CHAPTER THREE

THE ICJ AS A GUARDIAN OF COMMUNITY INTERESTS?
LEGAL LIMITATIONS ON THE USE OF PROVISIONAL MEASURES

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I. Introduction

About twenty years ago, Bruno Simma proposed the term ‘community interests’ in order to describe ‘a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States’.¹ The concept of community interests is elusive, but many scholars appear to share its core idea: there are fundamental values which exist beyond a bilateral relationship between States.² As globalization produces the effect of lowering the threshold of sovereignty,³ it has led to an increasing awareness that some interests have a fundamental value which transcends the interests of individual sovereign States. Examples of community interests include, but are not limited to, the maintenance of international peace and security, the protection of human rights, the protection of the environment, and the management of spaces beyond national territorial jurisdiction, all of which essentially have a multilateral dimension.

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¹ See Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 Recueil des Cours 229, 233.
³ See Rosalyn Higgins, ‘International Law in a Changing International System’, Themes and Theories, (Oxford University Press, 2009) vol 2, 906–907. Higgins points out that globalization represents the reality that we live in at a time when the walls of sovereignty are no protection against movements of capital, labor, information, and ideas.
While the existence of community interests in international law is now widely accepted, this development has not yet led to the creation of institutions for their adequate protection or enforcement. As a result, much of the discourse has focused on how community interests may be enforced through international dispute settlement.\(^4\) In this context, some scholars argue that the International Court of Justice (‘the ICJ’ or ‘the Court’) is becoming a true ‘World Court’ which functions as a forum for the maintenance of peace and the protection of human rights.\(^5\) There have also been calls for the ICJ to actively respond to enforce community interests. However, such a function stands in contrast to the traditional role of the ICJ which concerns settling an inter-State dispute through a strict bilateral process between two States. This traditional role focuses mainly on protecting and adjudicating individual interests and rights of States. This raises the question of whether, and to what extent, the Court can reconcile its function as adjudicator of bilateral disputes with the multilateral demands of protecting and enforcing community interests.

Focusing on the judicial protection of community interests through provisional measures indicated by the ICJ, this chapter seeks to address the above question. It is suggested that States and the Court have already used the existing procedural tools to enforce community interests. In particular, provisional measures have been used as a means of protecting community interests.\(^6\) This view, however, presents two problems in relation to Article 41 of the ICJ Statute (‘the Statute’). The first concerns the purpose of provisional measures. Whereas Article 41 of the Statute stipulates that ‘the Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party’,\(^7\) it is debatable whether the purpose of provisional measures is confined to the preservation of rights. Markus Benzing has pointed out, for instance, that ‘provisional measures in inter-State judicial proceedings traditionally serve to

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\(^6\) See, eg, Benzing, above n 2, 377–379.

\(^7\) *Statute of the International Court of Justice* art 41.