

Implementation of ICJ Provisional Measures: An Innovative Approach to Article 78 of the Rules of the Court

Vahid Bazzar* and Heibatollah Nazhandimanesh**

DOI: 10.22034/IRUNS.2020.126538

Received: 20 August 2019

Accepted: 1 February 2020

Abstract

According to Article 78 of the Rules of the International Court of Justice, the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated. While this provision makes it more likely that the provisional measures will be implemented, it is notable that it remains unexplored in the Court's case-law. In the case relating to the "Alleged Violations of the Treaty of Amity", the Court adopted an innovative approach and, contrary to its practice, exercised its power under Article 78 only a few months after it ordered the provisional measures. It thus requested the United States of America to notify the Court of any measures taken to execute the provisional measures within a maximum of 48 days. It is argued here that repetition and confirmation of this innovative approach in future cases will make it possible for the Court to act as a supervisory entity assuring the implementation of any provisional measures it has ordered.

* PhD in International Law, Faculty of Law and Political Science, Allameh Tabataba'i University.

** Assistant Professor of Public International Law, Faculty of Law and Political Science, Allameh Tabataba'i University.

Keywords: International Court of Justice, ICJ, Article 78, provisional measures, “Alleged Violations of the Treaty of Amity” case, Islamic Republic of Iran, United States of America

Introduction

Article 41 of the Statute of the International Court of Justice (ICJ) stipulates that “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”.¹ However, while contemporary international law recognizes the binding nature of obligations arising from the ICJ interim measures, an assessment of the Court’s case-law reveals that it has been difficult to monitor their implementation. Nonetheless, as contained in Article 41 (1) of the Statute, these measures are undertaken in response to the urgent needs of either parties; accordingly, the issues concerning their implementation need to be pursued urgently. When provisional measures are requested from the Court,² it must be proved that a real, imminent

¹ Statute of International Court of Justice, Art. 41(1).

² The provisional measures requested from the International Court of Justice shall not restrict the Court, and the Court shall, in accordance with its Rules (Article 75 (2)), have the power to indicate measures distinct from those requested. The decisions made in the cases relating to the “Application of the International Convention on the Elimination of All Forms of Racial Discrimination”, and to the “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” are examples of this. See: (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, para. 73; 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. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, para. 100).

risk and an irreparable prejudice will arise by the time the Court renders its judgment. Although urgency is a prerequisite for the provisional measures, it is notable that no article of the Statute and the Rules of the Court is dedicated to the implementation of the provisional measures. Similarly, the Rules of the Court do not indicate whether there is a time limit for implementing of provisional measures ordered by the ICJ. Nor do they stipulate whether the Court shall determine whether the parties have implemented these measures.

According to Article 94 of the United Nations Charter, when “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 recourse to the Security Council” in an attempt to pursue the implementation of provisional measures.³ At the same time, however, the Court may also make efforts to enforce provisional measures by exercising some of its powers. The refusal to implement provisional measures which creates legal obligations may be considered in the judgment of the Court as a basis for the responsibility of the refusing party.⁴ Hence, the

³ The possibility of recourse to the UN Security Council, however, has been subject to disagreement. The practice of the UN Security Council, following provisional measures issued in “Application of the Convention on the Prevention and Punishment of the Crime of Genocide” (Bosnia and Herzegovina v. Serbia) case, has been for the Council to put the issue of the implementation of provisional measures on the agenda. Yet, it has not thus far made any recommendations or decisions in this regard under Article 94 (2). See: (Najafi Asfad, Morteza and Hadi, Mehdi. 2005. “The Guarantee of Implementation of the Judgments of the International Court of Justice”, Legal Letter, Vol. 1, No. 2, at 39).

⁴ The ICJ in the “LaGrand” case held that provisional measures shall create legal obligations and if such obligations are breached, the other party may obtain reparation. See: (LaGrand Case (Germany v, United States of America), I.C.J. Reports 2001, paras. 110, 116). The reparation for disregarding the Court’s provisional measures was first raised in “Interpretation and

Court may employ Article 78 of the Rules to pursue the implementation of any provisional measures it has indicated, requesting the party or parties to provide information on the steps taken to implement these measures.

This article will begin by examining the legal aspects of the power granted by Article 78 of the Rules of the Court. It will then address the approach taken by the Court in the “Alleged Violations of the Treaty of Amity” case when it requested the United States to provide information on the implementation of the provisional measures it had ordered.

I. The Use of Court Power under Article 78 of Rules of the Court

According to Article 78 of the Rules of the ICJ, “the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated”. It is worth noting that this provision was added to Rules in the 1978 revision.⁵ The Court has exercised its power under Article

Application of the Convention on the Prevention and Punishment of the Crime of Genocide” case. In this case, the applicant (Bosnia and Herzegovina) claimed that failure to comply with the Court’s provisional measures (dated April 1 and September 13) by the respondent (Serbia) constitutes a breach of the international obligations of state and, therefore, Serbia must compensate as much as the Court determines. Nevertheless, since the Court failed to find a causal link between the respondent’s obligation to prevent genocide and the damages caused by the genocide in “Srebrenica”, it declared that determining compensation is not an appropriate form of reparation for disregarding provisional measures, and the compensation which the applicant entitled to is satisfaction. Hence, a Declaratory Judgment is deemed sufficient in this case. See: (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, paras. 66 (7), 234,463)).

⁵ The Court had considered the content of this article in its practice and had even accepted a broad interpretation of it before anticipating Article 78 in the Rules of the ICJ. In the “Fisheries Jurisdiction” case, the Court demanded that

78 of the Rules in a few cases. Of course, before this article was added to Rules of the Court, the ICJ had considered it in the “Fisheries Jurisdiction” case.⁶ Thirty years later, it exercised its power under Article 78 in the “Avena” case,⁷ and only within a short period of time after the “Avena” case, this article was applied four more times.

It appears that this change in the Court's case-law stems from the developments following the “LaGrand” case on the binding nature of the Court's provisional measures.⁸ In most cases where

the respondent (Germany) provide the information to the Court and the applicant (Iceland), including in relation to the decisions made and measures taken to monitor and systematize the living resources of the maritime region (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Provisional Measures, I.C.J. Reports 1972, at 35, para. 1 (f). Article 78 is not a novel article specific to the ICJ. Indeed, some other international and regional courts, such as the International Tribunal for the Law of the Sea and the European Court of Human Rights, included a similar article in their Rules. See: (Rules of International Tribunal for the Law of the Sea (ITLOS), Art. 95; Rules of European Court of Human Rights (ECHR) 2015, rule. 39 (According to Article 5 of the Rules of the International Tribunal for the Law of the Sea, each party shall inform the Court, as far as possible, of the implementation of the provisional measures anticipated by the Court. In the International Tribunal for the Law of the Sea, however, this is not subject to the Court's request. Nevertheless, the International Tribunal for the Law of the Sea may also request further information on the implementation of provisional measures from the parties (Paragraph 2, Article 95 of the procedural law of the International Tribunal for the Law of the Sea).

⁶ Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), I.C.J. Reports 1972, Order of 17 August 1972, at 35, para. 1(f).

⁷ Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, I.C.J. Reports 2003, para. 59 (1) (b).

⁸ The nature of provisional measures requested by the ICJ was disputed among jurists before the “LaGrand” case. The Court, however, permanently terminated all the questions by its judgment in the “LaGrand” case and declared that by virtue of the subject and purpose of the Statute, as well as the text of its Article 41, provisional measures of the Court shall be binding so as to prevent the violation of the rights of parties stipulated in the Court's judgment. The Court also cited Article 94 (1) of the UN Charter and the

the Court has requested information from the party or parties concerning the implementation of provisional measures, this has been unanimously done by the judges of the Court,⁹ although the unanimity has been achieved only in three cases. In the first case where the Court employed Article 78 (the “Fisheries Jurisdiction” case), only one of the judges, “Padilla Nervo”, opposed it. This objection, however, did not specifically concern the request for information on the implementation of provisional measures. This provisional measures had stipulated certain requirements in six paragraphs, one of which was related to the request of information on the implementation of provisional measures, while all paragraphs were voted for simultaneously.¹⁰ Another objection raised from Judge Joan E. Donoghue in “Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear” case.¹¹ In the “Application of the International Convention on the Elimination of All Forms of Racial Discrimination” case where the consensus among judges on the request under Article 78 was hardly achieved (eight to seven), the Court requested the parties to notify it of their implementation of provisional measures, as indicated

preparatory work for the formulation of Article 1 to empower its statement. See: (LaGrand (Germany v. United States of America), I.C.J. Reports 2001, paras. 102, 108)). The Court repeated and reaffirmed its finding on provisional measures in subsequent cases.

⁹ Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, I.C.J. Reports 2003, para. 59 (1) (b); Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures. I.C.J. Reports 2011, para. 86 (4).

¹⁰ Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Provisional Measures, I.C.J. Reports 1972, at 35.

¹¹ Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear, Provisional Measures, I.C.J. Reports 2011, para. 69 (C).

by the ICJ in that case.¹² It should be noted that, at least in two cases, the requested states have complied with the Court's request under Article 78 of the Rules. For example, in the "Fisheries Jurisdiction" case, the parties (Iceland and Germany) provided the information requested by the Court on the implementation of provisional measures while submitting their memorials. Similarly, in the "Application of the International Convention on the Elimination of All Forms of Racial Discrimination" case, Russia and Georgia reacted to the request made by the Court under Article 78; both submitted reports to the Court on the implementation of provisional measures the Court had indicated on 15 October 2008.¹³

The purpose of the creation of Article 78 is to further empower the Court in the process of anticipating its provisional measures¹⁴, and to ensure that the Court will monitor the implementation of provisional measures until the judgment is rendered. Thus, for example, in "The United States Diplomatic and Consular Staff in Tehran" case, the "Breard" case, the "LaGrand" case, and the "Military and Paramilitary Activities of the United States of

¹² Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) , Provisional Measures. I.C.J. Reports 2008. Para. 149 (D). In her dissenting opinion annexed to the Court's judgment on the "Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear" case, Mrs. "Joan E. Donoghue" did not explain why, contrary to the opinion of six other judges, she chose to vote against this paragraph of the Court's judgment which obliges the parties to provide information on the implementation of provisional measures.

¹³ Oellers-Frahm, Karin. 2012, "Article 41" The Statute of the International Court of Justice: A Commentary, edited by Andreas Zimmermann and Christian Tomuschat and Karin Oellers-Frahm and Christian J. Tams, Oxford University Press, at 1072.

¹⁴ Rosenne, Shabtai. 1983, A Commentary on the 1978 Rules of the International Court of Justice, Martinus Nijhoff Publishers, at 157.

America against Nicaragua” case, the Court emphasized that by the time the judgment is rendered, it will continuously monitor the issues concerning the implementation of provisional measures. This continuing monitoring stems from the nature of provisional measures which is considered as a preventive measure rather than a punitive one.¹⁵ There shall be no restriction on the Court's request for the provision of information on the implementation of provisional measures, which can be made from either one or both parties.¹⁶ According to the Court's case-law regarding Article 78, the ICJ has not set any time limit for the parties to provide information.¹⁷ In the “Application of the

¹⁵ United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). Provisional Measures. I.C.J. Reports 1979, para. 47 (2); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, I.C.J. Reports 1984, para. 41 (C); Breard (Paraguay v. United States of America). Provisional Measures. I.C.J. Reports 1998. Para. 41 (II); LaGrand (Germany v. United States of America) Provisional Measures, I.C.J. Reports 1999, para. 29 (II). See also: Miles. Cameron A. 2017, Provisional Measures before International Courts and Tribunals, Cambridge University Press. at 329.

¹⁶ The ICJ may even oblige the requesting party of provisional measures to carry out certain measures, and this is justified by the fact that the Court has the power to indicate provisional measures *proprio motu*.

¹⁷ Unlike the ICJ, The Permanent Court of Arbitration has limited the implementation of provisional measures to the specified time. See: Miles, Cameron A. 2017, Provisional Measures before International Courts and Tribunals, Cambridge University Press, at 322. In the “Arctic Sunrise” case for which the Permanent Court of Arbitration was established by virtue of Annex Eight of the Convention on the Law of the Sea to consider the dispute between Russia and Netherlands, it issued provisional measures for the release of the ship and its 30 crews, which the Russian fully executed. The Court, of course, declared that although the release of the crew from the Russian prison took place at a reasonable time (seven days after the provisional measures were issued) its exit from Russia and the release of the “Arctic Sunrise” ship were respectively carried out one and six months after the issuance of the provisional measures, and this treats the non-compliance of provisional measures at the specified time. See: (Arctic Sunrise, PCA Case No 20102, paras. 343, 350,

International Convention on the Elimination of All Forms of Racial Discrimination” case, for example, where the Court issued its order of 15 October 2008 and requested the parties to provide information on the implementation of provisional measures, the report of the applicant (Georgia) was submitted approximately three months after provisional measures were issued, while the report by the respondent (Russian Federation) was submitted almost nine months later (i.e., on 8 July 2009).¹⁸ The Court, of course, was reluctant to envisage a time limit on the provision of information concerning the measures taken about the implementation of provisional measures. In addition to the fact that the Court does not impose any time limit on the provision of information, it does not object to information provided after a long time. It even ignores practically the request to obligate the other party to provide information within a time limit. For example, in the “Certain Activities Carried Out by Nicaragua in the Border Area” case, although the Applicant (Costa Rica) had asked the Court to assign a two-week deadline for the parties to provide information on the implementation of provisional measures, it disregarded the request.¹⁹

355). According to the appropriate practice of the Permanent Court of Arbitration, the “urgency” criterion as a prerequisite for issuing provisional measures must be taken into account when implementing provisional measures.

¹⁸ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), I.C.J. Reports 2011, para. 9.

¹⁹ Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, I.C.J. Reports 2013, para. 12 (3). The case concerning “Certain Activities carried out by Nicaragua in the Border Area” which concerning the dispute between Costa Rica and Nicaragua in 2010 was merged with “Road Construction in Costa Rica Along San Juan River” case concerning the dispute between Costa Rica and Nicaragua (2011) by the decision of the Court under two provisional measures issued on 17 April 2013.

There are several questions concerning Article 78. First, the request for information on the measures taken regarding provisional measures obligatory? To answer this question, it must be ascertained whenever the Court has exercised its power concerning the use of Article 78, and has obliged the requested party to comply with it, while the Article 78 refers to the Court's request for the provision of information. When the Court has acted under Article 78, this issue has often been stipulated in the dispositive of provisional measures, rather than in its text, indicating that it is as obliging as provisional measures themselves. The Court also uses the word "shall" to oblige in this regard, a word with a high-binding force. No dispute so far exists regarding the fact that the obligations arising from the Court's provisional measures are binding, and treat as the obligations arising from the Court's statute (Article 41) as the annex of the Charter of the United Nations. The binding nature of the Court's decisions has also been stipulated in the Charter (Article 94 (1)), and while the Court confirmed this in its case-law,²⁰ it has emphasized that provisional measures create "international legal obligations" for its addressee.²¹ Another argument supporting this conclusion is based on Article 49 of the Statute and Article 61 of the Rules of the Court. According to these articles, the Court may, during the proceedings or before the commencement of them, request the party or parties to provide further documents or explanations. Therefore, if Article 78 is assumed to only repeat

²⁰ La Grand (Germany v. United States of America), I.C.J. Reports 2001, para. 109.

²¹ Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA), Provisional Measures, I.C.J. Reports 2018, para. 100. The Court's confirmation to create international legal obligations stemming from its provisional measures indicates that the violation of these obligations by the party will cause international responsibility (Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 2).

these articles, it will have no practical benefit. Likewise, if we assume that Article 78 of the Rules merely requires an explanation from the party or parties, the object of this article shall be null and void. Nevertheless, the Court has adopted a “double-standard” practice in this regard, because its approach to information provision reinforces its binding hypothesis, while its reaction to the responses of the implementing party or parties has been highly passive. While the Court’s Statute and Rules do not specify what measures the ICJ must take after receiving the information, it is clear that the Court itself has not made any attempt to explain this issue in its case-law,²² and practically, in cases where it has received such information, it has failed to take any measures.²³ The Court has also been extremely passive where the requested state has refused to comply with its request. The Court, however, could take certain measures to reduce this non-compliance; it could, for example, declare the refusal of the requested state in the periodic report submitted to the United Nations General Assembly.²⁴ Similarly, in compliance with the “Public Shame” system implemented by the African Court of

²² Zyberi, Gentian. 2010, “Provisional Measures of the International Court of Justice in Armed Conflict Situations”, *Leiden Journal of International Law*, Vol. 23, Issue. 3, at 575.

²³ In its periodic reports to the General Assembly, the ICJ has highlighted the refusal of the requested state to implement provisional measures. In its 2006 report, for instance, the Court declared that Uganda did not comply with provisional measures anticipated by the Court on 1 July 2000, in the “armed activities on the territory of Congo” case. Additionally, in its 2007 report, the ICJ referred to Serbia and Montenegro’s non-compliance with two provisional measures issued by the Court on 8 April and 13 September, in the “Interpretation and Application of the Convention on the Prevention and Punishment of the Crime of Genocide” case.

²⁴ Declaration of violation is regarded as one of the methods of reparation and, in particular, one of the examples of satisfaction (Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 37 (2)).

Human Rights, it could periodically publish a list of states which have failed to provide information on the implementation of provisional measures.²⁵ Since neither the Courts' Statute and Rules nor its case-law indicate how the ICJ might react when a party to a case does not comply with a request made under Article 78,²⁶ the consequences of such non-compliance are likewise unclear.

It may be possible to request information concerning the implementation of provisional measures after the ICJ indicated them. Therefore, the Court may, in its judgment, react to the non-compliance with the request. Two situations must be distinguished. When the refusing party also fails to comply with some other provisional measures the ICJ has indicated, the Court

²⁵ Lando, Massimo. 2015, "Compliance with Provisional Measures Indicated by the International Court of Justice", *Journal of International Dispute Settlement*, Vol. 8, Issue. 1, at 50.

²⁶ The Court's disregard for the refusal of the parties to provide information on the implementation of provisional measures can be found in other cases as well. Under Article 74 (4) of the Court's Rules, for instance, pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects. In the "Alleged Violations of the Treaty of Amity" case, the ICJ exercised its power under this Article only nine days after the Applicant requested that provisional measures were issued, and sent a letter to the respondent's Minister of Foreign Affairs, calling upon him to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects. The US replied that the Court is not competent; however, the Court did not react to the US's non-compliance with the request. Although Iran repeatedly underscored the non-compliance by the US during hearings on the request for provisional measures, (Verbatim Record of Public sitting held on Tuesday 27 August 2018 in the Case Concerning Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA), The First Round of Oral Observations of the Iran (Mohsen Mohebi), at 20, paras. 6-7, 38, available at <https://www.icj-cij.org/en/case/175>), the Court itself made no reference to it in the interim 3 October 2018.

may announce the issue of refusal, in addition to failure to comply with the other provisions of provisional measures, in merit, in particular when issuing its judgment.²⁷ If the party implements the provisional measures indicated, and the Court does not render any judgment against the party, the question arises whether non-compliance with the Court's request under Article 78 can be treated as a basis for the wrongful act. It appears that in this situation, too, the international responsibility of the refusing state can be declared, because obliging the party to provide information on the implementation of provisional measures has often been referred to in the dispositive of provisional measures which has the binding nature. If in its judgment, the Court refer to the refusal of the party to comply with the Court's request under Article 78 as a violation of its obligation, the request under Article 78 may enjoy the legal penalty of Article 94 (2) of the Charter.

It is also questionable whether the party is entitled to ask the Court to oblige the other party to provide information on the implementation of provisional measures under Article 78. The phrase "the Court may request ..." as contained in Article 78, indicates that the Court's action under this article is not bound to the request of any party benefiting from provisional measures. Rather, the Court acts *proprio motu* in this regard. Therefore, the request of the beneficiary party does not affect the Court's action under Article 78. There is, of course, no prohibition in this regard and by referring to the possible violations of provisional measures, the other party may attract the Court's attention, requesting it to exercise its power under Article 78.

²⁷ Oellers-Frahm, Karin. 2012, "Article 41" The Statute of the International Court of Justice: A Commentary, edited by Andreas Zimmermann and Christian Tomuschat and Karin Oellers-Frahm and Christian J. Tams, Oxford University Press. at 1072.

The approach taken by the ICJ in the “Alleged Violations of the Treaty of Amity” case would suggest that the Court is not utterly indifferent to the request of the party concerning Article 78. Following the issuance of provisional measures of 3 October 2018, the Iranian representative submitted a letter directly to the ICJ President, requesting that the Court exercise its power under Article 78, and that the USA elaborate on the implementation of provisional measures. Subsequently, the ICJ formally requested the USA to provide information detailing the steps it took to comply with the Court’s provisional measures.²⁸

II. An Innovative Approach to Article 78 of the Rules of the Court: the “Alleged Violations of the Treaty of Amity” case

On 16 July 2018, Iran filed an application instituting proceedings against the United States with respect to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the US, which was signed on 15 August 1955 and entered into force on 16 June 1957. It maintained that American nuclear sanctions against Iran, which were reimposed on 8 May 2018 when the US announced its withdrawal from the Joint Comprehensive Plan of Action (JCPOA), have violated the Treaty of Amity. On the same day, Iran also submitted a request for the indication of provisional measures. In Particular, it requested that, “pending its final decision, the Court indicate that the USA shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions, and refrain from imposing or threatening announced further sanctions and measures which might aggravate or extend the

²⁸ <https://www.irma.ir/news/83259705> (accessed 23 June 2019).

dispute submitted to the Court”. On 3 October 2018, the Court indicated certain provisional measures so as to remove any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of medicines and medical devices; foodstuffs and agricultural commodities; and spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation. The Court further stipulated that “the United States of America shall ensure that those licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point”.²⁹ On 29 March 2019, the Court exercised its power under Article 78 of the Rules, requesting that the US provide information on measures taken to implement the provisional measures it had indicated. To further strengthen its order of 3 October 2018, it however seems that the Court applied a broad interpretation of Article 78. On this basis, a distinction must be made this and other cases with regard to the approach taken by the ICJ concerning this article.

The first distinction relates to the circumstances and the time in which the Court exercised its power under Article 78. The text of the Article does not refer to the time in which the Court shall exercise its power under this article. Of course, this timing can be seen from the Court's case-law. The ICJ has always responded to requests for the indication of provisional measures. In the “Alleged Violations of the Treaty of Amity” case, the Court requested that the US submit a report on the measures taken to implement provisional measures approximately six months after it issued its order. It might seem, at first glance, that the Court has

²⁹ Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018, para. 102.

delayed requesting information on the implementation of the provisional measures it had indicated. Upon closer examination, however, it becomes evident that, by taking an innovative approach in the “Alleged Violations of the Treaty of Amity” case, the ICJ has departed from the ineffective approach concerning Article 78, as adopted in previous cases brought to it. In other words, the ICJ was accustomed to making a general request for the provision of information on the implementation of provisional measures which it never pursued. However, pursuing the implementation of provisional measures several months after its indication, as it has been done in the “Alleged Violations of the Treaty of Amity” case, would suggest that the Court not only has not neglected provisional measures after being issued but it has continuously monitored their implementation. If the Court continues to take this approach and accordingly can be seen as having the authority to monitor the implementation of provisional measures, the parties will always endeavor to fully implement the provisional measures,³⁰ because non-compliance with the Court's interim order could influence its final decision.

In previous cases, too, having anticipated the provisional measures in provisional measures which were supposedly urgent, the Court neglected the implementation of provisional measures and started jurisdiction proceeding. Nevertheless, addressing the

³⁰ If the Court is now requested to indicate provisional measures, it suspends the proceedings and resumes it after deciding on the request. In the early years of the Court's activity, however, consideration of the request to indicate provisional measures was carried out simultaneously with the principal proceedings. This action which was carried out even in some cases, including the “Anglo-Iranian Oil Company” case, raised the question whether if the Court's jurisdiction is not obtained during the proceedings, what will happen to the consideration of the request to indicate provisional measures or if the jurisdiction is not obtained after provisional measures is indicated, is it possible to compensate the damage inflicted by the implementation of provisional measures? See: Mir Abbasi and Sadat Meidani, at 118-119, 2010.

implementation of provisional measures six months after it was indicated can highlight the importance of these provisional measures which often have a humanitarian and/or human rights nature.

Interestingly, the Court in this case was to set a relatively short time limit for providing information on the implementation of provisional measures. On 29 March 2019, the Court held that the USA has 48 days to provide the Court with information on the implementation of provisional measures. The US submitted the report to the Court 10 days before the deadline.

Setting a deadline for providing information on the implementation of provisional measures has no precedent in the Court's case-law, because when the ICJ has acted under Article 78, and the other party has refused to provide information, it has not reacted to such refusal. Although determining a deadline, which its non-compliance has no legal penalty, seems inappropriate, this highlights the Court's seriousness in pursuing the implementation of provisional measures. It is worth mentioning that, in the "Alleged Violations of the Treaty of Amity" case, the ICJ also requested Iran to provide any information on implementation of provisional measures. By setting a time limit for providing information on the implementation of provisional measures, it seems clear that the Court acted in compliance with the purposes and conditions of the indication of the provisional measures, including the urgency of implementing of anticipated provisional measures and the irreparable nature of the damages inflicted by the violation of rights which provisional measures aim to recover.

When the Court provides that some urgent measures are necessary to safeguard the rights of the parties until a judgment is handed down or that some urgent measures are required to prevent the worsening of the situation and then indicates

provisional measures but makes no attempt to implement them, it would seem that its position will decline to an ineffective authority for the settlement of disputes. Conversely, implementing provisional measures, which is binding under Article 94 (1) of the UN Charter and Article 59 of the Court's Statute, could make it a reliable authority for resolving disputes between countries and promote its validity in the international community.

Conclusion

It is obvious that ICJ's interim orders impose binding obligations. Despite this, the implementation of these interim orders calls for an effective monitoring process. This has been neglected in the Court's Statute and Rules. However, an important disadvantage of the Court's approach to the implementation of provisional measures and Article 78 of the Rules of the Court is reflected in the prolongation of the proceedings. In the situation where states are urged to settle their disputes through amicable means and refrain from using force, which is prohibited in international relations, if provisional measures prove to be inefficient, the ICJ can no longer be regarded as a key tool for the peaceful settlement of international disputes.

The innovative approach taken by the ICJ in the "Alleged Violations of the Treaty of Amity" case points to the impact Article 78 of the Rules of the Court may have on the implementation of provisional measures. Here, the Court did for the first time oblige the refusing party (USA) to provide the required information within 48 days of the indication of the provisional measures. In its application, however, Iran had requested the Court to oblige the USA to provide information on the implementation of provisional measures within three

months.³¹ The Court addressed the implementation of provisional measures six months after it issued its order of 3 October 2018. This reflects the Court's shift from its former practice where it used to indicate measures while at the same time requesting information on the implementation of provisional measures. The Court can stabilize its innovative approach to the use of its power on the implementation of provisional measures in the "Alleged Violations of the Treaty of Amity" case by repeating it in subsequent cases. On the basis, although it's Statute and Rules are silent, the Court could provide a broad interpretation of Article 78, thus making it more likely that its provisional measures will be implemented urgently. Finally, it is submitted that Article 78 of the Rules of the Court could be amended to ensure the implementation of provisional measures. For example, it could be inspired by Article 95 of the Rules of the International Tribunal for the Law of the Sea whereby the party to a case is obligated to provide information on the implementation of provisional measures even without the Court's request.

³¹ Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA), Request for the indication of provisional measures, 16 July 2018, para. 42 (c).