

Dialogue with Legal Practitioners

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1. Introduction

It is an honour for me to address you at this Dialogue. I thank Professor Roy Lee for inviting my Colleagues and I to speak on a topic of growing interest amongst international lawyers and people familiar with the proceedings of the International Court of Justice. Professor. Lee, for me to be able to respond or comment upon the views of my senior colleagues after they have spoken, is an added privilege, for which I have you to thank! I thank both President Yusuf and Judge Cancado Trindade, for each of their presentations. President Yusuf has highlighted the role that provisional measures play in dispute settlement and taken us through the various pre-indication criteria that the Court examines before deciding whether or not to indicate them. Judge Cancado on the one hand has raised some very interesting arguments, namely that Provisional Measures are in fact an autonomous regime of proceedings distinct from the main case: “ a case within a case” so to speak, which the Court should handle as such by making specific findings as to their compliance or not before the judgment on the merits.

In my presentation I focus on the post-indication aspects of provisional measures, namely, compliance with provisional measures; monitoring of compliance, and modification and revocation of provisional measures. As you can imagine, it's one thing for the Court to indicate interim measures to protect the rights of the disputing parties *pendente lite*: it's quite another for the parties to actually comply with those measures. I deliberately avoid the term "enforcement" for the reason I will explain below. The Court itself continues to explore ways and means of strengthening compliance with its provisional measures orders, through reform of its Rules and practice. So perhaps this is an excellent forum to exchange ideas on how that compliance can be improved.

Enforcement of court's decisions/judgments distinguished

Article 94 of the Charter of the United Nations states that:

- i. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

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- ii. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have a recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 94 envisions on the one hand, that compliance with the Court's decisions and judgments is voluntary act on the part of Sovereign States consensually appearing before the Court; whilst on the other, enforcement is political process whereby the Security Council only steps in at the invitation of an aggrieved party in the event of non-compliance by the other party.¹ Although Article 94 of the UN Charter and Article 41.2 of the Statute of the ICJ appear to establish some kind of organic cooperation between the Court and the Security Council in ensuring compliance with decisions or judgments of the Court, in reality the two organs act quite independently and the Security Council will not step in to enforce a judgment of the Court, much less provisional measures, unless the breach is so serious as to 'pose a threat to international peace and security.' Given the focus of this presentation, I do not discuss issues of enforcement.

2. The obligation of compliance

The obligation of compliance with provisional measures is rooted in Article 41 of the ICJ Statute as we have already heard.² If there was any doubt as to the existence of such an obligation before the *Avena and LaGrand* cases, the Court has since made it abundantly clear both in the *Armed Activities case*³ and more recently in *Georgia v Russia*⁴ and the *Temple of Preah Vihear case*⁵, that its orders on provisional measures create international legal obligations which the parties are required to comply with. Be that as it may, provisional measures indicated by the Court are often in danger of being violated or not complied with by one or both of the disputing parties. Since *LaGrand* the ICJ has issued 20 orders related to provisional measures.

¹ M. Lando, 'Compliance with Provisional Measures Indicated by the International Court of Justice' (2017) 8 JIDS 22.

² Article 41: 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 be given to the parties and to the Security Council.

³ *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep. p.168, para 263.

⁴ *Application of the International Convention on the Elimination of all forms of Discrimination (Georgia v Russian Federation)* (Provisional Measures) (Order) ICJ Rep. 2008 para 147.

⁵ *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Provisional Measures Order) [2011] ICJ Rep. p.554 paras 67-69.