Questions of International Judicial Jurisdiction in the *LaGrand* Case

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Abstract. On 27 June 2001, the International Court of Justice rendered its final decision in the case of *LaGrand* (*Germany* v. *United States of America*), which deals with many complex issues of international law. Apart from the very interesting substantive legal issues relating to the regime of consular assistance and death penalty in international law, the Judgment of the Court contains significant principles and reflections as to the essence and scope of international judicial jurisdiction. In contrast to the traditional approach to this question, the Court's Judgment is concerned with practical and specific aspects of jurisdiction in action, rather than dealing with general assumptions and conceptions surrounding the problem. From this point of view, the present contribution examines the significance of *LaGrand* as a case in which the traditional assumptions on international judicial jurisdiction are tested and reappraised.

1. INTRODUCTION

The *LaGrand* decision of the International Court of Justice (hereinafter 'ICJ' or 'International Court') arose out of the failure of the United States to inform two German nationals – the brothers Walter and Karl LaGrand – of their right to contact the consular officials of their state of nationality.[1] The LaGrand brothers had been arrested in the United States for an attempted bank robbery, in the course of which the bank manager was murdered. The Superior Court of Pima County, Arizona, convicted them of several crimes, including first degree murder, and they were both sentenced to death and executed pursuant to the decisions of judicial and administrative authorities of the United States. During the period between detention and execution, the competent authorities of the United States failed to inform the brothers of their right to consular assistance, and thus acted in violation of Article 36 of the Vienna Convention on Consular Relations, which requires that the authorities of a state detaining a foreign

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1. Case concerning the Vienna Convention on Consular Relations (Germany *v.* United States of America), Decision of 27 June 2001 (hereinafter 'Judgment'). Not yet published. References are made to the text available at the Court's website, http://www.icj-cij.org.

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national shall inform the person concerned without delay of his right to contact the consular mission of the state of his nationality.[2]

The case of the LaGrands involved litigation before several judicial bodies and decision-making by several administrative authorities in the United States, both at the federal and state level.[3] Once sentenced to death, the brothers were unable to get clemency or to have their sentence reviewed by a judicial tribunal. Karl LaGrand was executed on 24 February 1999. In response, Germany instituted proceedings before the International Court, claiming that the United States violated Article 36 of the Vienna Convention and requesting the Court to issue provisional measures to prevent the execution of Walter LaGrand. On 3 March 1999, the Court issued a provisional measures Order requiring the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and […] inform the Court of all the measures which it has taken in implementation of this Order."[4] Still, the US Supreme Court refused to intervene and Walter LaGrand was executed the same day.

In the subsequent proceedings before the International Court, Germany's submissions invited the Court to rule not only on the violation of substantive provisions of the Vienna Convention, but also on certain aspects of international judicial jurisdiction, as well as on the principles and standards that should govern the future relations between the applicant and respondent relating to the subject-matter of the case. Thus, Germany requested the Court to state that the United States had violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals under Article 5 and Article 36, paragraph 1, of the Vienna Convention (submissions 1 and 2), and had violated the Order of the Court of 3 March 1999 (submission 3). In addition, Germany asked the Court to require the United States to provide the appropriate guarantees of non-repetition to Germany (submission 4).[5] The United States, on its part, conceded that it was in breach of the substantive obligations it owed to Germany under the Vienna Convention, and requested the Court to dismiss all of Germany's other submissions.[6]

The Judgment deals with many complex issues of international law. The entire proceedings attracted more than sufficient attention among scholars and practitioners, primarily because they concerned the issue of death penalty and mechanisms within the consular law which may operate to reduce the likelihood of arbitrary deprivation of life of foreign nationals in the receiving state. This article will examine the case from a different

2. 1963 Vienna Convention on Consular Relations, 596 UNTS 261. The facts underlying this breach of the Vienna Convention have not been disputed during the proceedings before the Court. *See* Judgment, para. 15.
3. For the over-view of these proceedings *see* paras. 16–34 of the Judgment.
4. 1999 ICJ Rep. 9, at para. 26; Judgment, para. 33.
5. Judgment, para. 12.
6. *Id.*

perspective: it will focus on the issue of international judicial jurisdiction in a broad sense.

Even from the perspective of international judicial jurisdiction, the focus here is intended to be specific and not to touch upon all the issues of judicial competence on which the Court decided.[7] Only certain issues pertaining to the competence of the International Court will be examined. These issues are: the scope of jurisdictional clauses contained in treaties (Section 2), the binding force of provisional measures (Section 3), and remedial competence (Section 4). The choice of these issues is not arbitrary, but results from the fact that their treatment in the Judgment illustrates the important tension between the jurisdictional categories, namely between the consensual nature of jurisdiction and the inherent powers of international tribunals.

The relationship between consensual nature and inherent powers of tribunals delivers a perspective common to these three issues: each of them involves the question whether the Court may assume certain jurisdictional powers in order to serve the dispute with finality and exercise its judicial function to the fullest extent possible. Furthermore, these issues beg the question whether the Court is empowered to assume such powers even if its constituent instrument or an instrument granting jurisdiction does not explicitly empower it to act in such a way, or if the exercise of such action would not be compatible with certain commonly assumed jurisdictional categories, such as the principle of consent. It was exactly the tension between these categories which, as we shall see later on, was underlying the arguments of parties in *LaGrand*.

Generally, the notion of inherent powers of international tribunals follows from the nature of international judicial function, rather than from the specific provisions and instruments governing the competence of tribunals. Unlike national courts, international tribunals operate in the decentralised legal system, which does not define all the necessary elements of their jurisdiction. In this context, in order to maintain their juridical character, international tribunals have to assume certain inherent powers to be able to exercise their judicial function. Different views have been expressed concerning the nature and scope of inherent powers of international tribunals. As an example of the restrictive and sceptical approach, Thirlway construes the International Court's incidental jurisdiction as limited to the inherent powers of the Court to make conclusions as to its decline to exercise the jurisdiction,[8] not least because of the consensual

7. For instance, the Court ruled on the issues of judicial competence such as the abuse of proceedings, exhaustion of local remedies and the role of international tribunals in remedying national judicial and administrative decisions when they are thought to be in violation of international law. *See* Judgment, paras. 50–60.
8. H. Thirlway, *The Law and Procedure of the International Court of Justice*, 69 BYIL 1, at 21 (1998).

nature of jurisdiction.[9] Briggs, on the other hand, sees the incidental jurisdiction of the Court in the light of inherent powers which the Court may use in order to support the exercise of its principal jurisdiction. The Court may compulsorily exercise these incidental powers independently of the consent by the respondent.[10] The Court's approach in *LaGrand* to the three jurisdictional issues identified above seems to favour the latter approach.

The following sections will examine these three jurisdictional issues as specific phenomena of the exercise by tribunals of their inherent powers. Although its principal focus will be on *LaGrand*, the article is intended to provide the analysis of these questions in their general context. In particular, special attention will be given to the possible impact of *LaGrand* on the general law of judicial competence, as well as the jurisprudence of other international tribunals, such as the European Court of Human Rights.

2. The Scope and Interpretation of Jurisdictional Clauses

This section will examine the issue of inherent powers of international tribunals by reference to the interpretation and application of the jurisdictional clause of the Vienna Convention in *LaGrand* and will put this decision in the broader perspective of the Court's jurisprudence. The Court had to focus on the scope of the jurisdictional clause from three different perspectives. The first perspective involves the scope of a jurisdictional clause in a narrow sense and its relation to the substantive provisions of an instrument of which it forms part. The second and third perspectives involve 'extensions' of the scope of a jurisdictional clause and relate, respectively, to the power of the Court to decide on non-compliance with provisional measures and to the guarantees of non-repetition. These two last perspectives beg the question of interpretation and application of jurisdictional clauses in a way that ensures the final and effective resolution of a dispute brought before the Court. They differ from the first perspective in that they are not directly linked with the interpretation of texts containing a jurisdictional clause but are more related to the judicial character

9. *Id.*, at 6:

> When Jurisdiction is referred to, it must always be asked, 'jurisdiction to do what?' Jurisdiction or competence is not, in the sense in which those terms are used in relation to a dispute, a general property vested in the court or tribunal contemplated: it is the power, conferred by the consent of the parties, to make a determination on specified disputed issues which will be binding on the parties because that is what they have consented to.

10. H. Briggs, *The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction*, *in* F.A.Frhr. v.d. Heydte, *et al.* (Eds.), Völkerrecht und Rechtliches Weltbild. Festschrift für Alfred Verdross 92–95 (1960). Reference is made here to the judicial powers such as *compétence de la compétence*, indication of provisional measures, admissibility of third-party intervention, interpretation of judgments, award of remedies etc.

of international tribunals, which have to assume certain inherent powers in order to fully discharge their judicial function.

These perspectives will now be examined in turn.

2.1. The construction of the jurisdictional clause

As the jurisdictional basis in *LaGrand*, Germany invoked Article I of the Optional Protocol Concerning Compulsory Settlement of Disputes to the Vienna Convention, which provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." The United States raised certain objections to jurisdiction, which were common in that they were intended to construe certain inherent limitations on the Court's jurisdiction under the compromissory clause. This approach is illustrated by the respondent's attempt to persuade the Court that the claims of the applicant were outside the scope of the Optional Protocol.

To begin with, the respondent contended that since the applicant's claims related to diplomatic protection under customary international law, they did not concern the application and interpretation of the Convention and were therefore outside the Court's jurisdiction under the Optional Protocol.[11] Thus, the respondent argued that the applicant's claims were outside the scope of the Optional Protocol merely because they were brought before the Court by way of diplomatic protection.

The Court does not seem to have shared the respondent's submission that Germany tried to establish the Court's jurisdiction "over exercise of diplomatic protection."[12] What Germany tried was merely to establish – through the use of its right of diplomatic protection – the Court's jurisdiction over and with regard to the Vienna Convention. In other words, diplomatic protection was not the object of the dispute and claims, but merely a method of instituting proceedings.[13] The object of the claims was the violation of individual rights guaranteed under the Convention. The Court rejected the respondent's contention that a claim based on individual rights is outside the Court's jurisdiction because diplomatic protection is a concept of customary law. For a state is entitled to take up the case of one of its nationals, and institute international judicial proceedings on behalf of that national, on the basis of a jurisdictional clause in a treaty.[14] Later in the Judgment, the Court concluded "that Article 36, paragraph 1,

11. Judgment, paras. 40 *et seq.*
12. As submitted by respondent: LaGrand Verbatim Record, CR 2000/28, Meron, at 39, available at http://www.icj-cij.org.
13. As the applicant submitted, if Art. 36 of the Convention creates individual rights, the right to diplomatic protection "will be the necessary corollary," Verbatim Record, CR 2000/30, Simma, at 16.
14. Judgment, para. 42.

creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[15]

The relevance of this problem, as discussed by the Court, is not limited to the question of diplomatic protection, but extends to a broader issue of jurisdiction over the disputes of a certain category which may simultaneously belong to another category of disputes. Another aspect of this problem involves the question of interpretation of jurisdictional clauses. It is preferable to deal with these issues in this sequence.

The Court's practice is replete with cases in which the jurisdictional dispute has involved a disagreement concerning the subject-matter of the substantive dispute and the legal framework governing it. In *Oil Platforms*, the Court noted that in order to clarify whether a dispute in sense of a given treaty exists, "the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it," but should ascertain whether the violations pleaded do or do not fall within the provisions of that treaty.[16] In *Lockerbie*, where the parties differed on whether the Montreal Convention of 1971 was applicable to their dispute, the Court formulated the same principle in a more refined way. The Court noted that a dispute existed "between the Parties as to the legal régime applicable to this event." Such a dispute concerned the application and interpretation of the Montreal Convention and was to be decided by the Court.[17] In both cases the Court affirmed that it had jurisdiction.

In *LaGrand*, the United States did not deny that the Vienna Convention constituted the legal régime applicable to the dispute – most likely because even a theoretical chance to prove this was less realistic than in the cases quoted above. It decided to challenge the jurisdictional relevance of the Vienna Convention in a different and more indirect way, by arguing that, as outlined above, the issue brought before the Court related to the customary law on diplomatic protection. In the narrow context of *LaGrand*, this argument of the United States is a repetition of its arguments submitted in *Oil Platforms* and *Lockerbie*. In a more general context, however, the issues affected by this submission of the respondent may not always overlap with jurisdictional questions involved in those two other cases, and can relate to a different jurisdictional environment. The question of jurisdiction over disputes likely to arise simultaneously in consequence of operation of different sources of the law may provide an example. This issue – which relates to the applicability of jurisdictional clauses to different sources of the law rather than to different categories of substantive legal relations – is no less complicated.

15. *Id.*, para. 77.
16. Case concerning Oil Platforms (Islamic Republic of Iran *v.* United States of America), Preliminary Objection, Judgment of 12 December 1996, 1996 ICJ Rep. 803, at 810.
17. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom), Preliminary Objections, Judgment of 27 February 1998, 1998 ICJ Rep. 9, at 18.

The jurisprudence of the Court offers the answer also on this jurisdictional question. In *Nicaragua*, the Court decided that it had jurisdiction over the matters covered by the multilateral treaty reservation of the United States insofar as those matters were also governed by customary law.[18] The Court emphasised that it could not "dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua."[19] In the *LaGrand* proceedings, the respondent repeatedly referred to *Nicaragua*,[20] but failed to demonstrate why the Court should have dismissed the claims of Germany based on the Vienna Convention simply because certain issues related to those claims formed part of customary law.

In general, preliminary objections with regard to diplomatic protection and nationality of claims can relate to the admissibility of claims and challenge the applicant's standing in the proceedings.[21] However, as *LaGrand* demonstrated, the same objection is not very helpful as a jurisdictional objection. This leads us to a wider problem of the interpretation of jurisdictional clauses contained in treaties. The question is whether the restrictive understanding of the scope of jurisdictional clauses is justified if this is not warranted by the natural wording of that clause.

In *Oil Platforms* and *Lockerbie*, no attempt was made to construe jurisdictional clauses restrictively by finding certain inherent limitations of their scope. Rather, these cases involved the discussion of whether the object of claims submitted to the Court was governed by the substantive provisions of a treaty in question and thus covered by the jurisdictional clause.[22] The US' contentions in *LaGrand* seem to be more similar to the objections to jurisdiction found in certain other cases focused on below. The general difference is that, in *Oil Platforms* and *Lockerbie*, the respondent implicitly and conclusively recognised, and the Court affirmed, that a treaty jurisdictional clause extends to the totality of legal relations governed by substantive provisions of a given treaty, while in *LaGrand* the United States did not challenge the general scope of a jurisdictional clause, but tried to exclude the dispute from this scope by reference to certain circumstances external to the textual provisions of the Vienna Convention. The Court's jurisprudence has sufficiently dealt with this issue as well.

In the extremely controversial decision on *South West Africa* (Second

18. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ Rep. 392, at 422 *et seq*.
19. *Id.*, at 424.
20. Meron, *supra* note 12, at 40–41; Verbatim Record, CR 2000/31, Meron, at 16.
21. Nottebohm case (Second Phase), Judgment of 6 April 1955, 1955 ICJ Rep. 4, at 22 *et seq*.
22. Oil Platforms, *supra* note 16, at 811–820; Lockerbie, *supra* note 17, at 18–23.

Phase),[23] the Court considered that the jurisdictional clause of the Mandate for South West Africa did not extend to all the substantive provisions of the same mandate, although the text of the mandate revealed that the opposite was true. The Court held that Article 7 of the Mandate, which conferred jurisdiction upon the Court, was applicable only with regard to provisions of the Mandate related to the special interests of states, and not to clauses safeguarding the general interest. Neither Article 7 nor the entire text of the Mandate warranted such an interpretation.

More recently, in *Bosnian Genocide*, the Court refused to construe any inherent limitation on the scope of the jurisdictional clause embodied in Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'). The respondent contended that Article IX did not cover "the responsibility of a State for an act of genocide perpetrated by the State itself." The Court replied that "the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III [of the Convention]," does not exclude any form of State responsibility."[24] In contrast to *South West Africa*, the jurisdictional clause was held to be applicable to the totality of legal relations governed by the Genocide Convention.

To sum up, an analysis of the respondent's approach to the question of jurisdiction in *LaGrand* reveals a combination of three different litigation strategies aimed at challenging applicability of jurisdictional clauses. The first strategy is to deny that the given treaty governs a dispute, and that the jurisdictional clause is not applicable (as in *Oil Platforms* and *Lockerbie*). The second strategy is to submit that the subject-matter of a dispute before the Court is also governed by a source of law other than the one over which the Court is specifically vested with jurisdiction under a given jurisdictional clause (as in *Nicaragua*). The third strategy is not to challenge the applicability of the substantive treaty provisions to a given dispute, but to refer to certain external circumstances to prove that the jurisdictional clause is not applicable (as in *South West Africa* and *Bosnian Genocide*). As the respondent's submissions in *LaGrand* were more or less a combination of these different litigation strategies, it is entirely understandable that the Court disagreed since, as practice demonstrates, all three abovementioned strategies are bound to fail.

That this is the likely outcome follows from the broader nature of jurisdictional clauses. Inherent limitations on the scope of a jurisdictional clause should not be presumed unless they are warranted by either the plain wording of such clause or by some other provision of the law of treaties. A jurisdictional clause in a treaty is nothing but a procedural continuation of its substantive provisions. Thus, if a treaty provides for certain

23. South West Africa (Second Phase), Judgment of 18 July 1966, 1966 ICJ Rep. 6, at 39–42.
24. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Judgment of 11 July 1996, 1996 ICJ Rep. 595, at 616.

rights to be exercised by individuals, it is not clear why the jurisdictional clause should not extend to the claims of a state party concerning the violation of those rights by another state party. It would hardly be a legally sound decision to make certain provisions of a treaty non-justiciable before the Court solely because of the manner in which the case is brought before it, if those provisions would otherwise fall within the scope of the jurisdictional clause. Adherence to this approach would substantially weaken the compromissory clauses which vest the Court with jurisdiction in accordance with Article 36(1) of its Statute. It must not be forgotten that jurisdictional clauses are treaty provisions on the same footing with substantive provisions, and that they have to be interpreted in accordance with their plain meaning and context, as well as the object and purpose of the treaty in question.

2.2. The Court's power to decide on compliance with provisional measures

The proper interpretation of jurisdictional clauses is necessary for the final and effective settlement of a dispute brought before the Court. Before deciding to exclude a given question from its jurisdiction, the Court must ascertain what will be the impact on its ability to resolve the dispute on the merits. In this respect, the question whether the issue of non-compliance with the Court's order on provisional measures is within the Court's jurisdiction is essentially different from the issue of legal consequences of such non-compliance. Resolving the former question is the prerequisite for assessing the need to decide on the latter question.[25]

Both the applicant's and respondent's submissions on this point in the *LaGrand* case related to the scope of the Court's jurisdiction and not to the legal force of the Court's orders. The applicant claimed that a dispute as to "whether the United States were obliged to comply and did comply with the Order" under Article 41 of the Statute necessarily arose out of the interpretation or application of the Convention and was within the jurisdiction of the Court as an integral element of the entire original dispute between the parties.[26] The respondent submitted that "the Court can fully and adequately dispose of the merits of this case without having to rule on the submission."[27]

Whether a tribunal is or is not empowered to issue binding interim orders, the non-compliance with the orders issued can generate certain legal consequences and, in particular, lead to the aggravation of the wrongfulness involved.[28] Thus, a tribunal is unable to exercise its judicial

25. The question of the binding nature of provisional measures as such is dealt with in Section 3 below.
26. Judgment, para. 44.
27. *Id.*, at para. 43.
28. As illustrated by the approach of the European Court of Human Rights, Cruz Varas *v.* Sweden, Judgment of 20 March 1991, ECHR (Ser. A201) 4, at 37. Cf. Section 3, *infra*.

function "fully and adequately" if it cannot pronounce on the very issue of whether or not the conduct of a party has contributed to the aggravation of the wrongfulness originally complained of. The Court in *LaGrand* had to agree, therefore, that the issue of the interpretation of Article 41 of the Statute was part of the dispute arising out of the interpretation of the Vienna Convention.

Accordingly, the Court subsumed the question of compliance with the Order under the category of submissions "based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application."[29] The Court made the concluding observation in the language of inherent powers:

> Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.[30]

2.3. The Court's power to decide on guarantees of non-repetition

The respondent disputed the Court's jurisdiction to decide on the requested guarantees of non-repetition. It is generally established that international tribunals possess the inherent jurisdiction to award remedies in disputes which they adjudicate.[31] In *Chorzhow Factory*, the Permanent Court of International Justice accepted the view that the power to award reparation, as a natural consequence of every internationally wrongful act, was within the Court's jurisdiction, and that no additional consent of the parties was necessary.[32] The International Court reiterated this view in *Corfu Channel*,[33] *Fisheries Jurisdiction*,[34] and *Nicaragua*.[35] This practice confirms that the inherent jurisdiction is necessary to ensure "the effectiveness of the undertaking contained in the jurisdictional clause" and the Court shall be deemed to possess the relevant jurisdictional powers.[36]

However, in *LaGrand* the United States referred to the "conceptually distinct" nature of the guarantees of non-repetition and contended that they – unlike ordinary forms of reparation – were future-oriented and thus outside the Court's jurisdiction. The Court was considered incompetent

29. Judgment, para. 45.
30. *Id.*
31. I. Brownlie, *Remedies in the International Court of Justice*, *in* V. Lowe & M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice 557–558 (1996).
32. Case concerning the Factory at Chorzów, Judgment of 26 July 1927, 1927 PCIJ (Ser. A) No. 8, 4, at 23.
33. Corfu Channel, Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4, at 26.
34. Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 175, at 203.
35. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 142.
36. H. Lauterpacht, The Development of International Law by the International Court 246–248 (1958).

"to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention."[37] Thus, the respondent explicitly referred to the principle of consent as the basis of the Court's jurisdiction, relying on its traditional respect for that principle. The Court responded by interpreting its remedial competence broadly, stating that "where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation."[38]

It is noteworthy that the Court's language differs from the language used in past decisions that refer to the power to determine *reparation*, while *LaGrand* refers to the broader category of *remedies*. This is not just an affirmation of past precedents, but also illustrates the ability of the Court to make decisions even in the absence of relevant precedent and practice, if this is required by the need for the effective discharge of its judicial function. The Court's jurisdiction covers all remedies due under international law, whether retrospective or prospective. In other words, the notion of remedies is wider than reparation and this difference in the substantive law must be reflected at the jurisdictional level. A different approach would prevent jurisdictional clauses from being interpreted in a way which ensures their effectiveness.

Whether the guarantees of non-repetition shall be provided is not a jurisdictional issue, but an issue of substantive law.[39] If the Court is otherwise empowered to deal with the dispute and is bound to enforce international law as dictated by Article 38 of its Statute, it must be deemed competent to consider and award any remedy which is necessary for the final and effective settlement of the dispute, whether or not such remedy is "conceptually distinct" from the ordinary forms of reparation. Remedial competence must be understood in the light of the broader mandate specified under Article 38. The Court must ascertain for itself whether a dispute is resolved in accordance with international law, and this inevitably involves the judgment on whether a remedy requested by the party is available in law and whether all the requisite remedies have been awarded.

To conclude, a jurisdictional clause forms an integral part of a treaty and is intended to serve the effective operation and enforcement of that treaty. It is part of the expectations of states parties and other persons entitled to benefit from the provisions of a treaty. The existence of any restriction of the scope of such clauses cannot simply be presumed, but must be proved through the careful interpretation and evidence. However, the judicial nature of international tribunals and inherent powers following therefrom may produce a jurisdictional "supplement" not directly foreseen under a given jurisdictional clause, as exemplified by inherent powers of

37. Judgment, para. 46; *see also* Verbatim Record, CR 2000/31, Mathias, at 26–27.
38. Judgment, para. 48.
39. On this point, *see* Section 4 below.

the Court to decide on compliance with provisional measures, as well as with the guarantees of non-repetition.

3. The Binding Force of Provisional Measures

3.1. The basis for the binding force of provisional measures

The power to indicate provisional measures has long been viewed as an inherent power of international tribunals. As Fitzmaurice remarked, the power to indicate interim measures falls into the same category as its *compétence de la compétence*. While the latter enables the International Court to function at all, the former is intended to prevent its decisions from being stultified.[40] Following this reasoning, Fitzmaurice suggested that

> [t]he whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding – for this jurisdiction is based upon the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point.[41]

This view has not been commonly accepted. According to Thirlway, the wording of the text of Article 41 of the Court's Statute, in combination with its *travaux préparatoires*, suggests that provisional measures are not binding. For if the parties to the Statute intended to endow the Court's orders with binding force, they were in position to draft the relevant provisions accordingly, which they did not do.[42] This approach relates to the use in Article 41 of the words "indicate," "ought" and "measures suggested."

The difference between the views just described was at the heart of the arguments developed by the parties in *LaGrand*. The further controversy focused on the difference between the English and French texts of the Statute; with regard to provisional measures the latter was considered to contain a more imperative language than the former.[43] Thus, the Court was faced with a situation in which the interpretation of each text in isolation might have led to essentially different results. To overcome this tension, the Court adopted the stance prescribed by Article 33 of the 1969 Vienna Convention on the Law of Treaties ('VCLT'), which gives priority to the text more favourable to the object and purpose of a treaty. This task

40. G. Fitzmaurice, The Law and Procedure of the International Court of Justice 542 (1986).
41. *Id.*, at 548.
42. H. Thirlway, *Indication of Provisional Measures by the International Court of Justice*, *in* R. Bernhardt (Ed.), Interim Measures Indicated by International Courts 28 (1994); Thirlway, *supra* note 8, at 20–21; S. Oda, *Provisional Measures*, *in* Lowe & Fitzmaurice, *supra* note 31, at 554–555 (1996).
43. Judgment, para. 100.

required the Court to "consider the object and purpose of the Statute together with the context of Article 41."[44] The Court made the following observation:

> The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[45]

The examination of the object and purpose of the Statute by the Court is a serious innovation in the law and practice of international judicial competence. The "classical" or "traditional" view on the subject is more receptive to the attitudes of states and preparatory work when jurisdictional clauses are interpreted. This view proceeds from the assumption that judicial competence is based on the principle of consent. In this spirit, Judge Oda suggested in his Dissenting Opinion that the affirmative reasons for the binding nature of provisional measures should have been identifiable from the provisions of the Statute.[46]

However, in interpreting the Statute as a treaty, the Court applied the ordinary methods of treaty interpretation and thus acted contrary to the assumption that the particular characteristics of judicial competence may generate certain inherent limitations on such competence, even if this assumption is not supported by the ordinary methods of treaty interpretation. This is even more significant if one bears in mind that the restrictive understanding of judicial competence is often coupled with the assumption of the primacy of the preparatory work and intentions of drafters. The Court, however, made its view clear also concerning this point. After "interpreting the text of Article 41 of the Statute in the light of its object and purpose," the Court did not "consider it necessary to resort to the preparatory work in order to determine the meaning of that Article."[47]

The Court nevertheless pointed out "that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have

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44. *Id.*, para. 101.
45. *Id.*, para. 102; *see also* Separate Opinion of Judge Koroma, para. 7.
46. Dissenting Opinion of Judge Oda, para. 30.
47. Judgment, para. 104.

binding force."[48] If the wording of this phrase is carefully analysed, its resemblance to the relevant provisions of the VCLT becomes clear. Article 32 of the Convention clearly emphasises that the recourse to the preparatory work and circumstances of conclusion of a treaty may be made "in order to confirm the meaning resulting from the application of Article 31," *i.e.*, the plain meaning and the object and purpose of a treaty. The Court's examination of the *travaux* of the Statute merely served this purpose.[49]

Thus, the Court acted in conformity with the order of priority of certain interpretive methods over the others, as required by the VCLT. More significantly, the Court seems to have upheld the view that the preparatory work and circumstances of conclusion of a treaty possess only secondary value for treaty interpretation, not only in general international law but also in the particular context of jurisdictional disputes.

The Court's approach makes clear that the notion of the object and purpose of a treaty is not just an ancillary notion having a marginal value, but, on the contrary, it guides the process of interpretation and plays a major role in understanding the very textual meaning of treaty provisions. The rules on treaty interpretation apply equally to substantive and institutional treaty provisions. This factor diminishes the value of the possible argument that the rules concerning the competence of tribunals should be interpreted restrictively because of the consent-based nature of judicial competence.

The Court's application of the VCLT to its Statute reveals a tendency to extend to constituent instruments of tribunals the methods of interpretation applicable to the constituent instruments of international organisations. This approach favours the existence and operation of implied or inherent powers in case of international organisations, if they are necessary for the exercise by an organisation of powers explicitly provided for in its constituent instrument.[50] This approach may give rise to the development of teleological and constitutional approaches of the interpretation of the constituent instruments and competence of tribunals, which would evidence a strong diminution in importance of "traditional" restrictive understanding of international judicial jurisdiction. Most significantly, this case-specific treatment of the issue of interpretation in *LaGrand* may serve as a precedent to support future judicial decisions embodying similar approaches to other questions of judicial competence.

48. *Id.*
49. *Id.*, paras. 105–107.
50. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 13 July 1954, 1954 ICJ Rep. 47, at 57.

3.2. The intention of the Court to issue binding provisional measures in *LaGrand*

The International Court in *LaGrand* affirmed that it has the power to issue binding provisional measures. However, the US arguments were intended to deny the bindingness of the Order in the specific case at hand, contending that the Order of 3 March 1999 had failed to impose a legal obligation on the United States. For, according to the operative provision of that Order, the respondent "*should* take all measures at its disposal" to ensure that execution would not take place pending the final decision. It was thus submitted that the Court had no need to consider whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory terms;[51] for the fact remained that the Order, whatever the general nature of the Court's powers, was not intended to be binding.[52] This issue is not specifically addressed in the Court's Judgment.

At a first glance, some part of international jurisprudence may appear to support the respondent's submissions, since more imperative terms are indeed sometimes used. For instance, in the second order on *Bosnian Genocide*, the International Court explicitly ordered the Federal Republic of Yugoslavia that the measures indicated "should be immediately and effectively implemented."[53] The Inter-American Court of Human Rights in the *Honduran Disappearances* case, dealing with the physical elimination of witnesses before that Court, adopted two orders which make it clear that the Court's intention was to impose a binding obligation on the defendant state. Operative paragraphs containing the words "orders" and "orders and resolves" may serve as evidence.[54] It is also noteworthy that tribunals are more determined in these cases to issue binding orders where their previous orders are not complied with.

The International Court's approach in *LaGrand* can be explained by the principle of "effectiveness," which would dictate in this case that the Court's order was intended to impose an effective obligation on the United States. In view of the specific function of provisional measures – which consists in the preservation of the subject-matter of the dispute – the Court would hardly have intended to issue a mere recommendation under Article 41 of the Statute. As was demonstrated in the previous section, the binding force of provisional measures derives not from the language of a specific

51. Judgment, para. 96 (emphasis added).
52. The respondent submitted that the 'should' is meant "not to create binding obligations, but rather to state expectations or desires about the future behaviour," Verbatim Record, CR 2000/29, Matheson, at 45. *See* the references to the Court's practice where more imperative language is used in Orders, *id.*, at 46 *et seq*.
53. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order 13 September 1993, 1993 ICJ Rep. 325, at 350, para. 61.
54. Second Order of the Court to Protect Witnesses in the Three Cases *v.* Honduras, 9 Human Rights Law Journal 105, at 105–106 (1988).

text, but from the inherent power of an international court to preserve the subject-matter of the dispute. Such binding force depends not on a specific text, but may exist independently of it. If the Court was able to consider that its provisional measures Orders could be binding, despite the absence of the corresponding language in Article 41 of the Statute, it is unclear why a similar conclusion should not be reached with regard to the Order itself, despite the absence of imperative language in its text.

In addition to the principle of effectiveness, the nature of a violation has to be considered. The case involved a serious violation of a treaty provision providing for the rights of individuals. It would hardly have been in accordance with the Court's judicial function to have held that it was not firmly determined in its earlier order to prevent the serious violation of a fundamental international obligation, but had merely expressed its view or wish and left the final outcome to the respondent's discretion. In particular, in cases with a humanitarian dimension and/or those concerning arbitrary deprivation of human life, the Court must not be deemed to have issued an order implying that a state is at liberty to execute a person when the execution may later prove wrongful under international law.

3.3. The possible impact of the Court's treatment of the issue of provisional measures on the practice of other tribunals

The approach upheld by the International Court may have certain relevance for the practice of other international tribunals. In contrast to the International Court, the European Court of Human Rights denied the binding force of interim orders issued by the European Commission, because the text and travaux of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') are silent in this regard.[55] The European Court ignored the relevance of the Convention's object and purpose, giving preference to the preparatory work. However, the fact that provisional measures are based on the inherent powers of tribunals means that the approach embodied in *travaux* or subsequent practice may hardly be determinative. This point has now been sufficiently clarified in *LaGrand*.

Furthermore, the European Court in *Cruz Varas* assumed that "no assistance can be derived from general principles of international law since […] the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists."[56] In *LaGrand*, the ICJ did not even consider it necessary to examine this question. As we have seen, the ICJ deduced the requirement of bindingness of provisional measures not from the practice of other tribunals, but from the need to discharge its own judicial function effectively.

55. Cruz Varas, *supra* note 28, at 34.
56. *Id.*, at 36.

The European Court's approach runs counter to the assumption that if states decide to set up a tribunal entrusted with the task to effectively settle disputes, that very fact is sufficient basis for the binding force of provisional measures. Attitudes of states external to this circumstance, whether expressed at the time of adoption of the tribunal's constituent instrument or subsequently, are thus hardly decisive. In this regard, it has been submitted that the approach of the European Court results in a regrettable limitation of effective enforcement of the European Convention.[57]

Despite the denial of the binding force of provisional measures, the European Court conceded that the non-compliance with such orders might aggravate the subsequent breach of the Convention.[58] This approach is controversial. It is difficult to imagine how the non-observance of provisional measures may aggravate the breach of the Convention, if no legal obligation flows from such measures.

4. The Remedial Competence

4.1. Submissions of the parties and reasoning of the Court

In its fourth submission, the applicant in *LaGrand* asked the Court to declare that the United States should provide an assurance that it would not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, it would ensure the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In cases involving the death penalty, Germany required from the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36. In addition, Germany considered that the apologies offered by the respondent did not amount to a sufficient remedy.[59]

The United States referred to "a vast and detailed programme" launched within its domestic legal system with a view to ensure the future compliance with Article 36 of the Vienna Convention.[60] It was further submitted that the assurances of non-repetition sought by the applicant "has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction."[61] Thus, the United States argued in line with the restrictive

57. J. Frowein & W. Peukert, EMRK-Kommentar 556 (1994).
58. Cruz Varas, *supra* note 28, at 37.
59. Judgment, para. 117 *et seq*.
60. Judgment, paras. 121–123. These measures involved the publication of more than 60,000 copies of the brochure concerning consular assistance, as well as the training programmes reaching out to all levels of government. The United States informed the Court that in the Department of State a permanent office to focus on United States and foreign compliance with consular notification and access requirements has been established. For the detailed description of those measures *see* Verbatim Record, CR 2000/28, Brown, 51 *et seq.*, and Mathias, *supra* note 37, at 28–29.
61. Judgment, para. 119.

understanding of the Court's remedial competence, by attempting to construe certain inherent limitations on it. Lawyers who adhere to the 'traditional' restrictive understanding of judicial competence could be very receptive to such approach.

The US objection to the Court's remedial competence was indeed twofold. First, it was contended that the question of the guarantees of non-repetition did not form part of the interpretation and application of the Vienna Convention on Consular Relations and was thus outside the Court's jurisdiction.[62] This objection was then followed by the assertion that guarantees of non-repetition are inappropriate as a remedy.[63] These objections, although made separately by the respondent and discussed by the Court in different parts of the Judgment, do not essentially differ from each other, since the arguments underlying them are essentially similar – the principle of consent and lack of precedent. However, the questions whether the Court has the general competence to decide on remedies and whether it is empowered to grant a particular remedy are essentially different. The Court affirmed that it could decide on guarantees of non-repetition,[64] but it had also to decide whether the extent of its competence warranted award of this remedy in this specific case.

At the outset, it should be noted that, in discussing the availability of this remedy, the Court did not refer to the applicable law. It made no indication as to the place of guarantees of non-repetition within the general law of state responsibility, in particular the draft articles of the International Law Commission ('ILC') on state responsibility. This is quite unusual, as other tribunals do not hesitate to refer to relevant provisions of the ILC's draft articles when dealing with issues of state responsibility.[65] The Court's reluctance in this regard becomes even more significant when it is recalled that the applicant expressly referred to the ILC's draft articles as the evidence of the applicable law,[66] and that the respondent also examined those draft articles in order to support its own contentions.[67]

Thus, the Court merely limited itself to the discussion of the parties' submissions. This part of the Judgment[68] differs from other parts in that it does not focus on interpretation and application of the relevant international legal provisions, but is limited to the examination and reconciliation of the attitudes of parties. It may seem that the Court takes the remedy of the guarantees of non-repetition for granted. It is silent,

62. *Id.*, at paras. 46–47. As discussed in Section 2.3 above.
63. Judgment, para. 119 *et seq*.
64. Section 2.3 above.
65. Case Concerning the Gabčikovo-Nagymaros Project (Hungary *v.* Slovakia), Judgment of 25 September 1997, 1998 ICJ Rep. 7, at 39–46, 55–56; Cumaraswamy: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 29 April 1999, 1999 ICJ Rep. 62, at 87; Case concerning Rainbow Warrior Affair, Decision of 30 April 1990, XX RIAA 217, at 252–254, 269–270.
66. Verbatim Record CR 2000/27, Simma, at 32–34; Simma, *supra* note 13, at 34 *et seq*.
67. Verbatim Record CR 2000/29, Mathias, at 13–21; Mathias, *supra* note 37, at 26 *et seq*.
68. Judgment, paras. 117–124.

however, as to the authority for this remedy and the juridical weight of the ILC's draft articles.

Generally, the Court's treatment of its remedial competence tends to contradict the assumption that there are some inherent limitations on the powers of tribunals allowing them to award only certain kinds of remedies but not others. As a starting-point, the Court considered that an apology, as offered by the United States, cannot be a sufficient remedy in cases "where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties."[69]

It seems that the sufficiency of a given remedy in specific cases should be determined not by reference to the fact of breach of the Vienna Convention itself, but to the severity and gravity of the consequent treatment of the individuals in question. In other words, it is not a breach of the state-to-state obligation embodied in Article 36 of the Convention which is crucial in question of remedies, but the degree and severity of the harm caused to individuals. This approach accords with the assumption that Article 36 creates individual rights.

In deciding on the guarantees of non-repetition, the Court took a position which seems to be intermediate between the contentions of the applicant and respondent. It referred to the steps taken within the US domestic legal system with a view to ensure the future compliance with the Vienna Convention.[70] The Court noted that "if a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard."[71]

However, Germany's fourth submission requested the Court to do more than that: the Court was asked to provide a remedy against *future* repetition. The Court asserted its competence to determine the existence of international wrongfulness and held that a domestic law or its implementation may be the cause of such wrongfulness.[72] Having pointed out once again that an apology would not suffice as a remedy in such a case, the Court imposed a duty on the respondent to allow in the future "the review and reconsideration of the conviction and sentence by taking into account of the violation of the rights set forth in the [Vienna] Convention."[73] Germany may invoke this duty of the United States, and thereby possesses an essential degree of legal security: if the United States fails in the future to comply with Article 36 of the Vienna Convention, it is under a clear duty to allow the review and reconsideration of the cases.

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69. *Id.*, at para. 123.
70. *Supra* note 59 and accompanying text.
71. Judgment, para. 124.
72. *Id.*, at para. 125.
73. *Id.*, at para. 125 and operative para. 7.

The Court's reasoning emphasises the link between the substance of the wrongful act and the judicial remedies. Since the violation of an international obligation has taken place through the measures undertaken within the domestic law of a state, the adequate remedy is to take certain steps within the domestic legal system and reverse the existing wrongfulness. Consequently, the Court must be deemed to possess the power to award such a remedy to an injured party.

4.2. Broader implications of *LaGrand* for the legal framework of judicial competence

The Court's treatment of the issue of guarantees of non-repetition possesses certain relevance for a broader question of judicial competence, such as the question of mootness of claims submitted to the Court. During the proceedings, it was explicitly submitted that the aspect of the dispute concerning the guarantees of non-repetition was already resolved, since the attitude of the respondent was in accordance with the claim of the applicant.[74]

The basic condition for the mootness of a case, as developed in *Northern Cameroons* is that the Court's decision, if delivered, would have no effective applicability.[75] In a way more relevant to the present analysis was the Court's treatment of the issue of mootness in *Nuclear Tests*. After the claims concerning the French nuclear testing in the South Pacific had been submitted to the Court, the respondent in that case made a series of unilateral statements to stop those tests. The Court observed in this regard:

> The Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.[76]
>
> The object of a claim having clearly disappeared, there is nothing on which to give judgement.[77]

This approach was criticised by Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock in their Joint Dissenting Opinion. The Judges emphasised that the consequences of the French unilateral acts were merely factual and not juridical. The Court still had to clarify the relationships between the parties by way of declaratory judgment:

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74. The respondent has explicitly suggested that the actual dispute between the parties "has been resolved by the United States apology and appropriate assurances of non-repetition, making the case in that sense moot," Verbatim Record, CR 2000/28, Thessin, at 10. The applicant did not consider these assurances sufficient, Simma, *supra* note 13, at 37.
75. Northern Cameroons, Judgment of 2 December 1963, 1963 ICJ Rep. 15, at 37.
76. Nuclear Tests (Australia *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 253, at 270.
77. *Id.*, at 271.

> a declaratory judgement stating the general legal position applicable between the parties […] would have given the parties the certainty in their legal relations. This desired result is not satisfied by a finding by the Court of the existence of a unilateral engagement based on series of declarations which are somewhat divergent and are not accompanied by an acceptance of the Applicant's legal contentions.
>
> Moreover, the Court's finding as to that unilateral engagements regarding the recurrence of atmospheric nuclear tests cannot, we think, be considered as affording the Applicant legal security of the same kind or degree as would result from a declaration by the Court specifying that such tests contravened general rules of international law applicable between France and Australia.[78]

The situation in the *Nuclear Tests* case, according to the dissenting judges, concerned the continuing applicability of a treaty in force or customary rules, and the requirements of the mootness were hence not fulfilled.[79] The principal point seems to have been that the applicant deserved to be afforded an appropriate degree of the legal security, which also will be an element of the final resolution of a dispute brought before the Court.

In *LaGrand*, the Court went further than it did in *Nuclear Tests* and considered the issue of legal security of Germany, so as to avoid the perpetuation of an open-ended dispute between the parties. To achieve this, certain obligations had to be imposed on the respondent, requiring it to take certain further measures within its domestic legal system. The Court's approach in *LaGrand* is in fact essentially opposite to its approach in *Nuclear Tests* where it asserted that "once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it."[80]

Indeed, if the respondent in *LaGrand* fails in the future to comply with Article 36 of the Vienna Convention, it is under a clear duty to allow the review and reconsideration of the cases. This goes essentially beyond the clause in *Nuclear Tests* that the Court would return to consideration of a case on the basis of the request of examination by the applicant if the basis of the Judgment were to be affected.[81]

Lastly, it must be emphasised that the Court in *LaGrand* proceeded to determine prospectively the remedies for the breaches likely to occur in the future. This seems to be a deviation from the generally accepted principle that the Court should not deal with hypothetical questions but merely apply legal rules to the existing facts. This may partly be linked to the seriousness and gravity of the consequences of the respondent's potential future breaches of the Vienna Convention.

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78. *Id.*, at 320.
79. *Id.*, at 321.
80. *Id.*, at 417.
81. Nuclear Tests, *supra* note 76, at 417.

4.3. Possible impact of *LaGrand* on the general law of judicial remedies

The Court's treatment of the issue of guarantees of non-repetition raises certain issues relevant to the more general context of this remedy and its place within the international law of judicial remedies. The judicial power to award remedies penetrating into the domestic legal prerogatives has been treated controversially in international jurisprudence. The Inter-American Court of Human Rights found in *Castillo Petruzzi* that the proceedings conducted against the applicants in that case were invalid, as they were incompatible with the 1969 American Convention on Human Rights, and ordered that the persons in question be guaranteed a new trial.[82] The Court ordered the respondent state to amend the laws which it declared to be in violation of the American Convention on Human Rights.[83] In *Loayza Tamayo*, the Inter-American Court directed the respondent state that the amount of compensation paid to the applicant shall not be subject to any deductions or taxes.[84] Similarly, in *Suarez Rosero*, the same Court ordered the state not to subject the compensation to be received by the victim to any fine or taxes.[85]

Conversely, the European Court of Human Rights refused to award consequential orders or even declaratory remedies in several cases including well-known ones, such as *Ireland* v. *UK*, *Belilos* and *Selmouni*. The European Court's reluctance to issue consequential orders in the form of directions or recommendations to a state is based on the adherence to the drafting history of the European Convention on Human Rights.[86]

In *Ireland* v. *UK*, the European Court refused to direct the United Kingdom to initiate criminal prosecutions against those responsible for the ill-treatment of persons contrary to Article 3 of the Convention.[87] In *Belilos*, the European Court refused to direct Switzerland to cancel and refund the fine which was considered to have been imposed in violation of the Convention. The Court considered that the Convention does not give it the jurisdiction to take such a measure.[88] With the same reasoning, the Court refused to direct Switzerland to undertake the legislative amendment in order to meet its obligations under the European Convention.[89]

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82. Castillo Petruzzi *et al.* case, Judgment of 30 May 1999, para. 221 and operative para. 13, 7 International Human Rights Reports 690, at 744–746 (2000).
83. *Id.*, at para. 122 and operative para. 14.
84. Loayza Tamayo *v.* Peru (Reparations), Judgment of 27 November 1998, para. 189 and operative para. 9, 116 ILR 388, at 439 and 442.
85. Suarez Rosero *v.* Ecuador (Reparations), Judgment of 20 January 1999, para. 76 and operative paras. 1 and 4, 118 ILR 92, at 113 and 119–120.
86. D. Harris, M. O'Boyle & C. Warbrick, The Law of the European Convention on Human Rights 684 (1995).
87. Case of Ireland *v.* the United Kingdom, Judgment of 18 January 1978, 1978 ECHR (Ser. A25) 5, at 72.
88. Belilos case, Judgment of 29 April 1988, 1988 ECHR (Ser. A132) 3, at 32.
89. *Id.*, at 33.

In *Selmouni*, the European Court condemned France for the extremely serious breaches of the prohibition of torture embodied in Article 3 of the European Convention and imposed compensation on it, but refused to order the transfer of the victim to the country of its nationality and exemption of the awarded compensation from attachment.[90] The Court reiterated that the European Convention "does not give it jurisdiction to make such an order against a Contracting State."[91] Thus, despite the award of substantial amount of compensation, the European Court seems to have failed in several ways to perform its task to ensure the observance of the European Convention, as dictated by Article 19 of the European Convention.

By leaving the victim in the hands of the respondent, the European Court left unclear the fate of the detained person who had been tortured in serious violation of the Convention. Moreover, by refusing to exempt the compensation from the attachment, the European Court in fact afforded discretion to France in deciding whether or not to comply with the judgment. It is thus questionable whether the declaration of serious breaches of the Convention and the consequent award of compensation could serve any real purpose if the respondent state is allowed to take certain steps which would nullify its obligations under the judgment of the European Court.

It seems perfectly clear that by failing to assume certain inherent remedial powers, the European Court failed to impose through its judgment the effective obligations on the respondent, which in the end is the failure to perform the mandate imposed under Article 19 of the European Convention. This failure is even more serious if it is remembered that the case – unlike the precedents referred to by the Court[92] – involved a serious breach of a non-derogable Convention right[93] which is also safeguarded by a peremptory norm of general international law. Even if it is assumed that those earlier cases embody the correct approach – for which there seems to be no warrant – they are nevertheless different from *Selmouni* both in the nature of a violated Convention provision and the gravity of a breach itself.

The approach of the International Court in *LaGrand* differed from the approach of the European Court of Human Rights in that it adopted a decision which precludes the exercise of discretion by the United States in implementation of the Judgment and avoids the non-resolution of certain aspects of the dispute. To achieve this, the Court elected to ignore all the arguments which were grounded in the lack of precedent and possible excess of jurisdiction. If states consent to the jurisdiction of the Court, they consent to its mandate to apply and enforce international law in accordance with Article 38 of the Statute. If the exercise of this mandate requires

90. Selmouni *v.* France, Judgment of 25 July 1999, 1999 ECHR (25803/94), at para. 133.
91. *Id.*, at para. 126.
92. The Court referred to the case of Philis *v.* Greece, Decision of 27 August 1991, ECHR (Ser. A209) 6, at 27; Allenet de Ribemont *v.* France, Decision of 7 August 1996, at paras. 63–65.
93. *See*, *generally*, Art. 15 of the European Convention.

the exercise of a certain remedy, neither the lack of precedent, nor the pleas of excess of jurisdiction should discourage the Court from awarding each and every remedy necessary in view of the gravity of the wrongfulness involved. It is submitted that the contrast between *LaGrand* and *Selmouni* consists in the compliance by the International Court with Article 38 of its Statute and failure of the European Court to comply with Article 19 of the European Convention.

Although the European Convention does not explicitly empower the European Court to issue consequential orders, it does not prohibit it from doing so.[94] The restraint of the European Court in ordering injunctive relief exceeds that compelled by the text of the Convention.[95] Furthermore, by analogy to the principles of institutional law, touched upon in the previous section, the existence of inherent or implied powers must be presumed if this is necessary for the proper exercise of explicitly conferred powers.[96] Certain inherent judicial powers must be deemed to exist which help a judicial organ to maintain its judicial character. The scope of such powers has to be determined by reference not only to the textual provisions and attitudes of states, but also to the need of the settlement of disputes in a final and conclusive way. If a tribunal has a clear mandate to apply and enforce a certain established body of international legal rules, it must interpret and apply its remedial powers in accordance with that mandate. In essence, *Selmouni* is not a judicial decision, since the respondent in that case was not precluded from taking measures nullifying the judgment of the European Court.

The power to award remedies required by the circumstances of a case lies at the heart of the judicial function, the essence of which is the resolution of disputes. If a judicial organ – as in *Selmouni* – refuses to award certain remedies because of its deemed incompetence to do so, it fails to settle the dispute. For if a tribunal pronounces on the wrongfulness of the conduct of a party but does not fully award remedies, the dispute between the parties – disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,[97] involving the positive opposition of legal claims to each other[98] – is not resolved, but still persists.

Another consequence of the International Court's observations on remedies relates to the issue of compensation for the non-material injury to a state and its nationals, although the applicant elected not to pursue such a remedy. Consequently, the Court has not pronounced on this issue. However, the Judgment implicitly gives certain indications to this effect,

94. J. Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte 147 (1993).
95. T. Meron, Human Rights and Humanitarian Norms as Customary Law 145 (1989).
96. *Supra* note 50 and accompanying text.
97. Mavrommatis Palestine Concessions case (Greece *v.* UK), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, 6, at 11.
98. South West Africa, Preliminary Objection, Judgment of 21 December 1962, 1962 ICJ Rep. 319, at 328.

inter alia, by emphasising that apologies and acknowledgment of breach would not be a sufficient remedy. It is not perfectly clear what the Court's approach would have been had Germany asked for compensation for the moral damage instead of assurances of non-repetition, or for both remedies combined. Jurisprudence of other tribunals favours the idea of pecuniary compensation for moral injury. The practice of human rights tribunals is familiar with cases where an acknowledgment of breach was not considered appropriate satisfaction, and further compensation for non-pecuniary damage was awarded to the victims.

If the International Court is seised of a case involving serious violations of individual rights and is asked to award compensation for the non-material injury, two circumstances are supposed to serve as the starting-point. Firstly, the apologies and acknowledgment of breach are not always sufficient. Secondly, the material compensation for the non-material injury is not ruled out in international law. Beyond this starting-point, the nature of specific cases will be determinative of which remedies should be awarded.

If it is still suggested that no precedential evidence supports the International Court's power to award pecuniary remedy for non-pecuniary damage, it must be remembered how the *LaGrand* Judgment deals with pleas based on the lack of (affirmative) evidence. Lack of evidence and precedent was invoked both with regard to the binding force of provisional measures and the guarantees of non-repetition. The dismissal of these pleas by the Court is further evidence of the fact that the seriousness and gravity of a breach may override the lack of precedent in question of remedies.

5. Concluding Remarks

LaGrand is a truly innovative step towards the understanding of the nature and scope of international judicial jurisdiction. In many respects, this decision is at variance with what has been understood for decades to be the 'traditional' or 'dominant' view on jurisdiction. The Court's complex treatment of jurisdictional issues illustrates the irrelevance of the rigid adherence to the principle of consent as an absolute and non-derogable jurisdictional principle. *LaGrand* demonstrates that various methods and techniques are available to set aside the considerations based on the principle of consent and that the Court is perfectly able to do that if it finds that the need for proper preservation and enforcement of the substantive legal obligations involved in a case before it so requires.

Furthermore, *LaGrand* may be instructive for the uniform understanding of jurisdictional principles by universal and regional tribunals. This case, like several cases brought before the European Court of Human Rights, exhibits an increasing influence of humanitarian considerations. But it differs from the practice of the European Court in adapting the jurisdictional policies to those humanitarian considerations. This is all the more

remarkable since these considerations are, unlike in the Vienna Convention on Consular Relations, at the heart of the European Convention on Human Rights. The approach of *LaGrand* may thus serve as a fresh impetus for the European Court to consider in framing its judicial policies.

It is sometimes assumed that the tribunals acting at the universal level do not possess certain powers exercised by regional tribunals, such as the European Court, which operate in the context of increased regional solidarity.[99] But the *LaGrand* decision creates the opposite impression, since the International Court assumed the powers which the European Court elected not to exercise. Consequently, it seems legitimate to question whether the normative and jurisprudential framework still tolerates the assumption of certain hypothetically construed differences among international tribunals, even without the explicit support for such assumptions by the constituent instruments of the relevant tribunals. The analysis developed throughout this article seems to illustrate that, at least within the scope of *LaGrand*, the construction of inherent and hypothetical differences between the powers of various tribunals is not well-founded.

99. For instance, the power of the European Commission and European Court of Human Rights to sever incompatible reservations has been sometimes attributed to the fact that these organs operate within specific European context. However, the UN Human Rights Committee asserted a similar power in its General Comment No. 24, which has been opposed within the ILC. *See*, *generally*, Second Report on Reservations to Treaties by Pellet, A/CN.4/477/Add.1, and the Report of the ILC *in* 1996 YILC, Vol. 50 II (Part Two). A detailed examination of this issue is outside the focus of the present article.