USE AND ABUSE OF INTERIM PROTECTION BEFORE INTERNATIONAL COURTS AND TRIBUNALS

Karin Oellers-Frahm

A. Introduction

The settlement of international disputes by international courts or tribunals, which a century ago was just at its beginnings, can today be considered a success story. The number of international dispute settlement organs has increased impressively, which in the last analysis reflects the acceptability of the judges’ work. It is therefore a pleasure to contribute to the Festschrift in honour of Rüdiger Wolfrum who embodies not only the qualities of a renowned international judge, but also those of an outstanding international lawyer familiar with and also active in nearly all fields of international law.

This chapter will focus on a particular instrument which has increasingly been used—perhaps also abused—in international adjudication, namely provisional measures of protection. Of course, provisional protection measures have been the subject of numerous—even innumerable—articles, and it would seem that since the findings of the ICJ\(^1\) which have been followed by other courts and judicial bodies\(^2\) on the binding force of such measures all has been said and there is no need for any further study of such provisional measures. However, recent developments in using interim protection and also Rüdiger Wolfrum himself mentioning rather casually and without further explanation that “a tendency may develop that de facto decisions on provisional measures may substitute those on the merits”\(^3\) have paved the way for a new discussion on interim protection. Accordingly, the following necessarily summary considerations will first address some recent developments

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\(^1\) LaGrand (Germany v. United States of America), ICJ Reports 2001, 466.


which can be summarized under the heading of interim measures as a means of “litigation strategy” (B) and then turn to the particularities of the use of interim protection in the field of human rights (C) and in the context of the Law of the Sea Tribunal’s competence to issue provisional measures to safeguard the marine environment (D); this will lead to an assessment of the issue of de facto substitution of the decision on the merits by the decision on provisional measures (E), which will be followed by some concluding remarks on the use, abuse or merely improper use of provisional measures (F).

B. INTERIM PROTECTION AS A LITIGATION STRATEGY

The fact that requests for the indication of provisional measures are increasing before all international courts and tribunals cannot be explained just by the increase in cases at large, but is also due to the aims pursued by requests for such measures which are not always strictly related to the preservation of the rights at stake in the case, and thus the efficacy of the judgment, which are the original justification for such measures. This means that the request for interim protection becomes part of the litigation strategy, which in principle serves two different aims: on the one hand interim protection is used to assess the possible outcome of the case in order to plan its further conduct, and on the other hand it may be used because it offers a forum for addressing the international public.4

I. INTERIM MEASURES AND PROSPECTS OF FURTHER CONDUCT OF PROCEDURE

A request for interim protection leads to a prompt reaction from the court, which undertakes a summary evaluation and prima facie finding on jurisdiction as well as on the possible injury to the rights claimed, thus including a first appreciation of the basis of the claim. On the basis of the findings of the court both parties will be enabled roughly to appreciate the chances of success of their claims and the pros and cons of going on with the case. If, for example, the court finds prima facie in favour of its jurisdiction, the Applicant can be fairly sure that the court