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INTERNATIONAL COURTS AND TRIBUNALS SERIES

Provisional Measures in International Law

*The International Court of Justice and the
International Tribunal for the Law of the Sea*



SHABTAI ROSENNE

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The International Court of Justice and the
International Tribunal for the Law of the Sea

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and Cesare Romano

PROVISIONAL MEASURES IN
INTERNATIONAL LAW

INTERNATIONAL COURTS AND TRIBUNALS SERIES

A distinctive feature of modern international society is the increase in the number of international judicial bodies and dispute settlement and implementation control bodies; in their case-loads; and in the range and importance of the issues that they are called upon to address. These factors reflect a new stage in the delivery of international justice. The International Courts and Tribunals series has been established to encourage the publication of independent and scholarly works which address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including their institutional, substantive and procedural aspects.

To the memory of my Mentors—
Hersch Lauterpacht and Jacob Robinson

Peace be upon them

Preface

Since the establishment of the Permanent Court of International Justice in 1921, Article 41 of its Statute, on provisional or interim measures of protection, has been the subject of prolonged controversy. The language of that provision gave rise to the question of whether orders of that Court indicating provisional measures of protection created any legal obligation of compliance on the parties to whom they were addressed. It seems, on good authority, that most writers of that period were of the view that those indications were in the nature of recommendations, to be considered by their addressees in good faith, but not creating binding obligations. This controversy among the writers has continued after the establishment of the International Court of Justice as a principal organ of the United Nations. It was finally put to rest by the clear decision of the present Court in the *LaGrand* case in 2001 (ICJ Rep. 2001, 466), that an Order indicating provisional measures of protection creates binding obligations on the parties, and that non-compliance with such an Order could give rise to an instance of international responsibility.

Diplomatic practice showed some impatience with the idea that orders indicating provisional measures of protection could not be binding on the parties, and a number of treaties, both bilateral and multilateral, were concluded, even during the days of the League of Nations, providing for compliance with such orders. That diplomatic position was finally consolidated in the complicated settlement of dispute provisions of the UN Convention on the Law of the Sea of 10 December 1982 and the establishment of the International Tribunal for the Law of the Sea, with compulsory jurisdiction over requests for provisional measures in certain cases. That Convention contained a specific provision obliging its parties to comply with any provisional measures of protection prescribed by any court or tribunal having jurisdiction in accordance with that Convention.

In addition to this, both the International Court of Justice and the International Tribunal for the Law of the Sea have been faced with entirely new types of requests for provisional measures. These are bringing the whole machinery of the judicial settlement of international disputes more closely into the broader regime for the peaceful settlement of international disputes and the maintenance of international peace and security, the prime purpose of the United Nations, of which the International Court of Justice is not only a principal organ but also the principal judicial organ, and through which the international community established the International Tribunal for the Law of the Sea, itself brought into a co-operative working arrangement with the United Nations.

These are a series of radical and far-reaching changes in the standing of international tribunals, especially the two standing tribunals mentioned here, and in the mechanisms available to diplomatic processes for the settlement of disputes. In that context, judicial decisions on provisional measures of protection are beginning to assume a new position and a new importance.

This has led me to re-examine in greater detail the present position of provisional measures of protection in the context of the judicial settlement of international disputes. The former controversies of whether such measures are binding and whether they are an example of a general principle of law recognized by the nations of the world within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice have lost much if not all of their importance (except perhaps as a matter of legal theory). While this book concentrates on the present position, the historical evolution, especially between the *Alabama* arbitration of 1872 and the establishment of the League of Nations in 1919, cannot be ignored, as it is there that the germs of the institution of provisional measures are to be found.

I wish to thank the Center for Oceans Law and Policy of the University of Virginia and Martinus Nijhoff Publishers for permission to include extracts from their *United Nations Convention on the Law of the Sea: A Commentary* (1989–2002); Martinus Nijhoff Publishers for permission to include extracts from my articles originally published in their journal *Law and Practice of International Courts and Tribunals* and in different collections of essays which that House has published; and Oxford University Press for permission to use extracts from my article in *State, Sovereignty and International Governance*, edited by Gerard Kreijen (2000).

I owe a special debt of gratitude to the Registrars of the International Court of Justice and of the International Tribunal for the Law of the Sea for helping to keep me supplied with relevant materials. Professor Myron Nordquist of the University of Virginia assisted me in obtaining some obscure documents of the United States Senate relating to the Bryan Treaties. Dr Cesare Romano of New York University and one of the managers of the Project on International Courts and Tribunals gave me valuable assistance regarding the activities of the short-lived and controversial Central American Court of Justice, the first international tribunal to exercise its power to order provisional measures. Dr Chester Brown of St John's College, Cambridge, unearthed for me the details of the discussions in the Institute of International Law in 1871, when the first code of international arbitration procedure was drawn up. I have also had the advantage of being able to use the manuscript of Dr Silvina S. González Napolitano of the University of Buenos Aires, *Las Medidas provisionales en derecho internacional ante las Cortes y Tribunales internacionales* (2002), a work crowned with the Rolin-Jaequemyns Prize of the Institute of International Law in 2003. Finally, I

wish to thank John Louth and all his colleagues at Oxford University Press for seeing this book through the press.

This manuscript was completed on 30 April 2004.

Sh. R.
Jerusalem 2004

Abbreviations and Note on Documentation

adv. op.	advisory opinion
AJIL	American Journal of International Law
BYIL	British Year Book of International Law
CTS	Consolidated Treaty Series
GAOR	General Assembly Official Records
ICSID	International Centre for the Settlement of Investment Disputes
ILR	International Law Reports
<i>Law and Practice</i>	Sh. Rosenne, <i>Law and Practice of the International Court, 1920–1996</i> (The Hague: Martinus Nijhoff, 1997)
LNTS	League of Nations Treaty Series
<i>Recueil</i>	Academy of International Law, <i>Recueil des Cours/Collected Courses</i>
SCOR	Security Council Official Records
UNCIO	United Nations Conference on International Organization (The San Francisco Conference, 1945)
UNRIAA	United Nations <i>Reports of International Arbitral Awards</i>
UNTS	United Nations Treaty Series
YBILC	Yearbook of the International Law Commission

As far as possible documents of international organizations, of the International Court of Justice, and the International Tribunal for the Law of the Sea, are taken from their official publications. However, many documents and cases are not yet available in printed form. These have been taken from their respective websites and are indicated in this book by their dates and, if relevant, their case numbers. Published arbitral awards are taken from the United Nations *Reports of International Arbitral Awards* or from the International Law Reports. Some unpublished awards have been taken from the website of the Permanent Court of Arbitration. The most commonly used websites are as follows:

United Nations: www.un.org (in all the official languages of the UN)
International Court of Justice (including all the publications of the Permanent Court of International Justice): www.icj-cij.org, also available through the UN website
International Tribunal for the Law of the Sea: www.itlos.org (English), www.tidm.org (French), also available through the UN website
Permanent Court of Arbitration: www.pca-cpa.org

The International Seabed Authority has published in three CD-ROM discs all the records of the Law of the Sea Conferences 1968–94 as follows: Disc 1: Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (1968–73); Disc 2: Third United Nations Conference on the Law of the Sea (1973–82); Disc 3: Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (1983–94).

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