Interim measures

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Interim measures: international tribunals as international organisations*

The death of Sir Elihu Lauterpacht has given rise to the opportunity to evaluate his doctrinal writings.[1] He was a much accomplished advocate, adviser, and arbitrator which has caused his academic contribution to be seriously overlooked. His published work covered a wide range of topics but two major themes are evident: the law of international organisations, and the functioning and procedure of international courts and tribunals. These two concerns, however, are united because he argued that international tribunals themselves are international organisations. This is exemplified in his article on partial judgments delivered by, and the inherent jurisdiction of, the International Court.[2] A 'partial' judgment is 'one that does not dispose of the whole issues presented to it by the submissions of the parties',[3] as occurred in the jurisdiction and admissibility judgment of the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[4] He argued that the Court's inherent jurisdiction, over matters such as counter–claims and the discontinuance of proceedings which are

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*. Iain Scobbie, Professor of Public International Law and Director of the Manchester International Law Centre, University of Manchester. *In memorium* Marek Miszczak 07.xi.1990-27.ix.2019: *lux aeterna luceat ei.* All URLs cited were correct as of May 2020.

1. See I Scobbie, 'Out of the Shadows: An Appreciation of Sir Elihu Lauterpacht's Contribution to the Doctrine of International Law', 87 British Yearbook of International Law (2017) 1; contributions to G Cox, *Sir Elihu Lauterpacht: A Life in International Law, 1928-2017* (privately published: 2020); and 'Sir Elihu Lauterpacht', *Oxford Dictionary of National Biography* (forthcoming).

2. See E Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge UP: Cambridge: 1996) 465.

3. Ibid, 478.

4. *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain) ICJ Rep, 1995, 112.

not expressly provided for in its Statute, is an implied power necessary for the performance of its functions 'comparable in legal justification and method to the implication of powers for any other international organ operating on the basis of a constitutive instrument'.[5]

This chapter examines the conditions under which international tribunals may issue orders for interim measures in contentious cases in order to preserve the parties' respective rights pending final judgment on the merits of the case. It contends that tribunals influence one another in their practice. The chapter first considers whether international tribunals can be categorized as international organisations. It starts by examining relevant jurisprudence of the International Criminal Court [ICC] which has explicitly addressed this issue and affirmed its institutional nature. Although it is not competent to entertain disputes which involve States, the view expounded by the ICC is applicable *mutatis mutandis* to other international courts and tribunals. Drawing on Eli Lauterpacht's notions of cross-fertilisation and parallel instances, and employing principles of international institutional law, primarily maxims of constitutional interpretation and the doctrine of functionalism, this chapter then addresses whether these in themselves provide a foundation for a general claim that interim measures orders are binding and impose obligations on the parties to which they are addressed. This involves a close analysis of the *LaGrand* case. The underpinning premise is that if international tribunals are conceived as international organisations, they have a degree of autonomy in determining the parameters of their competence which is detached from the intentions of their authors. The chapter then turns to the influence exerted by the International Court's practice concerning interim measures on that of other international tribunals in matters such as the requirements of urgency and irreparable prejudice as prerequisites for the indication of measures. It concludes by noting that this process is dynamic as developments in the practice of one court may be received by others. This illustrated by the adoption of the notion of 'plausibility' by international tribunals once this criterion had been enunciated by the International Court of Justice. As a parting shot, possible normative bases for this exchange of practice are briefly canvassed.

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5. See E Lauterpacht, 'Partial Judgments', 476-478, quotation at 477.

International tribunals as international organisations–the International Criminal Court:

Leaving to one side, for the moment, any potential conceptual distinction between inherent jurisdiction and implied powers, this view of the organisational nature of international tribunals is perhaps under-developed in both jurisprudence and commentary but it was at the fore in the September 2018 decision of Pre-Trial Chamber I of the International Criminal Court on the *Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*.[6] The request arose out of the alleged deportation of members of the Rohinga minority from Myanmar, which is not a party to the Rome Statute, to Bangladesh, which is. Myanmar was invited, but refused, to file observations on the Prosecutor's request, but it did make a public statement concerning the proceedings which denied that the ICC had jurisdiction over the question.[7]

In addressing this complaint the Pre-Trial Chamber relied on principles of institutional law, effectively assimilating its international status to that of the United Nations. It echoed the words of the International Court in the *Reparations for Injuries* advisory opinion to assert that it had an objective legal personality opposable to Myanmar:

> more than 120 States, representing the vast majority of the international community, had the power, in conformity with international law to bring into being an entity called the "International Criminal Court", possessing objective international legal personality...the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.[8]

The key characteristic is 'institutional' and the claim to a non-State international legal

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6. ICC-RoC46(3)-01/18 (6 September 2018): for commentary, see M Vagias, 113 American Journal of International Law (2019) 368.

7. See ICC-RoC46(3)-01/18, paras.22-24, 28, and 34-35.

8. See ICC-RoC46(3)-01/18, paras.37-49: quotation at para.48: compare *Reparations for Injuries Suffered in the Service of the United Nations advisory opinion*, 1949 ICJ Reps 174, 185.

personality which, nonetheless, was created by States. Moreover, this ruling can be seen as supereragotory, because Article 4(1) of the Rome Statute expressly provides that the ICC possesses international personality.[9] Thus the Pre-Trial Chamber not only affirmed its international personality, but asserted an objective existence opposable to non-member States simply because it is an international organisation.

A feature that Eli Lauterpacht identified as central to the law of international organisations was that organisations do not exist in isolation, and where similar problems or issues arise 'its solution in one context must have a bearing on its solution in another'.[10] This he terms the interpretative 'cross-fertilisation' of the constitutive instruments of international organisations where international tribunals draw on 'parallel instances'—provisions, problems, and issues—which the instruments have in common. This idea is based in the interpretative practice of international tribunals which will ascertain the meaning of terms in treaties other than that under construction to presume that when the parties concluded the treaty they must have had in contemplation the meaning attributed to similar terms employed in earlier treaties.[11] The earliest example he offered to illustrate this proposition is the *Wimbledon* case where the Permanent Court interpreted the provisions of the Treaty of Versailles regarding the internationalisation of the Kiel Canal by reference to cognate provisions—'parallel instances'—in the Suez and Panama Canal treaties.[12]

This was precisely the technique employed by Pre-Trial Chamber I in the *Prosecutor's Request* decision to justify its authority to entertain the case on the basis of the principle of *la compétence de la compétence*, the capacity of an international tribunal to rule on the extent of its jurisdiction by interpreting the instruments which confer that

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9. Article 4(1) of the Rome Statute provides:

> The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

10. E Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals', 152 Recueil des Cours de l'Académie de Droit International de la Haye (1976) 381, 396.

11. See Lauterpacht, 'Development of the Law of International Organization', 396, Chapter II, 'The Common Law of International Organizations', and 414, Chapter IV, 'Interpretation of Constitutions'.

12. Lauterpacht, 'Development of the Law of International Organization' 396-397: *The case of the SS Wimbledon* (Britain, France, Italy and Japan v Germany: Poland intervening), PCIJ Ser.A No.1 (1923).

jurisdiction. It examined the practice of other international tribunals, starting with the International Court of Justice.[13] The Pre-Trial Chamber found that this competence 'has been recognised by numerous international courts and tribunals'; affirmed the International Court's ruling in the *Nottebohm* case that recognised this to be a 'rule of general international law' which the Court was competent to exercise even in the absence of Article 36(6) of its Statute; and noted that the reaffirmation of this ruling in subsequent ICJ jurisprudence.[14] The Pre-Trial Chamber further noted that this position pre-dated the *Nottebohm* ruling because it had been endorsed by the Permanent Court of International Law as early as the *Interpretation of the Greco-Turkish Agreement advisory opinion*[15] and by arbitral tribunals.[16] In particular, the Pre-Trial Chamber noted that the principle has been relied upon by international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, the Special Tribunal for Lebanon, and by Chambers of the ICC itself.[17] It quoted with approval the Yugoslav Tribunal's ruling in *Tadić* that *compétence de la compétence*, is 'a well–entrenched principle of general international law' that constitutes part 'of the incidental or inherent jurisdiction of any judicial or arbitral tribunal' which is 'a necessary component in the exercise of the judicial function that need not be expressly conferred by a tribunal's constitutive instrument'.[18]

This organisational approach, and the notions of cross-fertilisation and parallel instances, may be applied to the question of interim measures indicated by international tribunals, with a focus on two aspects which can be seen as related—the binding nature of interim measures orders, and the requirement of plausibility before measures should be indicated.

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13. See ICC-RoC46(3)-01/18, paras.29-33.

14. ICC-RoC46(3)-01/18, paras.30-31: *Nottebohm case: preliminary objections judgment* (Liechtenstein v Guatemala), ICJ Reps, 1953, 111, 119-120. Article 36(6) of the ICJ Statute provides, 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be decided by the decision of the Court'.

15. PCIJ Ser.B, No.16, 20.

16. See ICC-RoC46(3)-01/18, para.30, n.38.

17. ICC-RoC46(3)-01/18, paras.31-32.

18. ICC-RoC46(3)-01/18, para.31: *Prosecutor v Duŝko Tadić*, Case No.IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras.18-19.

Constitutional interpretation and functionalism: are interim measures orders binding?

The first institutionalised international court whose constitutive instrument conferred the power to order interim measures was the Central American Court of Justice which was operative between 1908 and 1918.[19] Article XVIII of the 1907 Convention which established the Court provided:

> 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 *statu quo* pending a final decision.

The terms of Article XVIII make it clear that the measures ordered were binding on the litigant parties. The Central American Court of Justice did so in two proceedings, *Honduras v Guatemala and El Salvador* (1908)[20] and *El Salvador v Nicaragua* (1916).[21] The Permanent Court received six requests for interim measures, and indicated them only twice, but these did not give rise to any controversy regarding their binding nature;[22] the International Court of Justice has done so on numerous occasions since its

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19. For overviews of the Court, see R Riquelme Cortado, 'Central American Court of Justice (1907-1918), Max Planck Encyclopedia of Public International Law (2013) <https://opil.ouplaw.com/home/mpil>; and MO Hudson, 'The Central American Court of Justice', 26 American Journal of International Law (1932) 759.

20. See Hudson, 'Central American Court of Justice' 768-769; and Editorial, 'The First Case before the Central American Court of Justice', 2 American Journal of International Law (1908) 835-841.

21. See Hudson, 'Central American Court of Justice' 776; and also S Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford UP: Oxford: 2005) 17-19.

22. The six cases were: *Denunciation of the 1865 Sino-Belgium Treaty* (Belgium v China), Order of 8 January 1927, PCIJ Ser.A No.8; *Chorzów Factory (Indemnity)* (Germany v Poland), Order of 21 November 1927, Ser.A, No.12; *Legal Status of the South-Eastern Territory of Greenland* (Norway v Denmark), Order of 3 August 1932, Ser.A/B, No.52/53, 277; *Administration of the Prince von Pless* (Germany v Poland), Order of 11 May 1933, Ser.A/B, No.54, 150; *Polish Agrarian reform and the German Minority* (Germany v Poland), Order of 29 July 1933 SerA/B, No.58, 175; and *Electricity Company of Sofia and Bulgaria* (Belgium v Bulgaria), Order of 5 December 1939, Ser.A/B, No.79, 194. Measures were indicated in the *Sino-Belgium Treaty* and *Electricity Company* cases. The authoritative account of the Permanent Court's interpretation and application of Article 41 of its Statute which provided for interim measures is B Schenk von Stauffenberg, *Statut et Règlement*

inception but for many years the nature of its orders was unsettled.

Although the Convention establishing the Central American Court of Justice had been drawn to the attention of the Advisory Committee of Jurists which drafted the initial version of the Statute of the Permanent Court,[23] on interim measures it drew its inspiration from the bilateral Bryan treaties concluded in 1914 between the United States and China, France, and Sweden. The Convention on the Central American Court of Justice appears to have been mentioned only in passing by the Advisory Committee in relation to proposals for the composition of the Permanent Court.[24] Article 4(2) of the United States–Sweden treaty provided:

> In case 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.[25]

The Advisory Committee understood this as a power of recommendation only:

> There is no question here of a definite order, even of a temporary nature, which must be carried out at once. Great care must be exercised in any matter entailing the limitation of sovereign powers. It is sufficiently difficult to ensure compliance with a definite decision; it would be much more difficult to ensure

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de la Cour permanente de Justice internationale: éléments d'interprétation (Carl Heymanns Verlag: Berlin: 1934) 309-317.

23. See PCIJ, *Documents presented to the Committee relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (1920), 'Memorandum presented by the Legal Section of the Permanent Secretariat of the League of Nations', 1, Annex 4, 141: Article XVIII is at 145: <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_documents_to_comm_existing_plans.pdf>. See also Rosenne, *Provisional Measures*, 22-29.

24. See PCIJ, *Procès–Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920* (van Langenhuysen Brothers: The Hague; 1920) 525 (24th meeting, July 14th, 1920): <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf>.

25. Text: <https://www.loc.gov/law/help/us-treaties/bevans/b-se-ust000011-0741.pdf>, emphasis added; see also Rosenne, *Provisional Measures*, 20-21.

the putting into effect of a purely temporary decision.[26]

This view was affirmed by the Permanent Court when it amended its Rules of Procedure in 1931.[27] As a result of this amendment, the practice of indicating interim measures in orders was consolidated by the Permanent Court in the interim measures order of 3 August 1932 in the *Legal Status of the South-Eastern Territory of Greenland* case. Before the Rules amendment, measures could be indicated by the President alone if the Court was not sitting, without giving the parties the opportunity to present observations. Indeed in the *Denunciation of the 1865 Sino-Belgium Treaty* (1927) and *Chorzów Factory (Indemnity)* (1927) interim measures proceedings, the parties had not been heard.[28] 1931 Rule 57 required that they be given this opportunity and, if the Court was not in session, required the President to convene it without delay should either or both parties request measures or if he thought that measures might be called for.[29] The Court noted that its decision to indicate measures in an order was mandated because interim measures were provisional while judgments were final. Further, the Court could indicate measures *proprio motu* 'whereas this would not be possible in the case of a judgment'.[30]

During the subsequent Rules revision, which culminated in the 1936 Rules of Court, the Court instructed the Registrar to compile a report indicating in relation to each Rule 'the questions which had in practice arisen as regards that article, as well as the solution, if any, which had been given to such questions'.[31] In his report which was delivered to the Court in June 1933, the Registrar, Åke Hammarskjøld, noted that interim measures were indicated in orders of the Court and stated in relation to orders

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26. Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 693, Annex I, The Report of the Committee, 735-736, Commentary to Article 38: quotation at 735.

27. See PCIJ, Ser.D, No.2 (second addendum) 183-185, and 198-200. For the text of these revised Rules, see PCIJ, Ser.D, No.1 (second edition, 1931), <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_2e_edition.pdf>.

28. See Stauffenberg, *Statut et Règlement*, 314.

29. PCIJ, Ser.D, No.1 (second edition, 1931), 42.

30. PCIJ, Ser.E, No.9, 171.

31. PCIJ, Ser.D, No.2 (third addendum), Registrar's Report 803.

in general:

> Orders are no doubt binding on the parties from the moment when the latter have received official communication of their contents. (Obviously, however, an order does not create *res judicata*.)[32]

Nevertheless, two years later, Hammarskjøld argued that interim measures orders did not bind the parties.[33] In 1955, Judge Hersch Lauterpacht prepared a draft report on the revision of the ICJ Statute.[34] He noted that, by the terms of Article 41 of the Statute, interim measures were not binding—'the Court has only the power "to indicate" provisional measures; in the language of the second paragraph those are measures merely "suggested" by the Court'—a position then endorsed by practically all commentators, with the exception of Manley Hudson, a former judge of the Permanent Court.[35] Lauterpacht thought that this situation was unsatisfactory and recommended:

> that if interim measures of protection are to be binding, then the Statute must provide so explicitly; that if they are not intended to be binding, then Article 41 is inappropriate as part of the constituent instrument of the highest judicial organ of the United Nations; and that if the position is uncertain, then the uncertainty ought to be removed...Article 41...must be either clarified in the direction of giving binding force to the ruling of the Court or be removed from the Statute. What is undesirable is the existing position, which is either one of uncertainty or one of freedom of the parties to disregard the ruling of the Court.[36]

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32. PCIJ, Ser.D, No.2 (third addendum), Registrar's Report 830-831, quotation at 831.

33. Å Hammarskjøld, 'Quelques aspects de la question des mesures conservatoires en droit international positif', 5 ZaöRuV 5 (1935); reprinted in his *Juridiction internationale* (Sijthoff: Leiden: 1938) 299.

34. H Lauterpacht, 'The Revision of the Statute of the International Court of Justice', in E Lauterpacht (ed), *International Law: being the Collected Papers of Hersch Lauterpacht*, Vol.5, *Disputes, War and Neutrality* (Cambridge UP: Cambridge: 2004) 112: also published in 1 The Law and Practice of International Courts and Tribunals (2002) 55. All page references are to the *Collected Papers* publication.

35. Lauterpacht, 'Revision of the Statute', 149, para.65: see generally 149-151, paras.65-68.

36. Lauterpacht, 'Revision of the Statute', 151, para.68.

This confusion persisted until the ruling in the *LaGrand* judgment in 2001 that interim measures orders issued by the International Court are binding—for example, writing in 1995, John Merrills noted that this was not clear,[37] a situation which was possibly exacerbated by the disarray in the Court's practice in the 1970s, principally as a result of the non–appearance of respondent States which studiously ignored the Court's pronouncements. The *LaGrand* ruling, however, has attracted criticism. Perhaps the most prominent and stringent is that of Hugh Thirlway, a former principal legal secretary of the ICJ, who condemned this ruling as 'naked judicial legislation on both the procedural and the substantive level'.[38]

Thirlway's critique of the *LaGrand* ruling is wide–ranging and incisive[39] but it underplays the institutional character of the International Court. Thirlway argues that the *LaGrand* ruling that interim measures orders are binding ignores previous decisions and State practice that assumed they were only indicative. He employs two examples in particular. In the Icelandic *Fisheries jurisdiction* cases (Germany v Iceland; United Kingdom v Iceland), he notes that the applicants brought to the Court's attention Iceland's intention not to comply with the interim measures orders issued on 17 August 1972[40] but they did not claim that it was in breach of a binding order. In its continuation of interim measures orders of 12 July 1973, the Court did not mention Iceland's non-compliance but simply confirmed that the measures ordered remained operative until the final judgment.[41] Thirlway interprets the attitude of the Court and the parties was that the measures were only indicative, not mandatory, 'and that

37. J Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice', 44 International and Comparative Law Quarterly (1995) 90, 116: see also H Thirlway, 'The Law and Procedure of the International Court of Justice 1906–1989: Part Twelve', 72 British Yearbook of International Law (2001) 37, 77.

38. Thirlway, 'Law and Procedure: part Twelve', 122.

39. The following exposition sets out the principal lines of Thirlway's critique: the original is much more detailed and deserves close consideration.

40. *Fisheries Jurisdiction case: Order of 17 August 1972*, ICJ Rep, 1972, 30 (Germany v Iceland), 12 (United Kingdom v Iceland).

41. *Fisheries Jurisdiction case: Order of 12 July 1973*, ICJ Rep, 1973, 313 (Germany v Iceland), 302 (United Kingdom v Iceland).

Iceland's refusal to comply with them could not be sanctioned *as such*'.[42]

Further, in discussing the merits phase of the *Nicaragua* case, he notes that during the proceedings Nicaragua had drawn to the Court's attention the United States failure to comply with the interim measures order of 10 May 1984 and had requested the Court indicate further measures. The President replied that the Court thought that this request should be considered once the then–pending preliminary objections had been decided. In subsequent proceedings, Nicaragua did not raise this issue.[43] In dealing with this matter in the merits judgment, the Court noted that the order had indicated that the parties should take no action which might aggravate the dispute or which might prejudice the rights of the other in respect of any merits decision. It commented:

> When the Court finds that the situation requires that measures of this kind 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.[44]

Thirlway interprets this ruling as demonstrating that the Court did not think that a disregard of interim measures orders gave rise to a delictual responsibility distinct from any unlawful acts alleged and proven in the principal proceedings, thus showing that the Court thought that they did not generate binding obligations.[45]

In his critique of *LaGrand*, Thirlway commends the Court for adopting an interpretative approach to the text of Article 41 of the Stature of the International Court as this avoided the claim that interim measures orders are binding on the basis of a general principle of law which he regards as an unconvincing justification.[46]

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42. Thirlway, 'Law and Procedure, Part Twelve', 112: emphasis in original.

43. *Military and Paramilitary Activities in and against Nicaragua case: merits judgment* (Nicaragua v United States of America), ICJ Rep, 1986, 14, 144, para.287.

44. *Military and Paramilitary Activities in and against Nicaragua case: merits judgment*, ICJ Rep, 1986 144, para.289.

45. Thirlway, 'Law and Procedure, Part Twelve', 123.

46. Thirlway, 'Law and Procedure, Part Twelve', 114.

Nonetheless, the criticised the Court for ignoring what he perceived to be the practice of both the Court and parties in contentious proceedings which demonstrated the belief that interim measures orders are not obligatory. [47]

The Court based its interpretation of Article 41 on the basis of the customary principles reflected in Articles 31(1) and 33(4) of the Vienna Convention on the Law of Treaties: namely that treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context in the light of the treaty's object and purpose (Article 31(1));[48] but because there was disharmony between the authentic French and English texts of Article 41, then the interpretation adopted must be that which best reconciles the texts, again in the light of the object and purpose of the treaty (Article 33(4)).[49]

Article 41 of the French text of the Statute provides:

1. La Cour a le pouvoir d'*indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires de droit de chacun *doivent* être prises à titre provisoire.
2. En attendant l'arrêt définitif, i'*indication* de ces mesures est immédiatement notifée aux parties et au Conseil de sécurité.

Article 41 in the English text 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 the measures *suggested* shall forthwith be given to the parties and to the Security Council.[50]

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47. Thirlway, 'Law and Procedure, Part Twelve', 117.

48. *LaGrand case* (Germany v United States of America), ICJ Rep, 2001, 466, 501, para.99.

49. *La Grand case*, ICJ Rep, 2001, 502, para.101.

50. Emphasis added in both texts following that used by the International Court in *LaGrand* 501-502, para.100.

The Court ruled that the terms 'indiquer' and 'l'indication' in the French text were neutral on the mandatory nature of the measures concerned, while the phrase 'doivent être prises' was imperative. It then noted that the United States had argued that the corresponding English terms employed–'indicate', 'ought', and 'suggested'–lack mandatory effect. The Court observed that it might be argued, because the French text was the original version of the 1920 Statute of the Permanent Court , that the terms 'indicate' and 'ought' 'have a meaning equivalent to "order" and "must" or "shall"'.[51] It did not, however, pursue this point. In contrast, Rosenne has argued that, given its drafting history, 'the French text of the Statute may legitimately be examined first'.[52]

Rather, the Court held that the two texts 'were not in total harmony'; that neither the Statute nor the UN Charter gave guidance on the reconciliation of divergences between two authentic texts; and therefore the Court had to have recourse to Article 33(4) of the Vienna Convention which placed emphasis on the object and purpose of the treaty. It ruled that the object and purpose of the Statute was to enable the Court to fulfil the functions it set out, the basic function being the binding judicial settlement of international disputes. The context of Article 41 within this scheme was 'to prevent the Court being hampered in the exercise of its functions because the respective rights of the parties to a dispute...are not preserved'. Accordingly:

> 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.[53]

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51. *LaGrand*, 502, para.100.

52. S Rosenne, 'The Meaning of "Authentic Text" in Modern Treaty Law', in R Bernhardt et al (eds), *Völkrrecht als Rechtsordnung: Internationale Gerichtsbarkeit, Menschenrecht. Festschrift für Herman Mosler* (Springer-Verlag: Berlin: 1983) 759, see 761-762; reprinted in S Rosenne, *An International Law Miscellany* (Nijhoff: Dordrecht: 1993) 397, see 400-401: quotation at 762, n.8, and 401, n.9, respectively, but compare his *Provisional Measures*, 37, n.40.

53. *LaGrand*, 502-503, para.102.

This appears to amount to the adoption of a functionalist approach to interpretation, grounded in a desire to ensure the efficient discharge of the powers conferred on the Court as an international organisation.

Although the Court thought that this interpretative conclusion rendered recourse to the *travaus préparatoires* superfluous, it never the less made reference to the preliminary draft of the Statute of the Permanent Court prepared by the Advisory Committee of Jurists, and its reception by the Sub–Committee of the Third Committee of the Assembly of the League of Nations, noting that the latter had rejected a proposal to replace 'indiquer' in the French text with 'ordonner' because 'the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters'. It noted that the text of Article 41 formulated in 1920 passed into the Statute of the International Court without discussion.[54] In fact, only minor textual modifications were made–the correction of a printing error in the English text, substituting 'preserve' for 'reserve' the parties' respective rights; replacing the reference to the League Council in paragraph 2 to the Security Council; and numbering the paragraphs of Article 41.[55]

Thirlway's criticism of the *LaGrand* ruling is multifold, drawing a number of strands of argument together which combine to form a cogent and persuasive analysis. The principal issues are the structural differences between domestic and international litigation, and a more textually dependent approach to interpretation which invokes the inter-temporal rule and places a greater reliance on the *travaux préparatoires* and original expectations directed towards the Permanent Court.

Thirlway's initial premise towards the analysis of all incidental proceedings before the International Court is structural: consensual jurisdiction makes it impossible to transfer to proceedings before it municipal procedural rules and techniques. He doubts if there are any general principles of procedural law recognised by civilised nations (to reiterate the out-dated terminology of Article 38(1) of the Statute) which may be transferred to international litigation, but if they do exist their application is

54. *LaGrand*, 503-505, paras.104-107.

55. See K Oellers–Frahm, 'Article 41', in A Zimmermann et al (eds), *The Statute of the International Court of Justice: a Commentary* (Oxford UP: Oxford: 2012, second edition)1026, 1030-1031, para.7.

modified by different jurisdictional considerations. While there is more than a degree of truth in this proposition, it is also over-stated. Although the specific modalities of procedural mechanisms undoubtedly differ from legal system to legal system, there are core concepts common to both domestic and international law such as the competence of tribunals to determine the parameters of their jurisdiction, the ability to issue injunctive relief (that is, to order provisional measures), and the doctrine of *res judicata*. Nevertheless, Thirlway relies on this proposition to reject the Court's reliance in *LaGrand* on the principle set out in the *Electricity Company of Sofia and Bulgaria case* that parties must refrain from any measure which might prejudice the execution of a future merits decision as support for its conclusion that provisional measures orders impose binding obligations.[56] Thirlway argues that this reliance is vitiated by consensual jurisdiction: although both domestic and international tribunals may indicate provisional measures to protect an alleged right which , at the merits stage, proves to be non-existent, and thus to have been an inappropriate interference with the affected party's interests, this only raises acute concerns in international litigation because the compulsory jurisdiction of domestic courts is presupposed and 'for a court to discover that it had previously lacked jurisdiction would be altogether exceptional'.[57] This claim is unconvincing if, for nothing else, because of the exigencies of forum competence under private international law.

Another difference between domestic courts and international tribunals, in this case the International Court, upon which Thirlway places emphasis, is the Court's inability to enforce provisional measures orders.[58] Two issues are inter-twined here: the existence of institutional machinery to enforce injunctive relief and, the burden of Thirlway's criticism of the *LaGrand* ruling, that the International Court ignored the importance of the inter-temporal rule in its interpretation of Article 41. These matters are difficult to disentangle but both revolve around the place of courts within the structure of governance, whether domestic or international. Within domestic legal

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56. *Electricity Company of Sofia and Bulgaria case: Order of 5 December 1939* (Belgium v Bulgaria), PCIJ, Ser.A/B, No.79 (1939), 194, 199: affirmed *LaGrand*, 503, para.103.

57. Thirlway, 'Law and Procedure, Part Twelve', 124: see 122-125.

58. See Thirlway, 'Law and Procedure, Part Twelve', 116.

systems this may refer to the role of courts within the domestic constitutional structure, and while there might be some analogy to be drawn with the relationship between the Permanent Court and the League of Nations and particularly the International Court of Justice and the United Nations, I do not wish to be drawn into discussion of the theory of the constitutionalisation of international law.[59] The notion I wish to employ is somewhat looser: the notion of judicial ontology proposed by Chaïm Perelman, which at root signifies the 'philosophical view which is the basis of a system of law'.[60] Perelman argues that the activity of any court depends on the political, or ideological, as well as the legal structures supporting it. The influence of these structures, or ontology, is system–specific but it determines the administration of justice, and consequently the nature of the judicial function. Perelman's concept of judicial ontology is aimed not simply at locating a court within any underlying constitutional structure, but attempts to take into account influences on the performance of the judicial function which are not dependent on the 'classical' tripartite separation of powers thesis derived from Montesquieu[61]. Judicial reasoning is oriented by the ideology which guides judicial activity–by the way in which judges perceive their role and function, by their concept of law, and their relationship with the legislature.[62] Ontology designates both the institutional framework within which a court operates–principally determined by the instruments which govern its judicial functioning–and also adverts to the normative aspects of its role, primarily its perception of its position in the law creative process.

Thirlway's understanding of the judicial ontology of the International Court is rooted in 1920, the drafting of the Statute of the Permanent Court, and its institutional context.[63] The ontological status of the Permanent Court was ambiguous. Formally the

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59. See, eg, J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford UP: Oxford: 2009).

60. Ch Perelman, 'Legal Ontology and Legal Reasoning', 16 Israel Law Review 365 (1981), 365.

61. See Montesquieu *L'esprit des lois*, (Garnier-Flammarion: Paris: 1979, Goldschmidt (ed)) Book 11, Chapter 6, 'De la constitution d'Angleterre' (1748), Vol I, 294. For an English translation, *The Spirit of the Laws* (Cambridge UP: Cambridge: 1989) translated and edited by A Cohler, B Miller, and H Stone: 'De la constitution d'Angleterre' is at 156-166.

62. Ch Perelman, *Logique juridique: nouvelle rhétorique* (Dalloz: Paris: 1976), ¶15:21, ¶71:135-137, ¶81:154.

63. See Thirlway, 'Law and Procedure, Part Twelve', 115-116.

Permanent Court was not an organ of the League of Nations. Its Statute was contained in an instrument, the Protocol of Signature, which was distinct from the League of Nations Covenant and which was open to accession by States which were not League members, such as the United States. Because of the isolationalist policy of the United States in the aftermath of of World War One, it had declined to become a member of the League for fear that it would be drawn into another 'European' war, but there was a lingering hope that it might become a party to the Permanent Court's Protocol of Signature.[64] Nevertheless, even during the preparatory work of the Advisory Committee of Jurists in drafting the Statute, de Lapradelle, the rapporteur of the Committee's drafting committee, drew a somewhat dubious analogy between the domestic constitutional separation of powers between the executive, legislature, and judiciary and the League Council, Assembly, and Permanent Court and claimed that the Court was 'the judicial organ of the League of Nations'.[65] This view was reiterated at the inaugural session of the Court on 15 February 1922 when the League Secretary General, Sir Eric Drummond, stated that the 'definitive establishment of the Court completes the organisation of the League as laid down in the Covenant...it derives its authority from the League...The relation between the Court and the League is similar to that which exists between the Courts and the Government in England, and elsewhere'.[66] The first President of the Permanent Court, President Loder, reiterated this view:

> The Court is one of the principal organs of the League, and at the same time it exercises its powers in full and sovereign independence. It occupies within the League of Nations a place similar to that occupied in many States by the Judicature as regards all that concerns its constitution, its organisation, its powers, its maintenance–but which recognises no master in the exercise of its duties, in regard to which it enjoys absolute liberty and is bound only by the law

64. For an authoritative account of the politics of United States' attitude to the Permanent Court, see M Dunne, *The United States and the World Court, 1920-1935* (Pinter: London: 1988).

65. PCIJ, *Procès Verbaux*, Meeting of 23 July 1920, 671, Annex 1, 704-705.

66. PCIJ, Ser.D.2, Minutes of the PCIJ Inaugural Meeting 15 February 1922, 45, Annex 33, Speech of Sir Eric Drummond, League Secretary General, 319, 320.

which is its task to apply.[67]

It cannot be denied that the Permanent Court was created by the League pursuant to Article 14 of the League of Nations Covenant,[68] nor can it be denied that the League Assembly approved its Statute and submitted it for approval by member States,[69] nor that in September 1928 it recommended that the Court's Statute be reviewed,[70] and approved the proposed amendments on 14 September 1929, expressing the hope that these 'may receive as many signatures as possible... and that all the governments concerned will use their utmost efforts to secure the entry into force of the amendments to the Statute'.[71] It is, however, apparent, that accession to the Statute, and revised Statute, of the Permanent Court was a matter left to individual States rather than being an organisational requirement.

Things have changed. Given the different structure of the international legal order at the start of the twentieth century—the centrality of the State and the paucity of international institutions and regional organisations—it is perhaps not surprising that the architects and first judges of the Permanent Court decided to be careful in its interim measures practice, paying deference to the sovereignty of States. The contemporary context of international relations has been transformed and, in particular, the relationship between the International Court and the United Nations is completely different, displaying a clearly articulated ontological shift. By virtue of Article 92 of the UN Charter, the International Court is the principal judicial organ of the

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67. Ibid, Annex 36, President Loder's Inaugural Speech, 325, 326.

68. Article 14 of the League Covenant provided:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

69. League Assembly Resolution Concerning the Establishment of a Permanent Court of International Justice, 13 December 1920, PCIJ, Ser.D, No.1, 4.

70. League of Nations Official Journal, 1929, 1843.

71. League Assembly Resolution Concerning the Revision of the Statute of the Permanent Court of International Justice, 14 September 1929, PCIJ, Ser.D, No.1 (4th edn), 8.

United Nations and the Statute is an integral part of the Charter; further, by virtue of Article 93, all UN members are *ipso facto* parties to the Statute. This changed ontology is perhaps best demonstrated in the International Court's oft–repeated mantra that in delivering an advisory opinion:

> The Court's Opinion is given not to the States, but to the organ which is entitled to request it ; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused.[72]

Indeed, in its first advisory opinion, the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* opinion, the Court relied expressly on its status as the principal judicial organ of the United Nations to assert its competence to interpret the Charter.[73]

Thirlway acknowledges this ontological shift, noting that the League Covenant contained no equivalent to Article 94(1) of the Charter which he sees as 'a somewhat tentative step in the direction of the enforcement of judicial rulings', but ignores its import, preferring to base the burden of his argument on the perceptions of the object and purpose of the Statute when it was first drafted in 1920 and the initial understanding of PCIJ parties that interim measures were not binding.[74] This is an odd argument: international organisations are organic, and their constitutive instruments:

> as a result of the practice of the organization...evolve and change in a manner

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72. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania advisory opinion (first phase)*, 1950 ICJ Rep, 65, 71: this doctrine has been much criticised, see, eg A Aust, 'Advisory Opinions', 1 Journal of International Dispute Settlement (2010) 123; and M Pomerance, 'The Advisory Role of the International Court of Justice and its "Judicial" Character: Past and Future Prisms', in AS Muller *et al* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Nijhoff: The Hague: 1997) 271, and her 'A Court of "UN Law"', 38 Israel Law Review (2005) 134.

73. *Conditions of Admission* advisory opinion, ICJ Rep, 1948, 57,61.

74. Thirlway, 'Law and Procedure, Part Twelve', 116: for contemporary commentary see, eg, HHL Bellot, *Texts Illustrating the Constitution of the Supreme Court of the United States and the Permanent Court of International Justice* (Sweet and Maxwell: London: 1921) 32, but compare Stauffenberg, *Statut et règlement*, 316-317.

> which may not be fully consistent with the original wording of the relevant texts.[75]

This is redolent of Judge Alvarez's *dictum* in the *Conditions of Admission* advisory opinion that:

> an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with international life.[76]

In *LaGrand*, it is submitted that the Court reached the correct answer, but this was the wrong case in which to do so given that the terms of the operative clause of the interim measures order were not mandatory, but only exhortatory, in the authoritative English text.[77] It was a recommendation, not a directive, as para.29 of the Order of 3 March 1999 reads in part:

> THE COURT
>
> Unanimously,
>
> I. *Indicates* the following provisional measures:
>
> (a) The United States of America *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;
>
> (b) The Government of the United States of America *should* transmit this Order to the Governor of the State of Arizona.[78]

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75. Lauterpacht, 'Development of the Law of International Organization' 395.

76. *Conditions of Admission of a State to Membership in the United Nations* advisory opinion, ICJ Rep, 1948, 57: individual opinion of Judge Alvarez, 67, 68.

77. See also S Rosenne, 'The International Court of Justice: the New Form of the Operative Clause of an Order Indicating Provisional Measures', 2 The Law and Practice of International Courts and Tribunals (2003) 201; and his *Provisional Measures*, 40-44.

78. *LaGrand case, Order of 3 March 1999*, ICJ Rep, 1999, 9, 16, para.29, emphasis added.

Nevertheless, if it is accepted that international tribunals are international organisations, then the interpretation of their constitutive instruments, in matters such as the power to indicate interim measures, should be subject to methods of constitutional interpretation,[79] such as functionalism and the doctrine of implied powers.

The Statute of the Permanent Court was drafted at the infancy of international organisations and before the emergence of functionalism as a legal doctrine and the gradual consolidation of institutional law.[80] Functionalism first emerged in the *Jurisdiction of the European Commission of the Danube* advisory opinion (1927) where the Permanent Court ruled:

> As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed on it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restraints upon it.[81]

The application of established methods of constitutional interpretation is detached from the parties' expectations and the *travaux préparatoires*, but functionalism in itself could offer a justification for the binding nature of interim measures orders in order to ensure that any final judgment is effective and not prejudiced by the unilateral action of a disputant party.

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79. See, eg, CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge UP: Cambridge: 1996) Chapter Two; V Engstrom, 'Implied Powers of International Organizations: On the Character of Legal Doctrine', 14 Finnish Yearbook of International Law (2003) 129, and his 'Reasoning on Powers of Organisations' in J Klabbers & A Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar: Cheltenham: 2011) 56; Lauterpacht, 'Development of the Law of International Organization', Chapter Four; and S Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge UP: Cambridge: 1989) 211-245.

80. For a masterly account of the early legal history of international organisations, see DJ Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', 36 Virginia Journal of International Law (1995-96) 275.

81. *Jurisdiction of the European Commission of the Danube between Galatz and Braïla* advisory opinion, (1927) PCIJ, Ser.B, No.14, 64. There are hints of functionalism in the earlier *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* advisory opinion, (1926) PCIJ, Ser.B, No.13, 18.

Reliance on functionalism is evidenced, for example, in the rulings that interim measures orders are binding made by the UN Human Rights Committee and European Court of Human Rights. Thus, in *Piandiong et al v The Philippines*, the Human Rights Committee stated:

> 5.1 By adhering to the Optional Protocol, a State Party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). 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 (Article 5 (1), (4)). 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.
>
> 5.4 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of this Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.[82]

Similarly, in *Mamatkulov v Turkey*, the European Court of Human Rights ruled that it was crucial that the Convention be interpreted in a way which made the rights 'practical and effective' as it 'is a living instrument which must be interpreted in the

82. *Piandiong et v The Philippines* (19 October 2000), 7 Selected Decisions of the Human Rights Committee under the Optional Protocol (2006) 133, 135 <https://www.ohchr.org/Documents/Publications/SDecisionsVol7en.pdf>.

light of present-day conditions'.[83] The Court then embarked on a comparative analysis of other international tribunals' rulings on the nature of interim measures orders–Lauterpacht's notion of 'parallel instances'–to conclude that its own interim measures orders were binding and imposed obligations on the State to which they were addressed. This conclusion was squarely based on the need to make the Court's proceedings effective, and thus on functionalism:

> The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.[84]

Neither the constitutive instruments of the Human Rights Committee nor the European Court grant either an express power to order interim measures so, as these two examples show, even if a tribunal's constitutive instrument is silent on the question of interim measures, functionalism may be used to justify the authority to do so as an inherent or as an implied judicial power or, as exemplified by the Human Rights Commission, a quasi–judicial power.

Doctrine and jurisprudence do not draw a clear conceptual distinction between inherent and implied powers, if indeed they are different, although in the 17 April 2013 *Costa Rica/Nicaragua* joinder orders, Judge Cançado Trindade stated:

> While the doctrinal construction of "implied powers" was intended to set up limits to powers transcending the letter of constitutive charters—limits found in the purposes and functions of the international organization at issue—the

83. *Mamatkulov and Abdurasulovic v Turkey* (6 February 2003), <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-68183%22]}>, para.121.

84. *Mamatkulov and Abdurasulovic v Turkey*, para.128, see paras.103-129 generally: the European Court's analysis of 'parallel instances' is at paras.111-117 and 124.

> doctrinal construction of "inherent powers", quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter.[85]

With regard to the 'inherent' powers of international tribunals, however, Lauterpacht observed that the International Court 'does not appear publicly to have discussed the source, character or limits of the exercise of this power. Its existence seems simply to have been assumed',[86] while in the *Tadić* case the Yugoslav Tribunal referred to the principle of *compétence de la compétence* as part of any international tribunal's 'incidental or inherent jurisdiction' without any further elucidation apart from the justification that this was a necessary attribute of a court.[87] Wolfrum sees the power to indicate interim measures as 'inherent to the judicial function',[88] while Blokker is more sceptical and argues that it cannot be 'convincingly...demonstrated how the notion of inherent powers could draw a clearer, more objective line than the notion of implied powers between what is inherent–or implied–and what is not'.[89] While Brown sets out a sustained analysis of the 'inherent' powers of international tribunals,[90] it seems safer to adopt an agnostic view of any rigid distinction between inherent and implied powers. This is perhaps best reflected in Amerasinghe's comment that for international organisations (and thus international courts) it might 'be possible that there are inherent capacities and powers which are skeletal in their incidence, their content and

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85. Separate Opinion of Judge Cançado Trinidade, *Certain Activities Carried Out by Nicaragua in the Border Area* case (Costa Rica v Nicaragua), Order of 17 April 2013 (Joinder), ICJ Rep, 2013, 172, 174, para.6, see 174-173, paras.4-6; and in *Construction of a Road in Costa Rica along the San Juan River* case, Order of 17 April 2013 (Joinder), ICJ Rep, 2013, 189, 191, para.6, see 190-191, paras.4-6.

86. Lauterpacht, '"Partial" Judgments', 477: compare GG Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius/Cambridge UP: Cambridge: 1986/1993) Vol.II, 451-543.

87. See *Prosecutor v Duŝko Tadić*, Case No.IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras.18-19.

88. R Wolfrum, 'Interim (Provisional) Measures of Protection', Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/home/MPIL> (2006), para.1.

89. NM Blokker, 'International Organizations or Institutions, Implied Powers', Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/home/MPIL> (2009), para.4.

90. See C Brown, *A Common Law of International Adjudicaiton* (Oxford UP: Oxford: 2007) 66-81.

extent being subject to implication or express grant'.[91] This approach captures the broad similarities between different tribunals' power to order interim measures, but also differences in the extent of these powers.

For example, Article 63(2) of the 1969 American Convention on Human Rights, which created the Inter–American Court of Human Rights, provides:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

The Inter–American Court of Human Rights elaborated on this provision in Article 27 of its Rules of Procedure:

> 1. At any stage of proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems appropriate, pursuant to Article 63(2) of the Convention.
>
> 2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
>
> 3. In contentious cases before the Court, victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject matter of the case.
>
> 4…

This is a clear example of Amerasinghe's 'skeletal' power being elaborated to deal with the exigencies of the contours of the type of litigation a court is asked to entertain. At

91. Amerasinghe, *Principles of Institutional Law*, 99.

times this is specified in the tribunal's governing instrument—for example, the stipulation in Article 31(2) of the 2002 Fish Stocks Agreement that a competent tribunal may order interim measures not simply preserve the parties' respective rights but also 'to prevent damage to the stocks in question', or that Article 26 of the UNCITRAL Arbitral Rules provides that an order may preserve assets from which a subsequent award may be satisfied. These are refinements geared towards ensuring that the tribunal may be effective in disposing of the specific substance of the type of dispute over which it has competence.

There is some support for a functionalist reading of the binding nature of interim measures orders in academic commentary. Although in his 1955 report on the revision of the Statute of the International Court, Judge Lauterpacht took the view its interim measures orders were not binding,[92] subsequently his attitude was more ambivalent—'It cannot be lightly assumed that the Statute of the Court—a legal instrument—contains provisions relating to any merely moral obligation of States...but the language of Article 41 of the Statute precludes any confident affirmation of the binding force of the measures issued'.[93] Fitzmaurice was more robust, clearly adopting a functionalist approach, while also criticising the formulation of Article 41:

> The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding—for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court.

If interim measures orders were not binding, Fitzmaurice argues that they would be pointless, and does not doubt that measures ordered by tribunals other than the International Court are binding where uncertainty arises solely from the terms of the

92. Lauterpacht, 'Revision of the Statute', 149-151, paras.65-68.

93. H Lauterpacht, *The Development of International Law by the International Court* (Stevens: London: 1958) 253-254, quotation at 254; see also 110 and 112.

Statute.[94]

In short, established methods of interpreting the powers of international organisations through recourse to functionalism provide a solid ground for concluding that interim measures orders issued by an international tribunal, or quasi-judicial body, are binding on those to which they are addressed. This does not exhaust the array of the available techniques of constitutional interpretation applicable to international tribunals: Lauterpacht's notion of 'parallel instances' can also play an important role in this process.

'Parallel instances'—plausibility:

The primary practice concerning interim measures has undoubtedly been that of the International Court which, in one way or another, has influenced that of other international tribunals in matters such as the requirements of urgency and irreparable prejudice as prerequisities for ordering of measures. For example, in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, the International Tribunal of the Law of the Sea made express reference to and followed the jurisprudence of the International Court of Justice:

> Considering, in this regard, that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered (see *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 398, at p. 405, para. 25).[95]

> The idea of 'parallel instances', however, is prominent in the notion that

94. Fitzmaurice, *Law and Procedure*, Vol.II, 548-550: quotation at 548.

95. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean,* Order of 15 April 2015 (Provision Measures), ITLOS Reports 2015 146, 156, para.42, <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23/23_published_texts/2015_23_Ord_25_Avr_2015-E.pdf>.

measures indicated should be 'plausible'. As a consequence of the International Court's ruling in *LaGrand* that its interim measures orders are binding upon the parties to which they are addressed, in subsequent cases it introduced new requirements for the indication of mea sures, that it is plausible that the rights claimed actually exist, and that there is to a connection between the measures requested and the specific rights in issue in the merits of the case.[96] This notion of plausibility had first been raised in the proceedings in the *Passage through the Great Belt* case[97] where Judge Shahabuddeen endorsed it in an erudite separation opinion,[98] but the term 'plausible case' was first introduced by Judge Abraham in a separate opinion in the *Pulp Mills* case.[99] As he emphasised, this was a consequence of the *LaGrand* ruling that interim measures orders are binding:

> It is now clear that the Court does not suggest: it orders. Yet, and this is the

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96. See, eg, *Questions relating to the Obligation to Prosecute or Extradite* case (Belgium v Senegal), Order of 28 May 2009, ICJ Rep, 2009 139, 151, paras.56-57; *Certain Activities Carried Out by Nicaragua in the Border Area* case (Costa Rica v Nicaragua), Order of 8 March 2011, ICJ Rep, 2011, 6, 18, paras.53-54; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* case (Cambodia v Thailand), Order of 18 July 2011, ICJ Rep, 2011, 537, 545, paras.33-34; *Construction of a Road in Costa Rica along the San Jun River* case (Nicaragua v Costa Rica), Order of 13 December 2013, ICJ Rep, 2013, 398, 402-402, paras.15016; *Questions relating to the Seizure and Detention of Certain Documents and Data* case (Timor–Leste v Australia), Order of 3 March 2014, ICJ Rep, 2014, 147, 153-154, paras.26-30; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* case (Ukraine v Russian Federation), Order of 19 April 2017, ICJ Rep, 2017, 104, 126, paras.63-64; *Jadhav* case (India v Pakistan), Order of 19 May 2017, ICJ Rep, 2017, 231, 240-241, paras.35-36; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case (Qatar v United Arab Emirates), Order of 23 July 2018, ICJ Rep, 2018, 406, 421-422, paras.43-44, and Order of 2 May 2019, <www.icj-cij.org>, paras.17-18; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* case (Iran v United States of America), Order of 30 October 2018, ICJ Rep, 2018, 638-639, para.54 and 643, para.67; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case* (The Gambia v Myanmar), Order of 23 January 2020, <www.icj-cij.org>, paras.43-44. See also C Miles, 'Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice, British Yearbook of International Law (pre-print August 2018), <https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/bry011/5066610>.

97. See *Passage through the Great Belt* (Finland v Denmark), Order of 29 July 1991, ICJ Rep, 1991, 12,17, para.21: for discussion, see, eg, Merrills, 'Interim Measures in the ICJ', 114-116.

98. *Passage through the Great Belt*, Order of 29 July 1991, ICJ Rep, 1991, 12, Separate Opinion of Judge Shahabuddeen, 28-36: in formulating his views, Judge Shahabuddeen was influenced by a passage in Judge Anzilotti's Dissenting Opinion in the *Polish Agrarian Reform and the German Minority* case (Germany v Poland), Order of 29 July 1933, PCIJ Ser.A/B, No.58, 181.

99. *Case concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay), Order of 13 July 2006, ICJ Rep, 2006, 113, Separate Opinion of Judge Abraham, 137, 139-141, paras.8-11.

> crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated—and irreparably so—in the absence of the provisional measures the Court has been asked to prescribe:...[100]

The roots of this concern might lie in Judge Oda's declarations in the *Breard*[101] and *LaGrand*[102] cases in which he expressed misgivings about the Court's decisions to indicate interim measures in almost verbatim terms, later echoed in his declaration in the *Avena* case.[103]

In both *Breard* and *LaGrand*, Judge Oda noted that the applicants (Paraguay and Germany respectively) had 'asked mainly for a decision relating to [Breard/LaGrand's] personal situation, namely, his pending execution by the competent authorities of the State of [Virginia/Arizona]'.[104] Paraguay and Germany had both filed their applications shortly before their nationals were scheduled for imminent execution: Paraguay on 3 April 1998, when Breard was scheduled to be executed on 14 April 1998,[105] and Germany at 7.30pm (Hague time) on 2 March 1999, when LaGrand was due to be executed at 3pm (Arizona time) on 3 March.[106] Judge Oda acknowledged that he could

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100. Ibid, 140, para.8.

101. *Vienna Convention on Consular Relations* case (Paraguay v United States of America), Order of 9 April 1998, ICJ Rep, 1998, 248, Declaration of Judge Oda, 260.

102. *LaGrand* case, Order of 3 March 1999, ICJ Rep, 1999, 9, Declaration of Judge Oda, 18.

103. *Avena and Other Mexican Nationals* case (Mexico v United States of America), Order of 5 February 2003, ICJ Rep, 2003, 77, Declaration of Judge Oda, 93.

104. Declaration of Judge Oda, *Breard*, Order of 9 April 1998, ICJ Rep, 1998, 261, para.4; *LaGrand*, Order of 3 March 1999, ICJ Rep, 1999, 19, para.4.

105. The Court heard oral argument on the interim measures request on 7 April 1998: *Breard*, Order of 9 April 1998, 253, para.16.

106. Although the Court consulted the parties, it did not hold formal oral hearings in relation to this order, which Bekker argues was issued as an exercise of the Court's *proprio motu* power under Article 75(1) of the Rules of Court: Thirlway denies that the Court's *proprio motu* power was invoked—see PHF Bekker, 'Provisional Measures in the Recent Practice of the International Court of Justice', 7 International Law Forum (2005) 24, 28-29 and 31; Thirlway, 'Law and Procedure, Part Twelve', 108; but see *LaGrand* Order of 3 March

'on humanitarian grounds, understand the plight of Mr [Breard/LaGrand] and recognised that owing to the fact [of the late and urgent submission in both cases] that...his fate now, albeit unreasonably, lies in the hands of the Court'[107] but, in both sets of proceedings 'in the limited time...given to the Court to deal with this matter, I have found it impossible to develop my points sufficiently to persuade my colleagues to alter their position'. He had only voted in favour of the orders 'with great hesitation', thought that the Court should have declined to indicate measures in both cases,[108] but nevertheless had 'voted in favour of the Order, for humanitarian reasons'.[109] Judge Oda was clear on his reason for disquiet in these cases:

> provisional measures are granted in order to preserve *rights of States*...[which] must constitute the subject–matter of the application instituting proceedings or be *directly* related to it. In this case...there is no question of...*rights* (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.[110]

Quite simply, Judge Oda thought that the fate of the condemned individuals did not form part of the subject–matter of the cases presented to the Court which were framed as an ostensible breach by the United States of the inter-State obligations owed under Article 36 of the Vienna Convention on Consular Relations rather than an assertion of diplomatic protection on behalf of a national. Judge Oda underlined this in *LaGrand*:

1999, 13, para.12 and 14, para.21, and the Separate Opinion of President Schwebel, 21. A clear example of a quasi–judicial body ordering interim measures *ex proprio motu* is the European Committee of Social Rights' *Decision on Admissibilityand on Immediate Measures* (4 July 2019) in the *Amnesty International v Italy* case, para.10 <http://hudoc.esc.coe.int/eng?i=cc-178-2019-dadmissandimmed-en >.

107. Declaration of Judge Oda, *Breard*, Order of 9 April 1998, ICJ Rep, 1998, 260, para.2; *LaGrand*, Order of 3 March 1999, ICJ Rep, 1999, 18, para.2.

108. Declaration of Judge Oda, *Breard*, Order of 9 April 1998, ICJ Rep, 1998, 260, para.1; *LaGrand*, Order of 3 March 1999, ICJ Rep, 1999, 18, para.1: emphasis in original in both.

109. Declaration of Judge Oda, *Breard,* 262, Order of 9 April 1998, ICJ Rep, 1998, para.8; *LaGrand*, 20, Order of 3 March 1999, ICJ Rep, 1999, para.7.

110. Declaration of Judge Oda, *Breard*, Order of 9 April 1998, ICJ Rep, 1998, 261, para.5; *LaGrand*, 19, Order of 3 March 1999, ICJ Rep, 1999, para.5.

> If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter–State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.[111]

The import of Judge Oda's declarations is clear: the interim relief sought by both Paraguay and Germany concerned issues which could not be sustained in a merits judgment. Although the failure to provide consular assistance to Breard and LaGrand was the immediate or material focus of the underlying 'dispute' between the parties, this was effectively peripheral to the 'case' presented to the Court.[112] In short, procedurally, the measures requested were not related to the 'case'.

Thirlway endorsed Judge Oda's analysis, noting that in the LaGrand judgment the Court found that LaGrand's execution was held to be in breach of the interim measures order, but not of the Vienna Convention itself. This, he argued, confirmed that 'the threatened execution at the time of the request for measures had not constituted a potential violation of any right of Germany' arising under the Convention 'or indeed of any legal rights of Germany that then existed'.[113]

This is perhaps not an entirely accurate reading of the judgment. The Court ruled that Article 36(1)(b) of the Convention set out obligations the receiving State assumed 'towards the detained person', which that individual's national State could invoke–'These rights were violated in the present case'.[114] The Court subsequently affirmed this ruling in the *Avena* case, holding that Article 36 created an 'interdependence of the rights of the State and individual rights' which entailed that a State could submit a claim for a breach of the Convention which it claimed to have

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111. Declaration of Judge Oda, *LaGrand*, Order of 3 March 1999, ICJ Rep, 1999, 19, para.6.

112. For a 'classic' account of the distinction between a 'dispute' and a 'case', see R Jennings, 'Reflections on the term "dispute"', in R StJ MacDonald (ed), *Essays in honour of Wang Tieya* (Nijhoff: Dodrecht: 1994) 401: see also *Case concerning Diplomatic and Consular Staff in Tehran* case (United States of America v Iran), ICJ Rep, 1980, 3, 18-20, paras.33-38.

113. Thirlway, 'Law and Procedure, Part Twelve', 91: see 89-91 and 98.

114. *LaGrand* case, ICJ Rep, 2001, 466, 494, para.77.

suffered directly and also through the violation of the rights of its nationals. In these circumstances, the duty to exhaust local remedies 'does not apply to such a request'.[115] The *LaGrand* ruling was also re-affirmed in the *Jadhar* proceedings.[116]

The Court as a whole first adopted the notion of "plausible measures"in the *Questions relating to the obligation to prosecute or extradite* case in which Belgium complained of Senegal's failure to prosecute Habré (former President of Chad) for torture or extradite him to Belgium which had issued a warrant for his arrest under the Torture Convention. Belgium feared that Senegal would allow Habré to leave its territory, or to claim head of State immunity to avoid prosecution by its domestic courts, or that Senegal simply lacked the resources necessary to prosecute him.

In its order of 28 May 2009, the Court recalled that the power to indicate measures is aimed at preserving the respective rights of the parties pending final decision, therefore the measures must concern rights that the Court might subsequently decide belonged to either party. There must be a link between the measures requested and the rights at stake in the merits proceedings but the Court should only indicate measures if it is satisfied that the rights claimed 'are at least plausible'. The Court ruled:

> 56...a link must therefore be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case;
> 57. Whereas the power of the Court to indicate provisional measures should be

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115. *Case concerning Avena and Other Mexican Nationals* (Mexico v United States of America), ICJ Rep, 2004, 12, 35-36, para.40. This ruling has been criticised by Simma and Hoppe on the ground that it creates an exception which diverges from the International Law Commission's codification of the exhaustion of local remedies rule in its Articles on Diplomatic Protection—see B Simma and C Hoppe, 'From *LaGrand* and *Avena* to *Medellin*—a Rocky Road toward Implementation', 14 Tulane Journal of International and Comparative Law (2005) 7, 14-16.

116. See *Jadhar* case (India v Pakistan), Order of 13 May 2017, ICJ Rep 2017, 231, 243, para.48, the Separate Opinion of Judge Cançado Trinidade, 247, 247-254, paras.1-17 and 257-259, paras.26-33, and the merits judgment of 17 July 2019, <www.icj-cij.org>, para.116. Compare *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* case (Ukraine v Russian Federation), Order of 19 April 2017, ICJ Rep, 2017, 104, 135, para.81: reaffirmed *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case (Qatar v United Arab Emirates), Order of 23 July 2018, ICJ Rep, 2018, 406, 426, para.51.

> exercised only if the Court is satisfied that the rights asserted by a party are at least plausible;

It concluded:

> at this stage of the proceedings the Court does not need to establish definitively the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert such rights before the Court;…the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible.[117]

The standard of a 'possible interpretation' is redolent of Anzilotti's *dictum* in the *Polish Agrarian Reform* case:

> If the *summaria cognitio*...enabled us to take into account the *possibility* of the right claimed...and the *possibility* of the danger to which that right was exposed, I should find it difficult to imagine any request for the indication of interim measures more just, more opportune or more appropriate than the one which we are considering.[118]

In his separate opinion appended to the interim measures order in the *Ukraine v Russia* case, Judge Owada stated that the *Questions relating to the obligation to prosecute or extradite* case only formally introduced the notion of plausibility into the jurisprudence of the International Court as it simply made explicit a factor which had been implicit in the Court's practice.[119] Further, he stressed that plausibility had to be

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117. *Questions relating to the obligation to prosecute or extradite* case (Belgium/Senegal), Order of 28 May 2009, 139, 151, paras.56-57, and 152.

118. *Polish Agrarian Reform and the German Minority* case (Germany v Poland), Order of 29 July 1933, PCIJ, Ser.A/B, No.58, Dissenting Opinion of Judge Anzilotti, 181.

119. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* case (Ukraine v Russian Federation), Order of 19 April 2017, ICJ Rep, 2017, 104, Separate Opinion of Judge Owada, 142, 145, para.11: see 144-147, paras.10-20 generally.

distinguished from the *prima facie* standard that the Court employs to determine whether there is a prospect of it possessing jurisdiction over the merits of a case and which is a prerequisite before it may indicate interim measures.[120] *Prima facie* constitutes a more stringent standard, and he observed:

> the standard of plausibility is, and must be, fairly low. The question to be asked should therefore be that of whether an asserted right is 'possible' or 'arguable' that it exists.[121]

For example, this could be satisfied by the indication that the right in question is encapsulated by a possible interpretation of a treaty, the test employed in the *Questions relating to the obligation to prosecute or extradite* case,[122] which was perhaps elaborated in the *Alleged Violations of the 1955 Treaty* case where the Court ruled that the rights Iran sought to be protected 'appear to be based on a possible interpretation of the 1955 Treaty and on the prima facie evidence of the relevant facts.[123] Further, in the *Seizure and Detention of Certain Documents and Data* case, Timor–Leste claimed that Australia had violated it right to confidential communication with its lawyers with regard to pending arbitral proceedings between the two States. The Court ruled that Timor–Leste had a plausible right to the protection of these communications which 'might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order.[124]

But how does the notion of plausibility tie into the thesis that interim measures may be seen as an example, or exemplar, of the nature of international tribunals as international organisations? The answer is Eli Lauterpacht's notion of cross-

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120. *Ukraine v Russia*, Separate Opinion of Judge Owada, 146, para.15.

121. *Ukraine v Russia*, Separate Opinion of Judge Owada, 147, para.20.

122. *Questions relating to the obligation to prosecute or extradite* case (Belgium/Senegal), Order of 28 May 2009, 139, 152, para.60.

123. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* case (Iran v United States of America), Order of 30 October 2018, ICJ Rep, 2018, 623, 643, para.67.

124. *Questions relating to the Seizure and Detention of Certain Documents and Data* case (Timor–Leste v Australia), Order of 3 March 2014, ICJ Rep, 2014, 147, 153, para.27.

fertilisation, the way that a solution adopted in one organisation influences the practice of another. Although the International Court's adoption of the requirement of plausibility is relatively recent, it has been adopted by other tribunals– by, for example, the Court of Arbitration in the *Kishenganga* arbitration. This arbitration, brought by Pakistan against India before the Permanent Court of Arbitration, arose under the 1960 Indus Waters Treaty which allocated the use of the Indus River system between the parties. Pakistan and India disagreed on the application of the treaty in relation to the Kishenganga Hydroelectric Project being constructed by India. The Court of Arbitration, referring expressly to jurisprudence of the International Court, observed:

> the Court nonetheless recognizes that interim measures under the Treaty remain an extraordinary recourse. Consistent with the general practice of international and national courts and tribunals, the Court must be satisfied that, without prejudice to its decision on the merits, the claims set forth by the Party seeking interim measures appear to be at least 'plausible.'...Regardless of the conditions under which a court is authorized under its rules to indicate interim relief, such relief cannot be said to be 'necessary' under any of those conditions if it is apparent to that court at an early stage that it is unlikely to have jurisdiction or that the applicant has failed to present a plausible case on the merits.[125]

Similarly, in a series of interim measures orders, the International Tribunal of the Law of the Sea has affirmed that the rights sought to be protected must be 'plausible'. This standard appears to have first been adopted by an ITLOS Special Chamber in its Order of 15 April 2015 in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* proceedings when, after referring expressly to the interim measures orders made by the International Court in the *Costa Rica/Nicaragua* cases to rule that it was 'not called upon to determine definitively whether the rights which they each wish to see protected exist', it continued:

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125. *The Indus Waters Kishenganga Arbitration* (Pakistan v India), Order of 23 September 2011 (PCA), <https://pcacases.com/web/sendAttach/1682>, 41-42, para.135, n.210 (note omitted in quotation).

> 58. Considering that, before prescribing provisional measures, the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible;[126]

This standard has been maintained in subsequent ITLOS proceedings.[127]

On the other hand, there are also examples of what might be termed negative or reverse cross-fertilisation where a tribunal or its constitutive instrument consciously departs from previous practice. This is manifestly apparent in aspects of tribunals' competence to order interim measures under the Law of the Sea Convention as Article 290(6) of the UN Law of the Sea Convention provides:

> The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

The preparatory work of the Convention clearly shows that this was included precisely to avoid the then current ambiguity as to whether ICJ interim measures orders were binding, which the drafting working party thought had led to States' non-compliance with ICJ orders.[128]

Quite simply, international tribunals are aware of, and assess the worth, of one another's practices and procedures, and are open to adopting or adapting the experience of other tribunals. It is perhaps not surprising that the institution which

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126. *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* case, Order of 25 April 2015, ITLOS Reports 2015, 146, 158, paras.57-58, available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23/23_published_texts/2015_23_Ord_25_Avr_2015-E.pdf>.

127. See *The Enrica Lexie Incident* (Italy v India), Order of 24 August 2015, ITLOS Reports 2015, 182, 197, para.84, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/24_published_texts/2015_24_Ord_24_Aug_2015-E.pdf.>; *Case concerning the Detention of Three Ukranian Naval Vessels* (Ukraine v Russian Federation), Order of 25 May 2019, para.91, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf>; and *the M/T @San Pedro Pio' case* (Switzerland v Nigeria), Order of 6 July 2019, paras.77 and 105, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_27/Orders/C27_Order_06.07.2019_rev.pdf>.

128. Rosenne, Interim Measures, 45, 51-56.

plays the leading role in this is the International Court of Justice. This is not, and has not always, been the case—the Court was slow to affirm the binding nature of its interim measures orders—but it seems to be the major source of influence. This should not be surprising. Although the suggestions made by Presidents Stephen Schwebel and Gilbert Guillaume some twenty–odd years ago to establish the International Court formally as the apex or supreme international court to which all others should defer, and possibly also domestic courts on issues concerning international law, were unrealistic,[129] on core doctrinal questions and on procedural matters it exerts an influence. Leaving criminal tribunals to one side, it should be expected that international tribunals, at least at their inception, will model their procedure on that of the International Court. After all, it is the tribunal with the most experience, and when the Permanent Court was created in the 1920s as a 'court of justice' rather than a 'court of arbitration'[130] it had to determine how it would discharge its judicial function, more or less from scratch. There was little, if any, guidance as to how an institutionalised international court should function. For example, it had to decide how its advisory competence should be exercised; how it should deal with other international actors, such as boundary commissions; how it should deal with preliminary objections to its jurisdiction or against the admissibility of a case or with counterclaims; and, for that matter, how it should act when asked to indicate interim measures. The Permanent Court, and following it the International Court, effectively wrote the manual on the international judicial function.[131] It is not

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129. See, eg, G Guillaume, 'Advantages and Risks of Proliferation: a Blueprint for Action', 2 Journal of International Criminal Justice 300 (2004) and, as President of the International Court, his addresses to the General Assembly on 26 October 2000 <https://www.icj-cij.org/files/press-releases/9/2999.pdf>, 30 October 2001 <https://www.icj-cij.org/files/press-releases/3/2993.pdf>, and to the General Assembly's Sixth Committee on 31 October 2001 <https://www.icj-cij.org/files/press-releases/5/2995.pdf>; S Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts', 95 Mededelingen van de Nederlandse Verenining voor Internationaal Recht (1987) 1 and, as President of the International Court, his address to the General Assemby on 27 October 1998 <https://www.icj-cij.org/files/press-releases/7/3007.pdf>. See also R Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', 50 International and Comparative Law Quarterly (2001) 121, 121-2; and P VerLoren van Themaat, 'Preliminary Rulings by the International Court of Justice at the Request of National Courts: Lessons from the EEC–Experience', 95 Mededelingen van de Nederlandse Verenining voor Internationaal Recht (1987) 53.

130. For this distinction see, eg 'Speech delived by M Léon Bourgeois', in PCIJ, *Procès–Verbaux of the Proceedings of the Committee*, 5, 6-7, and the Report of the Committee, ibid, 694-696.

131. See, eg, I Scobbie, 'The Permanent Court of International Justice, Arbitration, and Claims Commissions of the Inter-War Period', in CJ Tams and M Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Nijhoff: Leiden: 2013) 203.

surprising that its practices are accorded weight.

But what is the normative import of adopting the practice followed by other international institutions, including tribunals? It seems artificial to base the attraction of practice by reference to the sources enumerated in Article 38(1) of the Statute of the International Court. With few exceptions, such as the principle of compétence de la compétence[132] and the core aspects of the doctrine of res judicata,[133] it is doubtful that procedural aspects of international tribunals could be determined by 'general principles of law recognised by civilised nations'. Due to the structural difference of consensual jurisdiction, international tribunals cannot be assimilated to domestic courts. The persuasiveness of this normative foundation would appear to be even more tenuous when one considers cross-fertilisation in the practice of non-judicial international organisations.

The idea that there might exist a category of general principles of international judicial law, as a source of binding law as such, also seems dubious: how can the practice of international tribunals bind others? A solution might, however, lie in considerations of practical reasoning, such as Perelman's doctrine of inertia. Once the practice followed by one tribunal is seen as a sensible or practical approach to a given issue, especially if it is underpinned by matters of principle—such as reliance on plausibility as a necessary requirement when a tribunal issues binding interim measures orders given the exigencies of consensual jurisdiction—and this consolidates in the practice of other tribunals, then it sticks unless and until a countervailing reason emerges to dislodge it. The doctrine of inertia entails that only change need be justified, and the interpretation or position adopted in past practice will subsist, until reason is given to diverge from, or otherwise alter, it.[134]

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132. For affirmation of this a general principle see, eg, *Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18, paras.29-33 (6 September 2018). This view had been expressed at least as early as 1928 by the Permanent Court in the *Interpretation of the Greco-Turkish Agreement* advisory opinion, PCIJ Ser.B No.16, 20.

133. See, eg, PCIJ, *Procès–verbaux*, Meeting of 3 July 1920, 331, Statement of Phillimore, 335; and *Chorzów Factory case: interpretation judgment* (Germany v Poland) PCIJ Ser.A, No.13, Dissenting Opinion of Judge Anzilotti, 23, 27.

134. On the doctrine of inertia see, eg, Ch Perelman and L Olbrechts–Tyteca, *The New Rhetoric: a Treatise on Argumentation* (University of Notre Dame Press: Notre Dame: 1971) 104-110, 218-220; and Perelman, *Justice, Law, and Argument: Essays in Moral and Legal Reasoning* (Reidel: Dordrecht: 1980) 27-28, 169-171.

International tribunals, particularly the 'permanent' courts such as the International Court of Justice, the International Tribunal for the Law of the Sea, and the various regional human rights courts, should be seen as international institutions which possess a relative autonomy in the discharge of their judicial function which is divorced from a rigid constitutional structure. They can legitimately invoke principles of institutional interpretation in order they might discharge their functions effectively and, in their practice, learn from one another.