International and Comparative Law Quarterly (2025), **74**, 319–348
doi:10.1017/S0020589325100742

British Institute of International and Comparative Law

ARTICLE

Provisional Measures and the End of Prima Facie Jurisdiction

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Abstract

This article argues that, in provisional measures cases, the International Court of Justice (ICJ) now examines jurisdiction by assessing not only an applicant's arguments for jurisdiction, but also a respondent's arguments against it. This more granular examination is different from the ICJ's traditional prima facie test. The change in approach was demonstrated in the 2008 provisional measures order in *Georgia v Russian Federation*. This article suggests two likely explanations for the development of a more detailed test. The first is the ICJ's reluctance to limit State sovereignty by imposing provisional measures since it held, in the 2001 *LaGrand* judgment, that they are binding. The second is the political sensitivity of the particular dispute. However, the more detailed approach to the question of jurisdiction in provisional measures has generated inconsistency in the ICJ's jurisprudence: first, the malleability of this approach risks like cases being treated differently; second, this approach overlaps with the plausibility test, which concerns a separate requirement for provisional measures; and, third, this approach overlaps with the *Oil Platforms* test, which the Court uses to determine definitively whether it has jurisdiction ratione materiae. The new approach also promotes a dispute-settlement conception of the Court's judicial function, rather than acknowledging its role in developing international law or maintaining public order.

Keywords: International Court of Justice; provisional measures; jurisdiction; *Oil Platforms* test; plausibility; judicial function

1. Prima facie no longer

The International Court of Justice (ICJ or Court) has long adopted a prima facie test for jurisdiction in provisional measures cases.[1] This test was introduced because Article

[1] E De Brabandere, *Merrills' International Dispute Settlement* (7th edn, CUP 2022) 206; K Oellers-Frahm, 'Article 41' in A Zimmermann and CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1135, 1151–52; C Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) 148–49; H Thirlway, *The International Court of Justice* (OUP 2016) 154–57; M Shaw, *Rosenne's Law and Practice of the International Court 1920–2015* (5th edn, Brill 2015) vol III, 1446; S Rosenne, *Provisional Measures in International Law* (OUP 2005) 91.

41 of the Statute of the ICJ,[2] which gives it the power to indicate provisional measures, does not expressly mention jurisdiction. Article 41 only provides that '[t]he 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'.[3] In the ICJ's first two provisional measures cases, *Anglo-Iranian Oil Co* and *Interhandel*, judges disagreed on how certain the Court should be that it has jurisdiction over the merits to indicate provisional measures.[4] Writing separately in *Interhandel*, Judge Lauterpacht stated that the Court should indicate provisional measures if there is an instrument which '*prima facie* confers jurisdiction upon [it] and which incorporates no reservations obviously excluding its jurisdiction'.[5] The Court adopted this prima facie test in the subsequent *Fisheries Jurisdiction* cases[6] and, although it only applied this test until 2008, the Court has referred to it in every order on provisional measures.[7]

However, the Court's approach to jurisdiction at the provisional measures stage has changed since its 2008 provisional measures order in *Georgia v Russian Federation*.[8] In that case, the ICJ applied a new, more exacting test, no longer assessing whether there is a possible jurisdictional basis and reasons why it would obviously lack jurisdiction. Instead, the Court carries out a more granular assessment of its jurisdiction as regards the merits by examining not only the applicant's arguments in support of jurisdiction, but also any counterarguments raised by the respondent which might successfully contest jurisdiction. Examples of the latter are that the applicant's claim falls outside the scope of the Court's jurisdiction ratione materiae,[9] or that the applicant has failed

[2] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945).

[3] ibid. On this development, see Section 2.1.

[4] *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Provisional Measures) [1951] ICJ Rep 89 (*Anglo-Iranian Oil Co*); *Interhandel (Switzerland v United States of America)* (Provisional Measures) [1957] ICJ Rep 105 (*Interhandel*).

[5] *Interhandel* (n 4) 118–19 (Separate Opinion of Judge Lauterpacht).

[6] *Fisheries Jurisdiction (United Kingdom v Iceland)* (Provisional Measures) [1972] ICJ Rep 16 (*Fisheries Jurisdiction (UK v Iceland)*) para 17; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Provisional Measures) [1972] ICJ Rep 30 (*Fisheries Jurisdiction (Germany v Iceland)*) para 18. See also JG Merrills, 'Interim Measures of Protection and the Substantive Jurisdiction of the International Court' (1977) 36 CLJ 86, 92–97; M Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972–73) 46 BYIL 259, 287.

[7] Most recently, despite applying the granular approach, the Court recalled the prima facie test in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates)* (Provisional Measures) (unreported, 5 May 2025) para 18; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep 3 (*South Africa v Israel*) para 15; *Application of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v Syria)* (Provisional Measures) [2023] ICJ Rep 587 (*Canada and the Netherlands v Syria*) para 20; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures) [2023] ICJ Rep 14, para 26; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures) [2023] ICJ Rep 14, para 13.

[8] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Rep 353 (*Georgia v Russian Federation*).

[9] This argument was raised by the United Arab Emirates (UAE) in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

to satisfy procedural preconditions,[10] such as the requirement to negotiate or to refer a situation to another body before bringing a case before the ICJ. These preconditions appear in several jurisdictional titles on which the Court's jurisdiction may be founded, such as Article 22 of the International Convention for the Elimination of All Forms of Racial Discrimination (CERD)[11] and Article 24 of the International Convention for the Suppression of the Financing of Terrorism (ICSFT).[12]

This article argues that the Court has developed a new granular approach to jurisdiction which cannot be described as prima facie. It is unnecessary to be prescriptive as to the label of this new approach. Terminology alone says little of how the Court really examines jurisdiction at the provisional measures stage. It would be an exaggeration to suggest that, under this granular approach, the Court seeks to be certain that it has jurisdiction over the dispute. Rather, under this approach, the Court decides which it finds more persuasive: the applicant's arguments for jurisdiction, or the respondent's arguments against it. Put another way, the Court decides which party has the better argument as to jurisdiction based on the material available to it at the provisional measures stage. One may liken this granular approach to a 'good arguable case' test.[13] In some cases, the International Tribunal for the Law of the Sea has applied an approach comparable to the ICJ's granular one,[14] as have certain investor–State

(Provisional Measures, Order of 23 July 2018) [2018] ICJ Rep 406 (*Qatar v UAE* (Provisional Measures)) para 24.

[10] See, e.g. the Russian Federation's arguments in *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) [2017] ICJ Rep 104 (*Ukraine v Russian Federation (ICSFT and CERD)* (Provisional Measures)) paras 49–51, 57–58.

[11] International Convention for the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

[12] International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

[13] The ICJ's new approach is reminiscent of that of the courts of England and Wales in deciding whether to allow a claimant to serve a claim form outside the jurisdiction. The court must be satisfied that a party has 'the better of the argument' on the facts going to jurisdiction, meaning that it has a 'plausible evidential basis for the application of a relevant jurisdictional gateway' under para 3.1 of Practice Direction 6B of the Civil Procedure Rules: see *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, para 9; *KAEFER Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, paras 70–71. These cases built on the 'good arguable case' test in the earlier authorities of *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555 and *Seaconsar Far East Ltd v Bank Markazi* [1994] 1 AC 438 (HL) 442.

[14] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, paras 39–62; *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, paras 34–62; *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, paras 30–59; *M/V 'Louisa' (St Vincent and the Grenadines v Spain)* (Provisional Measures, Order of 23 December 2010) ITLOS Reports 2008–2010, paras 38–70; *'ARA Libertad' (Argentina v Ghana)* (Provisional Measures, Order of 15 December 2012) ITLOS Reports 2012, paras 61–67; *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)* (Provisional Measures, Order of 25 May 2019) ITLOS Reports 2018–2019, paras 51–53. The Tribunal adopted a non-granular approach in *M/V 'Saiga' (No 2)* and *Arctic Sunrise*: see *M/V 'Saiga' (No 2) (St Vincent and the Grenadines v Guinea)* (Provisional Measures, Order of 11 March 1998) ITLOS Reports 1998, paras 27–30; *Arctic Sunrise (Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013, paras 67–70.

arbitral tribunals.[15] However, as the ICJ's jurisprudence seems not to have influenced the approaches of those bodies, it is not necessary to examine them in this article.

The focus of this article, provisional measures at the ICJ, is an important area of practice and scholarly work. In practice, the ICJ's development of the granular approach matters for several reasons. First, the Court receives frequent requests for provisional measures, often in sensitive matters such as diplomatic immunities, the prevention of racial discrimination and the prevention of genocide.[16] Understanding the Court's approach to jurisdiction can inform litigation strategy in future cases. This consideration is especially relevant given that requests for the Court to indicate provisional measures have risen since 2001, when the Court indicated that orders for provisional measures under Article 41 of its Statute are binding on the parties to the dispute, ending the long debate concerning the binding effect of provisional measures indicated under Article 41.[17] Second, the Court's analysis under the granular approach overlaps with the Court's analysis of plausibility, which is a separate requirement for provisional measures.[18] Third, the granular approach overlaps also with the *Oil Platforms* test that the Court uses to determine definitively whether it has jurisdiction over the dispute.[19]

The article is structured as follows. Section 2 explores the development of the ICJ's approach to jurisdiction in provisional measures cases. Section 3 explores two possible explanations for the ICJ's shift to the granular approach: first, the binding character of provisional measures; and second, the political sensitivity of the cases in which the Court has made and consolidated this shift. Section 4 considers the ramifications of the granular approach: the malleability of the Court's jurisdictional approach at the provisional measures stage; the overlap with the plausibility test; the overlap with the *Oil Platforms* test; and how the granular approach promotes a conception of the judicial function that is focused on dispute settlement. Section 5 concludes.

2. Development of the ICJ's approach to jurisdiction

The prima facie test, adopted in *Fisheries Jurisdiction*, entailed a low threshold for establishing jurisdiction. The Court's order in *Georgia v Russian Federation* marked the

[15] *Tethyan Copper Company Pty Ltd v Pakistan*, ICSID Case No ARB/12/1, Decision (13 December 2012) para 85; *Dawood Rawat v Mauritius*, PCA Case No 2016-20, Order (11 January 2017) paras 81–86; *Sergei Viktorovich Pugachev v Russian Federation*, Interim Award (7 July 2017) paras 225–236. For tribunals that did not apply a granular approach, see *Valle Verde Sociedad Financiera SL v Venezuela*, ICSID Case No ARB/12/18, Decision (25 January 2016) paras 76–77; *Sergei Paushok v Mongolia*, Order (2 September 2008) paras 47–54.

[16] For examples, see Section 2.

[17] *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 (*LaGrand*) para 109. In the 55 years from 1946 to 2000, States requested provisional measures in 24 cases (the 10 orders in *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Rep 124 are counted as one because Yugoslavia made all the requests and the Court dealt with them at the same time). In the years since 2001, States requested provisional measures in over 25 cases. See further Section 3.1.1.

[18] On plausibility, see M Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice' (2018) 31 LJIL 641; Miles (n 1) 193–208.

[19] *Oil Platforms (Iran v United States of America)* (Preliminary Objections) [1996] ICJ Rep 803 (*Oil Platforms*) para 16. The *Oil Platforms* test comprises three distinct variants, outlined in Section 4.1.3. On the three variants of the *Oil Platforms* test, see M Lando, 'Jurisdiction *Ratione Materiae* of the International Court of Justice in Compromissory Clause Cases' (2023) 139 LQR 52, 56–64.

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

shift towards the granular approach, raising the jurisdictional threshold in provisional measures cases.

2.1. Prima facie test (1951–2008)

The ICJ's first three provisional measures cases illuminate the operation of the prima facie test. *Anglo-Iranian Oil Co* originated from Iran's expropriation of assets belonging to Anglo-Iranian Oil, a British company. The United Kingdom (UK) argued that the Court's jurisdiction was founded on the parties' optional clause declarations, but Iran's declaration was limited by a reservation. The Court did not elaborate on its approach to jurisdiction, nor did it comment on Iran's reservation; it simply held that 'it cannot be accepted *a priori* that [the UK's] claim … falls completely outside the scope of international jurisdiction'.[20] The Court did not use the 'prima facie' terminology but appeared to apply a very low threshold for jurisdiction. Judges Winiarski and Badawi Pasha dissented. They stated that provisional measures are 'a scarcely tolerable interference in the affairs of a sovereign State',[21] which justified adopting a rigorous test for jurisdiction: 'if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated'.[22] To them, the Court should decide which are more convincing: the arguments for jurisdiction or the arguments against it.

Interhandel involved a claim that jurisdiction was based on the parties' optional clause declarations and a reservation by the respondent, the United States (US), to its declaration. The Court concluded that the circumstances did not require the indication of provisional measures,[23] and made no clear finding on jurisdiction, stating only that it would defer examination of the US objections to a later phase of the proceedings.[24] However, the classic formulation of the prima facie test was articulated in this case by Judge Lauterpacht in his Separate Opinion. He noted that States which have accepted the Court's jurisdiction 'have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest'[25] and, accordingly, some consideration of jurisdiction is required. Following international arbitral and judicial practice, he formulated the 'correct practice' as follows:

> [t]he Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.[26]

The Court took the next available opportunity to adopt that test, although it formulated it more pithily. In the parallel *Fisheries Jurisdiction* cases, the UK and Germany claimed

[20] *Anglo-Iranian Oil Co* (n 4) 92–93.
[21] ibid 97 (Dissenting Opinion of Judges Winiarski and Badawi Pasha).
[22] ibid.
[23] *Interhandel* (n 4) 112.
[24] ibid 111.
[25] ibid 118 (Separate Opinion of Judge Lauterpacht).
[26] ibid 118–19 (Separate Opinion of Judge Lauterpacht).

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

that the Court's jurisdiction was founded on two separate but identical clauses under certain Exchanges of Notes with Iceland. Iceland did not appear but sent a message stating that the agreements under those Exchanges of Notes had achieved their object and purpose and, accordingly, had been terminated.[27] Without elaboration, the Court stated that 'on a request for provisional measures [it] need not … finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest'.[28] The Court did not comment on Iceland's objection, and held that each clause 'appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'.[29] The approach in *Fisheries Jurisdiction* shows continuity with the approach in the earlier two cases, because applying the prima facie test required deciding whether there was a basis on which jurisdiction might be founded but did not require considering a respondent's arguments against jurisdiction.[30] In *Fisheries Jurisdiction*, the ICJ did not refer to reservations 'obviously excluding' jurisdiction, to which Judge Lauterpacht had referred in his Separate Opinion. However, if such reservations were present, lack of jurisdiction would be 'manifest', using the language of *Fisheries Jurisdiction*. The formulations of the prima facie test by the Court and Judge Lauterpacht are equivalent, both requiring that the Court simply consider whether there are reasons why its jurisdiction would be manifestly, or obviously, lacking.

Since *Fisheries Jurisdiction*, the Court has repeated adherence to the prima facie test in all orders indicating provisional measures.[31] Until *Georgia v Russian Federation*, the Court did not examine jurisdictional objections in its orders on provisional measures even though respondents may have raised them.[32] In some cases, respondents did not contest jurisdiction, either at all or by reserving the right to raise jurisdictional objections at a later stage.[33] The political sensitivity of other cases might have resulted in lengthier reasoning on jurisdiction, but even in such cases the Court

[27] *Fisheries Jurisdiction (UK v Iceland)* (n 6) para 5; *Fisheries Jurisdiction (Germany v Iceland)* (n 6) para 5.

[28] *Fisheries Jurisdiction (UK v Iceland)* (n 6) para 15; *Fisheries Jurisdiction (Germany v Iceland)* (n 6) para 16.

[29] *Fisheries Jurisdiction (UK v Iceland)* (n 6) paras 16–17; *Fisheries Jurisdiction (Germany v Iceland)* (n 6) paras 17–18.

[30] *Interhandel* (n 4) 118–19 (Separate Opinion of Judge Lauterpacht).

[31] In *Lockerbie*, the Court did not comment on jurisdiction because it rejected Libya's request for provisional measures on non-jurisdictional grounds. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3, para 42.

[32] *Nuclear Tests (Australia v France)* (Provisional Measures) [1973] ICJ Rep 99, paras 18–23; *Aegean Sea Continental Shelf (Greece v Turkey)* (Provisional Measures) [1976] ICJ Rep 3, paras 19–21; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Provisional Measures) [1996] ICJ Rep 13, paras 28–31; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Provisional Measures) [2000] ICJ Rep 182, paras 61–68; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2006] ICJ Rep 113 (*Pulp Mills* (2006)) paras 57–59.

[33] *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures) [1986] ICJ Rep 3, para 6; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Provisional Measures) [1990] ICJ Rep 64, para 21; *Passage through the Great Belt (Finland v Denmark)* (Provisional Measures) [1991] ICJ Rep 12, para 14; *LaGrand (Germany v United States of America)* (Provisional Measures) [1999] ICJ Rep 9, paras 13–18; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Provisional Measures) [2000] ICJ Rep 111, paras 32–34; *Avena and Other Mexican Nationals (Mexico v United States of America)* (Provisional

generally summarised the parties' arguments and deferred analysis of all jurisdictional objections.[34]

The Court examined such objections in only two cases,[35] *Legality of the Use of Force*[36] and *Democratic Republic of the Congo (DRC) v Rwanda*.[37] In *Legality of the Use of Force*, Yugoslavia argued that jurisdiction was founded on various titles, including Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[38] The Court considered whether the acts of which Yugoslavia complained prima facie constituted genocide under the Genocide Convention, which meant that it decided on the objection that it lacked prima facie jurisdiction ratione materiae.[39] In *DRC v Rwanda*, the DRC sought to found the Court's jurisdiction on several treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[40] Rwanda objected that it had never been a party to that Convention, which the Court found to be true.[41] In both cases, and in contrast to its established approach, the Court examined the respondents' arguments against jurisdiction, perhaps as a result of the political sensitivity of the case and to take the opportunity to ground a finding of no jurisdiction on more detailed reasoning. The Court returned to assessing jurisdiction based on the prima facie test in subsequent

Measures) [2003] ICJ Rep 77, paras 38–42; *Certain Criminal Proceedings in France (Republic of the Congo v France)* (Provisional Measures) [2003] ICJ Rep 102, paras 20–21.

[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Provisional Measures) [1984] ICJ Rep 169 (*Nicaragua*) paras 10–26; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Provisional Measures) [1993] ICJ Rep 3 (*Bosnian Genocide*) paras 14–26; *Vienna Convention on Consular Relations (Paraguay v United States of America)* (Provisional Measures) [1998] ICJ Rep 248, paras 23–34. The Court's approach to jurisdiction in its 2007 order in *Pulp Mills* stands alone as the reasoning on jurisdiction did not really concern jurisdiction, but whether the rights claimed by Uruguay, the respondent, existed under the treaty on which Argentina, the applicant, had founded the Court's jurisdiction: see *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2007] ICJ Rep 3 (*Pulp Mills* (2007)) paras 24–30. For further detail on this case, see Section 3.1.2.

[35] In *United States Diplomatic and Consular Staff in Tehran*, the ICJ analysed whether the relevant procedural preconditions had been met. The reason for this was not related to the prima facie test but to Iran's non-appearance, requiring the ICJ, under art 53(2) of the Court's Statute, to anticipate possible objections to jurisdiction: see *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Provisional Measures) [1979] ICJ Rep 7, paras 14–18.

[36] *Legality of the Use of Force* denotes ten cases filed at the same time by Yugoslavia against various members of the North Atlantic Treaty Organization. The Court's reasoning was similar across its ten orders on provisional measures. For example, see *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (n 17) paras 20–45. The Court also decided to remove the cases against Spain and the US from the General List for want of jurisdiction even on a prima facie level: see *Legality of the Use of Force (Yugoslavia v Spain)* (Provisional Measures) [1999] ICJ Rep 761, para 35; *Legality of the Use of Force (Yugoslavia v United States of America)* (Provisional Measures) [1999] ICJ Rep 916, para 29.

[37] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (New Application: 2002) (Provisional Measures) [2002] ICJ Rep 219 (*DRC v Rwanda*) paras 57–89.

[38] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[39] *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (n 17) paras 21–28.

[40] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[41] *DRC v Rwanda* (n 37) para 61.

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cases. At most, the orders in *Legality of the Use of Force* and *DRC v Rwanda* can be seen as foreshadowing the adoption of the granular approach in *Georgia v Russian Federation*.

2.2. Granular approach (2008–present)

Georgia v Russian Federation is both a turning point in the ICJ's provisional measures jurisprudence and a paradigm of the granular approach. This approach is characterised by more complex jurisdictional objections by the parties, closer scrutiny of the evidence by the Court, and its applicability regardless of the type of jurisdictional title on which applicants rely.

2.2.1. Georgia v Russian Federation *as a turning point and paradigm*

On 12 August 2008, Georgia instituted proceedings against the Russian Federation for alleged breaches of CERD stemming from the Russian military operations in Abkhazia and South Ossetia. Georgia founded the Court's jurisdiction on Article 22 CERD.[42] The Russian Federation raised three objections to jurisdiction. First, it argued that the dispute fell outside the Court's jurisdiction ratione materiae, as it did not concern racial discrimination but alleged violations of international humanitarian law.[43] To support this argument, the Russian Federation relied on the language in Georgia's pleadings[44] and the lack of references to a CERD dispute in certain bilateral and multilateral fora.[45] Second, the Russian Federation argued that CERD had no extraterritorial application.[46] Third, it argued that the procedural preconditions under Article 22 CERD had not been met, filing documentary evidence of exchanges between the parties to substantiate its contention.[47]

In its Order, although the ICJ iterated the prima facie jurisdiction requirement,[48] it actually examined the Russian Federation's objections more closely than a prima facie examination would require. The Court considered whether the application of CERD was limited ratione loci, looking at the language of CERD both generally and specifically in relation to Articles 2 and 5.[49] As to the objection to jurisdiction ratione materiae, the Court found that there was a dispute concerning the interpretation or application of CERD because the parties disagreed as to whether CERD was applicable to the events in Abkhazia and South Ossetia.[50] This finding would have been sufficient for a prima facie assessment, but the Court went further by finding also that the Russian Federation's acts could breach Georgia's rights under CERD.[51] Not only that, but the Court referred to Georgia's argument that its evidence showed the existence of racial

[42] *Georgia v Russian Federation* (n 8) para 2.
[43] ibid para 95.
[44] ibid para 97.
[45] ibid paras 98–99.
[46] ibid para 100.
[47] ibid paras 101–102.
[48] ibid para 85.
[49] ibid paras 108–109.
[50] ibid para 112.
[51] ibid.

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discrimination within the meaning of CERD, which indicates that the Court examined that evidence.[52] Last, the Court considered the objection concerning procedural preconditions. To dismiss it, the ICJ made three points: it analysed the plain text of Article 22 CERD; it compared Article 22 with jurisdictional clauses from other treaties, to find that its structure was different from that of those jurisdictional clauses; and, again, it examined the evidence on file indicating that Georgia had publicly referred to a dispute under CERD before starting proceedings.[53] The Court then declared that 'in view of all the foregoing, [it] considers that, *prima facie*, it has jurisdiction under Article 22 of CERD to deal with the case'.[54] The Court reached its conclusion only following a detailed issue-by-issue examination of the respondent's arguments against jurisdiction. The seven judges who wrote a joint dissenting opinion considered the Russian Federation's arguments in even more detail. They focused on the interpretation and application of Article 22, including in light of earlier ICJ decisions, and on further evidence showing that the procedural preconditions had not been met.[55]

2.2.2. Features of the granular approach

Georgia v Russian Federation illustrates the features of the granular approach, which later cases also reflect. The first feature is that the granular approach responds to an increasing tendency for States to file more complex objections to jurisdiction. In some cases following *Georgia v Russian Federation*, the respondents have not contested jurisdiction and the Court therefore has not discussed it in detail.[56] In other cases, respondents have contested jurisdiction on various grounds, and the Court has addressed their concerns by applying the new granular approach.[57] The objections raised can be broadly grouped into three classes: lack of jurisdiction ratione

[52] ibid.

[53] ibid para 115.

[54] ibid para 117.

[55] ibid paras 11–19 (Joint Dissenting Opinion of Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov).

[56] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) [2011] ICJ Rep 6, paras 50–52; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Provisional Measures) [2013] ICJ Rep 398, paras 12–14; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147 (*Questions relating to the Seizure and Detention of Certain Documents and Data*) paras 18–21.

[57] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2012] ICJ Rep 147 (*Belgium v Senegal*) paras 40–55; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures) [2016] ICJ Rep 1148 (*Immunities and Criminal Proceedings*) paras 31–70; *Ukraine v Russian Federation (ICSFT and CERD)* (Provisional Measures) (n 10) paras 17–62; *Jadhav (India v Pakistan)* (Provisional Measures) [2018] ICJ Rep 231 (*Jadhav*) paras 15–34; *Qatar v UAE* (Provisional Measures) (n 9) paras 14–42; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v United States of America)* (Provisional Measures) [2018] ICJ Rep 623 (*Alleged Violations of the 1955 Treaty*) paras 24–52; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Rep 3 (*The Gambia v Myanmar*) paras 16–38; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures) [2021] ICJ Rep 361 (*Armenia v Azerbaijan*) paras 15–43; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures) [2021] ICJ Rep 405 (*Azerbaijan v Armenia*)

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

materiae; failure to satisfy procedural preconditions; and reservations, both to optional clause declarations and to specific treaty provisions. An example of an objection to jurisdiction ratione materiae occurred in the case between Ukraine and the Russian Federation under the ICSFT and CERD. The Russian Federation argued that Ukraine had failed to demonstrate that the alleged facts constituted a violation of its rights under CERD, and that those rights were already protected in Crimea. For instance, in respect of the right to education, the Russian Federation filed evidence to show that Ukrainian and Tatar were languages of instruction at the Crimean Federal University and that numerous schools offered Ukrainian-language education.[58]

Respondents have also objected that relevant procedural preconditions had not been satisfied. In *Alleged Violations of the 1955 Treaty*, the US argued that Iran had not given it an adequate opportunity to settle their dispute by negotiation, as required by Article XXI of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (1955 Treaty).[59] The US filed into evidence diplomatic notes between itself and Iran concerning the dispute.[60] Respondents have also based jurisdictional objections on reservations to optional clause declarations that are different from ratione materiae reservations. An example is Pakistan's objection in *Jadhav* that India's reservation excluded the Court's jurisdiction in disputes between members of the Commonwealth.[61] Respondents have based yet other jurisdictional objections on provisions specific to the treaties containing the compromissory clauses on which the applicants founded jurisdiction. In the case brought by The Gambia, Myanmar argued that the Court lacked jurisdiction because of its reservation to Article VIII Genocide Convention, which allows parties to that Convention to refer situations of alleged genocide to United Nations (UN) organs like the Court.[62]

The second notable feature of the granular approach is the detailed examination by the Court of the evidence filed by respondents to support their jurisdictional objections raised at the provisional measures stage. This practice has made it apparent that respondents often file considerable evidence relating to jurisdiction, though it is difficult to know precisely how extensive the evidential record is because, in provisional measures cases, the Court does not make the entire record public. However, the parts of the Court's orders summarising the parties' arguments often mention the evidence filed and can provide some insight. The Court's focus on evidence does not indicate that jurisdictional objections were not raised in provisional measures cases prior to *Georgia v Russian Federation*, nor that the parties did not file evidence to support those objections. Rather, the Court simply did not examine such objections or the evidence adduced to support them, or, at least, did not record doing so.

paras 15–40; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) [2022] ICJ Rep 211, paras 24–49.

[58] *Ukraine v Russian Federation (ICSFT and CERD)* (Provisional Measures) (n 10) para 36.

[59] Treaty of Amity, Economic Relations, and Consular Rights (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93.

[60] *Alleged Violations of the 1955 Treaty* (n 57) para 49.

[61] *Jadhav* (n 57) para 23.

[62] *The Gambia v Myanmar* (n 57) para 32.

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The Court's attention to the respondents' arguments on jurisdiction and the evidence submitted in that regard shows that assessing whether it has jurisdiction now entails a much closer scrutiny than before *Georgia v Russian Federation*. This closer scrutiny is different from Judge Lauterpacht's prima facie test that the Court adopted in *Fisheries Jurisdiction*. That test requires the Court, at most, to consider whether respondents have made arguments showing that it obviously lacks jurisdiction.[63] No objection raised since *Georgia v Russian Federation* has appeared compelling enough to show that the Court obviously lacks jurisdiction. Addressing objections to its jurisdiction ratione materiae requires the ICJ to examine whether a respondent's conduct, as alleged by an applicant, might amount to a breach of certain rights. It is difficult for such objections to show obvious lack of jurisdiction except in extreme cases, which are unlikely to arise in practice, such as in the hypothetical scenario where an applicant founds jurisdiction on CERD and complains that a respondent has breached its right to enjoy freedom of navigation. Objections that certain procedural preconditions have not been satisfied require the Court to examine evidence of the exchanges between the parties, for example to decide whether an applicant has given a respondent an adequate opportunity to negotiate or has genuinely attempted to negotiate. Unless the evidence shows that there was no contact whatsoever between the parties, also unlikely in practice, it is difficult for objections concerning procedural preconditions to show obvious lack of jurisdiction. The Court has examined these and other jurisdictional objections individually and, considering the early stage in the proceedings and the relative scarcity of evidence, quite thoroughly. This examination is stricter than that under the prima facie test.

The third feature of the granular approach is that its application does not depend on the type of jurisdictional title on which applicants rely, which was also the case for the prima facie test. Jurisdictional limitations are comparable under compromissory clauses and where jurisdiction is based on optional clause declarations or special agreements. The prime example is limitations ratione materiae. Compromissory clauses are, by their character, limited to the subject-matter of the treaties in which they are contained. Similarly, special agreements confer jurisdiction limited to certain matters.[64] States can also declare that their acceptance of the Court's compulsory jurisdiction does not extend to cases concerning certain matters.[65] All cases since 2008 in which respondents have contested jurisdiction began by way of a compromissory

[63] An example of such an argument is the US objection in *Legality of the Use of Force* that, under its reservation to art IX Genocide Convention, it could be a party to a case under that treaty only after having given specific consent in each case, which it had not done in respect of the case started by Yugoslavia. See *Legality of the Use of Force (Yugoslavia v United States of America)* (n 36) paras 21–22. Equally compelling was Spain's objection, in its own case against Yugoslavia, that the Court could not have jurisdiction based on the parties' optional clause declarations because Spain had made a reservation excluding jurisdiction in all cases in which the other party had made an optional clause declaration less than 12 months before the filing of the application instituting proceedings, which Yugoslavia had done. See *Legality of the Use of Force (Yugoslavia v Spain)* (n 36) paras 23–25.

[64] For example, art 2 of the special agreement between Malaysia and Singapore concerning the Pedra Branca territorial dispute: see *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, para 2.

[65] Iran used Canada's 1994 optional clause declaration to support its argument in favour of the Court exercising jurisdiction in *Alleged Violations of State Immunities (Iran v Canada)* (General List No 189,

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clause. This fact might suggest that the Court uses the granular approach to avoid adjudicating on disputes that, by their subject-matter, do not fall within the scope of the treaty that contains the relevant compromissory clause. Put differently, the Court might have used the granular approach to discourage applicants from disaggregating disputes, which is the practice of artificially framing the subject-matter of a dispute to fit within the scope ratione materiae of whichever treaty might confer jurisdiction on the Court.[66]

There are two problems with this view. First, the Court is likely to discourage the disaggregation of disputes irrespective of jurisdictional title, as long as that title is limited ratione materiae. In *Fisheries Jurisdiction (Spain v Canada)*, an optional clause case, the ICJ's jurisdiction ratione materiae was limited by Canada's reservation to its optional clause declaration. Canada's reservation excluded from the Court's jurisdiction certain disputes about conservation and management measures enacted by Canada itself in respect of a certain maritime area.[67] The parties characterised the dispute differently to support their respective arguments as to whether the dispute fell within the scope of that reservation or not.[68] The Court made its own independent characterisation of the dispute,[69] signalling that States should not artificially frame disputes to make them fit within the available jurisdictional titles, as Spain seemed to have done in this case.[70] The second argument against the granular approach being a response to the disaggregation phenomenon is that the disaggregation phenomenon was known before *Georgia v Russian Federation*.[71] To discourage this phenomenon, the Court could have used different jurisdictional tests depending on the title invoked, without needing to conduct a detailed examination of both parties' arguments in relation to jurisdiction. Nevertheless, the jurisprudence before 2008 shows that the Court adopted the same test across all cases, regardless of jurisdictional title.

3. Explanations for the granular approach

Two main reasons may explain the development of the granular approach by the Court: first, the binding character of provisional measures, and second, the political sensitivity of the cases in which the Court introduced and consolidated the new approach.

2023), which remains pending before the Court. That declaration contained a reservation, which was irrelevant to the merits of the case, under which Canada did not accept the ICJ's jurisdiction in relation to certain fisheries disputes arising under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.

[66] On disaggregation of disputes, see L Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study' (2019) 68 ICLQ 779.

[67] *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, para 61.

[68] ibid para 23.

[69] ibid paras 31, 62–63, 66–73, 76–87.

[70] Kwiatkowska noted how Spain had 'carefully framed its Application in an effort to avoid Canada's reservation': see B Kwiatkowska, 'Fisheries Jurisdiction (Spain v. Canada), Jurisdiction' (1999) 93 AJIL 502, 503.

[71] CJ Greenwood, 'Some Challenges of International Litigation' (2012) 1 CJICL 7, 16.

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3.1. Binding character of provisional measures

The Court clarified that provisional measures impose international obligations on States in its 2001 *LaGrand* judgment.[72] The granular approach represents a safeguarding of sovereignty that introduces a higher threshold for imposing international obligations through provisional measures. Moreover, the Court's examination of whether an applicant's claimed rights exist, a legacy of *LaGrand*, can be cast as a question of jurisdiction, which then appears also to be linked to the binding character of provisional measures.

3.1.1. Safeguarding of sovereignty

Interference with sovereignty may be an inevitable consequence of protecting the rights at issue on the merits,[73] but the Court is traditionally reluctant to grant requests that might come across as too intrusive into State sovereignty.[74] The jurisdictional test in provisional measures proceedings aims to find a balance between the competing objectives of preserving the rights claimed to be at risk of prejudice by an applicant and avoiding placing limitations on the sovereignty of a respondent when the question remains whether the Court has jurisdiction on the merits. The prima facie test prioritises protecting the applicant's rights over the respondent's sovereignty, as it allows the Court to indicate provisional measures where there is little certainty that it has jurisdiction. The granular approach gives greater weight to the protection of the respondent's sovereignty, at least in principle. It is difficult not to see this development as a legacy of *LaGrand*, the thrust of which was that provisional measures create international obligations that limit sovereignty.

The question is whether the granular approach has altered the balance between protecting rights and not unduly limiting sovereignty not only in principle, but also in practice. This may be illustrated by how often the Court has found that it lacked jurisdiction under the two different approaches. Since adopting the granular approach, the Court has found that it lacked jurisdiction only in *Immunities and Criminal Proceedings* and, even then, only in respect of Equatorial Guinea's claims under the UN Convention against Transnational Organized Crime (Palermo Convention).[75] Under the earlier approach, the Court found that it lacked jurisdiction in two cases: *Legality of*

[72] *LaGrand* (n 17) para 109. Even prior to *Anglo-Iranian Oil Co* (n 4), there was a debate on whether provisional measures indicated under the Statute of the ICJ (and that of its predecessor, the Permanent Court of International Justice) had binding character: see, e.g. Å Hammarskjöld, 'Quelques Aspects de la Question des Mesures Conservatoires en Droit International Positif' (1935) 5 ZaöRV 5; P Guggenheim, 'Les Mesures Conservatoires dans la Procédure Arbitrale et Judiciaire' (1932) 40 RdC 645, 696–97.

[73] Oellers-Frahm (n 1) 1155.

[74] A Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy*' (2013) 4 JIDS 457, 460. On the implications of safeguarding sovereignty on the judicial function, see Section 4.2.

[75] *Immunities and Criminal Proceedings* (n 57) paras 47–50. Equatorial Guinea also requested the Court to protect its rights under the Vienna Convention on Diplomatic Relations, in relation to which it obtained provisional measures: see UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (Palermo Convention); Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

the Use of Force and *DRC v Rwanda*.[76] This record may not be conclusive proof of how likely it is for the Court to find that it lacks jurisdiction under either approach, but it may suggest that the balance between protecting rights and avoiding undue limitations on sovereignty is not that different under either approach.

This view is, however, misleading. In *Legality of the Use of Force* and *DRC v Rwanda*, the Court applied a higher jurisdictional threshold than usually required under the prima facie test, by deciding whether it had jurisdiction ratione materiae.[77] In all cases in which the Court has found that it lacks jurisdiction at the provisional measures stage, it has not applied a prima facie test. It thus seems likely that the granular approach in practice does alter the balance between protecting an applicant's rights and avoiding undue limitations on a respondent's sovereignty, giving the latter greater weight than it would have had under the prima facie test.

There may be reasons unrelated to the application of either approach that could explain why the Court found that it lacked jurisdiction only in *Legality of the Use of Force* and *DRC v Rwanda*. For example, these two cases could be seen as exceptional because Yugoslavia and the DRC, as opposed to respondents in other cases, did not advance any credible arguments in support of the Court's jurisdiction. This difficulty was confirmed in the Court's later decisions that it lacked jurisdiction in respect of the cases filed by Yugoslavia and the DRC.[78] It is also conceivable that the clarification in *LaGrand* that provisional measures are binding might have pushed respondents to make more elaborate arguments against jurisdiction, to use all possible ways to prevent the indication by the Court of provisional measures that would limit their sovereignty. This view might explain the outcomes in *DRC v Rwanda* and *Immunities and Criminal Proceedings*, but it does not explain that in *Legality of the Use of Force*, which took place two years before the *LaGrand* judgment. Whatever the possible explanations for why the Court found that it lacked jurisdiction in these particular cases, it is clear that the Court applied a jurisdictional threshold higher than that applied under the prima facie test.

3.1.2. Existence of rights as a question of jurisdiction

In its 2009 order in *Belgium v Senegal*, the ICJ adopted a new requirement under which 'the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible'.[79] The adoption of this plausibility requirement followed from the recognition that provisional measures are binding in character, the idea being that the Court should indicate such measures only where they would protect rights that plausibly exist under

[76] See Section 2.1.

[77] ibid. The approach in these cases shows that it is unrealistic to suggest that, in use-of-force cases, the Court should not assess jurisdiction at all because such cases require immediate action. For a discussion on provisional measures in use-of-force cases, see C Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*' (2003) 14 EJIL 867, 889–92.

[78] As an example of the *Legality of the Use of Force* cases, see *Legality of the Use of Force (Yugoslavia v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (New Application: 2002) (Jurisdiction and Admissibility) [2006] ICJ Rep 6.

[79] *Belgium v Senegal* (n 57) para 57.

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

international law.[80] However, whether an applicant's rights might be said plausibly to exist can be cast as a question of jurisdiction ratione materiae, the existence of which the Court may have to determine under the granular approach.[81] It follows that, if plausibility is linked to the binding character of provisional measures, so too is the granular approach to jurisdiction.

Prior to adopting the plausibility requirement, in the second provisional measures phase in *Pulp Mills*, the Court examined the existence of the applicant's claimed rights as a question of jurisdiction ratione materiae. The respondent, Uruguay, requested provisional measures, seeking to protect its rights to continue constructing and operating a pulp mill and to have its dispute with Argentina settled by the Court,[82] which it argued were about to be breached by the blockade of a transboundary bridge by Argentinian citizens. Argentina argued that Uruguay's claimed rights did not exist under the 1975 Statute of the River Uruguay (1975 Statute),[83] on which the Court's jurisdiction was based, but under the treaty establishing Mercosur.[84] Accordingly, Argentina submitted that Uruguay's claims fell outside the Court's jurisdiction ratione materiae,[85] thus framing the question of the existence of Uruguay's claimed rights as a question of jurisdiction.

In its reasoning, the ICJ adopted Argentina's framing. The Court stated that 'in establishing [its] *prima facie* jurisdiction … the question of the nature and extent of the rights for which protection is being sought in the request for the indication of provisional measures has no bearing'.[86] However, the Court considered the substance of Uruguay's claimed rights. It found that the right to continue constructing the pulp mill 'effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures'.[87] This phrasing is not entirely clear but the underlying idea appears to be that, as the 1975 Statute provided the basis for the Court's jurisdiction, only rights arising under it were before the Court. The right to continue constructing the pulp mill could not have 'in principle be[en] protected by the indication of provisional measures', which are available only to protect rights before the Court,[88] unless the Court found it to exist under the 1975 Statute. The ICJ's conflation of questions of jurisdiction with questions concerning the existence of an applicant's claimed rights can be explained by considering that, in 2007, plausibility was not yet a requirement for provisional measures in the Court's jurisprudence. The Court lacked an established non-jurisdictional framework within which to examine Argentina's argument that Uruguay's claimed rights did not exist or, to use plausibility's language, had no plausible basis under the 1975 Statute. Nonetheless, *Pulp Mills* shows that

[80] *Pulp Mills* (2006) (n 32) paras 7–8 (Separate Opinion of Judge Abraham).

[81] Section 2.2.2. See also P Palchetti, 'La controversia tra Georgia e Russia davanti alla Corte internazionale di giustizia: l'ordinanza sulle misure provvisorie del 15 ottobre 2008' (2009) 3 DirUmaniDirIntern 111, 119.

[82] *Pulp Mills* (2007) (n 34) paras 11–12.

[83] Statute of the River Uruguay (adopted 26 February 1975, entered into force 18 September 1976) 1295 UNTS 331.

[84] *Pulp Mills* (2007) (n 34) para 21.

[85] ibid para 20.

[86] ibid para 25.

[87] ibid para 29.

[88] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (n 33) para 24.

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the question of plausibility can be cast as a question of jurisdiction ratione materiae. To that extent, and as plausibility follows from the binding character of provisional measures, the Court's approach in *Pulp Mills* suggests that the granular approach is also rooted in the binding character of provisional measures as recognised in *LaGrand*.

3.2. Political sensitivity of disputes

The shift to the granular approach to jurisdiction can also be explained by reference to the political sensitivity of the cases in which the ICJ made and has consolidated that shift. In politically sensitive cases, it can be difficult to secure States' acceptance of the Court's decisions.[89] To pre-empt such difficulties, it may be desirable for the ICJ to show that, at the relevant stage of the proceedings, it gives full consideration to whether it has the power to make the decision requested of it. This drive to give the fullest possible justification potentially explains the Court's close examination of a respondent's arguments against jurisdiction and the relevant evidence in relation to provisional measures.

Politically sensitive disputes are those which, owing to their subject-matter or the potential for resistance by certain States, are seen as highly controversial.[90] It should be beyond serious doubt that certain categories of cases are politically sensitive, such as cases concerning alleged breaches of the rules on the use of force and the protection of human rights, as well as cases concerning the alleged commission of morally reprehensible acts, like genocide. Politically sensitive cases may include disputes concerning immunity, both of States and their property, and of high-ranking State officials. The identity of the parties can add a layer of complexity. For instance, the political sensitivity of a case on the use of force could increase if one of the parties is a permanent member of the UN Security Council (UNSC). There are other cases in which the subject-matter and the identity of the parties may not immediately suggest a high degree of political sensitivity, but which emerge as politically sensitive due to the facts from which they stem. For example, disputes concerning obligations that appear neutral, such as the obligation to prosecute or extradite, may acquire a politically sensitive dimension where they stem from the alleged perpetration of serious human rights violations.

The ICJ foreshadowed and later adopted its granular approach in politically sensitive cases. *Legality of the Use of Force* was an intensely political case, originating from Yugoslavia's ethnic cleansing in Kosovo, concerning allegations of genocide and involving, among others, three permanent members of the UNSC. *DRC v Rwanda* concerned the use of force and violations of human rights and international humanitarian law, including allegations of genocide. *Georgia v Russian Federation* was politically sensitive due to its subject-matter, which concerned alleged breaches of CERD, and also because a party was a permanent member of the UNSC. The cases

[89] De Brabandere (n 1) 247.

[90] J Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14 IntJLC 221, 223. See also H Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 152.

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following *Georgia v Russian Federation* in which the ICJ consolidated its granular approach were politically sensitive too: four cases also concerned alleged breaches of CERD arising from the use of force;[91] three cases concerned allegations of genocide;[92] one concerned allegations of torture;[93] and one originated from the imposition of the death penalty on a man detained in breach of his consular rights.[94] *Belgium v Senegal* arose from the refusal by Senegal to prosecute or extradite Hissène Habré, who had committed gross violations of human rights in Chad during his time as President. *Immunities and Criminal Proceedings* and *Alleged Violations of the 1955 Treaty* were politically sensitive too: the former because it touched on the immunity of the Vice-President of Equatorial Guinea; the latter because it arose from the US administration's decision to reimpose economic sanctions on Iran on the basis that it had allegedly breached commitments relating to its nuclear programme.

The ICJ had already heard politically sensitive cases featuring requests for provisional measures prior to *Georgia v Russian Federation*, including *United States Diplomatic and Consular Staff in Tehran*,[95] *Nicaragua*[96] and *Bosnian Genocide*.[97] In those cases, however, the ICJ did not examine the respondents' arguments against jurisdiction. The question is therefore what the difference is between these cases and those heard since *Georgia v Russian Federation* that justifies the application of the different jurisdictional tests. A first distinction is that the finding in *LaGrand* that provisional measures are binding has added to the political sensitivity of requests for such measures. It is now clear that the Court's orders impose international obligations limiting sovereignty in areas in which States do not wish to give up control, the use of force being an example. A second difference is the change in the political discourse on international law, especially with the rise of populist narratives since the end of the 2000s challenging multilateral institutions and processes.[98] In this context, it is understandable that the Court would seek to fashion its reasoning to enhance its authority and legitimacy.

In relation to provisional measures, it is unsurprising that the drive to buttress the Court's authority has resulted in its seeking to provide detailed justification for its jurisdiction, explaining the adoption of the granular approach. This approach responds to the concern of States that the Court may take an expansive view of its jurisdiction. It is States that define the Court's jurisdiction under the Statute, special agreements and other treaties containing compromissory clauses. The definition of jurisdiction is an ex ante political constraint which operates to limit the Court's jurisdiction even before a

[91] See *Ukraine v Russian Federation (ICSFT and CERD)* (n 10); *Qatar v UAE* (Provisional Measures) (n 9); *Armenia v Azerbaijan* (n 57); *Azerbaijan v Armenia* (n 57).

[92] See *South Africa v Israel* (n 7); *Ukraine v Russian Federation (ICSFT and CERD)* (n 10); *The Gambia v Myanmar* (n 57).

[93] See *Canada and the Netherlands v Syria* (n 7).

[94] See *Jadhav* (n 57).

[95] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (n 35).

[96] *Nicaragua* (n 34).

[97] *Bosnian Genocide* (n 34).

[98] C McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 ICLQ 499; J Crawford, 'The Current Political Discourse concerning International Law' (2018) 81 MLR 1; HG Cohen, 'Multilateralism's Life Cycle' (2018) 112 AJIL 47.

case is brought, and which States expect the Court to heed.[99] To do so, the ICJ can use jurisdictional arguments, which also help it avoid engaging with politically sensitive issues.[100] An example is finding that there is no 'dispute' between the parties, as the Court did in the *Nuclear Disarmament* cases.[101] Similarly, the granular approach can help the Court to avoid indicating provisional measures in politically charged cases, such as *Legality of the Use of Force*. Even where the ICJ indicates provisional measures, the granular approach can provide an argumentative framework for dissenting judges to influence the outcome of subsequent decisions on jurisdiction. In *Georgia v Russian Federation*, a seven-judge minority dissented from the Court's finding on jurisdiction at the provisional measures stage. At the preliminary objections stage, that minority was part of the ten-judge majority which found that there was no jurisdiction because the preconditions under Article 22 CERD had not been satisfied.[102] Whether the granular approach is used as an avoidance technique by the Court or as a framework for dissenting opinions, it is an instrument that the Court can use in politically sensitive cases either to find that it lacks jurisdiction, or to give the appearance that it has grounded its jurisdiction in sound reasoning.

4. Ramifications of the granular approach

The granular approach has two main ramifications: first, it has generated inconsistency in the ICJ's jurisprudence; and second, it promotes a conception of the ICJ's judicial function as focused on the settlement of disputes rather than on the development of international law or the maintenance of public order.

4.1. Inconsistency in the Court's jurisprudence

There are three strands of inconsistency that have been introduced into the ICJ's jurisprudence through its adoption of the granular approach: first, the granular approach is so malleable that, by applying it, the Court risks treating like cases differently; second, it overlaps with the plausibility test, which is a separate requirement for provisional measures; and third, it overlaps with the *Oil Platforms* test, which the Court uses to make definitive decisions on whether it has jurisdiction ratione materiae.

4.1.1. Malleability of the granular approach

The granular approach is a more malleable jurisdictional test than the prima facie test. Under the latter, as long as an applicant relied on a possible jurisdictional title, parties could expect the Court to find that it had jurisdiction, unless a respondent's objections were already so compelling at the provisional measures

[99] T Ginsburg, 'Political Constraints on International Courts' in CPR Romano, K Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 483, 489.

[100] Odermatt (n 90) 227–32. The different approaches to jurisdiction in the context of disaggregated disputes are also types of avoidance techniques: see Hill-Cawthorne (n 66) 793–813.

[101] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833 (*Nuclear Disarmament*) paras 36–58.

[102] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70.

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stage that the only sound decision was not to indicate provisional measures for want of jurisdiction.[103] The granular approach, however, requires consideration of a respondent's jurisdictional objections and an examination of the available evidence, which introduce indeterminacy into the ICJ's decisions on jurisdiction.

First, the Court exercises a high degree of discretion in determining whether a jurisdictional objection is 'sufficiently' compelling to justify finding that there is no jurisdiction. The function of courts of law is to decide whether an argument is more convincing than another by exercising their judgment. It is undesirable to limit this appreciation too much. However, the 'sufficiency' element may give the Court too much discretion in evaluating jurisdictional objections, which offsets the equally important need for predictability in that evaluation.

Second, there is no clear guidance concerning whether and how closely the Court should examine the evidence relating to a respondent's jurisdictional objections. Absence of clarity on the evaluation of evidence is not specific to provisional measures proceedings but, rather, is a general concern given the paucity of specific rules on evidence at the ICJ.[104] Under the prima facie test, the Court did not have to worry about whether and how to assess evidence relating to a respondent's jurisdictional objections. Parties also knew that the Court would not consider respondents' objections in relation to jurisdiction.

The indeterminacy resulting from these two factors shows how malleable the granular approach can be. Two cases exemplify this malleability and how the Court can use the granular approach to justify any decision on jurisdiction that it may wish to make. In *Immunities and Criminal Proceedings*[105] and in *Qatar v United Arab Emirates* (UAE),[106] the existence of the Court's jurisdiction depended on the interpretation of certain treaty provisions. Despite the similarity of the underlying question, the Court applied the granular approach differently: it interpreted the Palermo Convention in *Immunities and Criminal Proceedings*, thus raising the jurisdictional bar, but deferred interpretation of CERD in *Qatar v UAE*, thus lowering that same bar.

In *Immunities and Criminal Proceedings*, the parties disputed whether Article 4 Palermo Convention incorporated rules of customary international law on the immunity of State officials. Equatorial Guinea argued that it did because, under Article 4 itself, States must implement their obligations consistently with 'the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States'.[107] The Court stated that Article 4 'does not appear to … incorporate rules of customary international law concerning those immunities' and, on that basis, found in the order on provisional measures that it lacked jurisdiction.[108] The Court developed its reasoning along two strands: first, it looked at the provisions of the Palermo Convention to identify the types of obligations that they created; and

[103] Section 2.1.

[104] J Devaney, 'Fact-finding and Expert Evidence' in C Espósito and K Parlett (eds), *The Cambridge Companion to the International Court of Justice* (CUP 2023) 187, 188.

[105] *Immunities and Criminal Proceedings* (n 57).

[106] *Qatar v UAE* (Provisional Measures) (n 9).

[107] Palermo Convention (n 75) art 4.

[108] *Immunities and Criminal Proceedings* (n 57) paras 49–50.

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

second, it characterised the dispute not as an assessment of France's performance of its obligations under the Palermo Convention but, rather, as an examination of whether Equatorial Guinea's Vice-President had immunity ratione personae under customary international law.[109] Under the granular approach, the Court did not need to consider other provisions of the Palermo Convention or to characterise the dispute. The Court could merely have stated that references to sovereign equality and non-intervention were sufficiently open-ended to incorporate customary rules into the Palermo Convention, leaving the interpretation of Article 4 to a later stage in the proceedings. Such a decision would also have been consistent with the practice, under the granular approach, not to interpret treaty provisions.[110]

Qatar v UAE also raised a question of treaty interpretation. Article 1 CERD lists 'national origin' as a ground of discrimination that is prohibited under CERD. The parties disputed whether 'national origin' encompassed 'nationality', meaning that discrimination based on 'nationality' would also be prohibited under CERD.[111] The Court found that it did not need to address this issue at the provisional measures stage and decided that it had jurisdiction ratione materiae to indicate provisional measures.[112] Unlike in *Immunities and Criminal Proceedings*, where the judges unanimously found that the Court had jurisdiction, in *Qatar v UAE* four judges dissented on the ground that 'national origin' did not cover 'nationality'.[113] Given the disagreement among judges, the Court had more cause to interpret Article 1 CERD in this case, however cursorily, than it did to interpret Article 4 Palermo Convention in *Immunities and Criminal Proceedings*. In fact, the Court later decided that it lacked jurisdiction when it interpreted Article 1 CERD at the preliminary objections stage.[114] In *Qatar v UAE*, the Court could have made the same finding that it lacked jurisdiction as it made in *Immunities and Criminal Proceedings*. The fact that the granular approach allows such different outcomes in such similar cases indicates how much flexibility the Court has when applying it.

The danger of a high degree of flexibility is that it enables the Court to treat like cases differently, exactly as it did in the above cases. Such an approach reflects poorly on the consistency of the Court's jurisprudence. Inconsistency could adversely affect the quality of judicial reasoning and diminish the authority of the Court's decisions as a consequence.[115] Reduced authority can generate various problems, including a weaker pull towards compliance.[116] At the level of normative authority,

[109] ibid paras 48–49.

[110] Section 4.1.3.

[111] *Qatar v UAE* (Provisional Measures) (n 9) paras 19, 24.

[112] ibid paras 27–28.

[113] ibid 435–37 (Joint Dissenting Opinion of Judges Tomka, Gaja and Gevorgian); ibid 481–84 (Dissenting Opinion of Judge Salam).

[114] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Preliminary Objections, Judgment) [2021] ICJ Rep 71, paras 74–105.

[115] Although the persuasiveness of the Court's reasoning impacts the authority of its decisions, that authority depends also on other factors: see I Venzke, 'International Courts' *De Facto* Authority and its Justification' in KJ Alter, LR Helfer and MR Madsen (eds), *International Court Authority* (OUP 2018) 391, 393–95.

[116] T Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 706.

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persuasive, high-quality reasoning significantly enhances an international judicial body's reputation among States. A good reputation makes an international judicial body an attractive dispute settlement forum, especially in a system without compulsory jurisdiction where international courts and tribunals compete for cases.[117] The ICJ is not in dire need of attracting more cases, with its docket as full as ever. However, the Court must remain aware of the risk of its caseload decreasing, as occurred in the 1970s and 1980s, and the possibility it may need to capitalise on its reputation to gain judicial business in the future.

4.1.2. Overlap with the plausibility test

The granular approach overlaps with the test to apply the plausibility requirement, at least where it requires the Court to address jurisdiction ratione materiae. The Court performs the same exercise to decide whether an applicant's claims are plausible and whether, under the granular approach, it has jurisdiction ratione materiae. To avoid redundancy, the ICJ could dispense with the second stage of the plausibility test and continue applying the granular approach to jurisdiction.

As introduced in *Belgium v Senegal*, plausibility requires the Court to find whether an applicant's claimed rights might have a basis in international law. The Court subsequently developed the plausibility requirement into a two-stage test, which also requires it to ascertain whether an applicant's claims might be supported by the evidence available at the provisional measures stage.[118] In other words, the Court assesses the plausibility of claims by assessing whether a right exists and whether a respondent's conduct might constitute a breach of the applicant's rights. To address issues of jurisdiction under the granular approach, the Court may have to decide whether it has jurisdiction ratione materiae. The test for the latter is that formulated in *Oil Platforms*, under which the Court must assess whether the violations alleged fell within the provisions of the treaty, 'and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain'.[119] This decision requires the Court to examine whether a respondent's conduct might fall within the provisions of the relevant treaty, which means determining whether that conduct has the potential to amount to a breach of an applicant's rights. The Court's task at the second stage of the plausibility test is strikingly similar, even identical to its task under the granular approach in regard to jurisdiction ratione materiae.

If the Court stopped assessing the plausibility of claims entirely, plausibility would return to being a requirement concerned only with the existence of an applicant's claimed rights, as it was when it was introduced in *Belgium v Senegal*. Framed as an inquiry into the existence of a right, plausibility would remain a useful requirement for provisional measures because no other requirement fulfils its particular function, that

[117] See generally C Giorgetti and M Pollack, 'Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals' in C Giorgetti and M Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (CUP 2022) 1.

[118] This two-stage test was developed in *Immunities and Criminal Proceedings*. See *Immunities and Criminal Proceedings* (n 57) paras 77–79. See also Lando (n 18) 648–50, 658–62.

[119] *Oil Platforms* (n 19) para 16. For further discussion on the relationship between the granular approach and the *Oil Platforms* test, see Section 4.1.3.

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of allowing the Court to indicate provisional measures only where applicants invoke rights that might have a basis in international law. Assessing the plausibility of claims fulfils a separate function, allowing the Court to indicate provisional measures only where a respondent might breach an applicant's plausible rights. A similar function is, however, fulfilled by another requirement for provisional measures, irreparable prejudice.[120] The aim of irreparable prejudice is to establish whether a respondent might prejudice an applicant's rights irremediably before the Court's final judgment, allowing it to indicate provisional measures only if a respondent might breach an applicant's rights.[121]

Yet, irreparable prejudice and plausibility of claims are not coextensive. Irreparable prejudice allows the indication of provisional measures where there might not only be a breach by a respondent, but irremediable prejudice would be caused by that breach. The latter aspect is irrelevant to the plausibility of an applicant's claims. There may thus be cases in which an applicant's claims are plausible, but the prejudice is not irreparable. The consequence would be that irreparable prejudice cannot always fulfil the function of assessing the plausibility of claims. This view is, however, unconvincing. Irreparable prejudice is a threshold question concerning whether the seriousness of the prejudice can rise to the level of irreparability.[122] When examining irreparable prejudice, the Court seeks to determine not whether there is a breach, but whether a respondent could make reparation for causing that prejudice. Irreparable prejudice does not require a yes-or-no answer concerning the existence of a breach. Thus understood, irreparable prejudice presupposes that there might be a breach. If the Court reaches the point at which it must consider the irreparability of the prejudice, it should necessarily be satisfied that it has jurisdiction under the granular approach, and therefore that a respondent's conduct might constitute a breach of an applicant's rights.

The Court has not assessed jurisdiction ratione materiae in all provisional measures cases since adopting the granular approach, but only where respondents have raised ratione materiae objections.[123] The problem could therefore be that the Court may analyse irreparable prejudice without having first established whether there might be a breach of an applicant's rights. This situation could be problematic only where the Court finds that prejudice is not irreparable, as to find otherwise presupposes that there might be a breach. In a scenario where prejudice is not irreparable, the Court would not indicate provisional measures. This would be the result if the Court did not examine jurisdiction ratione materiae but determined that prejudice is not irreparable. This would also be the result if the Court did examine jurisdiction ratione materiae: if the Court found that a respondent's conduct might not amount to a breach of an applicant's rights, it would not indicate provisional measures; if the Court found instead that a respondent's conduct might constitute a breach of an applicant's rights, it would

[120] For an example of the Court's examination of irreparable prejudice, see *Immunities and Criminal Proceedings* (n 57) paras 88–91. On the similarity between plausibility and irreparable prejudice, see MA Becker, 'Crisis in Gaza: *South Africa v Israel* at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)' (2024) 25 MJIL (forthcoming).

[121] Rosenne (n 1) 136.

[122] Miles (n 1) 226–31; Oellers-Frahm (n 1) 1160–63.

[123] Section 2.2.2.

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not indicate provisional measures either because, in this scenario, prejudice is not irreparable. The choice to examine jurisdiction ratione materiae or not does not have an impact on the result, as the Court would not indicate provisional measures in any event.

If the Court stopped assessing the plausibility of claims, the function of assessing whether there might be a breach, a task currently shared between plausibility and irreparable prejudice, would be sufficiently fulfilled by the irreparable prejudice and jurisdiction assessments. Irreparable prejudice presupposes a possible breach, while jurisdiction ratione materiae confirms whether the conduct might constitute such a breach. Thus, even if plausibility were confined to an inquiry into rights, which would better define its unclear contours that have generated much scholarly debate,[124] the Court would still safeguard against indicating provisional measures in cases lacking a plausible basis for breach, enhancing conceptual clarity and avoiding duplicative analyses.

Framing plausibility as concerning only the existence of rights would also limit its usefulness to cases in which applicants invoke rights under customary international law. Where applicants request provisional measures in respect of treaty rights, the existence of those rights in principle is certain, which is not necessarily the case for rights under customary international law.[125] *Certain Documents and Data* is a good example of the latter. Timor-Leste invoked a customary right to confidential communication with legal counsel, which the Court found to be plausible because it might be 'derived from the principle of the sovereign equality of States'.[126] It is possible to imagine cases in which even a treaty right might not be found to be a plausible basis, for example, where an applicant puts forward a ludicrous interpretation of the treaty provision from which that right would stem. Such situations are unlikely in practice but, even if they were to materialise, the Court could address them using the granular approach to jurisdiction.

4.1.3. *Overlap with the* Oil Platforms *test*

The granular approach may be a sound substitute for assessing the plausibility of claims, but it raises problems of consistency with the *Oil Platforms* test. The Court uses this test to decide definitively whether it has jurisdiction ratione materiae in cases brought under a compromissory clause.

The Court has formulated the *Oil Platforms* test as a uniform approach, under which it decides whether a respondent's conduct can, in principle, constitute a breach of the obligations under the treaty that contains the compromissory clause conferring jurisdiction on it.[127] In fact, the *Oil Platforms* test comprises three variants, which the ICJ applies separately, sometimes within the same judgment.[128] First, under the

[124] In addition to Lando (n 18) 650–64, see C Miles, 'Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice' (2018) 88 BYIL 1; R Kolb, 'Digging Deeper into the "Plausibility of Rights"-Criterion in the Provisional Measures Jurisprudence of the ICJ' (2020) 19 LPICT 365; DG Kontogiannis, 'Provisional Measures of the International Court of Justice: Recapturing the Plausibility Test as Foreshadowed' (2020) 33 HagueYIL 31.

[125] Lando (n 18) 653.

[126] *Questions relating to the Seizure and Detention of Certain Documents and Data* (n 56) para 27.

[127] *Oil Platforms* (n 19) para 16.

[128] Lando (n 19) 56–64.

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'dispute variant', the Court decides only whether there is a dispute regarding the interpretation of the relevant treaty, as it did in *Immunities and Criminal Proceedings* in regard to Equatorial Guinea's claims relating to the Vienna Convention on Diplomatic Relations (VCDR).[129] Second, under the 'conduct variant', the Court considers whether a respondent's conduct can, in principle, amount to a breach of an applicant's rights, as it did in respect of Ukraine's claims against the Russian Federation relating to CERD.[130] Third, under the 'interpretation variant', the Court fully interprets the provisions of the treaty on which an applicant relies, as it did with Article X 1955 Treaty to determine that it had jurisdiction over Iran's claims in *Oil Platforms* itself.[131] The dispute variant of the *Oil Platforms* test requires the Court to decide only whether the parties dispute the interpretation of a treaty, but under the granular approach the Court applies a more exacting test by also assessing the parties' conduct based on the available evidence. It is procedurally problematic for the Court to apply a more exacting jurisdictional test at the provisional measures stage, under the granular approach, than it does when making a final determination on jurisdiction, under the *Oil Platforms* test.

With respect to the conduct variant, there is substantial overlap between what the Court does to find whether it has jurisdiction ratione materiae at the provisional measures stage under the granular approach and what it does to find whether it has jurisdiction ratione materiae at the preliminary objections stage under the *Oil Platforms* test. The two tests are formulated in similar terms with the same practical effect: *Georgia v Russian Federation* requires the Court to analyse whether 'the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD',[132] and *Oil Platforms* requires the Court to 'ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty'.[133] Both tests require the Court to decide whether a respondent's conduct can, in principle, constitute a breach of an applicant's rights. It is possible that the Court applies two distinct jurisdictional thresholds when deciding whether a respondent's conduct might amount to a breach of an applicant's rights: a lower one under the granular approach at the provisional measures stage and a higher threshold under the *Oil Platforms* test at the preliminary objections stage.

However, this is not borne out by the jurisprudence, which shows that, within the same case, the Court has applied a higher jurisdictional threshold under the granular approach than under the *Oil Platforms* test. With respect to Ukraine's claims against the Russian Federation under CERD, at the provisional measures stage the Court found that 'the acts referred to by Ukraine … appear to be capable of falling within the scope of CERD *ratione materiae*'.[134] At the preliminary objections stage,

[129] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292, paras 129–138.

[130] *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)* (Preliminary Objections) [2019] ICJ Rep 558 (*Ukraine v Russian Federation (ICSFT and CERD)* (Preliminary Objections)) paras 94–97.

[131] *Oil Platforms* (n 19) paras 41–52.

[132] *Georgia v Russian Federation* (n 8) para 112.

[133] *Oil Platforms* (n 19) para 16.

[134] *Ukraine v Russian Federation (ICSFT and CERD)* (Provisional Measures) (n 10) para 38.

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the Court found that 'the measures of which Ukraine complains … are capable of having an adverse effect on the enjoyment of *certain rights* protected under CERD'.[135] Under the granular approach, the Court found that the Russian Federation's acts might fall within the material scope of CERD. In making this finding, the Court did not indicate that the Russian Federation might have breached only *some* of Ukraine's claimed rights, the implication being that the Russian Federation might have breached *all* those rights. Conversely, under the *Oil Platforms* test, the Court determined that the Russian Federation's acts might have breached only 'certain' of Ukraine's claimed rights. The Court's statement in its order on provisional measures, indicating that the Russian Federation might have breached *all* of Ukraine's claimed rights, appears more exacting than its statement in its judgment on preliminary objections, that the Russian Federation might have breached only *some* of those rights, which the Court did not even identify. This difference suggests that the Court applied a higher jurisdictional threshold at the provisional measures stage.

Furthermore, in some cases the Court has appeared to examine the available evidence more thoroughly under the granular approach than under the *Oil Platforms* test. The Court's reasoning in the orders since *Georgia v Russian Federation* indicates that it decides on the respondents' arguments against jurisdiction by considering the evidence available at the provisional measures stage, though perhaps not in much depth.[136] The approach to evidence under the *Oil Platforms* test is ambiguous. Judges debated what that approach should be in *Oil Platforms* itself. Judge Ranjeva stated that the Court should establish whether an applicant's case was 'plausible'.[137] Judge Higgins instead wrote that the Court should 'accept *pro tem* the facts as alleged by [an applicant] to be true'.[138] This debate developed most clearly in the case between Ukraine and the Russian Federation under the ICSFT and CERD at the preliminary objections phase. Ukraine took Judge Higgins' view in its submissions,[139] while the Russian Federation argued that the Court should be satisfied that 'there is a plausible claim under the treaty being relied on'.[140] The Court's view on this point was unclear, as it stated that 'an examination … of the plausibility of the claims is not generally warranted' while adding that its task 'is to consider the questions of law and fact that are relevant to the objection to its jurisdiction'.[141]

If the Court did not consider questions of fact at the preliminary objections stage, this appears to be a less exacting jurisdictional examination than under the granular approach at the provisional measures stage, which seems procedurally unjustifiable. If the Court considers questions of fact at the preliminary objections stage, what it would do under the *Oil Platforms* test would be similar to what it would do under the

[135] *Ukraine v Russian Federation (ICSFT and CERD)* (Preliminary Objections) (n 130) para 95 (emphasis added).

[136] Section 2.2.2.

[137] *Oil Platforms* (n 19) 846 (Separate Opinion of Judge Ranjeva).

[138] ibid 856 (Separate Opinion of Judge Higgins).

[139] *Ukraine v Russian Federation (ICSFT and CERD)* (Preliminary Objections) (n 130) Verbatim Record CR 2019/10, 4 June 2019, 21, para 16 (Thouvenin).

[140] *Ukraine v Russian Federation (ICSFT and CERD)* (Preliminary Objections) (n 130) Verbatim Record CR 2019/9, 3 June 2019, 23–34, para 18 (Wordsworth).

[141] *Ukraine v Russian Federation (ICSFT and CERD)* (Preliminary Objections) (n 130) para 58.

granular approach. The question arises concerning the utility of, and opportunity for, examining jurisdiction twice in the same proceedings by a comparable, quite possibly identical, approach. By doing so, the Court might seek to ensure that respondents perceive that it has given their arguments against jurisdiction adequate consideration, which may help avoid disagreement with the Court's finding on jurisdiction becoming a basis for respondents to justify not complying with a judgment on the merits.[142] The potential gain from retaining a respondent's goodwill should be balanced with the perception of the Court's reasoning by other States. Cogency of reasoning increases the authority of the Court's decisions,[143] which contributes to making ICJ litigation an attractive mechanism for States to settle their disputes. It is at least doubtful, and possibly unlikely, that States would perceive the application of identical jurisdictional tests in two separate stages of the same proceedings as cogent reasoning.

However, there may be a way to solve the problems of consistency between the granular approach and the *Oil Platforms* test. The Court could always apply the *Oil Platforms* test by way of its 'interpretation variant'. The practice under the granular approach is not to interpret the treaty provisions on which applicants have relied. The 'interpretation variant' requires the Court to perform a distinct exercise from that under the granular approach, which should avoid the overlap that results from applying the 'conduct variant'. There are three obstacles to using the 'interpretation variant' to solve issues of consistency between the Court's jurisdictional tests. First, under the 'interpretation variant', the Court has sometimes interpreted treaty provisions only to decide whether a respondent's conduct might constitute a breach of its obligations under the provisions as interpreted. Examples of this approach are *Oil Platforms* and *Certain Iranian Assets*.[144] Applying the 'interpretation variant' is no guarantee that there will be no overlap between the assessments of jurisdiction at the preliminary objections and provisional measures stages.

Second, it is possible that the 'interpretation variant' does not entail a more exacting jurisdictional threshold than the granular approach. The ICJ performs two different exercises under each test, one interpretive and the other evaluative of the evidence, which makes it difficult to compare them to decide which is more exacting. Where, to apply the 'interpretation variant', the Court also considers whether a respondent's conduct might constitute a breach of an applicant's rights, the jurisdictional threshold appears higher than under the granular approach, but it seems difficult to take this assessment any further.

Third, applying the 'interpretation variant' depends also on whether a respondent objects to an applicant's reading of the relevant treaty. Respondents seem likely to make such an objection, but they might choose not to, instead disputing only the claim that their conduct amounts to a breach of the applicant's rights. Even in the more likely case where a respondent contests an applicant's reading of the relevant treaty, it would

[142] A classic example is the US refusal to appear at the merits phase of the proceedings in *Nicaragua* (n 34) and to comply with the Court's judgment.

[143] N Grossman, 'Solomonic Judgments and the Legitimacy of the International Court of Justice' in N Grossman et al (eds), *Legitimacy and International Courts* (CUP 2018) 43, 55.

[144] *Oil Platforms* (n 19) paras 50–51; *Certain Iranian Assets (Iran v United States of America)* (Preliminary Objections) [2019] ICJ Rep 7, paras 48–80.

not be certain that the Court would apply the 'interpretation variant'. In *Immunities and Criminal Proceedings*, for example, the parties disputed the meaning of 'premises of the mission' under Article 1(i) VCDR, but the Court determined that it had jurisdiction, without interpreting that provision, based on the existence of an interpretive dispute between the parties.[145]

4.2. Judicial function as dispute settlement

The granular approach responds to concerns that sovereignty is being eroded by apparent excesses of judicial power, such as the Court asserting jurisdiction where it may not exist.[146] It also stems from the Court's concern to discourage States from involving it in politically sensitive disputes. The granular approach emerges as an instrument of avoidance. The implication of using this approach is that the Court promotes, implicitly or otherwise, a conception of its judicial function focused on dispute settlement, instead of a conception extending to the development of international law and the maintenance of public order. Promoting this conception suggests that the granular approach is an instrument to enhance legitimacy that could help to alleviate the concerns of those States which have been openly challenging multilateral institutions like the Court.[147]

Broadly, the ICJ's judicial function has two aims: first, settling disputes;[148] and second, developing the law and maintaining public order.[149] These aims are not mutually exclusive and could be seen as complementary, being integral parts of the international judicial function.[150] The significance of each aim varies from case to case and over time. The dispute settlement aim is likely preponderant in politically sensitive cases, which may justify a restrained approach by the ICJ and thus are not always appropriate opportunities to introduce new developments. The dispute settlement aim is likely preponderant also at times when the Court may face backlash from States, for example because States perceive, justifiably or not, that it has engaged in judicial activism.[151] Regardless of which aim appears predominant in particular cases, these aims emphasise different aspects of the Court's judicial function. Settling disputes fulfils a primarily private function, in principle through the Court's exercise of its contentious jurisdiction.[152] Developing international law and maintaining public order fulfil a distinctly public function that finds expression in the Court's exercise of its advisory jurisdiction,[153] though the Court can also develop

[145] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) (n 129) paras 126, 128.

[146] McLachlan (n 98) 514–16.

[147] Generally on the backlash against multilateral institutions and processes, see the authors at n 98.

[148] Thirlway (n 1) 5.

[149] H Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 3–5.

[150] D Guilfoyle and J Mossop, 'The Extent and Legitimacy of the Judicial Function in UNCLOS Dispute Settlement' (2024) 73 ICLQ 1, 13–14.

[151] An example of a tribunal being harmed by allegations of judicial activism is the Appellate Body of the World Trade Organization: see I Van Damme, '25 Years of Law and Practice at the WTO: Did the Appellate Body Dig Its Own Grave?' (2023) 26 JIEL 124.

[152] GI Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 41–94.

[153] ibid. See also S Thin, 'Guardians of Legality? The International Judicial Function in an Era of Community Interest' (2023) 92 NordicJIL 499, 506–12.

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international law incidentally to the settlement of disputes.[154] In the context of Part XV of the UN Convention on the Law of the Sea (UNCLOS), these two aims have been conceptualised as a 'procedural' and a 'substantive' model: while the former emphasises consent and maximises sovereignty, the latter implies a responsibility to ensure the balance of rights between UNCLOS State Parties.[155]

Underlying the granular approach are the hallmarks of the private or procedural conception of the judicial function. First, the granular approach applies in contentious proceedings, in which the Court's primary aim is likely to be dispute settlement. Second, the granular approach emphasises consent because it raises the jurisdictional bar in provisional measures proceedings and, therefore, requires the Court to be more certain that parties have consented to its jurisdiction than under the prima facie test. Third, the granular approach maximises respect for sovereignty, its adoption being motivated, at least in part, by the concern to avoid imposing legal obligations on States by means of provisional measures.

Nevertheless, the adoption of the granular approach is not entirely incompatible with the public or substantive conception of the judicial function. The granular approach results from the Court's development of its earlier approach to jurisdiction, the prima facie test. This development would fit within a public or substantive conception of the judicial function. The distinction is between the granular approach's adoption and its application: its adoption is an exercise in the public or substantive judicial function, while its application is an exercise in the private or procedural judicial function. There are other ICJ cases that exemplify this distinction. In the *Nuclear Disarmament* cases, the Court developed the concept of 'dispute', a prerequisite to its jurisdiction, by adding the requirement that respondents must be aware, or could not be unaware, that their views are positively opposed by the views of the applicants.[156] New approaches or new requirements may emphasise consent and maximise sovereignty, but their very adoption illustrates the Court's law-developing power. Although the power to develop the law is limited to the moment in time when the Court adopts a new approach or requirement, considerations of consent and maximisation of sovereignty project into the future, because in principle the Court applies new approaches and requirements across future cases. Even though the Court exercised its public or substantive judicial function in developing the granular approach, it has exercised, and continues to exercise, its private or procedural judicial function by repeatedly applying that approach.

As the granular approach emphasises consent, it can be seen as an instrument for the Court to enhance the legitimacy of its orders on provisional measures. The role of consent as a source of legitimacy, understood as the right to rule,[157] has declined,[158] but the Court still derives significant legitimacy from respecting the jurisdictional

[154] RY Jennings, 'The Role of the International Court of Justice' (1997) 68 BYIL 1, 41.

[155] N Klein and K Parlett, *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea* (OUP 2022) 371. On the ICJ, see Thin (n 153) 512.

[156] *Nuclear Disarmament* (n 101) para 41.

[157] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 24.

[158] For example, see M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, 909–17.

limits imposed by State consent.[159] The prima facie test prioritised an applicant's consent, because it focused on whether an applicant provided a basis that might found the Court's jurisdiction. The Court paid little regard to whether a respondent's consent was more limited than an applicant's because it did not consider a respondent's arguments against jurisdiction unless they showed an obvious lack of jurisdiction. The granular approach strikes a different, and fairer, balance between an applicant's and a respondent's consent, which underlies the granular approach, by which the Court aims to determine which party has the better argument on the material available.

Seen in this light, the granular approach can result in decisions that better reflect the scope of the parties' consent, which can enhance the legitimacy of the Court's orders on provisional measures, both in terms of 'input' and 'output' legitimacy.[160] Input legitimacy is concerned with whether the Court has made its orders pursuant to established procedures. This includes whether the Court's jurisdiction in contentious cases has a sound basis, which is based on consent and is given greater focus under the granular approach.[161] Greater focus on consent can enhance output legitimacy too, which is concerned with whether the Court's orders alleviate the concerns of States,[162] including ensuring that the Court respects the limits of States' consent to jurisdiction. The granular approach ensures respect for those limits better than the prima facie test. It also indicates that the Court pays more attention to another concern of States, that of avoiding restrictions on their sovereignty, especially where their vital interests are concerned.[163] Greater legitimacy can also strengthen the pull towards compliance with provisional measures.[164] Legitimacy is especially important at present, with numerous States undermining, or at least not openly supporting, international law, its institutions and processes. Increasing legitimacy may not address States' criticism of the Court, but it can result in the Court remaining a viable, even attractive, dispute settlement forum. The granular approach can contribute to achieving this result.

5. A 'good arguable' case test

Since *Georgia v Russian Federation*, the ICJ has developed the established prima facie test for jurisdiction in provisional measures cases into a new approach. Under this approach, the Court considers not only whether an applicant has provided a basis on which jurisdiction might be founded, as it would do under the prima facie test, but it also examines a respondent's arguments against jurisdiction and the evidence relevant to them. This approach requires a more granular consideration of jurisdictional questions at the provisional measures stage than under the prima facie test. This

[159] Grossman (n 143) 45.

[160] T Broude, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the *Wall*' (2005) 38 IsLR 189, 194.

[161] R Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Springer 2008) 1, 6.

[162] Y Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 164–67.

[163] McLachlan (n 98) 513–14. The *Republic of the Philippines v Peoples' Republic of China*, PCA Case No 2013–19, Award on Jurisdiction and Admissibility (29 October 2015) exemplifies how a jurisdictional decision can touch on the vital interests of a State, in that case China's territorial and maritime claims.

[164] Franck (n 116) 706.

https://doi.org/10.1017/S0020589325100742 Published online by Cambridge University Press

change in approach is likely to have been prompted by the Court's recognition, in *LaGrand*, that provisional measures are binding. The possibility of casting questions of jurisdiction as questions concerning the existence of the rights to be protected, also a legacy of *LaGrand*, further illustrates the connection between the adoption of the granular approach and the binding character of provisional measures. Another potential motivation for developing a more granular approach is the political sensitivity of the cases in which the Court introduced and consolidated it.

Applying the granular approach, however, has some implications. First, it is vaguely formulated and, consequently, sufficiently malleable that the Court can use it to justify any decision it wishes to make concerning jurisdiction. Conversely, under the prima facie test, the parties could reasonably expect that the Court would not find that it lacked jurisdiction at the provisional measures stage. Second, the granular approach overlaps with the plausibility test applicable in deciding whether to indicate provisional measures. To address this overlap, the Court could stop applying the second limb of the test, assessing the plausibility of claims, because the function of that second limb would be subsumed by the inquiries into irreparable prejudice and jurisdiction ratione materiae under the granular approach. Third, the Court's analysis under the granular approach overlaps with its analysis under the *Oil Platforms* test. The granular approach entails a jurisdictional threshold higher than that under the 'dispute variant' of the *Oil Platforms* test and an evaluation of jurisdiction at least identical to the one required by the 'conduct variant' of that test. Fourth, by adopting the granular approach, the Court promotes a private conception of its judicial function, aimed primarily at settling disputes rather than at developing international law or maintaining public order.

The essence of the granular approach is to require the ICJ to determine whether, on the material available, an applicant has better arguments for jurisdiction than a respondent against it. If one had to choose a label for this granular approach, it might be that of a 'good arguable case' test. Regardless, it remains that the Court has abandoned its classic, prima facie jurisdiction test and has been applying a granular approach widening the focus of its analysis from the applicant's arguments for jurisdiction to the respondent's arguments against it.

Acknowledgements. The author thanks Marco Dimetto, Jessica Joly Hébert, Paolo Palchetti and the reviewers for their comments. The usual caveats apply.

Cite this article: M Lando, 'Provisional Measures and the End of Prima Facie Jurisdiction' (2025) 74(2) ICLQ 319–348. https://doi.org/10.1017/S0020589325100742