***Sałkiewicz-Munnerlyn, Ewa*: Jurisprudence of the PCIJ and the ICJ on Interim Measures of Protection.** The Hague: T. M. C. Asser Press, 2022. ISBN 978-94-6265-474-7. xi, 155 pp. €128.39 eISBN 978-94-6265-475-4. €96.29

Perhaps no event at the International Court of Justice (ICJ) has a greater capacity to capture global attention than a hearing on a request for the indication of provisional measures. The stakes are usually high, with life and death sometimes in the balance.[1] One need only consider Ukraine's recent request for provisional measures in its dispute with Russia under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – a request that Ukraine lodged within days of the invasion of its territory by Russia. Less than a month later, the Court directed Russia to 'immediately suspend the military operations' commenced on Ukraine's territory on 24 February 2022.[2] Another spectacle took place in December 2019, when Nobel Peace Prize laureate Aung San Suu Kyi, then the State Counsellor of Myanmar, appeared before the Court to defend her country against The Gambia's request for provisional measures aimed at preventing violence against the Rohingya, an ethnic minority group. A month later, the Court unanimously directed Myanmar to 'take all measures within its power' to prevent the commission of genocidal acts against the Rohingya group in its territory.[3] In both cases, the applicants persuaded the Court to indicate provisional measures while also leveraging the proceedings to focus the world's attention upon their claims.

At the outset of legal disputes that may take years to resolve, provisional measures requests create unique opportunities for applicants to frame those disputes for a global audience and to rally public opinion to their cause.[4] The indication of provisional measures may also persuade third states to apply pressure upon the state accused of malfeasance. The wheels of justice at the ICJ turn slowly, but provisional measures requests take priority on the Court's schedule and the relief obtained – if a request succeeds – comes within weeks, not years. In short, the sheer possibility of seeking provisional measures may be a crucial factor in deciding whether to bring a dispute to the ICJ in the first place. The prospect of imposing immediate costs upon an adversary may outweigh the risk of non-compliance or even be more important than the relief sought on the

1 See e. g. ICJ, *Jadhav Case* (India v. Pakistan), provisional measures, ICJ Reports 2017, 231.

2 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russia), Order of 16 March 2022, para. 86.

3 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), provisional measures, ICJ Reports 2020, 3 (para. 86).

4 See Christine Gray, 'Why States Resort to Litigation in Cases Concerning the Use of Force' in: Natalie Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (Cambridge: Cambridge University Press 2016), 305-329 (311).

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merits.[5] This may be the best reading of Ukraine's motivation in seeking provisional measures against Russia in 2022.[6]

It is little surprise that provisional measures are a subject of continuing academic scrutiny,[7] and 'Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection' by *Ewa Sałkiewicz-Munnerlyn*, a former Polish diplomat, is a recent addition to the literature. In the preface, *Sałkiewicz-Munnerlyn* explains her intention to set out 'the tendencies in doctrine and jurisprudence' relating to provisional measures from the Permanent Court of International Justice (PCIJ) up through recent ICJ practice, with an aim to incorporate scholarly views from Central Europe alongside those from Western Europe (p. v).

The book contains twelve chapters that cover broad themes (history, objectives, validity, and enforcement) and substantive requirements (prima facie jurisdiction, urgency, risk of irreparable damage, plausibility, and the link between the measures sought and the subject-matter of the main case). Several chapters include a sub-section on doctrine that surveys scholarly views and another on jurisprudence that identifies relevant case law. For the most part, the author leaves this material to speak for itself, rather than seeking to organise or systematise the information. Unfortunately, this makes it harder to identify or evaluate the doctrinal and jurisprudential shifts that the book sets out to address. This difficulty is magnified by a persistent focus on older writings and cases, with ICJ decisions from the 1970s featured prominently. To be sure, more recent cases are mentioned. But they receive nowhere near the attention devoted to the provisional measures orders in *Fisheries Jurisdiction*, *Nuclear Tests*, *Aegean Sea*, and *Tehran Hostages*.[8] This results in a somewhat outdated portrait of ICJ practice.

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5 Erlend M. Leonhardsen, 'Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-Compliance Is to Be Expected', Journal of International Dispute Settlement 5 (2014), 306-343; Karin Oellers-Frahm and Andreas Zimmermann, 'Article 41' in: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford: Oxford University Press 2019, 1135-1198 (1195).

6 Andreas Kulick, 'Provisional Measures after *Ukraine v. Russia* (2022)', Journal of International Dispute Settlement 13 (2022), 323-340 (335-336).

7 Recent contributions include Cameron A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge: Cambridge University Press 2017); Fulvio M. Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (Heidelberg/Berlin: Springer 2021).

8 ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), provisional measures, ICJ Reports 1972, 12; ICJ, *Nuclear Tests Case* (Australia v. France), provisional measures, ICJ Reports 1973, 99; ICJ, *Aegean Sea Continental Shelf* (Greece v. Turkey), provisional measures, ICJ Reports 1976, 3; ICJ, *Diplomatic and Consular Staff in Tehran* (United States v. Iran), provisional measures, ICJ Reports 1979, 7.

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A historical overview in Chapter 1 briefly describes the six PCIJ cases that involved provisional measures requests, as well as eleven such ICJ cases from 1945 to 1990. This cut-off point is not explained. The chapter concludes with a confusingly-organised table that lists all ICJ cases that have involved provisional measures requests as of 2020 and whether measures were indicated (notably, as of mid-2022, four additional requests have been made).

Chapter 2 addresses the objectives of provisional measures: namely, to protect the rights of the parties while a case is pending, including by preventing actions that might frustrate an eventual judgement. Provisional measures may also seek to prevent the aggravation of the dispute. The author highlights the Court's broad power under Article 41 of the Statute to indicate non-aggravation measures but avoids taking a position on whether the Court may do so where it has declined to indicate any other measures. Surprisingly the book does not address the Court's approach in *Pulp Mills* on this point.[9] A more up-to-date analysis on when non-aggravation measures have been indicated or declined would have been welcome.

Chapters 3 to 7 cover the requirements that a party must satisfy to obtain provisional measures. Chapter 3 on prima facie jurisdiction examines the scrutiny that should attach to ascertaining jurisdiction at the provisional measures phase. Views range from a 'simplified examination' to establish that jurisdiction is 'possible' (p. 45) to a demanding standard tantamount to final and binding review, such that the Court may be 'absolutely certain' of its competence (p. 38). The text considers doctrinal debates about whether the competence to grant interim relief is strictly limited by the basis of jurisdiction over the main dispute or arises independently from an 'inherent' or 'incidental' jurisdiction (p. 44). This issue has renewed relevance in light of the March 2022 order indicating provisional measures against Russia.[10] However, the book's treatment of these questions is rooted in 1960s-era scholarship and omits more recent cases (e. g.

9 ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), provisional measures, ICJ Reports 2007, 3 (paras 49-51), including the Declaration of Judge Buergenthal. See also Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute', LJIL 21 (2008), 623-642.

10 The decision to direct Russia to 'immediately suspend the military operations that it commenced on 24 February 2022 in the territory or Ukraine' went beyond Ukraine's request, which was limited to military operations 'that have as their stated purpose and objective the prevention and punishment of a claimed genocide' in Ukraine. *Ukraine v. Russia* (n. 2), paras 14, 86. That limitation stemmed from the fact that Ukraine bases the Court's jurisdiction on Article IX of the 1948 Genocide Convention and needed to link the requested provisional measures to the rights to be adjudged under the Convention. See Kulick (n. 6), 334-335.

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Legality of Use of Force; *Armed Activities*) that revealed divisions within the Court on this issue.[11] Chapter 3 also suggests that the Court's current approach to prima facie jurisdiction consists of identifying a valid jurisdictional title and confirming the applicant's standing to sue, without considering potential jurisdictional objections, such as reservations to an optional clause declaration or preconditions in a compromissory clause. In practice, the Court does consider such objections when assessing prima facie jurisdiction, without prejudice to such arguments being resubmitted as preliminary objections.[12]

Chapter 4 briefly addresses urgency and leads into Chapter 5 on the risk of irreparable harm – that is, harm that would be 'impossible to compensate' (p. 59). The author contrasts the outcomes from two provisional measures requests involving risk of economic harm (*Anglo-Iranian Oil Company*; *Fisheries Jurisdiction*) to illustrate the lack of clarity surrounding when the Court considers such harm compensable (and, therefore, not irreparable). The author also highlights *Nuclear Tests* where the Court found that the evidence before it could not 'preclude the possibility' (p. 57) that radioactive fall-out would cause irreparable harm (an early example of the precautionary principle in operation). She reasonably concludes that the Court has been more willing to find a risk of irreparable harm when 'human health and life were at risk' (p. 59) than in other situations, but the analysis might usefully have addressed more recent cases involving threats of environmental harm.[13]

In Chapter 6, *Sałkiewicz-Munnerlyn* expresses a dim view of the 'plausibility' requirement that the Court formally introduced in 2009 in *Belgium v. Senegal* – i. e. that the rights for which interim protection is sought 'are at least plausible' (p. 65). The author's position is that 'there is neither time nor need' to explore that question if all other requirements are met (p. 63). Referring to the Court's 2017 decision on Ukraine's request for provisional

11 See Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*', EJIL 14 (2003), 867-905 (889-892).

12 See e. g. ICJ, *Legality of Use of Force* (Yugoslavia v. United Kingdom), provisional measures, ICJ Reports 1999, 826 (paras 22-25); ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russia), provisional measures, ICJ Reports 2008, 353 (paras 113-117); *The Gambia v. Myanmar* (n. 3), 826 (paras 22-25).

13 See e. g. ICJ, *Pulp Mills on the River Uruguay* (Argentina v Uruguay), provisional measures, ICJ Reports 2006, 113 (paras 72-75); *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), provisional measures, ICJ Reports 2011, 6 (paras 81-82); *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), provisional measures, ICJ Reports 2013, 398 (paras 34-35).

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measures against Russia,[14] the author notes that the meaning of plausibility has already shifted from a focus on 'the credibility (likelihood) of the plaintiff's rights to the credibility of the claims, that is to say, that they were infringed by the defendant' (p. 64).[15] Unfortunately, the text does not engage further with the 2017 decision, the only case to date in which the Court has found the plausibility requirement unmet.[16] The author also draws upon the late Judge *Cançado-Trindade*'s criticism that characterising fundamental rights as 'plausible' threatens to devalue such rights and that the requirement unnecessarily obstructs the 'realization of justice' (p. 67). Endorsing this position, *Sałkiewicz-Munnerlyn* adds that in a case involving the violation of a *jus cogens* norm, 'this type of test makes no sense' (p. 67). One can agree or not with that perspective, but there may be good reasons to adopt a more open-minded view of 'plausibility' in a world of state-sponsored narratives that bear little connection to truth. The plausibility standard (which 'remains a challenge to describe . […] with precision'[17]) would benefit from clarification, but it may yet prove a valuable means to protect the judicial function against provisional measures requests made in bad faith.

Chapter 7 examines briefly the requirement that a link exists between the alleged rights for which protection is sought and the subject of the principal request before the Court. The only ICJ cases mentioned are *Fisheries Jurisdiction* and *Aegean Sea*. This overlooks more recent relevant practice, including *Temple of Preah Vihear (Interpretation)* in which the Court indicted measures (including a 'provisional demilitarized zone') that arguably went far beyond the rights at issue in the interpretation dis-

14 The Court found that at least 'some of the acts complained of by Ukraine' demonstrated the plausibility of its claims based on rights enshrined in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination but that Ukraine had not adduced sufficient evidence to establish the plausibility of its claims relating to the terrorism treaty. ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russia), provisional measures, ICJ Reports 2017, 658 (paras 75, 82-83).

15 Others have termed this a 'distinction between legal plausibility and factual plausibility'. Massimo Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice', LJIL 31 (2018), 641-668 (650).

16 For analysis: Lando (n. 15) 655-658; Iryna Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)', Melbourne Journal of International Law 18 (2017), 436-459 (445-454).

17 Separate Opinion of Judge Kress, *The Gambia v. Myanmar* (n. 3), para. 2.

pute.[18] Chapter 8 covers a grab bag of issues including third-party intervention, judges ad hoc, the status of *actio popularis* in international law, and situations in which the subject-matter of a provisional measures request is simultaneously under consideration by the United Nations (UN) Security Council. The latter discussion highlights *Aegean Sea* and *Tehran Hostages* but omits, for example, the *Lockerbie cases* and *Bosnia Genocide*, among other cases.

Chapter 9 examines whether provisional measures are legally binding (a question many readers will no doubt consider long settled) alongside compliance and enforcement. To begin, the author suggests reasons to question the legal authority of the ICJ to indicate legally binding provisional measures. She asserts that the *travaux préparatoires* to the PCIJ Statute make the non-binding status of interim relief 'apparent' (p. 87) and she underlines the decision to use the verb 'indicate' (*indiquer*) rather than 'order' (*ordonner*).[19] This language carried over into Article 41 of the ICJ Statute – a 'poorly drafted' provision that empowers the Court but 'does not give way to an appropriate legal penalty'(p. 87). The author also notes the Court's decision to address provisional measures in 'orders' rather than 'judgments', which leaves them beyond the scope of Article 94(2) of the UN Charter (which authorises recourse to the UN Security Council for non-compliance with a *judgement* of the Court). A summary of doctrine distinguishes writers who have argued that provisional measures are legally binding based on general principles or effectiveness from those who consider them precatory based on the Statute's text and drafting history. Finally, referring to state practice in *Fisheries Jurisdiction*, *Nuclear Tests*, and *Aegean Sea*, the author asserts that states consider provisional measures to be 'optional' (p. 88). The author acknowledges the Court's 2001 ruling in *LaGrand* that provisional measures are binding but posits that the failure of the United States to abide by the order in that case (and, later, in *Avena*) demonstrates that compliance 'leaves much to be desired' (pp. 90-91). The implication is that *LaGrand* – a celebrated decision that appeared to sweep aside decades of doctrinal uncertainty – has had limited practical significance.[20]

In sum, the author's position is that 'interim measures are not binding' (p. 94), unless the parties have agreed between themselves to treat them as such. Non-compliance may constitute a failure to act in good faith but 'parties have

18 ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand), provisional measures, ICJ Reports 2011, 537 (paras 62-63, 69). Requests for interpretation under Article 60 complicate the 'link' requirement. See Dissenting Opinion of Judge Donoghue, paras 13-26. See also Massimo Lando, 'Provisional Measures and the Link Requirement', The Law and Practice of International Courts and Tribunals 19 (2020), 177-199.

19 The text confusingly translates '*indiquer*' as 'manage' and '*ordonner*' as 'injunction' (p. 86).

20 For a more sanguine assessment: Cameron A. Miles, 'LaGrand (Germany v United States of America) (2001)' in: Eirik Bjorge and Cameron A. Miles, *Landmark Cases in Public International Law* (Oxford: Hart Publishing 2017), 509-538 (532-537).

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far-reaching freedom not to comply', something the author describes as a 'very negative phenomenon' (p. 88). A difficulty here is that the author does not make clear whether she means to describe the current state of the law (if so, the assertion is clearly incorrect in light of *LaGrand*), is making an empirical claim, or is staking out a normative position. The best reading seems to be that the author considers *LaGrand* a mistake based on faulty reasoning and that the better approach would be to treat provisional measures (in most cases) as non-binding, at least until the ICJ Statute is amended to provide otherwise. But the implications of such a view – in a world where *LaGrand* exists and where most actors seem content with or resigned to provisional measures that are legally binding – are not fully explored. This leads to the second part of Chapter 9 on compliance and enforcement.

The author asserts that 'in all cases' in which the Court has indicated provisional measures, respondent states have 'refused to implement them' (p. 95). This is an overstatement, at least in view of recent practice. Alongside instances in which states have failed to abide by provisional measures, there have been cases of compliance.[21] Moreover, assessing compliance is not always clear-cut. Nonetheless, the author rightfully observes that non-compliance undermines 'not only the authority of the Court, but the effective administration of justice' (p. 97). She then considers whether the Court could sanction parties for non-compliance, including by ordering costs.[22] She also highlights proposals by *Massimo Lando* for an accelerated procedure to consider instances of non-compliance and greater use of reporting requirements to encourage implementation.[23] The author also

21 See ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), provisional measures, ICJ Reports 2013, 354; ICJ, *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), provisional measures, ICJ Reports 2014, 147; ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), provisional measures, ICJ Reports 2016, 1148; *Jadhav Case* (n. 1). Mary-Ellen O'Connell asserts that the United States complied with the provisional measures in *Military and Paramilitary Activities in and against Nicaragua* by cutting off funding for the mining of Nicaragua's harbors. Mary-Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford: Oxford University Press 2008), 306-307.

22 The book's author notes that this was proposed unsuccessfully by judges in *Certain Activities*.

23 See Massimo Lando, 'Compliance With Provisional Measures Indicated by the International Court of Justice', Journal of International Dispute Settlement 8 (2017) 22-55 (48-54). The Court has included reporting obligations more often than not in provisional measures orders since 2003; the confidentiality of such reports may undermine their effectiveness. Kingsley Abbott, Michael A. Becker and Bruno Gelinas-Faucher, 'Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order', OpinioJuris, 25 August 2020, <http://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/>. In December 2020, the Court announced 'the establishment of an *ad hoc* committee, composed of three judges, which will assist the Court in monitoring the implementation of the provisional measures that it indicates'. ICJ, Press Release No. 2020/38 (21 December 2020).

suggests that the Court include a dedicated section on compliance with provisional measures in its annual report to the UN General Assembly. Finally, the author explains that because the indication of provisional measures creates obligations only between the parties, third states cannot lawfully seek to enforce interim relief through counter-measures; at best, such states can 'help the negotiations' (p. 101).

Chapters 10 and 11 are case studies. Chapter 10 examines the *Case Concerning the Arbitration Award of 31 July 1989 (Guinea-Bissau v. Senegal)*. This rather obscure example is provided 'to show the similarities and differences between the previous jurisprudence of the ICJ in the phase of the interim measures' (p. 113) but mainly highlights an example in which the Court determined that the alleged rights for which protection was sought (concerning a maritime delimitation dispute) were not the subject of proceedings before the Court (concerning the validity of an arbitral award relating to the delimitation) and therefore could not support the indication of provisional measures. Chapter 11 turns to *The Gambia v. Myanmar* where, as noted above, the Court directed Myanmar to take 'all measures within its power' to prevent the commission of genocidal acts against the Rohingya, to take 'effective measures' to preserve and protect relevant evidence, and to make periodic reports to the Court.[24] The author notes that Article IX of the 1948 Genocide Convention provided the basis for a finding of prima facie jurisdiction but does not mention Myanmar's argument that The Gambia, as a non-injured state, lacked standing. The text also recounts the Court's finding that the Rohingya in Myanmar faced a risk of irreparable harm and that the rights at issue were plausible, but it does not examine how the Court made these determinations (including its reliance on third-party fact-finding) or its rejection of Myanmar's argument that the plausibility standard was unmet given the high standard to establish genocidal indent.[25] Without comment, the author quotes the Court's determination not to include a non-aggravation measure, and the text omits discussion of the reporting requirement or the rejection of a request that a UN fact-finding body be granted access into Myanmar.[26] The analysis could have done more to situate the decision within the doctrinal and jurisprudential trends with which the book is concerned.[27]

In sum, this contribution to the literature on provisional measures regrettably does not live up to its ambitious goals. There is a shortage of cogent analysis and the coverage of ICJ practice since the 1990s is uneven. A different concern relates

24 *The Gambia v. Myanmar* (n. 3), para. 86.

25 *The Gambia v. Myanmar* (n. 3), paras 49-56, 70-73.

26 *The Gambia v. Myanmar* (n. 3), paras 62, 82.

27 For analysis: Michael A. Becker, 'The Plight of the Rohingya: Genocide Allegations and provisional measures in *The Gambia v Myanmar* at the International Court of Justice', Melbourne Journal of International Law 21 (2020), 428-449.

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to language and translation. The author acknowledges that she has relied on others for assistance. Unfortunately, the text is often error-prone and difficult to follow. However, the most egregious problem is that excerpts from ICJ decisions and documents such as the ICJ Statute are misquoted throughout the book. Rather than using official English language versions of these materials, the book appears to include unofficial English-language translations from non-English versions. This undermines the author's textual arguments but is of course problematic in any circumstance. While this contribution provides a useful reminder that current debates surrounding provisional measures have roots that extend back throughout the history of the PCIJ and ICJ, the shortcomings noted above demand that the text be approached with caution.

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