Urgency and human rights

International Conference at the Center for State and Law, Radboud University Nijmegen, The Netherlands, 29-30 May 2015, in cooperation with Seconda Università di Napoli, Italy and Ghent Human Rights Centre, Belgium

Various international and regional human rights mechanisms have had to deal with urgent situations. These situations may range from imminent extradition or expulsion, risks to health and dignity in detention, threats to human rights defenders, internally displaced persons and others vulnerable to attacks, to indigenous peoples facing destruction of their environment. Sometimes the situation is one of armed conflict. Each type of situation may trigger a different response. Moreover, the responses to urgent cases may differ depending on the role and function of the international and regional monitoring mechanisms.

To address urgent situations pending international litigation, human rights courts and other treaty monitoring bodies often use the tool of provisional measures (interim measures). It is this type of urgent proceedings that is the point of reference for this conference. At the same time it is foreseen that different types of responses to urgent situations, such as urgent appeals by United Nations thematic mechanisms, and their domestic implementation, will be addressed as well.

Substantively, the conference will firstly deal with urgent litigation in the context of detention, expulsion and extradition, as these issues are of particular concern in Europe. When persons are exposed to situations where their life or personal integrity is at stake, litigation must be quick and adequate and the court that is addressed by this litigation must similarly react quickly and adequately pending the case to help avert irreparable harm. This applies to international adjudicators as well as domestic courts. Indeed, another concern in Europe and beyond is the question how domestic courts deal with urgent human rights cases in general, also cases involving other rights than the right to life and the prohibition of torture and cruel treatment.

The use of provisional measures/interim measures

Research has found that even the International Court of Justice, as an inter-state court, has shown sensitivity to the fate of human beings in its use of provisional measures. In Europe, urgent litigation often takes place to halt removal of asylum seekers claiming that their life or personal integrity is at risk if they are removed, but also to prevent extradition of suspected criminals or to intervene in adverse detention situations. There is also urgent litigation on access to basic goods and services for (undocumented) persons. Very often the tool of ‘provisional measures’ or ‘interim measures’ is used in such cases.

Compliance with provisional measures
Given the importance of the rights at stake (generally speaking the right to life, the prohibition of torture and cruel treatment and the right of individual petition as such) it is crucial that states respect provisional measures. Many factors play a role in compliance and it is often difficult to disentangle them. Whichever reasons states may have for occasionally disrespecting provisional measures, in those cases they will try to legitimise their own actions, at times by denying the standing of the provisional measures or of the adjudicator ordering them.

Persuasiveness of provisional measures
In academic literature it has been argued that international adjudicators are in the best position to follow up on incidents of non-compliance if their provisional measures and the reasons provided for them are as persuasive as possible. Similarly, it is easier for (international) authorities and NGO’s to effectively respond to non-compliance with provisional measures when these measures were convincing as to their content and the manner in which they were decided upon. This persuasiveness for one part hinges on the nature and importance of the rights to be protected by provisional measures as well as the specificity of the protective measures required. Moreover, in most human rights systems, persuasiveness also means maintaining a relation to the claim on the merits. In other words, provisional measures cannot yet be seen as a free-standing tool, although this has been disputed in some systems and by some authors.

Furthermore, given the need for persuasiveness, a decision by an international adjudicator to order a state to take interim measures evidently stands to benefit from clear reasoning and explicit reference to the underlying principles applied. This includes grounding the measures in the adjudicator’s own case law and maintaining a level of openness to legal discourse, as well as coherence and consistency in the use of interim measures. Apart from enhancing the quality of reasoning and thereby persuasiveness, clear reasoning would also help to increase the predictability of decision-making.

Legitimacy and flexibility of provisional measures
The legitimacy of the use of provisional measures is sometimes questioned, e.g. by some States in the context of the Izmir Conference on the reform of the European Court of Human Rights and similarly within the Organisation of American States with regard to the practices developed by the Inter-American Commission on Human Rights. Legitimacy is generally seen as relating to lawfulness and acceptance and conformity to recognized principles or accepted rules and standards. At the same time it has been argued that with a sufficiently flexible tool of provisional measures the independent adjudicators themselves are in the best position to help prevent irreparable harm to persons and that they are the best guarantors of the legitimacy of the tool.

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3 See Rieter (2012), supra note 2, viz. 191-196.
**How should courts deal with urgency?**

There are many developments involving provisional measures in the various international and regional human rights systems, for instance with regard to the type of cases in which they are to be taken and the evidence required before they are ordered; the extent of the obligation on the State while the case is still pending and the (group of) rights bearers at his stage. These developments warrant further academic exploration of the ways in which independent (international) adjudicators can best help prevent irreparable harm to persons.

In light of these developments and the discussion on how the tool of provisional measures is most effective it is important to periodically evaluate the question: how should courts deal with urgency at the international and domestic level?

**Questions on the role of international adjudicators**

Questions on the role of international adjudicators include: What types of situations are considered to be urgent: extradition, expulsion, execution, death threats, conditions and situations in detention or also provision of basic subsistence rights? How do international adjudicators deal with evidentiary matters in the face of urgent pending cases? In particular, how do they deal with the available evidence in the face of a state’s request to withdraw provisional measures?

**Questions on the role of domestic courts**

While domestic implementation of international human rights law, and the role of the judiciary in this respect, is receiving increasing attention, the issue of domestic implementation of provisional measures, or of other international obligations to act urgently, remains relatively underexplored.

Addressing the manner in which domestic adjudicators perceive their function in the face of urgent situations adds vigor and focus to the discussion on the impact of international law on domestic law and the role of the judiciary in this. Questions which arise in this regard include: How do domestic courts deal with interim measures ordered/indicated by international adjudicators? What is the role of these domestic courts when they interpret, apply and implement international obligations in urgent cases? Do they distinguish between the individual cases of petitioners who actually brought cases internationally and cases of others similarly situated? What is the role of lawyers in deciding on urgent litigation? To what extent should they anticipate the long-term effects and the interests of a larger group of people? In light of the right to an effective remedy, what have been good approaches developed in domestic systems for addressing urgent situations pending litigation?

**Aim of the conference**

This conference firstly aims to bring together existing scholarship regarding urgency and human rights and discuss the evolving practices in this respect with practitioners. Secondly, its objective is to allow for in-depth discussion of what should be the role of the domestic judiciary when dealing with urgent cases.

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5 See e.g. Oxford’s online database on International Law in Domestic Courts; the ILA human rights committee’s ongoing project on domestic implementation of human rights; and the work of the ILA study group on domestic implementation of international law. Within Europe see e.g. Gerards & Fleuren (eds.) (2014), Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis.
Provisional measures are predominantly, but not exclusively, applicable in situations aimed at preventing the violation of the right to life and the prohibition of torture and cruel treatment. Indeed for the purpose of this conference ‘urgent cases’ are considered to be cases aimed at preventing irreparable harm to persons, in particular, but not exclusively, by preventing violation of international obligations under the right to life and the prohibition of torture and cruel treatment. Discussants will examine the above questions regarding urgency, and in particular the tool of provisional measures/ interim measures, from the perspectives of the judge/adjudicator, the litigant and the scholar. Apart from looking at the role of the judiciary this conference allows us to discuss the role of the lawyer in considering the broader impact of their litigation and the importance for lawyers of strategic litigation. By doing so, the conference aims to have both scholarly and societal impact. Roundtables are planned on Urgency in domestic proceedings on human rights; Urgency in expulsion and extradition cases and Urgency in detention cases.

Edited volume
The preparation of a volume on the issue of urgency is foreseen, based on the contributions of speakers and those selected following the Call for Papers.
Nijmegen Center for State and Law (SteR)

Radboud University School of law, Nijmegen, has a reputation within the Netherlands of delivering high quality lawyers. Nijmegen Centre for State and Law (SteR) has a long-standing practice of joining scholarly expertise with the insights of practitioners, addressing the question what is, or should be, the role of courts. The increasing presence of international law in domestic litigation, and the increasing resort by litigants to international adjudicators, warrants continued attention to the domestic implementation of international law and the role of courts in this respect. Moreover, for scholars dealing with the influence of international law or European and domestic law it is important to discuss convergence and divergence of underlying principles and approaches by the regional and international adjudicators.

The expertise within SteR on fundamental rights in Europe, detention issues, issues of migration and refugee law, international human rights law in general, and specifically the use of provisional measures in international litigation, has triggered the organization of this conference on urgency and human rights law. Detention and expulsion are the situations in which most often provisional measures are ordered by international adjudicators and these are the human rights cases in which domestic courts order injunctions and other such measures pending the case.

Member of the Centre Eva Rieter has published widely on the issue of international adjudication in urgent cases, comparing a range of systems and the dialogue between them and arriving at a definition of the common core and outer limits of the concept of provisional measures in human rights cases. She collaborates in relevant projects on this topic with Theo van Boven and Cees Flinterman of Maastricht University Center for Human Rights; Andrea Saccucci at the University of Naples II; and Yves Haeck and Clara Burbano Herrera of the University of Ghent, who have also taken a comparative approach to the issue of provisional measures (interim measures) in human rights law.

University of Naples II and Ghent Human Rights Centre will be co-organisers of the Conference.

Foreseen are about 50 participants, including about 20 speakers & panelists

Organising Committee, Radboud University Nijmegen

Dr. Eva Rieter, senior researcher and lecturer public international law
Rosa Möhrlein, LL.M; lecturer public international law, PhD candidate on judicial review and the ICJ
Dr. Karin Zwaan, senior researcher and lecturer Centre for Migration Law

6 See e.g. Eva Rieter, Preventing irreparable harm, provisional measures in international human rights adjudication, Intersentia 2010 (on adjudication by the International Court of Justice, the United Nations, European, Inter-American and African human rights adjudicators involving urgent issues ranging from non-refoulement, detention, death penalty, cultural survival of indigenous peoples and protection against death threats to less conventional situations).

7 Andrea Saccucci, professor of international law at Seconda Università di Napoli (also teaching at University of Urbino and LUMSA University, Rome) is an award winning attorney specialized in litigation before national and international courts and bodies (examples: the famous ECHR case Hirs I Jamaa and the case on the erased people of Slovenia (Kurić and Others v. Slovenia) and has published on the issue academically as well. Publications include his dissertation Le misure provvisorie nella protezione internazionale dei diritte umani, Torino, 2006; and ‘Le misure provvisorie della Corte europea dei diritti umani nell’ambito della procedura di ricorso interstatale Georgia c. Russia’, Diritti umani e diritto internazionale, 3 (2009), pp. 129-150.