Chapter 11
Conclusion: The Protective Potential and Legitimate Use of Interim Measures in Human Rights Cases

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Abstract  This chapter contains overall reflections on common threads between the various contributions in this book on the protective potential and legitimacy of judicial urgency measures in human rights cases. It refers to different mechanisms highlighted throughout the book. The focus is on interim measures. The subject matters discussed concern obstacles to compliance and state pressure to control the practices developed by different adjudicators, protection gaps and suggested measures to enhance the protective potential of interim measures. Two of those suggested measures in the preceding contributions are to increase specificity and to make sure there is follow-up. This chapter reflects on these and then zooms in on the third measure suggested:

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increasing the normative legitimacy of interim measures. Normative legitimacy is important for social legitimacy and, thereby, for the protective potential of interim measures. While the criticisms expressed by states often serve merely as excuses for non-compliance, rather than constitute real concerns, it is nonetheless important to discuss how adjudicators can enhance the normative legitimacy of their decisions on interim measures. This chapter brings together aspects of normative legitimacy suggested by the various authors in the previous chapters. Legitimacy aspects discussed are the purpose of interim measures, the authority of adjudicators to take them and the legal status of interim measures, the fairness of the decision-making, avoiding prejudgment, ensuring transparency, sufficiency of the evidence and staying within the scope.

**Keywords** Interim measures · provisional measures · protective potential · legitimacy · (quasi-)judicial proceedings · urgent action methods · urgency mechanism · urgent action procedure · urgent appeals mechanism · protection measures · urgency measures · ‘Letters of Reprisal’ · specificity · follow-up · domestic sensitivities · timeliness · procedural fairness · adversarial nature · prejudgment · integrity of the proceedings · death penalty · non-refoulement · death threats · access to court and counsel · medical care · disappearance · land rights · indigenous peoples · forced displacement · evictions · basic facilities · right to housing · children’s rights · right to property · judicial independence · systemic violations · structural measures

### 11.1 Introduction

Drawing from practices developed in various international and regional adjudicatory systems, the contributors to this book gave their perspectives on the legitimacy and/or the protective potential of interim measures and other (quasi-)judicial proceedings in urgent human rights cases.

The approaches developed by adjudicators depend, among others, on the human rights risk claimed in the case before them, the urgency of that risk and the specific system in which they operate. At the same time, states, applicants and adjudicators all draw from developments in other systems. There are certain features and approaches that surface from the various contributions. One is that meeting legitimacy criteria is expected to contribute to enhance compliance. This concerns procedural criteria, such as transparency and equality of arms, and more material ones, regarding the types of cases warranting urgent (quasi-)judicial action. While some of the observations were made before, what is new is the confirmation by the various authors, looking at these questions through different lenses, discussing specific subject matters and systems.

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1See Chap. 1 for literature references.
The book discusses mechanisms obstructing the protective value of urgent action methods by various international adjudicators, on the one hand, and tools strengthening the protective value of these methods, and thereby the likelihood of follow-up in case of non-compliance, on the other hand.

At the UN level the focus is on the practice of the UN Human Rights Committee (HRCtee) and the Committee against Torture (CAT), although other treaty bodies are touched upon as well. Practices in the three regional human rights systems are highlighted in various chapters. The practice of the Court of Justice of the European Union (CJEU) is discussed both with regard to its use of interim measures, and with regard to its urgent or accelerated preliminary ruling procedure. At domestic level, practices in Brazil and in various states of the African and European human rights systems are discussed, including a case study on the Ukraine. As to domestic courts, Canadian case law is highlighted, as well as the role of domestic courts in urgent cases involving interaction with the CJEU.

Next to variety in the systems drawn upon, the authors also refer to a variety of human rights situations, from halting refoulement and executions, to providing detainees with access to health care and to lawyers, to protecting indigenous peoples’ rights to land, to access to information or basic facilities. Some chapters

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2 For a discussion, see Pillay, Chap. 4 (discussing Human Rights Committee, Committee against Torture, Committee on the Rights of the Child (CRC-Committee) and Committee on Economic, Social and Cultural Rights (ESC-Committee)) and Harrington, Chap. 6 (discussing Human Rights Committee and Committee against Torture) and Zwaan, Chap. 7 (discussing Human Rights Committee, Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT) and the Committee on the Rights of the Child (CRC-Committee)). For some other references see Ebobrah, Chap. 5; Griffey, Chap. 8. This chapter also refers to the ESC-Committee and the Committee on Enforced Disappearances. Obviously, various authors refer to ICJ case law as well, see Rieter, Chap. 1; Shelton, Chap. 2; Ebobrah, Chap. 5; Griffey, Chap. 8; and, in passing, Griffey also refers to the Law of the Sea Tribunal.

3 For the African Commission and Court on Human and Peoples’ Rights, see Ebobrah, Chap. 5. See also Shelton, Chap. 2. For the Inter-American Commission on Human Rights, see Shelton, Chap. 2. See also Harrington, Chap. 6. Burbano Herrera and Haeck, Chap. 10 focus on the Inter-American Court’s practice in the context of detention. Shelton, Chap. 2; and Pillay, Chap. 4 also refer to this Court’s interim measures. Practices developed by the European Court of Human Rights (ECtHR) are discussed by Pillay, Chap. 4; Zwaan, Chap. 7; Leach, Chap. 9; Griffey, Chap. 8; and Shelton, Chap. 2. The European Committee of Social Rights is referenced by Pillay, Chap. 4.

4 Prechal and Pahladsingh, Chap. 3.

5 Burbano Herrera and Haeck, Chap. 10; Ebobrah, Chap. 5; Zwaan, Chap. 7; Leach, Chap. 9; Pillay, Chap. 4.

6 Griffey, Chap. 8.

7 Harrington, Chap. 6.

8 Prechal and Pahladsingh, Chap. 3.

9 On non-refoulement see Zwaan, Chap. 7; see also, e.g., Prechal and Pahladsingh (Chap. 3); Pillay (Chap. 4); Harrington (Chap. 6); and Shelton (Chap. 2); on halting execution of death sentences see Shelton (Chap. 2); and Ebobrah (Chap. 5).

10 Burbano Herrera and Haeck, Chap. 10; and Leach, Chap. 9.

11 Shelton, Chap. 2; and Ebobrah, Chap. 5.

12 See Leach, Chap. 9; and Pillay, Chap. 4, respectively. See also Sects. 11.4.2 and 11.5.5.
deal with systemic human rights violations, even in contexts of armed conflict.\textsuperscript{13} Urgent rule of law claims, such as to ensure independence of the judiciary, are also mentioned.\textsuperscript{14}

In litigation involving pressing situations, people expect international adjudicators to take urgent action. Yet what are pressing situations, what urgent actions can these adjudicators take and how can their protective potential be increased? Individual victims, NGOs, addressee states and third states often have different expectations. Differences in expectation, and in gains in the short run, also explain differences in approaches to the legitimacy and protective potential of the urgent decisions by the adjudicators. This applies both to the decision-making process and to the decisions themselves. The capacity to protect against harm decreases when the (perceived) legitimacy of interim measures decreases. The contributions in this book show awareness of the importance of normative legitimacy for social or external legitimacy. Unhappy states have ignored interim measures and sometimes protested against them as an infringement on their sovereignty and interference with the domestic justice system. In this context, the question is what international adjudicators can do to enhance the protective potential of their urgency measures. While often the criticisms expressed by states may in fact serve as excuses, rather than constitute real concerns, it is nonetheless important to discuss how adjudicators can enhance the normative legitimacy of their interim measures decisions.

This chapter explores the various mechanisms and normative legitimacy aspects highlighted throughout the book. First, it reviews the range of urgency mechanisms used by regional and international (quasi-)judicial bodies (Sect. 11.2). Then it refers to mechanisms obstructing the protective potential, discussing situations of non-compliance and state pressure to control the practices developed by different adjudicators (see Sect. 11.3) as well as measures enhancing the protective value (see Sect. 11.4). Particular attention is paid to several criteria for normative legitimacy: the purpose and legal authority of interim measures, fairness of the procedure and avoiding prejudgment, motivation of interim measures decisions, sufficiency of the evidence and staying within the scope (see Sect. 11.5).

11.2 Urgency Mechanisms Used by Regional and International (Quasi-)Judicial Bodies

Various urgency mechanisms have been developed to respond to the demands of the system in question. The function of such mechanisms can be to prevent irreparable harm to persons or to maintain the integrity of the proceedings and ensure a meaningful outcome of the case. Often, they call on the state to act or refrain from acting.

\textsuperscript{13}For a systemic detention situation, see Burbano Herrera and Haeck, Chap. 10. For urgent human rights situations in the context of armed conflict, see Griffey, Chap. 8; and Leach, Chap. 9.

\textsuperscript{14}See Prechal and Pahladsingh, Chap. 3; Pillay, Chap. 4; Leach, Chap. 9; and Sects. 11.5.2 and 11.5.5 of this chapter.
pending the proceedings, as is traditionally the case with interim measures. They can also concern a decision to speed up proceedings. Moreover, next to interim measures to ensure the integrity of the proceedings, there are also other interventions by (quasi-)judicial bodies to protect against reprisals for participating in the proceedings. These issues are discussed in this section.

The Court of Justice of the European Union (CJEU) makes use of the tool of interim measures. Moreover, as part of its role vis-à-vis domestic courts through the preliminary ruling (or preliminary reference) procedure, it can also make use of the urgent or accelerated preliminary ruling procedure. In the preliminary ruling procedure, domestic courts address questions to the CJEU on a case pending before them. Because of the urgency of the situation they may request the fast track procedure. This is a unique procedure in international law. While the CJEU is rather different from the other adjudicators, and while it is clear it is not a human rights court, it most certainly has dealt with urgent human rights issues. Its experience sheds more light on the various manners in which judicial bodies can deal with urgent situations. These manners can be explained, among others, by the role of the adjudicator in question, in the context of the applicable procedure, with the specific interplay between an international and a domestic court.

The legitimacy discussion on interim measures decisions relates to the legitimacy of the urgency decisions themselves, while the legitimacy concerns with regard to the use of the urgent or accelerated preliminary ruling procedure are concerns of the CJEU itself about maintaining the legitimacy of the preliminary ruling procedure as such. Thus, in this different setting, ensuring the legitimacy and overall workings of the proceedings before the adjudicator may also be a reason for limiting the use of urgent action mechanisms. This is shown in the discussion by Prechal and Pahladsingh, stressing the need to maintain legitimacy of the normal preliminary ruling procedure.

Next to the interplay between domestic and international courts, there is another type of interplay between adjudicators, e.g. in the context of the law of the sea, where, in specific situations, it is possible for states to call upon the International Tribunal on the Law of the Sea (ITLOS) to order provisional measures in cases that will subsequently be dealt with by an arbitral tribunal. Here it is the state that calls upon ITLOS for urgent action and the action is in the form of interim measures, decided within a short time span.

There is also interaction between adjudicators in the regional human rights systems. The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) interact on the basis of the authority of the Court to also order provisional measures in matters that are not yet pending before the Court, if the Commission formally requests this (see Article 63 ACHR).

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15Prechal and Pahladsingh, Chap. 3.
16See e.g. Sinaniotis 2006; and Apter 2003.
17See Sect. 11.5 on legitimacy.
18See Prechal and Pahladsingh, Chap. 3.
19See e.g. Prechal and Pahladsingh, Chap. 3; and Burbano and Haeck Chap. 10.
similarity with the CJEU is that the one tribunal calls upon the other for urgent action, but the differences are more numerous. Moreover, the Inter-American Court decides much more quickly. The African Court on Human and Peoples’ Rights (ACtHPR) is the most recent regional human rights adjudicator. It interacts with the pre-existing African Commission on Human and Peoples’ Rights (AComHPR). Thus far, most of its provisional measures were ordered against states that had, at the time, recognised direct recourse to the Court. Yet most states parties to the Protocol introducing this Court have not recognised direct recourse, meaning that petitioners depend on the African Commission to transfer a case to the Court. The AComHPR has rarely requested the Court to order provisional measures so far. Given the increasingly limited number of states that have recognised the possibility of direct access to the ACtHPR, the Commission may have to step up its own engagement with the Court.

Apart from noting the interplay between courts, and the EU’s exceptional urgent or accelerated preliminary ruling procedure, it is important to distinguish some other urgency procedures as well: those responding to death threats and reprisals. From its early beginnings, the Inter-American Court has been faced with threats, and even killings in the context of cases pending before it. In the exercise of its judicial function it already had to order provisional measures in 1988, in Velásquez Rodríguez. Currently, in the Inter-American system all situations involving death threats and harassment may be covered by the Court’s provisional measures or the Commission’s precautionary measures.

UN treaty bodies have also used interim measures in this context. In Alzery the HRCtee did not have a chance to use them to postpone an expulsion pending the case, because the state had misrepresented the situation and expelled Alzery to Egypt before counsel had a chance to ask the Committee for interim measures. Later, after refoulement had already occurred (following which ill treatment and torture was alleged), the Committee did use interim measures of a different nature. They were in response to a situation that occurred after Alzery’s release from detention, when Swedish authorities had been contacting him about the Committee case. They had contacted him to make an argument against admissibility of the case (with regard to, e.g., counsel’s authorization and the delay in the submission before the Committee). Counsel had noted the risks Alzery was facing because he was contacted. In response, the HRCtee used interim measures to the effect that the state ‘take necessary measures to ensure that he was not exposed to a foreseeable risk of substantial personal harm

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20See Sect. 11.3.
21See Ebobrah, Chap. 5 discussing the interim measures by both the Commission and the Court.
22See Ebobrah, Chap. 5 and Sect. 11.3.3 of this chapter, referring to withdrawals.
23IACTHR, Velásquez Rodríguez v. Honduras, Order of 15 January 1988 and earlier letters on behalf of witnesses in this and the other ‘Honduran cases’, see Rieter 2010, p. 407. Generally, for the practice by the Inter-American Court, European Court, African Commission and UN committees until 2008, in dealing with death threats and harassment, see references in Rieter 2010, pp. 405–449.
24See Rieter 2010, pp. 411–415 and 431–444.
25HRCtee, Alzery v Sweden, 10 November 2006, CCPR/C/88/D/1416/2005, para 11.11.
as a result of any act of the State party in respect of the author’. This could be seen as an interim measure to protect against death threats and harassment. Here the state party must abstain from action in respect of the petition so that the petitioners would not be exposed to a risk of ‘substantial personal harm’ by agents of the state to which he had already been returned.

Sometimes treaty supervisory bodies also use other urgency mechanisms, when exercising a supervisory but not a (quasi-)judicial function. Ebobrah notes that in its ‘distinct use of urgent appeals and provisional measures within and outside the context of (quasi-)judicial litigation, the African Commission mirrors the practice of other bodies’, such as the UN HRCtee.

Indeed, UN Committees have now developed separate urgency mechanisms to respond to situations where persons might suffer intimidation or reprisals for their cooperation with a Committee. There exists such a mechanism in the context of the reporting procedure and another on behalf of petitioners, or of others involved, who might suffer intimidation or reprisals in relation to their involvement in the individual complaint procedure. Previously, the latter urgent interventions were based on the procedural rule laying down the interim measures practice of the relevant Committee, but since the special attention at UN level for reprisals for cooperation with the UN, a separate rule of procedure was established.

Thus, in addition to their rule on interim measures, often used to halt refoulement pending a case, UN Committees have developed various urgency mechanisms to respond to the aforementioned context. For instance, the Committee against Torture has introduced a rapporteur to follow-up on allegations of reprisals against persons who cooperate with the Committee. The specific modus of this urgency mechanism is ‘Reprisal Letters’ issued by the rapporteur. Before the introduction of this

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26 Id., para 2.3.
27 See Ebobrah, Chap. 5, referring to the African Commission’s urgent (letters of) appeal, under Rules 79-80 of the Commission’s Rules of Procedure 2010 and based on Article 58(3) ACHPR. As he points out, for situations brought to the notice of the Commission within the context of the communications procedure, Rule 98 of the its Rules applies and the Commission then ought to formally indicate provisional measures.
28 Ebobrah, Chap. 5.
29 See Chairs human rights treaty bodies, Guidelines against Intimidation or Reprisals (“San José Guidelines”), June 2015, HRI/MC/2015/6.
30 See Zwaan, Chap. 7.
31 This cooperation can be in the context of state reports and shadow reports (Article 19 ICAT), in the context of the inquiry procedure (Article 20) and in the context of individual complaint (Article 22). Through this introduction of follow-up on reprisals, the Committee is specifically monitoring compliance with Article 13 Convention against Torture: “States parties shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”
32 See CAT statement on reprisals, 51st session, October-November 2013, CAT/C/51/3 and CAT guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee under Articles 13, 19, 20 and 22 of the Convention, 55th
urgency mechanism, the Committee had used its interim measures in the context of the individual complaint mechanism (Article 22) ‘to ensure that no harm is done to the author’s family, the alleged victim’s family or the witnesses and their families’. 33

Similarly, next to its rule on interim measures (current Rule 94), the HRCtee has now created a separate Rule for approaching the state for urgent protection in situations where authors of communications, or others involved, might suffer intimidation or reprisals (current Rule 95). 34 This is referred to as ‘protection measures’. Before it formalised this in its Rules of Procedure of 2019, the Committee already indicated that it had ‘developed the practice of requesting States parties to adopt measures of protection vis-à-vis the author(s) of a communication or close family members, when there are well-founded indications that the submission of the communication to the Committee has resulted or will result in acts of intimidation against these persons’. 35 It explained that ‘[p]rotection measures are to be distinguished from interim measures in that their purpose is not to prevent irreparable damage affecting the object of the communication itself, but simply to protect those who might suffer adverse consequences for having submitted the communication, or to call the State party’s attention to their aggravating situation linked to the alleged violations of their rights’. 36

An intervention by a treaty body in its function as a (quasi-)judicial body aims to protect the person in question, but also the integrity of the complaint procedure itself. If used in the context of the complaint proceedings, interim measures, protection measures, urgent actions or so-called ‘Letters of Reprisal’ could be referred to as (quasi-)judicial urgency measures. Still, a rule on ‘protection measures’ could also be invoked upon conclusion of a case, while at that stage invoking a rule on interim measures appears somewhat contradictory given the expectation of temporariness flowing from the words ‘interim’ or ‘provisional’. 37 In that light, one could see

session, July-August 2015, CAT/C/55/2. For the general information page see https://www.ohchr.org/EN/HRBodies/CAT/Pages/ReprisalLetters.aspx (accessed 1 May 2020).

33In April 1994, in CAT B.M’B v Tunisia, 5 May 1994 (inadm.), CAT/C/14/D/14/1994, para 2.4. See Rieter 2010, pp. 411, 443 and 754–758 on maintaining interim measures beyond a declaration of inadmissibility and beyond a judgment on the merits and reparation. The problematic aspect of this can be avoided with the use of Letters of Allegation or other urgent mechanisms instead of interim measures proper. See also Sect. 11.5 on legitimacy.

34Rule 95 (Protection measures), HRCtee Rules of Procedure CCPR/C/3/Rev.11, January 2019: Upon receiving information from the author of the communication, the Committee may also request the State party to take protection measures in favour of individuals, including the author(s), his/her counsel and family members, who might suffer acts of intimidation or reprisals as a result of the submission of the communication or cooperation with the Committee. The Committee may seek from the State party written explanations or statements clarifying the matter and describing any action taken in that regard."

35HRCtee, report by the Special Rapporteur, CCPR/C/110/3, 6 May 2014, para 11.

36Ibid, para 12. See also para 4 expressing concern about intimidation and reprisals in general (e.g. also in the context of involvement in the public hearings discussing state reports, or with the submission of shadow reports).

37The Inter-American Court does order provisional measures even if a case is not pending before it, but it has a special authority to do so because under Article 63(2) the Commission can bring any
protection measures as a *sui generis* tool for human rights treaty bodies, to use in the context of adjudication, in order to ensure the functioning of the individual complaint mechanism, additional to the traditional tool of interim measures.

The Convention against Enforced Disappearances (CED) introduces a new urgency procedure in Article 30. Its supervisory committee may apply this procedure *vis-à-vis* all states parties, also if they have not recognized the right of individual petition. By contrast, interim measures under Article 31(4) CED are only granted *vis-à-vis* states that have recognised the right of individual petition.38 As the Committee explains, ‘(a)n Urgent Action is a request from the Committee to the State party to immediately take all necessary measures to search and locate a disappeared person and investigate his or her disappearance’.39 Since 2012, the Committee has received a great number of urgent action requests, especially originating from Mexico and Iraq.

It might well be that family members of disappeared persons prefer this innovative direct urgent action procedure over initiating an individual petition and requesting interim measures, but Iraq and Mexico have not recognised the right of individual petition and therefore the great number of urgent action requests from those states cannot serve as an indication of preference for this tool over the more adjudicatory route.40
In addition to the various types of urgency mechanisms used by treaty supervisory bodies, there are also urgent appeals through which UN Special Rapporteurs and Working Groups aim to protect people. Based directly on the UN Charter and its general references to human rights, rather than specific human rights treaties, the Human Rights Council creates a mandate authorising a rapporteur to act vis-à-vis all states and not just those that have ratified human rights treaties.\(^{41}\) Urgent appeals are inherently more flexible, and often faster than the interim measures mechanism.\(^{42}\) Moreover, at least in one respect their protective potential is much wider, for they can also be used when the risk emanates from conduct of states that have not recognised relevant individual complaint mechanisms under human rights treaties.\(^{43}\)

11.3 Mechanisms Obstructing the Protective Potential of Urgent Action Mechanisms by Adjudicators

11.3.1 Introduction

Throughout this book, the authors distinguish several mechanisms that could obstruct the protective value of interim measures or other urgent action mechanisms by adjudicators. This section first discusses domestic sensitivities (Sect. 11.3.2) and then the strategies developed by states (Sect. 11.3.3). Equally, the lack of specificity and follow-up by the adjudicators may obstruct the protective potential. This is discussed in the section on enhancing the protective potential.\(^{44}\)

\(^{41}\)For early writing on this, see e.g. Van Boven 1994, pp. 61–788; Rodley 2001, pp. 279–283; and van Boven 2004, pp. 1651–1666.

\(^{42}\)In general, more informal avenues for direct access to people in power, or to people with knowledge can be useful.

\(^{43}\)The Office of the High Commissioner on Human Rights offers a webpage linking to both treaty and Charter mechanisms specifically aimed at the protection of those who appear to be harassed in connection with their invocation of or cooperation with UN mechanisms. See https://www.ohchr.org/EN/Issues/Reprisals/Pages/Reporting.aspx (accessed 1 May 2020). On this website the recommendation is given, when contacting a treaty body or Special Mechanism, to always copy in a specific e-mail address that has been created. This will facilitate appropriate follow-up in all submissions related to reprisals and intimidation as a result of cooperation with the UN on human rights: https://www.ohchr.org/EN/Issues/Reprisals/Pages/HowToShareInformationAboutCases.aspx. The UN Secretary-General also has a reporting mandate on intimidation and reprisals.

\(^{44}\)Sect. 11.4.2.
11.3.2 Domestic Sensitivities and Other Obstacles

The causes triggering urgent situations are often also the obstacles hindering proper respect for interim measures.\(^\text{45}\) Within communities and among states there is disagreement on how to deal with societal problems, including on the use of economic resources. States sometimes consider that adjudicators are ‘interfering with executive or administrative decisions, often allegedly at the expense of economic development or national security’.\(^\text{46}\)

Fears and anger are sometimes organised towards specific target-groups.\(^\text{47}\) One reason why states may ignore interim measures, or even speak out against them publicly, may be that the persons on whose behalf they are ordered are unpopular and/or do not constitute an important segment of the population in terms of electorate. Asylum-seekers, for instance, are a vulnerable group without a constituency, often unpopular and portrayed negatively in domestic media.\(^\text{48}\) Another unpopular group are detainees, again a traditionally vulnerable group with little constituency.\(^\text{49}\) The context, such as publications by domestic media or impending elections, may also play a role in non-compliance with interim measures.

Yet another, sometimes related, obstacle to the proper implementation of interim measures is that urgent applications by individual detainees often appear part of a pattern.\(^\text{50}\) Indeed, many urgent situations have a systemic nature, involving patterns of human rights violations, social and economic exclusion, discrimination and corruption. Addressing these is obviously complicated. The actors responsible for implementation may themselves be part of the problem, or have limited leverage or economic resources to implement specific measures and address the root causes by taking structural measures. Adjudicators also have to grapple with human rights complaints brought in a context of armed conflict. Whether these concern individual cases, larger groups, or even a case brought by one state against another, the setting is one of systemic human rights violations.\(^\text{51}\)

Some states are facing internal developments making them more intransigent. They may be notorious non-compliers with international obligations, simply because they can (to a certain extent). Yet this does not diminish the use of tools such as interim measures in a great number of other cases involving other states. Moreover, in the

\(^{45}\) See Chap. 1.

\(^{46}\) Shelton, Chap. 2, referring to the Belo Monte dam case.

\(^{47}\) Ibid.

\(^{48}\) See e.g. Zwaan, Chap. 7, discussing interim measures to halt refoulement. This is a traditional situation in which interim measures are used.

\(^{49}\) See Ebobrah (Chap. 5), Burbano Herrera and Haeck (Chap. 10) and see Leach (Chap. 9), drawing attention to access to counsel and access to health care,

\(^{50}\) See in particular the discussion of the approach by the Inter-American Court by Burbano Herrera and Haeck (Chap. 10).

\(^{51}\) See Griffey’s case study on the ECtHR and the Ukraine (Chap. 8). See also Leach’s observation about protection gaps in the context of armed conflict (Chap. 9).
face of powerful intransigent states, other states continue to invoke international law and even resort to the ICJ.\textsuperscript{52}

Overall, non-compliance by states can likely be explained by mechanisms within states, and this applies also to well-respected democratic states with a good reputation, as Harrington’s discussion of the attitude by Canada shows.\textsuperscript{53} Moreover, when states respond in words, they appear to draw inspiration from excuses and criticisms used by other states, sometimes in other regions.

11.3.3 Strategies of States in Response to Interim Measures

In the UN, Inter-American and European human rights systems states generally comply with interim measures, although there are marked differences between states and between time-periods, with bursts of non-compliance. Moreover, when interim measures include protective measures so that the state must do something and put in resources, there is often partial or late compliance. If states do not comply they may try to find excuses, or to turn the tables with accusations about infringement on sovereignty. The contributions in this book do not measure compliance, but they do refer to official responses of states to explore the protective potential and legitimacy of various interim measures decisions and opportunities for adjudicators themselves for enhancing these. This is discussed in the next sections. However, these opportunities should not detract from the awareness that interim measures are likely to be inconvenient to states, even if they are exemplary both as to process and as to content. States may use certain arguments as a defence and, in a more offensive strategy, use domestic media. They may refer to similar responses by other states and cooperate in challenging the interim measures practice of an adjudicator at the intergovernmental level.\textsuperscript{54}

Harrington’s discussion of the response by Canada is insightful. It demonstrates how a democratic state that generally shows its cooperative side, may question its longstanding acceptance of the Rules of Procedure by HRCtee and CAT, including the rule on interim measures, once they are applied also to that state.\textsuperscript{55} Sometimes this also gives rise to a campaign enlisting other states. Shelton gives the example of Brazil’s campaign (2011–2013) to restrict the Inter-American Commission’s power

\textsuperscript{52}See e.g. ICJ, \textit{Ukraine v Russian Federation}, 19 April 2017, Order for provisional measures (under ICERD). Some of the situations referred to in this case were previously brought before the European Court of Human Rights in an inter-state case and in various individual cases. See the discussion by Griffey in Chap. 8 of this volume. See further, Rieter 2019, pp. 27–168. See also ICJ \textit{Jadhav case (India v. Pakistan)}, Order for provisional measures of 18 May 2017 (‘that Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings’ involving the Vienna Convention on Consular Relations, para 58).

\textsuperscript{53}Harrington, Chap. 6. Her chapter also emphasises the importance of process and the opportunities for the human rights adjudicators to make improvements in this respect, see Sect. 11.5.

\textsuperscript{54}See Pillay, Chap. 4.

\textsuperscript{55}Harrington, Chap. 6.
to issue precautionary measures, following the Belo Monte dispute, and considers that
the reduction in the Commission’s favourable responses to requests for precautionary
measures, especially between 2012 and 2014, may reflect the ‘chilling effect’ of that
campaign. 56

Pillay discusses the ambiguous attitude of states at UN level, when drafting new
human right instruments. On the one hand, they show awareness of the importance
of urgency options for treaty monitoring bodies and, on the other hand, they try to
box them in through the phrasing of these options. Pillay also traces the discussions
at the European level, where certain states tried to put a curb on the interim measures
practice of the European Court of Human Rights (ECtHR). In addition, she gives
some background regarding the reform process of the Inter-American Commission,
which includes undermining statements by officials of the Organisation of American
States (OAS). 57 She observes that some recommendations in a report approved by
the OAS Permanent Council in 2012 appeared to be ‘more designed to serve the
needs of states than the functionality and effectiveness of precautionary measures,
such as the recommendation to introduce a qualified majority’ to approve a precau-
tionary measure, or the recommendation to grant ‘a reasonable amount of time for
states to implement precautionary measures, taking into consideration not only the
seriousness and urgency, but also the nature and scope of the measures, the number
of beneficiaries, and the overall circumstances of the case’. 58

The African Commission and Court on Human and Peoples’ Rights are the most
recent regional bodies adjudicating cases and, in the process, facing urgent situa-
tions. Currently, they have built and upheld an interesting practice. Yet at present, the
protective potential of their interim measures is limited, as Ebobrah discusses, while
applicants are indeed in urgent need of protection. States, he observes, did not neces-
sarily challenge the authority of the African Commission ‘to indicate provisional
measures even though that authority is self-conferred’. 59 They ‘generally ignored’
the requests, but made an effort to participate in subsequent proceedings, often to
‘justify their actions or deny that they had violated any obligations’. Sometimes they
claimed ‘that the prescribed action was either not necessary in the first place or had
already been taken without any indication whether this was merely coincidental or
was in compliance with the Commission’s request’. Therefore, he points out, ‘the
Commission was disobeyed by State Parties without having been undermined or
delegitimised in a destructive manner’. He does single out one strategy to justify

56 See Shelton, Chap. 2.
57 Pillay, Chap. 4. Shelton (Chap. 2) and Harrington (Chap. 6) focus on the improvements made by
the Inter-American Commission, see Sect. 11.5 of this chapter.
58 Pillay, Chap. 4, referring to Report of the Special Working Group to Reflect on the Workings
of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-
American Human Rights System for Consideration by the Permanent Council, OAS Doc, OEA/Ser
G GT/SIDH-13/11 rev. 2, 13 December 2011, Original in Spanish, OAS translation, para VIII
(ii)(2)(A)(j), p. 11.
59 Ebobrah, Chap. 5. For a discussion on authority and legal consequences, see Sect. 11.5.2.
non-compliance, which is also used by states in other regions: framing the adjudicator’s use of these measures as an attack on the domestic system.\(^\text{60}\) As to the Court, Ebobrah notes that more than 90 percent of its interim measures orders have remained unimplemented and that the protective value of its measures is ‘almost non-existent’. He considers that this can arguably ‘partly be linked to a set of legitimacy challenges that need to be addressed urgently’.\(^\text{61}\) Among others, he refers to a response by Tanzania in 2017 that it was unable to respect the Court’s Order to postpone the execution of a death sentence because ‘the African Court […] is not mandated to quash the decision’ of its highest court.\(^\text{62}\) In addition, he notes, Tanzania informed the Court that it ‘was deprived of the right to be heard when the Court delivered the Order for Provisional Measures \textit{suo motu}’ and that ‘insufficient reasons of extreme gravity’ were adduced.\(^\text{63}\) Thus, he concludes that Tanzania challenged ‘both an adversarial imbalance and the lack of clarity in the definition of the criteria for the grant of provisional measures’.\(^\text{64}\)

Explicit strategies of states unhappy with the Court’s decisions are often general and not specifically in response to the Court’s interim measures. They include Rwanda’s 2016 withdrawal of its recognition of the right of individuals and NGOs to submit cases directly to the African Court, under Article 34(6) Protocol. Rwanda also announced that it would no longer take part in the proceedings before the Court and that it no longer considered itself bound by the Court’s decisions.\(^\text{65}\) This is a clear strategy used previously by states in the UN and Inter-American systems, which eventually seemingly resulted in copycat behaviour, or concerted strategy.\(^\text{66}\)

Benin’s withdrawal of its recognition of the right of direct complaint to the Court does seem to be linked to unhappiness with provisional measures orders by the Court and the same applies to that of Côte d’Ivoire. In any case, they invoke arguments

\(^{60}\)Ebobrah, Chap. 5, He notes that Egypt responded uniformly to all matters involving it by stating that ‘the Egyptian judiciary is based on fundamental principles and safeguards for fair trials and for the imposition of the death penalty’ so that ‘there is no need for the urgent preventive measures required by the Commission in the communications’, referring to AComHPR, 40th Activity Report, December 2015 to April 2016, paras 18–19.

\(^{61}\)On the legitimacy of interim measures, see Sect. 11.5.

\(^{62}\)Response to Order in \textit{Guéhi} case, ACtHPR Activity Report 2017, EX.CL/1057(XXXII), 22–26 January 2018, pp. 12–13.

\(^{63}\)Ibid. The Court did respond: “On 3 April 2017, the Registry forwarded to the Respondent the correspondence sent to the Attorney General of Tanzania on 18 November 2016 to clarify the nature and purpose of the orders; that the effect of the orders is not to overturn the decision of the Court of Appeal, rather to ensure that the Applicant’s rights are not jeopardized pending the determination of the Application”, p. 14. For other examples, see pp. 14–33.

\(^{64}\)Ebobrah, Chap. 5.

\(^{65}\)Rwanda’s 2016 move was followed by Tanzania in 2019 and Côte d’Ivoire and Benin in 2020. This ‘can also be situated within African states’ broader practices of resistance to supranational adjudication, particularly when African regional courts uphold human rights, democracy, and the rule of law’, Ebobrah, Chap. 5.
about incompetence, lack of authority and infringement of their sovereignty. Benin also refers to the earlier withdrawals by other AU states and ominously threatens to revive the plans for an African Court of Justice and Human Rights to replace the current Court. Earlier, in the UN and Inter-American systems, the withdrawals by Trinidad and Tobago and by Jamaica were indeed specifically in response to interim measures practices ordering a suspension of executions pending the case.

11.4 Measures Enhancing the Protective Potential of (Quasi-)judicial Urgent Action Mechanisms

11.4.1 Introduction

Timeliness is crucial for protective potential. In case of disappearances, for instance, the first days without access to court and counsel are vital in terms of risk of ill-treatment and extrajudicial execution. How swiftly the adjudicator takes action can be seen as indicative of how seriously it takes the situation. The strength of wording also indicates this. Protective potential may lie partly in the symbolic validation resulting from the ritual of calling for and ordering interim measures.

67See De Silva and Plagis 2020. See also Koagne Zouapet 2020, arguing both that this is state strategy and that the Court could work on enhancing the legitimacy of its interim measures.

68De Silva and Plagis 2020, above n 67.

69In relation to case law by another judicial body introducing a cut-off date beyond which the forbidden death row phenomenon would start, see Rieter 2010, pp. 738–746.

70This means that once it becomes clear that a disappearance is recent, urgent action should be immediate. See e.g. Rieter 2010, pp. 309–328 (on locating and protecting disappeared persons). Ebobrah refers to AComHPR, Zegveld and Ephrem v Eritrea, November 2003, Communication 250/02, 17th Annual Activity Report, where the request by the complainants was received on 9 April 2002 and the provisional measures were communicated on 3 May 2002, see Ebobrah (Chap. 5). This appears rather tardy. See also Sect. 11.2 on the UN Committee against Disappearances for an additional urgency mechanism. Drawing from a description by Ebobrah (Chap. 5), of the sequence of events, in particular in AComHPR, Amnesty International v Zambia, 5 May 1999, Communication 212/98, ACHPR 1, one might conclude that delay can also be due to tardiness on the part of the secretariat, rather than on the part of the adjudicator.

71See e.g. Ebobrah, Chap. 5. See also Sect. 11.4 on the potential conflict with maintaining the adversarial nature of the proceedings. Of course tardiness could for a great part also be explained by limited resources.

72See e.g. ECtHR Nizomkhon Dzhurayev v Russia, Judgment, 3 October 2013, Application no. 31890/11, paras 155–156 and in general the discussion by Pillay, Chap. 4.

73A consolidated ritual may help to increase the importance of the international avenue used. Using a ritual is more likely to work when this indeed has a certain authority and is formalized. What is needed is international statements of principle involving the law. These statements of principle should be aimed at immediately preventing irreparable harm, but even if the measures required for this are not implemented by the state, these statements, if sufficiently precise and explained, still
There seem to be protection gaps, especially in the context of more systemic human rights situations. To enhance the protective potential of their urgency mechanisms, international adjudicators need to closely adapt them to fit the situation of the alleged victims. Furthermore, decisions should be sufficiently specific so that the state knows what is expected of it to address the urgent situation (Sect. 11.4.2). Perceived legitimacy is very important. While specificity may enable state compliance, legitimacy may trigger it. Both specificity and legitimacy allow for better monitoring and concrete follow-up. Additional validation and support for compliance can be found in follow-up activities by third parties, NGOs, international authorities such as UN Rapporteurs, as well as by third states (Sect. 11.4.3).

11.4.2 Responsiveness to Urgent Situations: Filling Gaps and Increasing Specificity

The protective potential of urgent interventions by international adjudicators is likely to increase if these adjudicators are accurately informed about the actual situation on the ground and are responsive to that information.

Since the first use of interim measures by international human rights bodies, more situations have come to be considered urgent, resulting in irreparable harm. Awareness of urgent situations has increased and protection gaps are noticed. The adjudicators themselves have expanded their use of interim measures. First they were mainly used in death penalty and non-refoulement cases, then in related matters involving risks to life and personal integrity, as well as the integrity of the complaint system. This includes protection of petitioners against death threats, access to court and counsel, and to medical care for detainees, locating recently disappeared, have a wider resonance and may have a longer-term impact as compared to the absence of such statements, an absence based on a sense of defeat and futility.

74See Sect. 11.5.
75For references to death penalty cases see Shelton, Chap. 2 and Ebobrah, Chap. 5. See further Rieter 2010, pp. 213–256. For references to non-refoulement see Zwaan, Chap. 7. See also, e.g., Prechal and Pahladsingh (Chap. 3), Pillay (Chap. 4), Harrington (Chap. 6) and Shelton (Chap. 2).
76On protecting against death threats and harassment, see Rieter 2010, pp. 405–449.
77As procedural rights to protect the right to life and personal integrity (habeas corpus), e.g. in the context of Guantanamo. See Leach, Chap. 9. See also Rieter 2010, pp. 385–403.
78For detention conditions, see Burbano Herrera and Haeck, Chap. 10 by reference to the Inter-American Court, Ebobrah, Chap. 5 discussing the African system and Leach, Chap. 9 discussing the European human rights system. See further, e.g., Burbano Herrera and Viljoen 2016 on the Inter-American Commission’s precautionary measures; on various (quasi)-judicial bodies and their interim measures in the context of detention, see Rieter 2010, pp. 329–383. For the specific context of minors in immigration detention, see e.g. ECtHR, Interim measures decision of 10 October 2019 ‘to transfer the unaccompanied minors who applied to the Court and are detained at police stations, to suitable accommodation centres for unaccompanied minors’ and ‘to ensure that their reception conditions are compatible with Article 3 of the Convention and the children’s particular status’, reported by ARSIS—Association for the Social Support of Youth, Press Release: ‘The
persons,\textsuperscript{79} and protection against infringements of the land rights of indigenous peoples.\textsuperscript{80} In addition, adjudicators have now used interim measures, or similar urgent decisions, to protect against forced displacement, halting evictions and ensuring

\textsuperscript{79}For early practice by adjudicators, until 2009, see Rieter 2010, pp. 309–328. See also the Urgent Action procedure by the UN Committee on Enforced Disappearances, Sect. 11.2.

\textsuperscript{80}See Shelton, Chap. 2, discussing relevant precautionary measures by the Inter-American Commission. See also Pillay, Chap. 4, referring to the Inter-American Commission’s precautionary measures in IACHR, \textit{Teribe and Bribri of Salitre Indigenous People}, Costa Rica, Resolution on Precautionary Measures, 30 April 2015, 16/15 and, like Shelton, to the response by Brazil to the precautionary measures in the \textit{Belo Monte} dam case. The Inter-American Court has also ordered a provisional measure on behalf of indigenous peoples that not only takes into account the right to life and personal integrity, but also access to natural resources and freedom of movement, as on the River Borbonanza in \textit{Pueblo Indigena de Sarayaku (Ecuador)}, Orders of 6 July 2004 and 17 June 2005, see Rieter 2010, pp. 461–463. For a discussion of the provisional measures by the African Commission and Court on Human and Peoples’ Rights in \textit{Ogiek}, see Ebobrah, Chap. 5. For a discussion of an earlier provisional measure by the African Commission (in fact referred to by the Commission’s merits decision as an Urgent Appeal of 9 August 2004), in \textit{Endorois v Kenya}, see Rieter 2010, pp. 463–465,
access to basic facilities, all while a case is pending before them. Since the entry into force of the Optional Protocol on individual complaints to the International Covenant on Economic, Social and Cultural Rights (ICESCR), its supervisory Committee (ESC-Committee) has developed a practice of asking the state party for a suspension of evictions in certain housing rights claims.

In light of different developmental stages and greater vulnerability, certain conduct could have irreparable consequences for children much sooner than for adults. This

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81See Leach, Chap. 9 on the ECtHR and Pillay, Chap. 4 referring to European Committee of Social Rights, International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Decision on Admissibility and on Immediate Measures, 23 May 2019, Complaint No. 173/2018. See further Pillay 2019. For this Committee’s first immediate measures decisions see Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, Decision on Immediate Measures of 25 October 2013 and European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012, Decision on Immediate Measures of 25 October 2013. On earlier cases of forced displacement and evictions, see Rieter 2010, 501–521 and 525–531 on access to water, medication, sanitary facilities, humanitarian support. On forced eviction in the context of pervasive discrimination, see Rieter 2010, 501–521. Pillay, Chap. 4 and Leach, Chap. 9 refer to more recent cases involving eviction of members of a Roma community.

82See ESC-Committee, López Albán et al v Spain, View of 11 October 2019, E/C.12/66/D/37/2018, para 2.1 (interim measures decision of 22 June 2018 to ask the state to suspend the eviction of the author and her children while the communication was being considered or, alternatively, to provide them with adequate housing in genuine consultation with the author, in order to avoid causing them irreparable damage); ESC-Committee SSR v Spain, Decision, 11 October 2019, E/C.12/66/D/51/2018 (interim measures of 5 September 2018 to suspend eviction; subsequently declaring complaint inadmissible but with an elaborate discussion of its interim measure, paras 7.1–7.9 and, in para 10, “a general recommendation to the State party in a bid to prevent future violations of article 5 of the Optional Protocol. The Committee recommends that, to ensure the integrity of the procedure, the State party develop a protocol for honouring the Committee’s requests for interim
has triggered the use of interim measures and other urgent decisions as well.\footnote{See Prechal and Pahladsingh, Chap. 3, Pillay, Chap. 4 and Leach, Chap. 9. See also Rieter 2010, 531–535 and 708-9 on different developmental stages and greater vulnerability. For case law by the CRC under the Optional Protocol to the Children’s Rights Convention see Zwaan, Chap. 7.} In April 2014 the Optional Protocol to the Convention on the Rights of the Child (OPIC) entered into force, opening up an individual complaint mechanism. The rule on interim measures is laid down in Article 6 OPIC. In its Guidelines on Interim Measures, the Committee on the Rights of the Child (CRC) refers to the ‘special status’ of children. Violations of children’s rights often have severe and long-lasting effects on their development. The Committee considers that ‘violations that have a grave impact on children’s rights in the sense of article 6 of the OPIC are not limited to violations to the right to life or integrity but may extend to all rights enshrined in the Convention and its two substantive Optional Protocols’\footnote{CRC Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child, adopted at its 80th session (14 January to 1 February 2019), para 4.}. The CRC considers that children are evolving subjects. Certain violations of their rights during that evolution may be impossible to restore, and no adequate reparation exists. The assessment of the existence of irreparable damage will be done on a case-by-case basis, taking into account the age of the affected children, among other circumstances.\footnote{Id., para 5.}

Some interim measures are particularly controversial domestically and likely to be met with resistance, e.g. because they implicate investment/development projects.\footnote{See Shelton, Chap. 2, referring to the role of multinational companies and the states in which they are headquartered or incorporated and referring specifically to the proceedings and precautionary measures regarding the Marlin Mine in Guatemala. See also Pillay, Chap. 4, referring to Brazil’s reaction to the precautionary measures in the Belo Monte dam case, in 2011, calling for a review of the Commission’s precautionary measures practice. See Sect. 11.2.} Here the awareness of protection gaps meets with the fear for, or the actual repercussions of, negative government response, as discussed in Sect. 11.3. At the same time, at UN level, states have decided to expand the right of individual petition with new Optional Protocols, including provisions on interim measures. This indicates awareness of states, that during proceedings on, for instance, economic, social and cultural rights, urgent situations may arise as well. Addressing these may require considerable financial resources. Of course, some states may have anticipated that once a monitoring body would be assigned a (quasi-)judicial function, that body would also have the authority to use interim measures. Therefore, these states may have wished to curb that authority by explicitly including it in the text of the Protocol, but at the same time inserting weakening language. While this may be the case, the inclusion still shows an awareness of the need to fill urgent protection gaps.\footnote{On the drafting process of the Optional Protocols to the Convention for the Elimination of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and Convention on the Rights of Persons with Disabilities (CRPD) see Pillay, Chap. 4. She also observes that the actual measures and that it inform all relevant authorities of the need to honour such requests.”}; ESC-Committee, Gómez-Limón Pardo v Spain, View, 5 March 2020, E/C.12/67/D/52/2018 (interim measures of 10 September 2018 to suspend eviction, para 10.1).
Adjudicators are often faced with complaints on behalf of groups of people. Since group claims are even more likely to be brought in the context of structural human rights violations. In theory states are also aware of the structural problems underlying many urgent situations, in which interim measures should have the capacity to protect persons against irreparable harm.

The Inter-American Court has tried to deal with systemic issues head on. Burbano Herrera and Haeck illustrate this in their case study of an important provisional measures order in a detention case. Leach discusses the detention context as well, drawing attention to access to counsel and access to health care. Yet in a setting of systemic violations, there are serious protection gaps. As Leach argues, this may mean that in some contexts the current scope of these measures must be widened. He refers to protection gaps regarding complaints to the ECtHR in the context of armed conflict. Ebobrah discusses the first provisional measures order by the ACTHPR on widespread and systemic violations in Libya. Griffey specifically zooms in on a case study involving armed conflict. He argues that due to the over-broadness and lack of follow-up mechanisms, the inter-state interim measures ordered by the ECtHR in the armed conflict in Ukraine have been ineffectual. In general, interim measures regarding the Crimea, which were more specific, appear to have been more effective. Moreover, there appears to have been more interplay with social movements and international advocacy. Griffey also suggests that interim measures could order states to allow access to UN fact-finding missions.

The fact that pressing situations generally have structural causes begs the question whether an international adjudicator can require a state to refrain from certain action pending a case in the face of a real risk of conduct that would likely exacerbate a structural problem, rather than an immediate risk to life and personal integrity. In such structural contexts, the use of interim measures pending the case may be in order as well, especially if the complaint concerns a group or many similar individual complaints. This depends on the specific (quasi-)judicial function of the supervisory body, as well as the specification of primary and secondary obligations in merits and use of interim measures by the Committees in question is likely to increase the controversy. The recognition of the need for interim measures, also in the context of economic, social and cultural rights, shows an awareness of the importance of such mechanisms in the abstract, and Pillay’s forewarning is based on the experience of state resistance in the concrete, in similar settings. This phenomenon could indeed arise no matter how exemplary the process and substance of the interim measures decisions in question, see Sect. 11.2 above. See Sect. 11.4 on possible improvements as to process and substance.

88 Burbano Herrera and Haeck, Chap. 10.
89 Leach, Chap. 9.
90 Ibid.
91 Ebobrah, Chap. 5.
92 See also Dzehtsiarou 2016, pp. 254–271, considering that the general interim measures used by the ECtHR in inter-state cases involving armed conflict delegitimise its interim measures in the eyes of a state, thereby making the tool less effective.
93 Griffey, Chap. 8.
reparations judgments. Yet when a (quasi-)judicial body has other monitoring roles, employing those in such a context of systemic violations would be an option too.94

Depending on the function of the tool in the complaint system,95 interim measures are mainly used to protect persons against irreparable harm to the rights claimed, or to protect others than the alleged victims against irreparable harm to their lives, because they play a role in the proceedings, e.g. as witnesses. Threats against them undermine the whole system of international adjudication. At times interim measures are used even more generally safeguarding the rule of law, as pointed out by Pillay.96 Systemic problems may be underlying causes for many human rights violations and they undermine the domestic and/or international rule of law. Awareness of structural problems may be shown in the decision on whether or not to order interim measures in the first place, as well as in the substance of the decision and in the follow-up to its implementation. Increasing the extent to which the measure required of the state is geared towards the systemic contexts of the organisations and individuals requesting them, is likely to increase the protective value of the measures in question.

In situations where populism and/or traditional repression has increased fear, inequalities and racism, curbed judicial independence and limited freedom of expression and assembly, other structural human rights violations are likely to thrive as well. In such circumstances, very precise interim measures, or interim measures aimed more at the protection of judicial independence, may be necessary. At the same time, the response by the authorities to such measures may be to enlist other states in trying to curb the adjudicators.

Indeed, responsiveness may sometimes require cautious phrasing and gradual steps,97 while at other times it may require that adjudicators make their urgent decisions much more concrete. Leach stresses that the efficacy of interim measures can be improved by making them more precise as to the measures ordered.98 As Griffey discusses, the inter-state interim measures ordered by the ECtHR in Ukraine v Russia gave insufficient guidance on what was expected.99 The obligation to provide humanitarian aid may also require specification, depending on the situation at hand. In any case it must be provided to the population in need on a non-discriminatory basis. A specification might be to order a state to aid all affected groups on an equal basis, or

94Several UN treaty bodies, which have a range of monitoring roles, only one of which is as an adjudicatory, can also take general urgency measures, such as the early warning systems under the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of Persons with Disabilities.
95See also Sect. 11.5.2 on the purpose and 11.5.5 on the scope of interim measures.
96Pillay, Chap. 4.
97See further Sect. 11.5.3.
98Leach, Chap. 9. He notes that the Parliamentary Assembly recommended this in 2014, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Report, ‘Urgent need to deal with new failures to co-operate with the European Court of Human Rights’, Doc. 13435, 28 February 2014, para A. 8.1. For an earlier discussion, see e.g. Rieter 2010, 2012.
99Griffey, Chap. 8.
to allow international humanitarian assistance and remove any obstacles to the effectiveness of such assistance. Here too, there are some precedents.\textsuperscript{100} In the context of armed conflict, the ECtHR has ordered specific provisional measures in individual cases, but in inter-state cases the orders have been rather general. While preventing aggravation of the conflict is a very important purpose of provisional measures, it is crucial for the Court to specify the measures the states should take. These should be concrete measures that help protect the right to life and the prohibition of torture and cruel treatment of all persons involved.\textsuperscript{101}

Thus, specificity may be warranted in the face of risks to life and personal integrity.\textsuperscript{102} Sometimes adjudicators must be bold to ensure that their tool of provisional measures continues to be useful. For instance, several adjudicators have ordered provisional measures to ensure evidence. In the context of claims involving non-derogable rights, this seems entirely appropriate.\textsuperscript{103} In this light, the ECtHR could and should use interim measures to order states to take measures allowing the evidence to be safeguarded. If necessary, it could even order a state to allow access of international delegations to investigate the situation and secure evidence.\textsuperscript{104}

Specificity is especially warranted in the face of risks to life and personal integrity if there was an earlier failure to comply with more generally phrased interim measures. However, if there is no such compliance failure yet, and if there are no structural rule of law problems, the phrasing should give sufficient leeway to the state on how to implement its obligations, especially pending the case. It may often be best to simply call on the state to take all available domestic measures to achieve the protection required. Then the state has its own margin of action for implementation, to which the Court should defer, as long as the state knows it has to take the means at its disposal to achieve a certain result, timely, and to report on it. That would generally be sufficiently precise, but would not interfere with the domestic system, leaving the choice of means to the state itself (until it has shown to be unable or unwilling to respect less directive interim measures).\textsuperscript{105}

\textsuperscript{100}See e.g. the references in Rieter 2010, pp. 528–29.

\textsuperscript{101}See further Griffey, Chap. 8. See also Dzehtsiarou 2016, above n 92.

\textsuperscript{102}See also, e.g., Working methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), CRPD/C/5/4, para 75: ‘When a State party is requested to take interim measures, the request will clearly indicate the nature and characteristics of the measures to be taken’.

\textsuperscript{103}See Rieter 2010, pp. 385–403; and Leach 2017.

\textsuperscript{104}For the ECtHR this means that not only Article 34 on the individual’s right not to be hindered in access to the Court, may be at issue, but also Article 38. Article 38 concerns the state’s duty to provide all necessary facilities for effective examination of the application by the Court. See e.g. ECtHR, Nizomkhon Dzhurayev v Russia, Judgment, 3 October 2013, Application no. 31890/11, para 162: “This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on a Government’s part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicants’ allegations, but may also reflect negatively on the level of compliance by a respondent.”

\textsuperscript{105}See further Sect. 11.5 on legitimacy.
Equally, when interim measures are ordered in a new context, and not directly related to the aforementioned core rights, it is wise to phrase them much more cautiously and to take a gradual and more general approach by referring to the aim that must be achieved and not directing the way in which this should be done. Yet in all cases it is useful to consider potential obstacles to implementation when formulating the interim measures, through further explanation and/or specification of the obligations.

To sum up, an important criterion for protective potential is that interim measures respond closely to the urgent experience of the victims and that they are indeed suited to the situation. They should be sufficiently clear for the state to know what is expected of it and sufficiently precise so that they contain practical tools for victims to help ensure the protection they need. Another, related, criterion is the likelihood of having a positive human rights impact on the urgent situation. For this, clarity of what is expected of a state is needed, meeting legitimacy criteria as well as enabling follow-up on non-compliance.

### 11.4.3 Increasing Legitimacy and Follow-Up

By increasing specificity and filling gaps, the social legitimacy of interim measures and other urgency tools used by adjudicators is likely to be enhanced in the eyes of victims, human rights organisations, third states and authorities concerned about human rights issues. In addition to formulating interim measures that are closely adapted to the situation, and filling gaps experienced by victims, enhancing the normative legitimacy of interim measures may also increase their protective value. As discussed in the next section (Sect. 11.5), meeting certain criteria is important for normative legitimacy of urgent decisions. This could legitimise interim measures in the eyes of all participants in the process, including state agents. Furthermore, by meeting these criteria adjudicators can disable ammunition for states that are trying to justify their non-compliance or that are teaming up to exert pressure against adjudicators at international fora. Finally, enhanced normative legitimacy of urgent

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106 See Rieter 2010, pp. 594–622, 1094.

107 The next sections discuss follow-up and legitimacy. Further research on the protective potential of judicial urgency mechanisms could also include case studies from the sub-regional adjudicatory systems in Africa. In addition, what would also provide important information and insights would be a survey and analysis, worldwide (especially from Asia, which has no regional human rights courts), on various domestic procedures for dealing with urgent matters, by reference to international human rights obligations, including injunctions and accelerated proceedings. While this book focusses on the international proceedings, domestic adjudicators are generally the first ones to be faced with urgent situations. There is also a heightened need for creative approaches by scholars and civil society in the urgent situations in which third parties such as companies (and the states backing them up) are involved (e.g. developing informal yet transparent mechanisms to support dialogue between the various parties in the context of industrial developments and land rights).

108 See Sect. 11.3.3.
action decisions provides incentive, as well as concrete handles, for third parties to follow up on non-compliance by states.

In their contributions, Leach and Griffey have criticised the lack of follow-up by the ECtHR on its own interim measures. Indeed, follow-up by the adjudicator itself shows the importance it attaches to respect for its interim measures as crucial to the adjudicatory process. The Inter-American Court has developed its own system of monitoring compliance, which includes hearings (resources permitting) and follow-up Orders. The Commission is also enlisted to report to the Court in this context. In addition, the Commission monitors compliance with its own precautionary measures. Both Inter-American Court and Commission require reporting by states. Ebobrah describes how in 2010 the African Commission added to its rule on interim measures that it could request the state to report back on their implementation. This addition introduces a form of follow-up on interim measures, which can already be introduced in the interim measures decision itself. The African Court requires the state to report about implementation within a set time. It does so in the last paragraph of its Orders.

The ICJ has a rule on asking follow-up information in its Rules of Court. It has used it, but not consistently. To include reporting obligations in the order for provisional measures itself could be seen as anticipated follow-up. In The Gambia v Myanmar the ICJ ordered Myanmar to submit a report on the measures undertaken to give effect to the order, and to do so within four months and thereafter every six months until a final decision is rendered. This would imply that the Court will keep the situation under continuous review and respond where needed. Yet it remains to be seen whether the ICJ will set up a mechanism to monitor compliance with its provisional measures, as the Inter-American Court has done.

For the ICJ, follow-up could also mean following up (proprio motu) in the reasoning of subsequent interim measures orders; adding specifications in subsequent orders involving a different case, in response to an earlier situation of non-compliance. Moreover, on the merits, it can hold states responsible for non-compliance with prior orders, quite apart from any other findings of violations of

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109 See Griffey, Chap. 8 and Leach, Chap. 9 stressing the importance of follow-up. See also Rieter 2012, 165–198.
110 Rule 39 currently does include a reference to the possibility to give ‘immediate notice of the measure adopted in a particular case’ to the Committee of Ministers. It does so, ‘where it is considered appropriate’. Moreover, the Chamber or a judge appointed pursuant to the Rule, ‘may request information from the parties on any matter connected with the implementation of any interim measure indicated’. ECtHR, Rules of Court, 1 January 2020, Rule 39, as amended by the Court on 4 July 2005, 16 January 2012 and 14 January 2013.
111 AComHPR Rules of Procedure 2010, Rule 98(4). See Ebobrah, Chap. 5.
112 See Rieter 2010, 90–97.
113 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar), Order of 23 January 2020, para 82. See also Griffey, Chap. 8.
114 See also the criticism by Leach with regard to the European system, Chap. 8.
115 More closely discussed in Rieter 2019, 158–167.
substantive rights, even when it finds it has no jurisdiction on the merits. 116 Currently, several (quasi-)judicial bodies mention non-compliance under a separate heading and often also refer to this in their conclusion, as a separate violation. Equally, the ICJ does so in its Operative Clauses. Nonetheless, it still needs to clarify how it will monitor reports pending the case, how non-compliance plays a role in establishing a breach, or an aggravated breach, and what remedies are required for disrespect for its interim measures. 117

A merits decision by the ESC-Committee serves as an example of an approach for remedies. It recommended the state to ‘(e)stablish a protocol for complying with requests for interim measures issued by the Committee and inform all relevant authorities of the need to respect such requests in order to ensure the integrity of the procedure’. 118

When urgent action is followed up it is more likely to be taken seriously by the authorities involved. Social legitimacy is likely to be enhanced when other international authorities put their weight behind the interim measures ordered. At the European level the Court’s Rule 39 on interim measures expressly refers to the immediate notice that the Court can give to the Committee of Ministers of the Council of Europe. 119 In addition, the Parliamentary Assembly and Commissioner on Human Rights can follow up on interim measures. Shelton refers to ‘OAS member state acquiescence over nearly four decades, plus positive affirmation’ by the General Assembly in 2006. 120 Ebobrah refers to the various calls by the African Union Executive Council on member states to comply with provisional measures. 121 At UN level the High Commissioner on Human Rights and her staff, UN Special Rapporteurs, and the Human Rights Council may also remind states of their obligation to implement interim measures issued by the treaty bodies in the context of the individual complaint procedure. Finally, individual third states and NGOs can remind states of their obligations in this respect. 122 All of this is more likely when the interim measures decisions are concrete and persuasive, providing more incentive as well as better handles for effective action.

116 The ICJ also concluded on non-compliance with the provisional measures in Avena II, after having found that it had no jurisdiction on the merits. ICJ, Avena II, Request for interpretation of the Judgment of 31 March 2004 (Mexico v US), judgment of 19 Jan 2009, para 61 under (2).
117 See e.g. Palchetti 2017, 5–21. See also Sect. 11.5.2. See further Rieter 2019.
118 ESC-Committee, Gómez-Limón Pardo v Spain, 5 March 2020, E/C.12/67/D/52/2018, para 14(b).
119 ECtHR Rule 39(2): “Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the [Council of Europe] Committee of Ministers.”
120 Shelton, Chap. 2.
121 Ebobrah, Chap. 5.
122 Civil society could continue to press in order to trigger follow-up by the bodies themselves; moreover, they could pressure third parties like companies, which play a more and more prominent de facto role.
11.5 Criteria for Normative Legitimacy of Interim Measures

11.5.1 Introduction

By meeting criteria for normative legitimacy, interim measures are more likely to achieve external or social legitimacy and hence compliance.\(^{123}\) This way, legitimacy is obviously enhanced vis-à-vis good faith state agents. Admittedly, states often play the legitimacy card for reasons unrelated to the normative legitimacy criticisms invoked by them. Still, if adjudicators take pains in achieving normative legitimacy, it will be more difficult for states to justify their non-compliance, and third parties will be more likely to join in follow-up against such non-compliance.\(^{124}\) Thus, to have protective potential, interim measures should be taken in conformity with recognised principles, both procedural and substantive. As announced, this chapter focuses on certain criteria for normative legitimacy of interim measures, as singled out by the various authors contributing to this book.\(^{125}\) These criteria should be consistently applied, while at the same time doing justice to the specific facts and context.

Interim measures by international adjudicators should be based on their legal authority, which is related to their purpose. Furthermore, the obligation to comply with them should be made explicit (Sect. 11.5.2). The process applied by the adjudicator for a request for interim measures should be fair and prejudgment should be avoided (Sect. 11.5.3). The decision taken should be motivated, consistent, non-arbitrary, and possibly supported by similar practices developed in other systems (Sect. 11.5.4). Finally, the substantive scope of the measures should be clear, as well as the evidence required, and the measures should build on the existing protective system (Sect. 11.5.5).

11.5.2 Purpose and Legal Authority of Interim Measures

In general, the purpose of interim measures could be described as to ensure a meaningful outcome of the case pending before the adjudicator, prevent aggravation of the conflict and ensure the sound administration of justice.\(^{126}\) At the same time, the notion of ‘preventing irreparable harm’ is recurrent. Preventing that persons are subjected to such harm is an obvious purpose, in particular for human rights monitoring bodies.

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\(^{123}\) See e.g. Shelton, Chap. 2; Ebobrah, Chap. 5; Harrington, Chap. 6.

\(^{124}\) See Sect. 11.4.3.

\(^{125}\) In addition, criteria for the appropriate use of interim measures include that there is prima facie jurisdiction on the main application; that there is a link between the interim measures requested and the rights claimed on the merits; that the rights invoked arguably exist; and that there is urgency and risk of irreparable harm.

\(^{126}\) This builds on Rieter 2019.
Conclusion: The Protective Potential and Legitimate …

Given the human rights obligations contained in constitutive documents of organisations, or in specific human rights treaties, and in light of the function of the human rights monitoring mechanisms instituted by states, it appears evident that they can indicate to states what measures they should take in the face of such irreparable harm. The question is in what contexts they have the competence to order interim measures rather than take other urgent action.

The Inter-American and African systems explicitly authorise the Inter-American and African Courts to order such measures. This is different for the Inter-American and the African Commission, for the earlier UN treaty bodies, for the ECtHR and the European Committee of Social Rights. Nevertheless, the inherent authority of adjudicators to decide on interim measures appears generally accepted. The authority of human rights monitoring bodies performing an adjudicatory function to order interim measures while a case is pending before them has long been recognised. Shelton observes that it ‘could be argued that such power is inherent to the administration of justice and within judicial powers, even without express authority, as a means of ensuring the effectiveness of the ultimate decision’. She explains the legal authority to take urgent action by reference not only to tribunals but also to all other human rights bodies that hear petitions. She first points out that ‘extensive and long-standing jurisprudence supports the view that any institution which carries the name ‘court’ or ‘tribunal’ has certain inherent powers, that are necessary to allow it to fulfil the judicial function, irrespective of limitations placed on the court’s jurisdiction or the type of proceedings it conducts’. She then explains that ‘these inherent attributes extend to human rights commissions and committees when they are hearing and deciding cases or otherwise exercising their explicitly-conferred quasi-judicial or protective mandates’. Shelton also reflects on state pressure, when she states that ‘[…] states have the power to mandate that only one side to a dispute be heard and to require that a ‘court’ decides on the basis of the evidence and arguments of that party alone. However, most (human rights) observers would not consider such an institution a ‘court of justice’ operating under the rule of law’. Thus, she notes that ‘[i]n general, courts must have the powers necessary to make independent decisions’.

As Pillay has described by reference to important regional and UN case law, it is now mostly accepted that states are legally bound to respect interim measures, even if the final decisions on the merits are still referred to as ‘Views’. As she puts it,
the fact that the binding effect of interim measures has been affirmed, irrespective of whether they are provided for in the relevant treaty or in the rules of court, and even where the final decisions of bodies concerned are not in themselves legally binding on states, is a testament to the significance attached to interim measures as a means of ensuring the effectiveness of international human rights law.133

The HRCtee, for instance, has consistently held that the undertaking to cooperate with it in good faith is implicit in the state’s ratification of the Optional Protocol (OP).134 It holds that, pursuant to its rules of procedure, adopted in conformity with Article 39 ICCPR, interim measures ‘are essential to the Committee’s role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as, in the present case, the author’s extradition undermines the protection of Covenant rights through the Optional Protocol’. It is ‘a serious breach’ by the state of its obligations under Article 1 OP.135 The Committee discusses this under a separate heading, and at the end of its decision it confirms the violation of this obligation and reaffirms the obligation to avoid violations of Article 1 of the Optional Protocol in the future and to comply with its requests for interim measures.136

Shelton also refers to the case law of the Inter-American and European Courts and to that of the Inter-American Commission regarding the binding nature of its precautionary measures.137 Ebobrah mentions numerous calls by the AU Executive Council on AU member states to comply with the decisions, recommendations, judgments and orders of the Commission and the Court. This includes interim measures orders.138 States can be held responsible for non-compliance with interim measures in a separate finding, next to any other findings on the merits. Significantly, the ICJ concluded on non-compliance with the provisional measures in Avena II, after having found that it had no jurisdiction on the merits.139 This indicates the separate legal obligation of states to respect interim measures.140

Harrington is somewhat more cautious, but she also refers to the good faith argument that the HRCtee and CAT have adopted. She notes the ‘strict formalism’ of the Canadian position that interim measures are not legally binding because the eventual

133Pillay, Chap. 4.

134This cooperation means that the state permits and enables the Committee ‘to consider such communications and, after examination, to forward its views to the State party and to the individual (Articles 5(1) and (4))’. See e.g. HRCtee, N.S. v. Russian Federation, 27 March 2015, CCPR/C/113/D/2192/2012, para 8.2. It observes that a state commits serious breaches of its obligations under the OP, when ‘its action or inaction serves to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile’.

135Ibid, para 8.3.

136Ibid, paras 11 and 12. The CAT and other UN treaty bodies have taken similar approaches. See e.g. Pillay, Chap. 4.

137Shelton, Chap. 2.

138Ebobrah, Chap. 5.

139ICJ, Avena II, Request for interpretation of the Judgment of 31 March 2004 (Mexico v US), judgment of 19 Jan 2009, para 61 under (2).

140See further Sect. 11.4.3.
Views are not: ‘The strict formalism of Canada’s position is striking, given that more mundane aspects of a committee’s rules of procedure, such as those that impose deadlines for the filing of a submission, have been supported by Canada as having some sense of a legally binding quality for reasons of function and practicality, even with the end result of the process being a non-legally binding Committee View’. 141

The reasoning on the authority and binding nature of interim measures relates to pending cases. As discussed in Sect. 11.2, there are other urgency instruments in addition to interim measures. The question is whether treaty monitoring bodies may order interim measures without a pending case. Indeed, the Inter-American Commission ‘derives its authority to issue precautionary measures to address instances of imminent danger separate from a pending case—referred to as “autonomous” measures or the “protective” aspect of the measures—from the Charter of the Organization of American States’. 142 The Inter-American Court posits that in international human rights law interim measures are not only precautionary or preventive, insofar as they preserve a juridical situation. Next to their ‘essentially preventive’ character, they go beyond this to effectively protect fundamental rights to the extent that they prevent irreparable harm to persons. 143

The Court refers to the preventive or precautionary dimension, or role, as seeking ‘to avoid obstruction of compliance with an eventual decision of the organs of the inter-American system’. 144 In other words, this refers to the traditional role of interim measures to ensure the integrity of the proceedings, as well as a meaningful outcome to those proceedings. Yet they are also a tool for protecting the human rights in the treaty, aiming to prevent irreparable harm to persons, either the same persons on whose behalf the case was brought, or persons involved in the case, such as witnesses. After all, such harm would undermine the integrity of the proceedings, and/or a meaningful outcome of claims aimed at protecting Convention rights involving life and personal integrity.

The reference to the protective dimension is a way to underline the fact that in human rights proceedings interim measures aim to protect people against irreparable harm, first and foremost by protecting their lives and personal integrity, but also safeguarding other rights, especially in the face of irreversible risks to the rule of law. This protective dimension gives these interim measures a heightened importance over and above the traditional preventive dimension.

Now, the description of preventive and protective character appears to be used to stress an autonomous role of interim measures in protecting the rights in the ACHR against irreparable harm, independent of a case pending before the Court. As noted, based on the treaty text the Court can order provisional measures involving

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141 Harrington, Chap. 6 (footnote omitted).
142 Comparative Analysis, above n 132, p. 4 and references therein. See further Shelton, Chap. 2, referring to Article 25 of the Commission’s Rules of Procedure.
143 See e.g. IACtHR, Peace Community of San Jose de Apartado v. Colombia, order of the President, 9 October 2000, confirmed by Order of 24 November 2000, Consid. Cl. 12.
144 See e.g. IACtHR, Matter of Wong Ho Wing regarding Peru, Provisional Measures Order, 26 June 2012, consid.cl 40.
matters that are not (yet) pending before it.\footnote{That is, only when the Commission requests this under Article 63(2) ACHR.} Moreover, the Commission also uses its precautionary measures when it has not received a formal complaint.

Despite the difference in context, the ‘precautionary/preventive’ and ‘protective’ distinction appears to be finding its way elsewhere as well. The CRC, for instance, refers to both in its Guidelines on interim measures. It states that ‘[i]nterim measures have a dual nature, precautionary and protective’.\footnote{CRC, Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted at its 80th session (14 January to 1 February 2019), para 2.} About their protective nature it simply notes that ‘the measures seek to avoid irreparable harm and preserve the exercise of human rights’.\footnote{Ibid.} It then proceeds to discuss the traditional, ‘precautionary’ nature, pointing out that ‘the measures have the purpose of preserving a legal situation under consideration by the Committee. Their precautionary nature aims at preserving rights at risk of a grave violation until the Committee can examine the complaint. Its object and purpose are to ensure the integrity and effectiveness of the Committee’s decision on the merits and, thus, avoid infringement of the rights at stake, which may adversely affect the useful purpose (\textit{effet utile}) of the final decision. Interim measures also enable the State concerned to implement the final Views and comply with the ordered reparations’.\footnote{This is also how the ESC-Committee discusses the obligations of states: “States Parties are expected to comply with requests for interim measures under Article 5(1) of the Optional Protocol. A State party that does not implement the interim measures requested by the Committee is failing to fulfil its obligation to respect in good faith the procedure for individual communications established in the Optional Protocol. A failure to respect interim measures makes it unlikely that any future Views of the Committee would be capable of reversing the damage suffered by the victims. A failure to co-operate with requests for interim measures thus undermines the duty of the Committee under the Optional Protocol to provide effective protection against violations of rights of the Covenant.” ESC-Committee Guidelines on interim measures, adopted at its 66th session, Sept-Oct, 2019, see \url{https://www.ohchr.org/Documents/HRBodies/CESCR/Guidelines_on_Interim_Measures.docx} (accessed 2 March 2020), para 8.}

The question is, however, whether interim measures can also be a tool for protecting the rights in the treaty related to a case that has already been concluded, or is otherwise independent of a pending case. The IACtHR monitors compliance with its judgments and considers a case closed only when it has determined that all aspects have been complied with. If, before this determination, the victims, witnesses or lawyers are receiving threats, it makes sense to order interim measures. Given that the IACtHR also refers to the fact that provisional measures are exceptional, at the stage of supervision of compliance, I believe they should only be ordered in the latter cases. On the other hand, if there are other developments, such as political action to remove judges from office on whom victims had vested their hope for investigation of
gross violations, these should be responded to through the normal monitoring mechanism.\textsuperscript{149} Moreover, in such a situation a new case should be opened about threats to the independence of the judiciary, bringing a claim of their structural nature.\textsuperscript{150}

In any case, in most human rights monitoring systems interim measures are not an autonomous tool.\textsuperscript{151} The ESC-Committee puts it as follows: ‘Interim measures are not a stand-alone mechanism, and must therefore form part of a communication that on its face establishes a violation of Covenant rights’.\textsuperscript{152}

### 11.5.3 Fairness of the Procedure and Avoiding Prejudgment

To make sure that the procedure for deciding on interim measures is legitimate, the process applied by the adjudicator should be fair. Several chapters in this book stress the importance of transparency and fairness of the urgency proceedings.\textsuperscript{153} For this, the adversarial nature is vital,\textsuperscript{154} ensuring equality or arms, as well as clear communication and access to information.\textsuperscript{155} Transparency and clear communication are also elements of motivation.\textsuperscript{156} Prechal and Pahladsingh highlight the inherent tension between the need in general for a thorough procedure in all cases and the need to address certain situations on an urgent basis.\textsuperscript{157}

The adversarial nature must be heeded to while at the same time meeting the criterion of timeliness. An urgent action that comes too late has zero protective

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\textsuperscript{149}See e.g. IACtHR, \textit{Caso Durand y Ugarte v Perú}, Order for provisional measures, 8 February 2018 where it ordered provisional measures aimed at halting parliamentary proceedings for the removal from office of four judges. This must be seen in a context of concerted efforts by political bodies to remove judges from office. In 2001 in \textit{Durand and Ugarte} the IACtHR had found that a situation of impunity must be remedied. See also the dissents to the Order by Vio Grossi and Sierra Porto.

\textsuperscript{150}For instance, if there is a threat to the independence of the judiciary, and there regularly is, and not just in the Americas, a case should be brought about that. Given the context, political proceedings to remove judges can have both the intention and the effect of blocking certain types of investigations and perpetuate impunity, whether for gross human rights violations, or corruption. This indicates that it may not be a single case that can be reversed (and therefore interim measures would be outside the scope), but instead concerns a structural problem, whereby removal of judges has a chilling effect both within the judiciary and with those seeking access to justice. In such a context interim measures aimed at halting the removal from office of certain judges could indeed be seen as preventing irreversible harm to the claim and therefore would be within the outer limits of the concept.

\textsuperscript{151}See \textit{Rieter 2021}.

\textsuperscript{152}ESC-Committee Guidelines, above n 148.

\textsuperscript{153}See, e.g., Shelton, Chap. 2; Prechal and Pahladsingh, Chap. 3; Ebobrah, Chap. 5; Harrington, Chap. 6; Leach, Chap. 9.

\textsuperscript{154}See e.g. Ebobrah, Chap. 5; Harrington, Chap. 6.

\textsuperscript{155}See Harrington, Chap. 6.

\textsuperscript{156}See Sect. 11.5.4.

\textsuperscript{157}Prechal and Pahladsingh, Chap. 3.
potential. Ebobrah discusses the Ken Saro Wiwa case, where the military junta of Nigeria did not get the opportunity to contest the third request by the petitioners for interim measures.\(^{158}\) He notes that the African Commission sacrificed the adversarial balance to meet the demands of urgency, ‘in ways similar to ex parte applications in domestic litigation’.\(^{159}\) Ken Saro Wiwa and the others were sentenced to death on 31 October 1995 and the next day the Commission used interim measures to suspend execution of the death penalty until the proceedings before the Commission were concluded, or until the Commission had an opportunity to discuss the matter with the government during a proposed protection visit to Nigeria. In these circumstances, which included two earlier interim measures, prescribing a new interim measure appears very reasonable. Several days later the executions took place after all. Here it was obviously the conduct of the junta that lacked legitimacy.

Yet it is noteworthy that 20 years later, in a different setting, the AU Executive Council urged the Commission to ‘observe due process of law in making decisions on complaints received’ and to ‘consider reviewing its rules of procedure, in particular, provisions in relation to provisional measures and letters of urgent appeals in consistence with the African Charter on Human and Peoples’ Rights’.\(^{160}\) Ebobrah observes that apparently at that time grievances of some states were serious enough to warrant inclusion in a collective AU decision. He points out: ‘While this may well be executive interference with the work of the Commission, it is equally a collective statement by AU Member States of their dissatisfaction with the processes of the Commission and a possible clue for explaining non-compliance’.\(^{161}\) He suggests that ‘when critical urgency is involved, the use of urgent appeals pending hearings should replace the unilateral consideration of provisional measures’. After all, a commitment to maintaining the status quo pending a hearing on a request for provisional measures is not uncommon in domestic proceedings either.\(^{162}\) This suggestion finds support in the practice of the Inter-American Court. Its President can order preliminary provisional measures, or ‘urgent measures’.\(^{163}\) The full Court can later lift them or confirm them as provisional measures.

Shelton observes that the Inter-American Commission usually notifies and consults the relevant state prior to a decision to grant precautionary measures.

\(^{158}\) AComHPR, International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria, 31 October 1998, Communications 137/94-139/94-154/96-161/9, 12th Annual Activity Report, AHRLR 212/7 International Human Rights Reports 274.

\(^{159}\) Ebobrah, Chap. 5.

\(^{160}\) AU Executive Council, Decision of June 2015 on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (xxvii), para 12.

\(^{161}\) Ebobrah, Chap. 5.

\(^{162}\) Ibid.

\(^{163}\) See e.g. IACtHR Caso Vélez Loor vs. Panamá. Medidas Urgentes. Resolución de la Presidenta de la Corte (Urgent measures of the President of the Court), 26 May 2020 concerning circumstances of immigration detention and the specification that ensuring access to health care also means taking measures to detect, prevent and treat COVID-19 infections for all persons in immigration detention at La Peña and Laja Blanca in the Darién region, without discrimination.
Nonetheless, there are situations where it is more of an *ex parte* decision, due to the urgency of a situation. She notes that it ‘could be argued that this violates a fundamental principle of juridical equality between the parties in adversarial proceedings’ and, partly to address this, Article 25 of the Commission’s Rules requires it to seek information from the state prior to adopting precautionary measures, ‘unless the urgency of the situation warrants the immediate granting of the measures’.\(^{164}\) As Shelton points out: ‘*ex parte* action should be exceptional, but remains necessary in practice’.\(^{165}\) Article 25 also confirms that the Commission will evaluate periodically whether measures should be maintained or lifted.\(^{166}\)

A judicial take on procedural legitimacy can be found in one of the individual opinions by Judge Ouguergouz. While agreeing with an Order of the African Court, the judge stressed that the state should have been served expeditiously with the application in order to give it an opportunity to ‘submit its observations’. This was required by the ‘adversarial principle’.\(^{167}\) Ebobrah finds that ‘the Court has also managed to improve the adversarial balance between parties by offering State Parties the opportunity to respond to requests for provisional measures, including in cases being considered *proprio motu* by the Court’, although in some situations ‘arguably at the risk of compromising urgency’.\(^{168}\)

The UN Committees seek a balance in order to achieve timeliness while ensuring adversarial standards.\(^ {169}\) CAT, for instance may initially grant interim measures on the basis of the information in the submission. The state may then request a review by the Committee. The latter decides to lift or maintain its interim measures, in the light of timely information provided by the state and after having allowed the complainant to comment. The state party may also inform the Committee at a later stage that the reasons for the interim measures have lapsed or present other arguments why the request for interim measures should be lifted. If convinced, the Committee, its Rapporteur or the Working Group may withdraw the request for interim measures.\(^ {170}\) The other UN treaty bodies also allow challenges to their interim measures. Firstly, in case of doubts or extremely limited time, they may order ‘provisional’ interim

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164Shelton, Chap. 2.
165Ibid.
166Ibid.
167Ibid, referring to ACtHPR, *African Commission on Human and Peoples’ Rights v Libya* (Libya 2), provisional measures order, 15 March 2013, Appl. No. 002/2013, 1 AfCLR 145, separate opinion by Judge Ouguergouz, para 4.
168Ebobrah, Chap. 5.
169See e.g. Rieter 2010, pp. 852–854 and 955–957.
170CAT Rule 114 CAT Rules of Procedure, CAT/C/3/Rev.6, 1 September 2014. The Committee on the Rights of Persons with Disabilities (CRPD) has developed a similar rule in Article 64, but this rule does not mention that it allows the complainant to respond to the state’s request to lift the interim measures. CRPD rules of procedure, as revised at its sixteenth session (15 August–2 September 2016).
measures. The ESC-Committee refers to these as time-bound interim measures. What this means is measures that are more provisional or more time-bound than usual. Secondly, a UN committee may lift them when it considers there is no need for them after all, or that there is no longer a need to maintain them. In this light, they commit to periodic reviewing of their interim measures. The ECtHR may also discontinue its interim measures at any time. In particular, since such measures are related to the proceedings before the Court, they may be lifted if the application is not maintained.

The ESC-Committee shows its concern for the adversarial procedure in urgent cases by stressing that there should not be unnecessary delay by the petitioners in the submission of their requests for interim measures. It explains that this is important ‘both in order to allow the Committee to properly examine the request and to allow the State Party to respond to any interim measures requested’. Furthermore, ‘[i]t is […] the duty of the authors to submit their request for interim measures as soon as it appears that effective domestic remedies capable of averting the irreparable damage are not available’. In this light, it determined that ‘in principle requests for interim measures should be made at least four working days before the damage is expected to materialize’. Yet this may put potential victims in a more vulnerable position and in that sense may not be conducive to material equality of arms.

In general, it could be said that the more immediate the urgency, the more bare the procedural requirements may be, by way of initial decision-making. A decision should be taken as soon as possible to lift, confirm or expand the provisional interim measures on the basis of the full set of procedural requirements, including sound procedure where both parties have ample opportunity to present counter-arguments and respond to those.

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171 See Rieter 2010, p. 597 on the cautious phrasing by the HRCtee.
172 ESC-Committee Guidelines on interim measures, above n 148, para 7: “In cases where the information provided by the author is insufficient, but the Committee has solid reasons to think that the risk of irreparable damage cannot be ruled out, the Committee may request interim measures for a limited time in order to allow the author a short, but reasonable period in which to provide the necessary substantiating information. In such cases, if the author does not provide the information within the relevant time period, the request for interim measures is withdrawn automatically.”
173 See also, e.g., Pillay, Chap. 4.
174 See also, e.g., ESC-Committee, Guidelines on interim measures, above n 148, para 9: “Under rule 7(3) of the Provisional Rules of Procedure under the Optional Protocol, the State party may “present arguments on why the request for interim measures should be lifted or is no longer justified”. Rule 7(4) states that the Committee may decide to “withdraw a request for interim measures on the basis of submissions received from the State party and the author/s of the communication”. The Committee may lift the request for interim measures if it considers, on the basis of new information provided by the State Party, that the interim measures were unjustified, or that they are no longer necessary.”
175 Press Unit ECtHR, Factsheet on interim measures, March 2020.
176 ESC-Committee Guidelines on interim measures, above n 148, para 4.
Another aspect of fair procedure is that the decision on interim measures should not prejudge the merits. Ebobrah refers to the provisional measures ordered by the African Court in *Konaté v Burkina Faso*. The applicant had requested the Court to order the state to release the journalist immediately ‘or alternatively to provide him with adequate medical care’. The Court granted the request for access to medication and health care, but it denied the request for ‘immediate release from prison,’ on the grounds that it ‘corresponds in substance with one of the reliefs sought in the substantive case’. He points out that by taking the view that an order of immediate release would ‘adversely affect consideration’ of the main action, the Court made clear that its orders for provisional measures cannot be an indirect means of getting a judgment on the merits.

Burbano-Herrera and Haeck also raise the question whether ordering release could constitute prejudging the merits. Indeed, if the claim on the merits is the contested detention and the argument for the release is the anticipated wrongfulness of the detention, there is a risk of prejudgment. This may be different if the measures aim to address an enduring situation of overcrowding, in the face of degrading detention conditions and risk to health. If other measures do not work, ordering release may be required to prevent irreparable harm to persons.

The Inter-American Court has pointed out that in requests for provisional measures it only considers arguments on extreme gravity and urgency, and the necessity to avoid irreparable damage.

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177 Ibid., para 10: “Under Article 5(2) of the Optional Protocol, a request for interim measures “does not imply a determination on admissibility or on the merits of the communication”. The Committee may therefore find that the initial communication is sufficiently substantiated to be registered and that the situation brought to its attention warrants a request for interim measures in order to avoid irreparable damage. Similarly, the information provided by the parties on the admissibility and merits of the communication may even lead the Committee to conclude that a communication, which initially appeared admissible *prima facie*, is inadmissible for non-compliance with the admissibility requirements of Article 3 of the Optional Protocol. The request for interim measures is therefore without prejudice to subsequent decisions of the Committee regarding the admissibility of the communication or its eventual findings of violations of rights under the Covenant when considering the merits of the communication.

178 *ACtHPR, Konaté v Burkina Faso*, Order for Provisional Measures, 4 Oct 2013, (2013) 1 AfCLR 310.

179 Ibid., para 22.

180 Ibid., para 19.

181 Ebobrah, Chap. 5. He also refers to three judges who would have granted provisional release pending the case because the state had not raised any objections (paras 1–3), considering that ‘since the applicant could easily be returned to jail if his action was unsuccessful, the failure to grant immediate release ‘will cause irreparable harm’ (para 4). *ACtHPR, Konaté*, 4 Oct 2013, Joint dissenting opinion of Judges Ramadhani, Tambala and Thompson.

182 Burbano-Herrera and Haeck, Chap. 10.

183 See further Rieder 2010, pp. 541–553.

184 As they put it, in the choice to specify the obligation as one of release, ‘it could also be seen as a Court, which is desperate to find a way to order provisional measures that will result in effective protection for detainees who are kept in deplorable conditions’. Burbano-Herrera and Haeck, Chap. 10.
irreparable damage to persons. Moreover, while it monitors compliance with its orders for provisional measures to protect persons against threats, and these orders obviously include investigation of instances of threats so as to prevent new ones, the Court does not monitor this investigation element of its provisional measures. At this stage it focuses on the implementation of other elements in its Orders. In the course of the reform process the Inter-American Commission also expressly agreed with the recommendation to ‘confine the assessment for granting precautionary measures to the “seriousness” and “urgency” of the situations, and avoid considerations on the merits of the matter’.

**11.5.4 Motivation of Interim Measures Decisions**

Transparency is an important criterion for legitimate judicial decisions in general. This also applies to urgent decision-making. It requires that the parties have access to information about the use of interim measures and the reasons for ordering them. The approach to irreparable harm is a substantive aspect of normative legitimacy, while the fairness of the proceedings constitutes a procedural aspect. The important element of motivation, as part of transparency, could be seen as both substantive and procedural.

A motivated decision includes a reference to international legal obligations; a reference to the principled and binding nature of the law and an indication of criteria used for the decision to take urgent action. It implies clarity of the decision, in terms of the rights of the persons involved and the obligations of the state pending the proceedings. To some extent the general principle of legal certainty is also relevant in interim measures. Only to some extent, because there is no judgment on the merits yet, so no finality. Still, the internal consistency between the general case law of the adjudicator and its practice of using interim measures in similar cases does play a role, along with the context of the domestic proceedings. The more an adjudicator

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185 See e.g. IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Order denying provisional measures of 29 January 2008, 10th ‘Considering’ clause and IACtHR, *Matter of “Globovisión” Television Station* (Venezuela), Order of 29 January 2008, 10th ‘Considering’ clause.

186 See Rieter 2010, p. 672, referring, e.g., to IACtHR *Cárcel de Urso Branco (Brasil)*, Order for provisional measures, 2 May 2008, Consid. Cl. 26. See also Rieter 2019 on the ICJ and prejudgment.

187 See Pillay, Chap. 4, referring to IACHR, ‘Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System’, Washington D.C., 23 October 2012, para 65.

188 See e.g. Harrington, Chap. 6.

189 See Ebobrah, Chap. 5.

190 See also Pillay, Chap. 4, and Leach, Chap. 9, referring to consistency and also noting that due to lack of published reasoning, in ‘outlier’ cases it is not always clear why the Court ordered interim measures.
can link an interim measures decision to its own relevant earlier interpretations and practices, the more authoritative such decision is. The petitioners and the states involved should have some idea of what to expect.

Another aspect that can be a component of motivated interim measures is referring to the case law of other adjudicators. A similar argumentation or practice used by other adjudicators can indeed strengthen the persuasiveness of interim measures decisions. A reference can confirm a certain development in international law, and the consistency of an interim measure with that development. How this reference is presented is crucial to avoid states undermining the social legitimacy of an order by implying that the adjudicator depends on ‘foreign’ elements. This applies particularly if the practice referred to is only European. By contrast, some interim measures are firmly rooted in the case law worldwide, thereby strengthening their persuasiveness.

Publication and motivation of decisions to grant interim measures not only meets the transparency criterion as a value in itself, but it may help to increase trust in the interim measures decided upon. As suggested by Harrington, ‘[r]easons can also serve to make clear the distinction between an interlocutory action and the final outcome, with an interim measures request, unlike a final decision on the merits, gaining legal force as a result of its important regulatory role in preserving the positions of the parties while a dispute is pending’. Translating this situation to the UN level, she suggests that when UN treaty bodies show greater transparency and provide detailed reasons, over time, this ‘may serve to foster greater confidence from other states in both the legitimacy and necessity of these protective measures for the prevention of irreparable harm’.

On the African Commission Ebobrah observes that by not publishing an order including the reasoning, ‘it is difficult to decipher what factual situations satisfy the criteria’ for indicating interim measures. This does not give the petitioners and the states much guidance. Moreover, the Commission ‘also denies itself the opportunity to contribute to the global jurisprudence on provisional measures.’ By contrast, he observes that the Court does publish its Orders, which are reasoned. It ‘always or almost always follows a fixed structure, basically following the requirements popularised by the ICJ’. The Court refers to the legal basis of its authority and the conditions for ordering interim measures. It establishes ‘that it has both material (Article 3 of the Protocol) and personal jurisdiction (Article 5 of the Protocol)’. It then discusses whether the particular situation satisfies the criteria of extreme gravity, urgency and risk of irreparable harm to the victim(s). Still, Ebobrah observes, there is ‘uncertainty regarding the factual situations that the mechanisms consider as

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191 As highlighted by Burbano Herrera and Haeck, Chap. 10.
192 See Ebobrah (Chap. 5).
193 See Harrington, Chap. 6; and Ebobrah, Chap. 5.
194 Harrington, Chap. 6.
195 Ibid.
196 Ebobrah, Chap. 5.
197 Ibid.
satisfying the criteria set out in the Court Protocol and the respective Rules’. He refers to Tanzania’s response to one of the Court’s interim measures stating that ‘facts were insufficient reasons’. He concludes: ‘Since the very nature of adjudication requires transparent motivation to convince a losing party to accept the decision, it is critical that more elaborate and persuasive documentation of the reasoning behind an interim decision be made.

Pillay and Shelton discuss the political pressure by several European states, displeased about the Court’s interim measures in the immigration context and calling for a serious reduction in the number of measures ordered. The ECtHR responded in several ways, including by creating a special Unit within the Registry specifically to deal with interim measures requests. Still, the Court does not make public its interim measures. It only transmits them to the applicant and the state, normally without motivation. As Shelton notes, the Registry has argued that for practical reasons, motivation should be provided only on an ad hoc and exceptional basis.

Shelton, Pillay and Harrington discuss how in the Inter-American system, the reform process instigated by a group of states led to significant changes in the rules of procedure, including a decision by the Commission to provide reasons for its use of precautionary measures and a published vote of the Commissioners. Rule 25 now also specifies how the measures can be lifted, prolonged or amended. Harrington suggests that motivated interim measures ‘may also serve to foster state respect for their protective role, while also assisting those who must take efforts in the national courts to secure a temporary stay of an order for removal or extradition’. She considers that if the Canadian courts are correct that interim measures requests are matters for ‘the court of public or international opinion’, then the public needs to know more about why the requests were made.

The other side of the coin is expressed by Pillay, who draws attention to the pressure mechanisms developed by states and points out the need for flexibility of the adjudicator in the face of urgency. Pillay explains that the ECtHR concluded in 2016 that ‘providing reasons for the application of Rule 39 would represent a considerable burden for the Court, likely to slow down a process that by its nature must operate rapidly. Instead, by the rapid communication of such applications, the Government concerned is informed of the factual basis for the interim measure’.

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198Ibid.
199Ibid.
200Ibid. (footnote in original omitted).
201Pillay, Chap. 4; and Shelton, Chap. 2. See also Sect. 11.3.3.
202Shelton, Chap. 2, referring to Drafting Group C on the Reform of the Court (GT-GDR-C), Article 39 of the Rules of Court: Modalities of Application and Procedure, Information document by the Registry of the Court, GT-GDR-C(2012)009, 7 December 2012, para 31.
203See Shelton, Chap. 2; Pillay, Chap. 4; and Harrington, Chap. 6.
204Harrington, Chap. 6.
205Pillay, Chap. 4, referring to ECtHR, ‘The Interlaken Process and the Court (2016 Report)’, 1 September 2016.
Indeed, the ability to react flexibly and in time is crucial for the protective potential of interim measures. Furthermore, there also is a need for openness about the motivations of states that are pressing for greater transparency. Much of the pressure by some European states to secure reasoned interim measures appears to have been based simply on a desire to curb the Court and achieve a more limited number of interim measures. This is especially the case when they argued for reasoned denials of interim measures (because they presumably hoped this would freeze the situation for subsequent cases), but not for motivated decisions granting interim measures (the implications of which for similar cases would be much more obvious for state institutions than unmotivated ones).

It seems that the ECtHR has already improved transparency to some extent through the publication of its Practice Direction on interim measures, a regularly updated Factsheet and its statistics regarding interim measures. At the same time it is clear that the Inter-American and African Courts show more transparency than the ECtHR in this regard. The Inter-American Commission too shows more transparency than the ECtHR. By contrast, the information provided by the UN treaty bodies and the African Commission is still very limited. These bodies do less in terms of reasoning and publication of their interim measures.206

Shelton concludes that ‘the legal systems put in place by the agreements the states wrote, have given human rights bodies the mandate and the obligation to carefully and fairly respond to imminent threats of irreparable harm. They should continue to do so when the facts and the law justify action’.207 As she explains, preventing irreparable harm to people is the ultimate purpose of all human rights regimes, but this does not mean that these regimes can ignore all procedural safeguards for states. It is exactly the adherence ‘to norms of procedure and having a transparent process’ that may enhance compliance with the interim measures of protection.208

11.5.5 Sufficiency of the Evidence and Staying within the Scope

Each year, the ECtHR publishes statistics on the numbers of interim measures it declared ‘outside the scope’, ‘refused’ and ‘granted’ in the preceding year, while setting these off against the previous two years. In its classification, ‘refused requests’ concern requests that the Court considers insufficiently backed up by evidence of a real risk at this stage. When the Court determines that a request is ‘outside the scope’, this indicates something about whether the situation is worthy of the use of interim measures in the first place. In fact, all adjudicators have refused requests for interim measures for both reasons: for lack of evidence of risk at this stage and because the

206As pointed out by Harrington, the current rules of procedure of the UN bodies would already allow for publication of interim measures’ reasoning, Harrington, Chap. 6.
207Shelton, Chap. 2.
208Ibid.
situation is not worthy of interim measures. The latter relates to the scope of the adjudicator’s interim measures and depends on the approach to their purpose, in the particular system, and on what, according to the adjudicator, constitutes irreparable harm.\textsuperscript{209} This section first singles out some issues involving evidence. Following this, it discusses the scope of interim measures.

Often states challenge interim measures decisions not for the type of situation in which they are used, but because of the assessment of urgency pending the case. For instance, at one point some states were particularly unhappy about the interim measures in non-refoulement cases, so they joined forces and even appeared to suggest imposing quota on the ECtHR. Forcing the Court to deny requests for interim measures after a specific number would obviously ignore the principle of non-refoulement and the underlying problems triggering the need for interim measures. Furthermore, it would undermine judicial independence and the right of individual petition.\textsuperscript{210} Moreover, it should also be noted that there would be less need for international adjudication if states took their primary responsibility in non-refoulement cases by providing full review and suspensive effect at the domestic level to avoid irreparable harm to persons in the first place.

Nonetheless, in the context of evidentiary matters, it is posited that for an interim measure decision there should be at least some indication of the existence of the right invoked and of the risk of violation of that right. This implies that the right claimed should arguably exist, or ‘the violation alleged is at least arguable’,\textsuperscript{211} and there appears to be a real risk of irreparable harm. In the context of non-refoulement cases, Zwaan discusses the manner in which the ECtHR and UN Committees establish urgency and the underlying reasoning for interim measures decisions. She observes that they have ordered interim measures in similar types of cases such as risk of ill-treatment related to sexual orientation, risk of family vengeance, risk of being subjected to FGM, risk of social exclusion, risk of sexual exploitation and a health risk. Most orders for interim measures do not provide reasoning with regard to their risk assessment at this stage. Zwaan therefore examined the available merits and other decisions, from which she infers that at the stage of interim measures there has to be at least some likelihood of a real risk of violation of the right that is claimed on the merits.\textsuperscript{212}

In practice, lawyers tend to turn to the ECtHR with requests for interim measures. Yet some lawyers seem to have found their way to the UN Committees for more specific topics. For instance, the case study on risk of FGM indicates that on the merits applicants may have a better chance of success before the CRC than before the ECtHR. Moreover, all adjudicators appear to be aware of the specific position

\textsuperscript{209}See the contributions by Shelton, Chap. 2; Ebobrah, Chap. 5; Pillay, Chap. 4; Leach, Chap. 9; Prechal and Pahladshing, Chap. 3.
\textsuperscript{210}On the political pressure on the ECtHR, see Pillay, Chap. 4.
\textsuperscript{211}ESC Committee Guidelines, above n 148, para 3.
\textsuperscript{212}Zwaan, Chap. 7.
of children, but the CRC obviously pays specific attention to risks for a child’s well-being.\textsuperscript{213}

In a different context, Ebobrah refers to \textit{Liesbeth Zegveld and Mussie Ephrem v Eritrea},\textsuperscript{214} where Eritrea ‘challenged the veracity of the facts presented to the Commission and by extension, the need for indication of provisional measures in the matter’.\textsuperscript{215} He suggests that a satisfactory explanation of the African Commission underpinning the use of interim measures and the opportunity of those concerned to contest them could enhance the legitimacy of the order.\textsuperscript{216} Of course, this interim measure would not be a candidate for controversy beyond Eritrea, because it simply reminded the state of clearly pre-existing obligations. The state was neither called upon to do something extraordinary, nor was state responsibility implied. In such context, more detail in explanation might even be seen as prejudgment. Still, an indication of reasons would be useful.

In its Guidelines, the ESC-Committee has paid specific attention to evidentiary matters. This offers a recent and interesting perspective, because of this Committee’s relatively new adjudicatory role. It notes the objective of interim measures, namely ‘to prevent irreparable damage, even in the absence of complete certainty that the damage will otherwise occur’. On the burden of proof for interim measures requests, it notes that the information provided must enable the Committee ‘to determine \textit{prima facie} that there is a risk of irreparable damage and that the communication is admissible’.\textsuperscript{217} The applicant has to provide, where available, documentary evidence helping to substantiate the claim that there is a real risk of irreparable harm.\textsuperscript{218} The applicant has the burden to show ‘the reality of a risk of the damage occurring, and why, should the risk materialize, the damage would be irreparable’.\textsuperscript{219} Yet, in my view this Guideline should not be read as expecting applicants to be able to present

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\textsuperscript{213}Zwaan, Chap. 7.
\textsuperscript{214}AComHPR, \textit{Liesbeth Zegveld and Mussie Ephrem v Eritrea}, Merits decision November 2003, Communication 250/02, referring to urgent appeals of 3 May and 25 October 2002 and 10 June 2003, paras 9, 10, 15 and 19. In May 2002 the state responded that the petitioners were detained ‘in appropriate government facilities, had not been ill-treated, have had continued access to medical services and the government is making every effort to bring them before an appropriate court of law as early as possible’, para 12.
\textsuperscript{215}Ebobrah, Chap. 5.
\textsuperscript{216}Ibid.
\textsuperscript{217}Ibid., para 5.
\textsuperscript{218}Ibid., para 6: “The author bears the responsibility of providing the Committee with enough information on the relevant facts and alleged violations to establish a \textit{prima facie} case of the existence of a risk of irreparable damage, including information about the absence of an effective domestic remedy capable of averting the irreparable damage. Such information must include, where available, documentary evidence such as copies of the relevant decisions of national authorities or relevant reports on the situation in the country that help to substantiate the claim that there is a real risk of irreparable damage. Authors have a duty to disclose in good faith all material facts and information relevant to the request for interim measures as in the case of the submission of communications under the Optional Protocol. Failure to disclose material information may result in the withdrawal of the request for interim measures.”
\textsuperscript{219}ESC-Committee Guidelines, above n 148, para 2. See also CRC Guidelines for interim measures (2019), above n 84, para 2b, stating that “irreparable damage” refers to a violation of rights which,
all existing evidence of irreparable harm at this early stage. At the stage of requesting interim measures, it is sufficient if they bring evidence to establish *prima facie* a real risk of irreparable harm.

As to evidentiary matters in the context of structural human rights violations, Griffey’s case study shows the importance of human rights fact-finding and reporting in decision-making on the use of interim measures. This is also why Leach reiterates the importance of the use of interim measures to safeguard evidence for the integrity of the (quasi-)judicial proceedings. In any case, calling for more evidence is not the prerogative of states. States have themselves the obligation to safeguard evidence. They have the obligation to investigate and to report on violations and sometimes to allow and facilitate fact-finding missions. This may also apply pending international proceedings.

The approach taken by adjudicators to the scope of situations in which interim measures are to be used can be too limited. This undermines their protective value by leaving protection gaps. A broadening of the application of the interim measures tool may be necessary to ensure protection of persons in vulnerable situations, to safeguard the rule of law, and maintain legitimacy within civil society. At the same time, the scope can also be too wide, which results, on its own, in undermining the legitimacy and thereby the protective value. The scope or the outer limits of the concept of interim measures is connected with normative legitimacy and the function of urgency tools in the specific system.

Shelton expresses some concern about certain broadening of the scope by the Inter-American Commission, because this might indeed undermine the legitimacy of its precautionary measures. An example she provides of the broadened scope is a precautionary measure to ensure the capacity to stand for election. This type of situation would appear to move beyond the outer limits of the concept if it solely concerns one individual’s political rights. It would then seem too invasive to order domestic authorities, for instance, to postpone democratic elections. On the other hand, if the rule of law and political access of minorities is at stake, in a context of pervasive discrimination, it could be argued that hindrance of political rights due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective.”

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220 Griffey, Chap. 8.
221 Leach, Chap. 9.
222 See Sect. 11.4.2.
223 See e.g. Pillay, Chap. 4; Leach, Chap. 8. See also Prechal and Pahldasingh, Chap. 3, on the interim measures by the CJEU and the types of situations in which it applies the accelerated preliminary question procedures. On filling protection gaps, one can also think of the immediate measures introduced by the European Committee of Social Rights, see Sect. 11.4.2.
224 See Shelton, Chap. 2; Ebobrah, Chap. 5; and Leach, Chap. 8.
225 Shelton, Chap. 2.
226 Idem, referring to IACHR, *Gustavo Francisco Petro Urrego v Colombia*, Resolution on Precautionary Measures, 18 March 2014, OAS Doc No.PM 374/13.
227 This is derived from Rieter 2010, p. 568.
has a considerable impact on society as a whole and could be irreversible, therefore warranting interim measures. Thus, a broadening of the application of the urgency tools may be necessary to ensure protection of persons in vulnerable situations, to safeguard the rule of law, and maintain legitimacy within civil society.\textsuperscript{228} In such cases what should be guiding is whether the measures can be linked to a pre-existing rationale and whether basic criteria of procedural fairness are met.

To the extent that there is no time for hearing the state, nor for adding extensive reasoning in the decision, it can be an option to issue temporary interim measures, or ‘urgent measures’, as suggested by Ebobrah for the African system,\textsuperscript{229} which can later be followed up by a more fully reasoned decision, where both parties have had the opportunity to submit their views.\textsuperscript{230} Meanwhile states are then legally bound to respect the temporary measures, as part of the good faith compliance with the human rights treaty and the complaint procedure accepted by it. This illustrates the interrelated nature of the criteria of remaining within the scope, being transparent and maintaining a fair procedure.

In any case, it is crucial for their function that there is no politically motivated interference in the standards and procedures for the indication of interim measures.\textsuperscript{231} In practice, states often criticise the use of interim measures exactly because the political context, e.g. immigration, is sensitive.\textsuperscript{232} While generally speaking they do not dispute the principle of non-refoulement, they may dispute the assessment of risk of irreparable harm in the case at hand.\textsuperscript{233} The fact that the subject matter of interim measures decisions can be politically sensitive does not as such take away from their normative legitimacy.

As noted, there are classical reasons as well as newer, non-traditional contexts for which interim measures or other urgency tools have been used. Classical reasons are, for example, to halt expulsion or extradition,\textsuperscript{234} and to ensure access of a detainee to a lawyer or doctor and to medical care in general,\textsuperscript{235} or to protect against violence in detention.\textsuperscript{236} Other common reasons are to protect persons against death threats or to halt industrial developments that could cause irreparable harm to the cultural survival of indigenous peoples.\textsuperscript{237} In addition, interim measures have been used, or their use

\textsuperscript{228}See e.g. Pillay, Chap. 4; Leach, Chap. 8. See also Prechal and Pahlad Singh, Chap. 3 on the interim measures by the CJEU and the types of situations in which it applies the accelerated preliminary question procedures. On filling protection gaps, one can also think of the immediate measures introduced by the European Committee of Social Rights, see Sect. 11.4.3.

\textsuperscript{229}Ebobrah, Chap. 5.

\textsuperscript{230}As noted, this is already the case for several UN Committees and one can think also of the preliminary provisional measures, or ‘urgent measures’ by the President of the Inter-American Court.

\textsuperscript{231}See Pillay, Chap. 4.

\textsuperscript{232}See e.g. Shelton, Chap. 2; Pillay, Chap. 4; and Ebobrah, Chap. 5. See also Sect. 11.3.

\textsuperscript{233}Zwaan, Chap. 7.

\textsuperscript{234}See Zwaan (Chap. 7), Harrington (Chap. 6), Prechal and Pahlad Singh (Chap. 3), Pillay (Chap. 4).

\textsuperscript{235}See Leach (Chap. 9); Burbano Herrera and Haeck (Chap. 10); Griffey (Chap. 8).

\textsuperscript{236}See Burbano Herrera and Haeck (Chap. 10); Griffey (Chap. 8).

\textsuperscript{237}See Shelton (Chap. 2)
has been proposed, in newer contexts equally involving imminent risk of irreparable harm. An example is to obtain access to justice and remedies pending the proceedings before the adjudicator. Generally, the claims concern achieving access of the petitioner to a lawyer and the right to be brought before a court. These *habeas corpus* rights are (indirectly) crucial for ensuring the right to life and personal integrity. After all, there can be clear risks of degrading treatment, torture and disappearance of persons detained without such access. In such contexts, the ECtHR has ordered interim measures to ensure access of lawyers to persons in a psychiatric hospital or a ‘Foreigners’ Admission and Accommodation Centre’.

As for the type of human rights which can be protected by interim measures, various adjudicators have identified the elevated status of certain rights in merits decisions. Rights with this status should not be irreversibly harmed. This would result in irreparable harm to persons. Such core rights are clear candidates for protection through interim measures, in particular when in other systems adjudicators have already taken interim measures to protect these rights, pointing at a convergence in practice, as well as in theory. In this respect, the convergence in practices of the various adjudicators as discussed in this book appears to be persistent. Section 11.4.2 already mentioned situations related to the right to life and the prohibition of degrading treatment, such as protection against forced displacement, halting evictions and ensuring access to basic facilities. Indeed, in the context of economic, social and cultural rights—apart from the most extreme cases of apparently deliberate starvation of persons held in transit, based on anti-immigrant sentiments—there is a related issue that many European states are grappling with: access to basic facilities, especially for undocumented people. For alleged violations of economic, social and cultural rights, the newer complaint systems have introduced and defined the scope of the tool of interim measures. The ESC-Committee, in its newly adjudicatory role under the ICESCR-OP, notes that ‘[i]n line with the practice of other international human rights bodies’, ‘irreparable damage’ refers to ‘the threat or risk of a violation of a Covenant right that could not lead to a reparation in kind (full

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238See Ebobrah, Chap. 5, See also Leach, Chap. 9 (also noting that the ECtHR ‘appears to be especially mindful of the position of children’, referring to the Sea Watch 3 Rule 39 with the specific requirement that the 15 unaccompanied minors who were on board should be given adequate legal representation). For earlier cases, see Rieter 2010, pp. 392–3.

239See the discussion by Leach, Chap. 9. Here the right of individual application was at stake and therefore the integrity of the proceedings before the Court. Moreover, in the psychiatric hospital case the claim may have concerned arbitrary detention, but the circumstances also suggested degrading treatment. Moreover, the immigration case concerned a non-refoulement claim.

240See further Rieter 2012.

241See Chap. 1.

242See Pillay (Chap. 4); Zwaan (Chap. 7).

243As mentioned by Pillay, Chap. 4, the interim measures provision was included in the Protocol despite Japan’s argument against this inclusion.
Conclusion: The Protective Potential and Legitimate Goals of Interim Measures

The scope of application of interim measures is closely connected to their purpose. Pillay stresses that for the UN and regional human rights mechanisms the function of interim measures is not just to freeze the situation and prevent irreparable harm to one of the parties, but also to ensure that the mechanism can provide real and effective protection of the human rights guaranteed by its governing treaty and an effective remedy for breach of those rights. They derive their legitimacy from the common interest in the international rule of law, together with the imperative of protecting human rights guaranteed by treaty, through complaints mechanisms explicitly accepted by states.245 Ebobrah concludes that in its provisional measures in Ogiek the ACtHPR ‘introduced preservation of the integrity of the Court’s processes as an additional justification’ for ordering interim measures.246 As Shelton puts it, ‘preventing irreparable harm to the human beings, which is the absolute focal point of all human rights regimes’, will ‘protect the very objective of such procedures’ and, in addition, interim measures have the ‘institutional aim of helping to ensure that human rights procedures and bodies are effective.’

Indeed, it appears that in addition to preventing irreparable harm to persons, interim measures aim to protect the integrity of the proceedings in human rights cases as well. Disrespect for these proceedings undermines access to justice and the rule of law internationally. In addition, interim measures have also been ordered to help ensure the rule of law in a particular system, such as the EU, or in the protection system under the ACHR. Examples are more atypical interim measures decisions, such as calling on a state to halt measures undermining domestic judicial independence.248 After all, domestic courts have an important role in the application of EU law. Moreover, in light of the principle of ‘primarity’, domestic courts are also

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244ESC-Committee Guidelines, above n 148. See also CRC Guidelines for interim measures (2019), above n 84, para 2b, stating that “irreparable damage” refers to a violation of rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective.”
245Pillay, Chap. 4.
246Ebobrah, Chap. 5. This element is not mentioned as such in Article 27(2) of the Court’s Protocol. The ACtHPR ordered Kenya to immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest and to refrain from any conduct that might irreparably prejudice the main application before the Court. It saw ‘a situation of extreme gravity and urgency as well as a risk of irreparable harm to the Ogiek’, an indigenous minority ethnic group in Kenya. Ebobrah observes that in its provisional measures order in Ogiek the ACtHPR took the conditions for interim measures as ‘conjunctive and cumulative’. Moreover, it also added the element of ‘prejudice to the substantive matter before the Court’. See ACtHPR, African Commission on Human and Peoples’ Rights v the Republic of Kenya, Order of Provisional Measures, 15 March 2013, 006/2012.
247Shelton, Chap. 2.
248See CJEU, Order of the Court (Grand Chamber) of 17 December 2018 in Case C-619/18 R, Commission/Republic of Poland, ECLI:EU:C:2018:1021, as discussed by Prechal and Pahladsingh, Chap. 3.
crucial in applying the ACHR. As to preserving the integrity of the proceedings before UN treaty bodies, the ESC-Committee, which has a quasi-judicial role based on the OP to ICESCR, has confirmed that the ‘reason for the existence of interim measures is, inter alia, to preserve the integrity of the process, thereby ensuring the mechanism’s effectiveness in protecting Covenant rights when there is a risk of irreparable damage’.  

Some courts have been authorised to order interim measures, or apply another urgency procedure, in a wide range of cases. It may also be that increased importance is attached to certain rights in a specific system. However, the contributions to this book referred to several examples of atypical interim measures, which do not appear to aim at preventing irreparable harm to persons, nor at preserving the integrity of the proceedings. They therefore seem to be situated beyond the scope of interim measures, especially given that interim measures are generally expected to be taken in exceptional circumstances.

Although the background of some of these atypical orders may be a wish to prevent the entrenchment of a systemic problem or to ensure the integrity of the proceedings, the text of the measures does not really explain why the measures were necessary and why they did not prejudice the merits, nor why a less far-reaching measure was not ordered. Generally speaking, for instance, the judicial seizure of assets or other financial measures are reversible and addressing such state conduct pending the proceedings is therefore beyond the scope of interim measures. The next paragraphs refer to some cases that seem to be beyond the scope, although with reasoning some of them might turn out to be within the outer limits of the concept after all. It is not for the states, but for the adjudicators to address any unclear situations. They should retain enough flexibility to perform their judicial function and be able to address urgent situations pending the proceedings.

Leach discusses two atypical cases involving press freedom, one ‘to halt the implementation of a supreme court judgment, amidst a struggle over control of the media’ and another ‘to protect the integrity of a journalist’s sources’. Because the ECtHR does not publish its interim measures, it is unclear whether its communications to

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249 In that sense an interim measure could be called for when a domestic court is under threat. At the same time, if an independent domestic court can properly monitor an urgent situation, there is no longer a need for international interim measures. See e.g. IACtHR Communities of Jiguamiandó and Curvaradó v Colombia, Order for provisional measures, 22 May 2013, Consid. Cl. 53–55, where the Court decided to lift its interim measures, in light of the principle of subsidiarity, including the knowledge that the Constitutional Court of Colombia will continue monitoring the situation.

250 ESC Committee, Gómez-Limón Pardo v Spain, 5 March 2020, Views, E/C.12/67/D/52/2018, para 10.2, referring to ESC-Committee S.S.R. v. Spain, inadm. decision, 11 October 2019, E/C.12/66/D/51/2018, paras 7.6 and 7.7 and Committee against Torture, Thirugnanasampanthar v. Australia, Decision of 9 August 2017, CAT/C/61/D/614/2014, para 6.1.

251 See Rieter 2010, pp. 584–585.

252 Leach, Chap. 8. He observes that the broad wording of Rule 39 allows for interim measures not just in the face of a risk of personal harm, but also of ‘irreparable damage’ to the applicant’s rights under the Convention. The aim is the preservation of the rights of the applicants under the ECHR, ‘avoiding irreversibility and ensuring their effective right of application to the Court – fundamental aspects of the right of access to justice’.
the parties included some reasoning and the rationale of the measures is more difficult to discern.253 He also observes that ‘[n]ot infrequently, states’ responses leave a lot to be desired, although there is no particular evidence to suggest that states are disputing the legitimacy of the extended scope of interim measures’. This appears to be different in the African system. The orders of the ACtHPR are published and include reasoning. Moreover, as Ebobrah observes, they follow a clear structure and include important elements of motivation. This structure and motivation is lacking for the measures of the AComHPR. Yet Ebobrah considers that the Court’s provisional measures could also be improved as to explanation of evidence required and as to the scope of the measures, and points out the opportunities for enhancing their legitimacy.254

While most measures concern halting executions, detention contexts and other situations where alleged victims are facing risk to their life, personal integrity or indigenous land rights, in 2017 the ACtHPR ordered provisional measures to maintain the status quo and to avoid the applicant’s property being sold ‘until this application is heard and determined’.255 Other atypical cases are, for example, the interim measures ordered in 2020, for the suspension of a change of ownership and to halt the seizure of a building,256 to suspend the execution of an arrest warrant,257 and to suspend municipal elections.258

Furthermore, interim measures have been issued in the context of arbitrary detention claims, in order to obtain release pending the international proceedings.259 Shelton observes that in this context the scope may be too wide: ‘It has long been accepted that loss of liberty is not an irreparable injury, but may be compensated if it is later determined that the trial or law on which the incarceration was based, 

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253 Ibid.
254 Ebobrah, Chap. 5.
255 ACtHPR, Woyome v Ghana, Order for Provisional Measures, 24 Nov 2017, Application no 001/2017.
256 ACtHPR, Kodeih v Benin, Order for provisional measures, 28 February 2020, 006/2020. See para 42: “The Court is of the view that it is endowed to issue orders for provisional measures not only in cases of “extreme gravity or urgency or when it is necessary to avoid irreparable harm” but also “in the interest of the parties or of justice”. (T)he Court finds, that in the instant case there is a matter of extreme gravity or urgency, same as a risk of irreparable harm because the change is done through a new registration on the land title which will become final and unquestionable.“ See para 45.
257 ACtHPR, Soro & Others v Côte d’Ivoire, 22 April 2020. Côte d’Ivoire responded by announcing its withdrawal of its consent to the direct access of individuals to the ACtHPR. See Windridge 2020; and De Silva and Plagis 2020.
258 ACtHPR, Aïkoue Ajavon v Benin, Order, 17 April 2020, 062/2019. This Order followed an earlier provisional measures order (to stay the execution of a domestic judgment against the politician Ajavon), 7 December 2018; a merits judgment of 29 March 2019 (to quash his conviction) and a judgment on reparations of 28 November 2019.
259 For an older order by the IACtHR, see Rieter 2010, pp. 541–549.
violated human rights standards’. She singles out another case that illustrates time-sensitivity and the risk of prejudgment, in particular when using interim measures in cases not involving life or personal integrity. This was the precautionary measure, issued in 2014, aimed at halting the removal from office of an impeached mayor in Colombia. He was facing corruption charges. Shelton notes that by the time the Commission will reach the merits of the dispute, the mayor’s term of office will have been completed, so that the precautionary measures have likely rendered the case moot.

Leach refers to an interim measure that ‘came as a surprise’. The ECtHR ordered the Georgian authorities to ‘abstain from interfering with the applicant company’s editorial policy in any manner’. This order was in place for more than two years, following which the Court found no violation on the merits. He notes that it is difficult to assess whether the interim measures were justified because the Court’s reasons are not known. Concerns for political pluralism and freedom of the media may have played a role. Based on another interim measures order referred to by Leach, the Ukrainian authorities should not access the data relating to the mobile phone of a journalist investigating corruption for Radio Free Europe.

Pillay argues that the adjudicators should be able to take interim measures irrespective of the rights at issue, ‘through speedy, efficient and flexible procedures.’ She also argues that the criterion of exceptionality ‘needs to be interpreted in light of these imperatives’. In my view, she is right about the authority of the adjudicators and the need to have sufficient flexibility to be able to respond properly to allegations of risk of irreparable harm pending the procedure. At the same time, I would argue for caution when ordering interim measures involving just any of the rights in the human rights treaty in question. Any extension concerning rights other than those related to the right to life and the prohibition of torture and cruel treatment may need to be especially well reasoned. This may be why the adjudicators themselves often stress that their interim measures are reserved for exceptional circumstances. Such circumstances are then linked to the risk of irreparable harm to persons or to the integrity of the complaint proceedings. When references to ‘exceptional circumstances’ are included in the treaty text, the supervisory body necessarily needs to interpret these terms and apply them to concrete and factual situations. The CRC, when discussing ‘exceptional circumstances’ in the text of the Protocol, refers to a grave impact that an action or omission by a State party can have on a protected

260Shelton, Chap. 2. See also Ebobrah’s discussion, Chap. 7, of ACtHPR, Konaté v Burkina Faso, Order for Provisional Measures, 4 Oct 2013, (2013) 1 AfCLR 310, para 19.
261See also Sect. 11.5.3 on avoiding prejudgment.
262Shelton, Chap. 2.
263Leach, Chap. 8, referring to ECtHR Rustavi 2 Broadcasting Company Ltd and Others v. Georgia, Judgment, 18 July 2019, No. 16812/17, paras 229–235 (interim measures orders of 3 and 7 March 2017).
264ECtHR Sedletskaya v Ukraine, No. 42634/18, communicated on 15 November 2018 (a decision by the Fourth Section of the Court).
265Pillay, Chap. 4.
266See Pillay on the political reasons for doing so, Chap. 4.
right or on the eventual effect of a pending decision in a case or petition before the Committee.267

Ultimately, some atypical situations, not involving life and personal integrity, nor land rights of indigenous peoples, might still warrant interim measures. Yet this requires a clear and published motivation by reference to authoritative reports on structural problems, claims of problematic legislation, or threats to the independence of the judiciary. For instance, in the circumstances discussed in such reports, the impact of elections could be long-lasting and could entrench systemic situations. Furthermore, the customary statement that the adjudicator’s interim measures do not prejudge the merits should be included in the interim measures decision, with the normally implicit assurances that the parties will subsequently have the opportunity to bring arguments on any withdrawal or lifting, as well as, in the merits phase, on state responsibility. All of this relates to normative legitimacy but, as indicated, this is closely related to social legitimacy. It is clear that ordering interim measures in certain atypical circumstances remains extremely sensitive.268 However, the adjudicators themselves are best placed to determine whether interim measures are necessary. As part of their (quasi-)judicial functions, they should retain discretion to impose interim measures in appropriate cases where there is a risk of irreparable harm. After all, as Shelton points out: ‘The legal systems put in place by the agreements the states wrote, have given human rights bodies the mandate and the obligation to carefully and fairly respond to imminent threats of irreparable harm. They should continue to do so when the facts and the law justify action’.269

11.6 Concluding Remarks

When faced with urgent situations in cases brought before them, adjudicators have the authority to take interim measures. In addition, there are some other urgency mechanisms, such as the accelerated preliminary ruling procedure developed by the CJEU, specific mechanisms to deal with reprisal, as well as possibilities for urgent intervention by treaty bodies independent of any case pending before them. This chapter, like most contributions, focussed on interim measures. They have the potential to protect people only when domestic authorities effectively implement them. Regularly, domestic sensitivities hinder this implementation. Other obstacles often constitute structural human rights problems and the fact that states sometimes

267 CRC Guidelines for interim measures 2019, above n 84, para 2a.
268 As can be seen in the response by Benin to Ajavon v Benin, n 258 above where the Court unanimously ordered a suspension of Benin’s municipal elections planned for that same day (17 May 2020). Benin announced that it would withdraw its consent to the direct access to the ACtHPR. See also Amnesty International, ‘Benin: Withdrawal of individuals right to refer cases to the African Court a dangerous setback in the protection of human rights’, 24 April 2020, https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/ Accessed 19 May 2020.
269 Shelton, Chap. 2.
cooperate to undermine the authority of the interim measures used, which is again related to the domestic sensitivities.

Promptness is required for interim measures to have any protective potential at all. The Inter-American Commission and Court are dealing with a sizable case load involving very large groups of beneficiaries of precautionary and provisional measures, meaning a considerable burden in terms of monitoring, especially given the limited number of judges, Commissioners and staff involved. Nevertheless, thus far they have managed to make initial urgent decisions in a matter of hours or days. The question is whether the ECtHR, with its even larger case load (although generally not covering such large groups of people as in the Inter-American system), will be able to maintain its timeliness when it must add one or two lines of reasoning.

The protective potential of interim measures is enhanced when the measures ordered are responsive to the alleged situation of danger of the alleged victims and sufficiently specific about what the state is expected to do. When urgent human rights situations arise in the face of societal controversy or indifference, or in the face of state security issues, or in the context of armed conflict, there is a heightened need for creative and situation-specific approaches. These approaches may include precisely formulated interim measures, especially aimed at securing evidence, or at access to humanitarian aid.

On the other hand, a situation-specific approach could also mean giving considerable leeway to the state to determine the manner in which it will implement interim measures. In particular in relation to democratically decided domestic measures, in a context of general respect for the rule of law, it is important that provisional measures do not dictate the manner in which the required protection should be achieved.270

Another element enhancing the protective potential of interim measures is follow-up on compliance, by the adjudicators themselves, both during the case and upon conclusion. This way they show that they are serious about their own measures. The protective potential is also considerably enhanced when third parties monitor compliance too. This should be done immediately and consistently and by official authorities as well as NGOs. Follow-up by civil society may trigger follow-up by official international bodies. Such follow-up will be easier when the initial decision by the adjudicator addressing urgency is as persuasive as possible.

The aforementioned criteria may all enhance the protective potential. Moreover, the normative legitimacy of interim measures decisions is an important aspect of their protective potential. Relevant cues for normative legitimacy include the authority of the adjudicator to decide on them in the first place, the manner in which the adjudicator expresses the binding nature of the measures and the respect shown for procedural fairness in the decision-making process. This means following an adversarial procedure where, on the one hand, the respondent state has the opportunity to contest a request for interim measures and, on the other hand, the applicant has

270 If the domestic courts in question have judicial independence, and/or the democratic processes in the state indicate the ability and willingness of that state to take up the primary responsibility to act swiftly and accurately in response to a more generally phrased interim measure, the principle of subsidiarity would call for policy freedom in implementation.
the opportunity to respond to a request by the state to the adjudicator to withdraw or lift the measures ordered. Moreover, to be as persuasive as possible, information on decisions by official bodies regarding urgent situations should be easily accessible and it should be sufficiently clear what the expected conduct of the state is. Finally, the manner in which the adjudicator explains interim measures is important. The decision should follow a structure referring to the legal basis, the obligatory nature, the consistency with earlier decisions and possibly also with the case law developed in other systems. They should show foreseeable and consistent application of adopted criteria for appropriate use. The evidentiary requirements and purpose should be clear and at the same time not prejudge the merits.

States often have internal political reasons for being unhappy with urgent decisions. They may criticise the legitimacy of these decisions in order to placate a specific domestic audience or to excuse a failure in implementation. In the face of concerted pressure by groups of states, international adjudicators sometimes become timid in response. Moreover, they grapple with lack of time and resources, a steep case load, coupled with increasing claims of imminent harm requiring immediate action. Faced with such immediacy, sometimes they sacrifice proper procedure to act in urgent situations. The general workload may, to some extent, explain the lack of motivation and publication of interim measures decisions in the European and UN systems.

Adjudicators are likely to prefer avoiding serious backlash against the rights holders and against the protection system as such. Yet not acting in urgent cases for fear of backlash, means not acting to prevent irreparable harm to persons pending the proceedings. This defeats the purpose of the available urgency tools and of the human rights complaint system as such. Instead, adjudicators should make sure that their use of these tools is as persuasive as possible.

The normative legitimacy of interim measures decisions is important for the users of the system. Applicants are more likely to trust the system, and good faith state agents are more likely to take such interim measures seriously. Moreover, persuasive interim measures are simply more likely to trigger the interest of other UN or regional authorities, third states, and NGOs to follow-up on non-compliance and to contain sufficient practical basis for lobbying and other follow-up actions. Adjudicators should have in place a follow-up mechanism as well. This process should not just include a checklist, but an inquisitive eye and ear and an insistent and firm voice. Litigants cannot stop either after they had their interim measure request granted. They should be equally inquisitive and insistent and assist the adjudicators in this respect.

The topic of urgent human rights adjudication is ongoing and in itself of continued urgency. It calls for continuing research and analysis, discussing the legitimacy and protective potential of interim measures and other urgency tools.
References

Apter SA (2003) Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts? Electronic Journal of Comparative Law, Vol. 7.2

Burbano Herrera C, Viljoen F (2016) Danger and Fear in Prison: Protecting the Most Vulnerable Persons in Africa and the Americas by Regional Human Rights Bodies Through Interim Measures. Netherlands Q. Hum. Rts. 33:163:163–193

CAT, Statement on reprisals, 51st Session, October-November 2013, CAT/C/51/3

CAT, Guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee under articles 13, 19, 20 and 22 of the Convention, 55th session, July-August 2015, CAT/C/55/2

Center for Justice and International Law (CEJIL) and International Human Rights Law Clinic, University of California, Berkeley, School of Law (USA) (2012) Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies, Submitted to Special Meeting of the Permanent Council of the Organization of American States, December 2012. https://www.law.berkeley.edu/files/ihrlc/precautionary_measures_research_paper%28final%29_121210.pdf. Accessed 12 October 2019

Chairs human rights treaty bodies (2015) Guidelines against Intimidation or Reprisals (“San José Guidelines”), June 2015, HRI/MC/2015/6

CRC (2019) Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted at its 80th session, 14 January to 1 February 2019

CRPD (2011) Working methods of the Committee on the Rights of Persons with Disabilities, adopted at its fifth session, 11-15 April 2011, CRPD/C/5/4

De Silva N, Plagis M (2020) A Court in Crisis: African States’ Increasing Resistance to Africa’s Human Rights Court. Opinio juris, 19 May 2020. https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/. Accessed 19 May 2020

Dzehtsiarou K (2016) Can the European Court of Human Rights prevent war? Interim measures in inter-state cases. Public Law Apr:254–271

ECtHR Press Unit (2020) Factsheet on interim measures. March 2020

ESC-Committee Guidelines on interim measures, adopted at its 66th session, Sept-Oct, 2019. https://www.ohchr.org/Documents/HRBodies/CESCR/Guidelineson_Interim_Measures.docx. Accessed 2 March 2020

HRCtee (2014) Report by the Special Rapporteur - The mandate of the Special Rapporteur on New Communications and Interim Measures CCPR/C/3/Rev.11, 6 May 2014

HRCtee (2019) Rules of Procedure CCPR/C/3/Rev.11, January 2019

IACHR (2012) Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System Washington D.C., 23 October 2012

Koagne Zouapet A (2020) Victim of its commitment … You, passerby, a tear to the proclaimed virtue’: Should the epitaph of the African Court on Human and Peoples’ Rights be prepared? EJIL Talk, 5 May 2020. https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/. Accessed 7 May 2020

Leach P (2017) The right to life – interim measures and the preservation of evidence in conflict situations. In: Austin A, Chernishova O, Early L, Ovey C (eds) The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom. Wolf Legal Publishers

Palchetti P (2017) Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function. Rivista di Diritto Internazionale, Anno C Fasc. 1:5–21
Parliamentary Assembly Council of Europe (PACE), Committee on Legal Affairs and Human Rights (2014) Report Urgent need to deal with new failures to co-operate with the European Court of Human Rights, Doc. 13435, 28 February 2014

Pillay R (2019) Irreparable harm and ESC Rights: Immediate measures of the European Committee of Social Rights, Opinio Juris, 7 August 2019. https://opiniojuris.org/2019/08/07/irreparable-harm-and-esc-rights-immediate-measures-of-the-european-committee-of-social-rights/. Accessed 12 January 2020

Rieter E (2010) Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication. Intersentia, Antwerp

Rieter E (2012) Provisional measures: binding and persuasive? Enabling human rights adjudicators to follow up on state disrespect? NILR 59, 165–198

Rieter E (2019) The ICJ and provisional measures involving the fate of persons. In: Kadelbach S, Rensmann T, Rieter E (eds) Judging international human rights, Courts of General Jurisdiction as Human Rights Courts. Springer, Heidelberg/Berlin, pp 128–170

Rieter E (2021) Autonomy of Provisional Measures. In: Palombino FM, Virzo R, Zarra G (eds) Provisional Measures Issued by International Courts and Tribunals. T.M.C. Asser Press, The Hague

Rodley N (2001) Urgent action. In: Alfredson G et al. (eds) International human rights monitoring mechanisms. Nijhoff, The Hague, pp 279–283

Sinaniotis D (2006) The Interim Protection of Individuals Before the European and National Courts. European Monographs, Kluwer Law International

Van Boven Th C (1994) Facing urgent human rights cases: Legal and diplomatic action. In: Lawson R, Blois M (eds) The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers. Martinus Nijhoff Publishers, 3:61–788

Van Boven Th C (2004) Urgent Appeals on behalf of Torture Victims. In: Libertés, Justice, Tolérance, Mélanges en hommage au Doyen Gérard Cohen – Jonathan. Bruylant, Brussels, pp. 1651–1666

Windridge O (2020) Under Attack? Under the Radar? Under-Appreciated? All of the Above? A Time of Reckoning for the African Court on Human and Peoples’ Rights Opinio Juris 07.05.20. https://opiniojuris.org/2020/05/07/under-attack-under-the-radar-under-appreciated-all-of-the-above-a-time-of-reckoning-for-the-african-court-on-human-and-peoples-rights/. Accessed 10 May 2020

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