over the Security Council in the phase of provisional measures. Provisional measures constitute an integral part of the dispute settlement procedure by ensuring the full execution of the forthcoming judgment, preserving the evidence. Meanwhile, they lessen the tension and create a basis for negotiation. To this extent, they play an important role for the maintenance of international peace and security.[36] Although it is arguable that the Court and the other organs of the UN work in a complementary and interactive manner, the Court's responsibility for the maintenance of international peace and security can only be implemented within the scope of its judicial function, which possesses the character as "afterwards" and "passive". Yet, the practice goes beyond the purpose and function of provisional measures. The effect, however, might turn out to be not as effective as expected.

[36] See Rosenne, *supra* note 3, 218-222; See also Elkind, Interim Protection: A Functional Approach, 1981, 50.