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The Binding Nature of Provisional Measures of the International Court of Justice: the 'Settlement' of the Issue in the *LaGrand* Case

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Abstract
In the *LaGrand* case, the International Court of Justice seems to have created a clear precedent in favour of the binding force of provisional measures. This essay surveys the main lines of argument for and against the binding nature of provisional measures in the relevant literature, and discusses how the *LaGrand* case was argued in this context. The elation to be found in recent literature with regard to the 'settlement' of the issue of the binding force will be questioned by a discussion of the apparent adoption in international law of a system of precedents and *stare decisis*.

Key words
International Court of Justice; *LaGrand* case; precedent; provisional measures

1. Introduction

Neither the Permanent Court of International Justice nor its successor, the International Court of Justice (ICJ), have, until 27 June 2001, ever uttered so much as a word on whether the provisional measures of the Court are legally binding. Over the course of eighty years international lawyers have argued their cases *pro* or *contra* their binding nature. Now the Court has created a clear precedent by declaring in the recent judgment in the *LaGrand* case[1] that provisional measures are binding.

The present work is primarily an attempt to describe the structure of the relevant arguments. At the outset I shall describe the pertinent points of the academic discussion on the matter over the decades. Legal literature will be condensed to show the main lines of argument. Second, we shall look at the *LaGrand* case to see how the case was argued, both by the parties and by the Court in its formalistic and somewhat concise analysis of the question. Furthermore, the elation at the 'settlement' of such a long-standing dispute will be questioned by a discussion of the apparent adoption, in international law, of a system of precedents and *stare decisis*.

In a second step I propose to add a few arguments to the discussion of the issue of the binding nature. It will have become clear that the question we are concerned

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1. *LaGrand case (Germany v. United States of America)*, Judgement of 27 June 2001, at: http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm. *Cf. inter alia* W. J. Aceves, 'LaGrand (Germany v. United States). Judgement', (2002) 96AJIL 210; Xiaodong Yang, 'Thou shalt not violate provisional measures', (2001) 60 *Cambridge Law Journal* 441.

with is primarily an issue of interpretation. Therefore the emphasis of these remarks will be placed on the value of interpretation in international law. This is not the place for a full discussion of these issues, but this article endeavours to make the reader aware of how the discussion of a 'technical' question, if it is a technicality of international law, can (and must) be concerned with issues of a theoretical nature.

We shall leave aside the questions of jurisdiction to indicate provisional measures, among them the interesting question whether the Court in *LaGrand* had jurisdiction to decide the issue at hand. The other preconditions for the indication of provisional measures as well as their enforcement are also outside the scope of this study. The reader will no doubt note that I have omitted to discuss at length other precedents concerning the nature of provisional measures. This is because other tribunals cannot offer guidance on the question whether the ICJ's provisional measures are binding, because they do not use the same statute[2] and, as I have mentioned above, the ICJ and its predecessor have never discussed the issue.

2. The state of the discussion before *LaGrand*

In this section I present the major lines of argument in the scientific discussion. A thorough critique of the notions will not be attempted here; I shall merely indicate the range of theses that have thus far been published. My personal views are expounded in section 4. Three lines of argument stand out as the main points of contention: first, the questions surrounding the formulation and interpretation of the relevant articles of the Statute of the ICJ, including their context, the intentions of the drafters and of those who have sought to influence the law on provisional measures indicated in the ICJ at later dates, and the practice of the two courts; second, the theory that provisional measures are morally, but not legally, binding; and third, the contention that interim protection has become a general principle of law.

2.1. Interpretation of the Statute

The relevant provisions to be interpreted have been identified as Article 41 of the Statute of the Court and Article 94 of the UN Charter. Discussion so far has been focused on these two articles, and some lawyers have voiced the opinion that it is only linguistic uncertainty in Article 41 that has caused the question of the binding nature to be controversial at all.[3] The dispute concerns mainly two items: the perceived weakness of the formulation of the English version of Article 41 and the difference in 'strength' between the English and the French text.

2. The provisional measures of the International Tribunal of the Law of the Sea (ITLOS), for example, are clearly binding (Article 290(6) United Nations Convention on the Law of the Sea 1984 (UNCLOS)).
3. *Cf. inter alia* J. B. Elkind, *Interim Protection. A Functional Approach* (1981), 153; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure', (1958) 34 *British Yearbook of International Law* 1, at 122; V. S. Mani, 'Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the UN Charter', (1970) 10 *Indian Journal of International Law* 359, at 360; E. Szabo, 'Provisional Measures in the World Court: Binding or Bound to be Ineffective?', (1997) 10 LJIL 475, at 477; J. Sztucki, *Interim Measures in the Hague Court. An Attempt at a Scrutiny* (1983), 261.

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2.1.1. Hortatory versus imperative language

According to many commentators, the language employed in the English version of Article 41 is not as clear as it ought to be. While some simply call the formulations employed 'confusing',[4] mixing the signals they send in linguistic terms, others attest that they contain 'restrained language'[5] and thus make it impossible to affirm any binding force to it.[6]

It is towards the terms 'power', 'indicate', 'ought to be taken' and 'measures suggested' that this criticism is mainly directed. A few writers feel that 'indicate' was chosen over 'order' because provisional measures were never meant to have binding force.[7] Manley Hudson identified 'indicated' as possessing 'diplomatic flavour' in order 'to avoid offence to the "susceptibilities of States"'.[8] Dictionaries are used in an effort to show that the 'ordinary meaning' of the word 'ought' has no imperative character.[9] Although the Court has the 'power' to indicate measures, such measures are only 'suggested', as Article 41(2) tells us.[10]

The issue of the differing English and French versions of Article 41, which the parties and the Court have thoroughly discussed in *LaGrand*,[11] is hardly discussed in literature at all.[12] According to those who do talk about it in their works, 'ought to be taken' and '*doivent être prises*' do not signify the same thing, the French version being 'more normative' than the English phrase. Furthermore, the English-language version of Article 41(2) refers to 'the measures suggested' whereas the French text merely mentions '*ces mesures*'. The French text is the 'original' text and all other versions are mere translations.[13]

While a correct interpretation of Article 41 is seen by the more positivist commentators to be the key to understanding the question at hand, Article 94 of the UN Charter is sometimes used to attribute binding force to provisional measures.[14] This obligation to comply with the 'decisions' of the Court does not lack a clear formulation, but its paragraph 2, concerned with recourse to the Security Council, talks of 'judgments', which provisional measures arguably are not, and that 'terminological

4. Elkind, *supra* note 3, at 153.
5. J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999), at 174.
6. H. Lauterpacht, *The Development of International Law by the International Court* (1958), 254; L. Gross, 'Some Observations on Provisional Measures', in Y. Dinstein (ed.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (1989), 307.
7. L. Collins, 'Provisional and Protective Measures in International Litigation', (1992) 234 *Recueil des Cours* 9, at 217; E. Hambro, 'The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice', in W. Schätzel, H.-J. Schlochauer (eds.), *Rechtsfragen der internationalen Organization. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (1956) 152, at 164; Mani, *supra* note 3, at 361; Sztucki, *supra* note 3, at 287.
8. M. O. Hudson, *The Permanent Court of International Justice 1920–1942* (1943), 423.
9. Szabo, *supra* note 3, at 477.
10. P. J. Goldsworthy, 'Interim Measures of Protection in the International Court of Justice', (1974) 68 AJIL 258, at 273.
11. See the discussion of the *LaGrand* case in section 3, *infra*.
12. H. G. Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofes, ihr Wesen und ihre Grenzen* (1932), 29–35; Sztucki, *supra* note 3, 263–4.
13. Sztucki, *supra* note 3, 264.
14. Hambro, *supra* note 6, 168–9.

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discrepancy'[15] is not, in fact, a discrepancy, as the terms 'decision' and 'judgment' are synonymous.[16]

2.1.2. Context, travaux préparatoires, *and the practice of the Court*

Two issues regarding the context of Article 41 have been mentioned in the literature on provisional measures before the ICJ. First, it is debated whether the placement of Article 41 in Chapter III of the Statute weakens[17] or strengthens the case for attributing binding force to provisional measures. Including provisional measures in the chapter on procedure, one argument goes, implies that provisional measures are merely a procedural tool of no importance. With equal force it is argued that this chapter includes some important provisions[18] and that placing an article in Chapter III is by no means indicative of the wish of the drafters to negate its binding force. A recent commentator has pointed out that 'Placement in the Chapter on procedure would therefore not necessarily lead to a preclusion of binding legal effect.'[19] Provisional measures have always been indicated in the form of orders.[20] Edvard Hambro argues that as orders of the Court under Articles 48 and 49 concerning minor matters of procedure are undoubtedly binding upon the parties, *ad maius* the much more important orders indicating provisional measures must be binding as well.[21]

The response of Jerzy Sztucki is that orders indicating provisional measures are special: while 'normal' orders concern points of procedure and are supported by sanctions of a procedural nature, 'no sanction for non-compliance may be imposed in this case [regarding orders indicating provisional measures] by the Court'. That is because 'interim measures . . . go beyond that domain [procedure] in so far as their substance is concerned.'[22]

Hans Gerd Niemeyer produced one of the most comprehensive analyses of the *travaux préparatoires* in 1932. According to him, Fernandes was the 'father' of Article 41; his proposal, however, had a '*scharfe und eindeutige Formulierung*':[23] '*la Cour pourra ordonner*'. At the suggestion of Judge Huber the Third Commission of the League of Nations Council changed 'suggest' in the English version to read 'indicate', as the first term was seen as weaker than the French '*indiquer*' and 'should be taken' was changed to 'ought to be taken'.[24] However, he was critical of the value of preparatory

15. Sztucki, *supra* note 2, 269.
16. H. Mosler, 'Article 94', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1995), 1003, at 1003–4; Szabo, *supra* note 3, 479.
17. Å. Hammarskjöld, 'Quelques aspects de la question des mesures conservatoires en droit international positif', (1935) 5 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 5, at 25–7.
18. Elkind, *supra* note 3, 155.
19. Szabo, *supra* note 3, 478.
20. S. Oda, 'Provisional Measures. The Practice of the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996), 541, at 555; Sztucki, *supra* note 3, 262 (this author argues that no conclusions can be drawn from that fact.).
21. Hambro, *supra* note 7, 170.
22. Sztucki, *supra* note 3, 290.
23. Niemeyer, *supra* note 12, 30. Author's translation: 'was formulated in strong and clear terms'.
24. *Ibid.*, 32.

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works for the interpretation of the provision:

> Motive gelten allgemein als geeignete Mittel für die Interpretation von Rechtsnormen. Diese Eignung findet aber ihre Grenze an dem objektiven Gehalt, der der Form bzw. dem Zeichen, das zur Ausdrucksform des zu positivierenden rechtlichen Inhalts gewählt worden ist, innewohnt. Der Form entspricht ein bestimmter Inhalt, der sich mit der durch die Formgebung erfolgten Verobjektivierung loslöst von subjektiven und möglicherweise zufälligen Vorstellungen oder Absichten der geistigen Urheber der Rechtsnorm.[25]

The Court did not pronounce on the issue[26] until 2001. Various authors have tried to coax information out of the earlier documents of the two courts,[27] but they have mostly concluded that the pronouncements are rather ambiguous. Two individual opinions of judges of the ICJ do stand out, however. These are the separate opinions of Judges Ajibola and Weeramantry to the Court's Order of 13 September 1993 indicating provisional measures in the *Bosnia Genocide* case. Both judges, but most eloquently Judge Weeramantry, defend the binding nature of provisional measures.[28]

2.2. Moral force

According to this view provisional measures are not binding. Their 'effectiveness' is guaranteed, however, by a different form of enticement to behave according to the wishes of the Court. The 'obligation' has become a moral norm, or, as it has been called, 'quasi-obligatory'.[29] The reasons for such a new qualification are found *inter alia* in the formulation of Article 41[30] or in the conviction that such a 'solemn pronouncement of a learned and august tribunal'[31] cannot simply be a *nullum*. It has also been argued that the opinion that provisional measures merely had moral force was the prevalent view among the drafters.[32]

Dissent comes from one of the most eminent international lawyers, Hersch Lauterpacht: 'It cannot be lightly assumed that the Statute of the Court – a legal

25. *Ibid.*, 32–33. Author's translation: 'Motives are commonly thought to be used as proper tools for the interpretation of legal norms. This suitability is limited by the objective content in the form or in the sign which has been chosen to express the legal content which is to be put in a positive form. The form corresponds to a certain content which, by the process of objectification during the formation of the norm, is divorced from subjective and possibly coincidental ideas and intentions of the authors of the norm.'
26. Collier and Lowe, *supra* note 4, 175; K. Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (1975), 109; Sztucki, *supra* note 3, 274.
27. Niemeyer, *supra* note 12, 44–8; Sztucki, *supra* note 3, at 270–75; H. W. A. Thirlway, 'The Indication of Provisional Measures by the International Court of Justice', in R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (1994) 1, at 31–3.
28. *Application of the Convention on the Prevention and Punishment of Genocide case (Bosnia-Herzegovina v. Yugoslavia)*, Order of 8 April 1993, (1993) ICJ Reports 325, Separate Opinion of Judge Weeramantry at 373–87, Separate Opinion of Judge Ajibola at 397. Whereas Judge Ajibola focused in his opinion on the fact that the whole procedure would have little point if provisional measures were not binding, Judge Weeramantry employs the whole range of argument laid out in this section of this paper, including the 'general principle' argument (subsection 3, *infra*) and an analysis of the language of the relevant provisions (this subsection).
29. Sztucki, *supra* note 3, 293.
30. Niemeyer, *supra* note 12, 34.
31. E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), 169; *cf.* Thirlway, *supra* note 27, at 32.
32. J. P. A. Bernhardt, 'The Provisional Measures Procedure of the International Court of Justice through US Staff in Tehran: *Fiat Iustitia, Pereat Curia?*', (1980) 20 *Virginia Journal of International Law* 557, at 606.

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instrument – contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.'[33]

2.3. General principle of law

The third avenue to accord binding nature to provisional measures is the contention that interim protection is inherent in the judicial function, so much so that the principle of provisional measures is a general principle of international law (Art. 38(1)(c) of the Statute).[34] Albeit controversial, general principles are regarded as a formal source of international law by most international lawyers, and law is *per definitionem* binding for its subjects. Some proponents derive the 'principle' from a mere teleological interpretation of the provisions,[35] while others divorce the principle from the procedure for its application, codified for the ICJ in Article 41 of the Statute.[36] The 'theory of institutional effectiveness' says that provisional measures are binding because if they were not they would violate the principle of effectiveness existing in international law.[37] Hans Gerd Niemeyer sees '*mesures conservatoires*' as concretization of the legal duty to abstain from frustrating the course of procedures *pendente lite* which is conditional on the existence of a permanent court and which is codified in Article 41.[38]

A few writers acknowledge the existence of a general principle of law, but deny that this means that provisional measures are binding.[39] The voices against such a legal construction[40] warn that 'it does not appear warranted to set aside lightly the question of the language of Article 41 and to interpret this provision . . . as meaning more than it says.'[41] The questions of the relationship between the various sources of law could be a stumbling block in this 'matter . . . governed by treaty'[42] as the Statute says one thing but the general principle says another thing: which source is to be preferred?

3. The judgement in the *LaGrand* case

This section will take a closer look at how the issue of the binding nature of provisional measures was argued during a recent case before the ICJ, a case where the

33. Lauterpacht, *supra* note 6, at 254.
34. Collier and Lowe, *supra* note 5, 174; Elkind, *supra* note 3, 162; Hambro, *supra* note 7, 167; B. H. Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987), 323, at 332.
35. Elkind, *supra* note 3, 163; Mani, *supra* note 3, 365; *contra*: Sztucki, *supra* note 3, 288.
36. Elkind, *supra* note 3, 163; Szabo, *supra* note 3, 487.
37. Mani, *supra* note 3, 362; Oellers-Frahm, *supra* note 26, at 110. *Cf.* also the concretization of the general principle by the Court in section 3, *infra*.
38. Niemeyer, *supra* note 12, 39, 42.
39. Collins, *supra* note 7, at 214, 216 (he is doubtful whether the general character of the principle sheds light on the question of the binding nature); Dumbauld, *supra* note 31, 180; Szabo, *supra* note 3, 487 (according to him this is in conflict with the intentions of the drafters and of the signatories of the Statute – why set that intent aside by means of municipal law analogies or functional interpretation?).
40. Bernhardt, *supra* note 32, 607 (there is no additional textual support to be found for this construction).
41. Sztucki, *supra* note 3, 288.
42. Thirlway, *supra* note 27, 30.

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Court finally decided to tackle the question of the status of provisional measures and where it came to the conclusion that they were binding. One can say that the discussion during the course of the proceedings was led within the parameters of the scientific discussion outlined above. The judgment itself was a perfect example of conventional international legal argument. It is also remarkable that the parties, especially the applicant Germany (which was the driving force in 'extending' the dispute from a mere technicality of the Vienna Convention on Consular Relations to such an important general question), presented such well-argued and comprehensive cases on the point of the binding nature of provisional measures to the Court, even including a discussion on the 'other' official languages' versions[43] of Article 41 of the Statute,[44] something which legal literature had not hitherto done. The relevant arguments, as long as they conform to the patterns of argument established in earlier scientific discussion (as discussed above), will only be mentioned briefly and will not be discussed again.

3.1. The parties' arguments

3.1.1. The German memorial

Germany's first argument is that the 'principle of institutional effectiveness', deduced from a general principle of law, demands that provisional measures be binding: 'In order to effectively fulfil its tasks, it must possess the necessary instruments.'[45] Also, as a general rule of judicial settlement there is symmetry between the final judgment and provisional measures to the effect that both are equally binding, since withdrawal of consent to adjudicate is not possible, neither should frustration of the opponent's claim be allowed.[46]

The applicant then invokes the relevant provisions of the UN Charter and of the Statute of the Court and interprets them. First, Article 91(1) of the UN Charter[47] and, second, Article 41(1) of the Statute of the Court are interpreted. Germany uses the interpretative 'canon' laid down in Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 (VCLT): after finding that 'the terminology used in Article 41(1) implies a binding character'[48] and that the context points to binding measures,[49] the view of Germany's counsel of the provision's object and purpose is virtually identical to the general principle at the start of its memorial.[50] There then follows a discussion of the other authentic languages' versions of Article 41: the French, Spanish, and Chinese versions 'clearly reveal the obligatory character of the measures'.[51] Only the English and Russian versions might theoretically be conceived as being 'open to a "softer" meaning'.[52] But as the other three languages demand an obligatory reading

43. 'Other', that is, than English and French.
44. *LaGrand* case, *supra* note 1, German Memorial, at paras. 4.149–4.150.
45. *Ibid.*, at para. 4.127.
46. *Ibid.*, at paras. 4.129–4.131.
47. *Ibid.*, at paras. 4.132–4.133.
48. *Ibid.*, at para. 4.137.
49. *Ibid.*, at paras. 4.141–4.146.
50. *Ibid.*, at paras. 4.147–4.148; *cf.* para. 4.125.
51. *Ibid.*, at para. 4.149.
52. *Ibid.*, at para. 4.150.

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and as Russian and English allow both readings, Article 33(4) VCLT demands, in order to reconcile the texts, that the narrower reading be adopted.[53] Recourse to the *travaux préparatoires* is not necessary, as they are only a supplementary means of interpretation available only if the interpretation by means of Article 31(1) VCLT leaves the text 'ambiguous or obscure, or leads to a manifestly absurd or unreasonable result',[54] which the German side claims it does not.[55] In its penultimate argument, the applicant cites various instances where, arguably, the Court has hinted at the binding nature of provisional measures.[56]

Lastly, the respondent is accused of having violated the customary law obligation 'to refrain from any action which might interfere with the subject-matter of a dispute'[57] *pendente lite*. This argument bases its validity on customary law rather than on an interpretation of the Charter and, apart from conceivable jurisdictional difficulties, sounds very much like the above-mentioned general principle.[58]

3.1.2. The US counter-memorial

The United States thinks that the Court in indicating the provisional measures of 3 March 1999 did not create binding legal obligations. The language employed is indicative of intent not to obligate the respondent. Had it wanted to do so, it would have had to use very different, explicit, words.[59] Furthermore, US lawyers claim that, in general, provisional measures are not binding, which they intend to prove by an interpretation of the constitutive instruments, by the Court's practice, and by discrediting the applicant's 'general principle' theory.

As regards the terms of Article 41, the respondent states that the language used is 'not the language that lawyers employ to create legal obligations'.[60] This is based on three component aspects: neither 'indicated'[61] nor 'ought to be taken'[62] nor 'suggested'[63] convey the notion of prescription or obligation. Dictionaries and the drafting history are used to substantiate that claim. The United States is not convinced that the other languages present a clear picture, but the only support they can muster for this contention is that the order in question was originally written in English and that Article 41 ought to be 'construed in accordance with the English text'.[64] As regards Article 94, Washington deploys the argument that 'decision' and 'judgment' are synonymous, and since an 'Order' is not a 'Judgment' it cannot be a 'decision' in the sense of Article 94(1).[65] The Court's practice is also scoured for support for the United States' contentions and this is found accordingly.[66]

53. *Ibid.*, at para. 4.150.
54. Article 32(b) VCLT.
55. German Memorial, *supra* note 44, at para. 4.152.
56. *Ibid.*, at paras. 4.154–4.156.
57. *Ibid.*, at para. 4.157.
58. *Cf. Ibid.*, at para. 4.125.
59. *LaGrand* case, *supra* note 1, US Counter-Memorial, at paras. 128–137.
60. *Ibid.*, at para. 142.
61. *Ibid.*, at paras. 142–146.
62. *Ibid.*, at paras. 147–148.
63. *Ibid.*, at para. 149.
64. *Ibid.*, at para. 152.
65. *Ibid.*, at paras. 154–158. *Cf.* also section 2, *supra*.
66. *Ibid.*, at paras. 159–164.

Germany's 'functional argument', that is, regarding the 'principle of institutional effectiveness', is also criticized by the United States. However, the German argument is misunderstood. The applicant's contention is reduced to the symmetry between judgment and provisional measures, which constituted but one facet of the German claim, and it is argued that, citing Jerzy Sztucki, there is 'no such peremptory correlation'[67] as well as a bland statement that it is understandable that the Court might have the power to issue binding judgments but not that of issuing binding provisional judgments.

3.1.3. Oral arguments

The oral arguments mostly repeat what had been written in the memorials. There is one new contention, however, which merits attention here. Germany makes the connection between 'normal' orders for the conduct of the case and provisional measures orders.[68] Hence those clearly are legal decisions, which means that provisional measures cannot be 'moral obligations'.[69] Professor Dupuy then states what is the logical consequence:

> There is only one case and one only . . . in which your Court is authorized to do anything but state the law. This . . . would be where the parties asked the Court to rule *ex aequo et bono*, pursuant to Article 38, paragraph 2. Otherwise, *the Court does only one thing; it lays down the law*![70]

The United States retorted to the suggestion that provisional measures must always be binding by saying that it was 'entirely unpersuasive . . . international tribunals have in fact issued provisional measures that used non-binding language and were not intended to be binding.'[71] One example is various provisional measures of the International Tribunal of the Law of the Sea in the *Saiga No. 2*[72] and *Southern Bluefin Tuna*[73] cases, as well as the case of *Cruz Varas v. Sweden*[74] before the European Court of Human Rights.

3.2. The judgment

The Court starts off by declaring that the dispute 'essentially concerns the interpretation of Article 41'[75] of the Statute. It thus purports to limit the discussion of the binding nature of provisional measures to an interpretation of the relevant treaty,

67. *Ibid.*, at para. 165. This argument was originally introduced by Sztucki, *supra* note 3, 291.
68. *LaGrand* case, *supra* note 1, Verbatim Record CR 2000/27 (*per* Dupuy), at para. 34.
69. *Ibid.*, at para. 36.
70. *Ibid.*, at para. 36, emphasis added.
71. *LaGrand* case, *supra* note 1, Verbatim Record CR 2000/31 (*per* Matheson), at para. 7.3.
72. *The M/V 'SAIGA' (No. 2) case (Saint Vincent and the Grenadines v. Guinea)*, at: http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=2&lang=en.
73. *Southern Bluefin Tuna cases (New Zealand v. Japan; Australia v. Japan)*, provisional measures, at: http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=3&lang=en.
74. *Cruz Varas v. Sweden*, ECHR (1991) Series A, No. 201.
75. *LaGrand* case, *supra* note 1, Judgement, at para. 90. Judge Koroma doubts that the question could be in doubt. In his view it is clear that provisional measures are binding, because 'Otherwise, there would be no purpose in making an order.' *Ibid.*, Judgement, Separate Opinion of Judge Koroma, at para. 7.

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namely the Statute of the International Court of Justice.[76] It is a logical conclusion that it then applies Article 31VCLT, which had been acknowledged by it in earlier cases to reflect customary law and therefore to be applicable to all treaties, whether covered by the VCLT or not.[77]

First, the Court concerns itself with the text of Article 41. The words '*indiquer*' and '*l'indication*' in the French version are seen as neutral regarding the mandatory character of provisional measures, whereas the phrase '*doivent être prises*' clearly has an 'imperative character'.[78] This was the original text in 1920 and, according to the Court, the English phrases are to be understood as reflecting the French version. However, both texts are equally authentic,[79] and since the versions are not in harmony the Court applies, again via its reception into customary law, Article 33(4) VCLT, which requires 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, [to] be adopted.'

The Court goes on to consider the object and purpose of the Statute together with the context of Article 41. Arguing from the necessity of it being allowed to render judgments and from the context of Article 41 as allowing the Court to exercise its functions, the majority is of the opinion that there is a necessity 'to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.[80] The judges acknowledge a general principle for parties to a dispute *sub judice* to abstain from measures capable of exercising a prejudicial effect on the proceedings as a 'related reason which points to the binding character' of provisional measures.[81]

The Court then declines to resort to the *travaux préparatoires* of Article 41 as grounds for its reasoning, but does so anyway and concludes that the 'weak' choice of words in 1920 was motivated by a concern over the lack of enforcement of provisional measures. 'However, the lack of means of execution and the lack of binding force are two different matters.'[82] The majority concludes that their reading of the preparatory works do 'not *preclude* the conclusion that orders under Article 41 have binding force.'[83]

Lastly, the Court considers whether Article 94 UN Charter '*precludes* attributing binding effect'[84] to provisional measures. By this time it is concerned only with possible grounds for overturning the interpretation the Court has established in paragraphs 99–107. It acknowledges that the term 'decision' is ambiguous, but since

76. Which is an integral part of the Charter of the United Nations.
77. Art. 4 of the Vienna Convention limits its application to treaties concluded by parties after the entry into force of the Vienna Convention (27 January 1980); a condition which the UN Charter does not fulfil (entry into force 24 October 1945). For the Court's determination that the VCLT reflects customary law see *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, (1994) ICJ Reports 4, at 21 (para. 41), *Kasikili/Sedudu Island (Botswana v. Namibia)*, (1999) ICJ Reports, at para. 18.
78. *LaGrand* case, *supra* note 1, Judgement, at para. 100.
79. Arts. 92 and 111 UN Charter.
80. *LaGrand* case, *supra* note 1, Judgement, at para. 102
81. *Ibid.*, at para. 103, citing *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ Series A/B, No. 79, 199. Judge Oda fails to be convinced how this order can be 'interpreted as supporting the contention'. *LaGrand* case, *supra* note 1, Judgement, Dissenting opinion Judge Oda, at para. 31.
82. *Ibid.*, at para. 107.
83. *Ibid.*, at para. 104 (emphasis added).
84. *Ibid.*, at para. 108 (emphasis added).

an exclusion of orders (by virtue of an analogy deriving from the term 'judgment' in paragraph 2 of the said article) from the scope of Article 94 does not exclude attributing binding force to orders, it can say that none of the possible interpretations *precludes* such an attribution.[85]

3.3. Thoughts on *stare decisis*

The International Court of Justice has pronounced 'that orders on provisional measures under Article 41 have binding effect'.[86] This clear statement of law seems to settle the contentious issue this article has set out to discuss. A short *excursus* will endeavour to get the reader thinking about the practice of accepting the Court's pronouncements as if they were authoritative statements of law. Here is not the place for a full discussion of the issue; these remarks attempt to relativize rather than to disprove.

In discussing the question of whether the ICJ can settle the issue once and for all, we have to differentiate between whether the Court is bound by the decision in the *LaGrand* case and whether the Court can authoritatively state what is the law on a given point, such as the binding nature of provisional measures. Whereas the first point concerns the doctrine of *stare decisis*, a formal presumption that the earlier decision must be followed in later decisions, the latter point discusses the possibility of 'judge-made law', whereby the Court's pronouncements are some sort of formal source of international law.

There is among international lawyers a general consensus that there is no doctrine of *stare decisis* in international law.[87] Article 59 of the Statute clearly excludes anyone from the binding force of decisions of the Court except the parties to the case in respect of the case. This means that decisions *qua* decisions only bind the parties. The Court has the power to create individual norms binding the parties to a case. Does this also mean that the *rationes decidendi* are excluded from having binding force? Having 'binding force' means that those reasons have become a norm. This implies that the Court's reasoning would be a formal source of international law, which, in turn, leads to the question whether the Court can authoritatively state what the law is. To rephrase: can a general norm emerge, independent of the existence of that norm according to the rules of the 'classical' sources triad, simply through the fact of the Court declaring it to be law? If this question were answered in the negative the Court's pronouncement would be a mere declaration of what it thinks the law is – without constitutive effect.

Article 38 of the Statute defines what law is applicable to proceedings before the ICJ. Any tribunal's founders may specify what law they wish their tribunal to apply to disputes coming before it, and the Statute of the ICJ is no exception. Article 38(1)(d) states that the Court, *inter alia*, shall apply judicial decisions 'as subsidiary means for the determination of rules of law'. This provision does not oblige the Court to use judicial decisions as a formal source of law, but rather as a place to look for opinions

85. *Ibid.*, at para. 108(3).
86. *Ibid.*, at para. 109.
87. Collier and Lowe, *supra* note 5, 262; M. Shahabuddeen, *Precedent in the World Court* (1996), 97.

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on what the law is. The Statute speaks of a 'subsidiary' means, inferior in status to treaty, custom, and general principles codified in subparagraphs a–c. Also, since it does not specify which judicial decisions are meant (which, conceivably, include every decision from an arbitration concerning a bilateral investment treaty to a municipal criminal court case with international legal ramifications) and since the 'teachings of . . . publicists' are included in that category as well, the status implied is that of a material source. The strongest argument in that respect is the phrase 'determination of rules of law'. Whereas some have argued that the word 'determination' can mean to 'lay down decisively or authoritatively. . . '[88] a standard treatise on international law unambiguously states that the ordinary meaning in its context quite clearly supports the view that judicial decisions merely help the Court to find the law.[89]

Concerning the broader issue of whether the Court can make general law by stating what is the law there is no indication of new sources establishing themselves. The status of the ICJ among international tribunals is prominent, but apart from the binding force of its decisions[90] which constitutes an individual obligation for the members of the United Nations, it is not obvious how 'the principal judicial organ of the United Nations'[91] could generate general law outside the sphere of UN law. It would take up too much time to review the discussion on new sources of law; let it suffice here that most publicists deny such a legislative function.[92]

While the Court is not bound by past decisions it is reliant on past decisions for its reasoning. One rather more pragmatic reason behind this reliance may be that the judges wish to make economies in their decision-making procedure. It would simply take up too much time trying to prove a norm of international law which has been proven in earlier cases. States going to court will have to expect the Court to reason as it has reasoned so far and not to change its view substantially.

4. Analysis

As we have seen, the question was discussed thoroughly in *LaGrand*, but such is the nature of legal discourse that nothing is ever to be considered as settled. A judgment of the ICJ, much as it may command respect as the well-considered opinion of learned international lawyers of high standing, is not the final authority on international law. Writers will find flaws in the Court's reasoning or the Court may reverse its finding in another case. In this section I shall offer my views on whether provisional measures indicated by the ICJ are binding or not. The discussion here will try not merely to duplicate what others have said, but to consider the more salient points of the matter from an independent perspective.

88. Shahabuddeen, *supra* note 87, 77.
89. R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th edn, 1992), Vol. I, 14.
90. Art. 94(1) UN Charter.
91. Art. 92 UN Charter.
92. R. Jennings, 'The Judicial Function and the Rule of Law', in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (1987), Vol. III, 145.

4.1. What does 'binding nature' mean?

As a preliminary point it is helpful to define the phrase 'binding nature'. Such words signify that the act in question is a law, a norm.[93] If provisional measures are indeed 'binding' then that leaves no doubt that they are a form of law. The Court's 'decisions'[94] are 'legal' because they derive their validity from the Court's Statute, which is an integral part of the UN Charter, which, in turn, is a multilateral treaty. Of all the sources of international law treaties are the least controversial, and the parties to a treaty can decide to endow an entity created by a treaty with the power to create 'secondary' law,[95] that is, law derived from the treaty by virtue of such endowment. That the entity thus created happens to be a court of law which *applies* the law and *creates* individual norms by its decisions does not change this legality. The granting of a 'power' to an organ does not automatically mean a duty for other subjects of law, only if the power granted is directed towards the establishment of obligation for these subjects.

It has repeatedly been argued that the Court's decisions could be in a legal form as well as in a non-legal form. There are voices that say that necessity/natural law demands that courts have the *pouvoir* to issue their orders in legal (i.e. binding) form.[96] The question must be thus: can the Court issue non-binding orders? The Court's powers are based on law. Why then should its pronouncements not be a concretization of that law? The Court can only decide on the basis of the law.[97]

On the other hand, there is no indication that the law establishing an entity cannot specify that a particular pronouncement by that entity should not be an individual norm. It is evident, however, that that exception would have to be express rather than implied. Where is the border between law and expressions of will other than law? How can we tell when states want to make law and when they do not? Where in the Helsinki Document 1975 do we find out that this is not a legal document, a treaty, but a political statement (however influential)? The answers to these questions might be found by looking at the will of the parties (perhaps as expressed in the text they have agreed upon). Therefore we shall now have a look at what can be learned from the text.

4.2. Language

Much of the discussion on the interpretation of Article 41 has focused on its language.[98] Words are used to convey the meaning of a norm to us and whenever they are used they can be seen to mean different things for different people. The formulation of Article 41 is not exceptional. As mentioned above[99] the words 'power', 'indicate', 'ought' and 'measures suggested' are used to support the case both for and against the binding nature of provisional measures. I think, however, that one

93. Hans Kelsen, *Allgemeine Theorie der Normen* (1978), *passim.*
94. Art. 94(1) UN Charter.
95. 'Secondary' is used here *not* in the sense of H. L. A. Hart's 'secondary rules of recognition', H. L. A. Hart, *The Concept of Law* (1961), 94.
96. Hambro, *supra* note 7, 170; Hudson, *supra* note 8, 426; Niemeyer, *supra* note 12, 42.
97. *LaGrand* case, *supra* note 1, Verbatim Record CR 2000/27 (*per* Dupuy), at para. 36.
98. See *supra* subsection 2.1.
99. *Ibid.*

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cannot exclude an interpretation of provisional measures as individual norms, not even on linguistic grounds. There are no clues in the text that unequivocally support the view that provisional measures are a legal *nullum*. The key word in the article, 'indicate',[100] as well as the supporting 'ought',[101] leave sufficient uncertainty to come to that conclusion. Additionally, the norm in question has five authentic language versions.[102] There is no preference among these language versions, neither because French was the language of the *travaux préparatoires* nor because the Court deliberated in English in the *LaGrand* case. Also, behind the use of a certain language is a legal tradition which 'colours' the meaning of words.[103] The reconciliation strategy in Article 33(3) and (4) VCLT is based on the fiction that the versions mean to express the same thing. The 'meaning which best reconciles the texts' might well be the smallest common denominator, but if that is so the object and purpose would not be needed as a criterion.

The legislator can prescribe the meaning of words. In legal language special *termini* are used and words often have a different meaning as in colloquial language. Any meaning could theoretically be assigned to a word or phrase:[104]

> 'I don't know what you mean by "glory",' Alice said.
> Humpty Dumpty smiled contemptuously. 'Of course you don't – till I tell you. I meant "there's a nice knock-down argument for you!"'
> 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected.
> 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
> 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'[105]

As a result, it can be safely assumed in our problem here that both possibilities are open. What is the relation to the 'ordinary meaning' clause in Article 31(1) VCLT? Can there be an ordinary meaning? Is it what the majority sees as such, is it what a 'reasonable person' would understand a word to mean? Ascertaining the 'ordinary' meaning is no rule of interpretation at all. 'It assumes what was to be proved; that the expression has a certain meaning instead of another one. The doctrine of "normal" meaning fails to deal with the fact that already the ascertainment

100. It is the key word, because it signifies the means of action the Court employs.
101. The German equivalent: '*Sollen*' is the precise *terminus* employed in German legal language to signify a norm. The 'ought' versus 'must' discussion is a good example. Whereas one may credibly argue that in common English 'must' would have signified a greater degree of force, legal philosophy makes a crucial difference between the 'must' of a 'law' of physics and the 'ought' of a norm (Kelsen, *supra* note 93). In the first case the force of, say, gravity *must* pull objects down, for if it did not in one case that 'law' would have to be amended to account for the exception if that 'law' were to remain 'in force'. In a norm, however, people *ought* not to drive faster than 50 km/h in a particular place. If that norm is broken the law does not change–otherwise there would be no violations of norms. As Niklas Luhmann has said, law is *kontrafaktisch stabilisiert* (N. Luhmann, *Rechtssoziologie*, 2nd edn, 1983).
102. Article 111 UN Charter. They are: English, French, Spanish, Russian and Chinese.
103. *Cf.*, *supra* note 101.
104. On the relative character of words, *cf.* A. McNair, *The Law of Treaties* (1961), at 366 *et seq.*
105. L. Carroll, *Through the Looking-Glass and What Alice Found There* (Everyman, London, 1993 edn [1871]), at 177–8.

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of the "normal" requires interpretation and that the very emergence of the dispute conclusively proves this.'[106] There is no ordinary meaning[107] and there can be no such thing, there is only assigned meaning, differing only in the entity and process of assignation.

4.3. The limits of (beyond) interpretation

First, as the reader will have noticed above, it seems to be a rather tricky business trying to coax the 'right' meaning out of a given provision, let alone the ambiguous Article 41 of the Statute. As the comments in the last subsection have shown, the canon of interpretation can support both claims, and, indeed, both those who see provisional measures as binding and those who do not make their respective judgment as a result of a process of interpretation. What we must ask ourselves is where the process of interpretation leads us. It is not unreasonable to state that seldom will a given text be assigned the same meaning by all readers. In a typical legal controversy, where differing views on a law are backed by state interests, such difference is predictable *a priori*.

There are the two classical views on the matter, the subjective and the objective theories.[108] The goal seems to be to find the intention of the parties. Whereas the objective theory (*Erklärungstheorie*) sees that intent manifested exclusively in the text, the subjective theory (*Willenstheorie*) wants to find the intention of the parties by looking at the intention of the parties beyond the text.[109] Martti Koskenniemi exposed the flaw in reasoning when he wrote,

> But it is virtually impossible to ascertain real, subjective party intent. In particular, doctrine lacks means to oppose its conception of party intent on a deviating conception proposed by the party itself. Besides, sometimes intent may seem like a relatively minor matter…The important point is, however, that if intent is to be the *goal* of interpretation, it cannot be used as a *means* for attaining it. A *Willenstheorie* stands on the shoulders of an *Erklärungstheorie*.[110]

Furthermore, it is not entirely clear why the will of the parties to a treaty should be decisive. First, it is argued that in treaty instruments with many parties, such as the UN Charter, the treaty takes on a life of its own, a quasi-statutory instrument.[111] Second, the consent of states is a *conditio sine qua non* for a text's validity as treaty law, but this does not necessitate that the end result, or rather the guiding principle, of treaty interpretation shall be party consent, their 'will' or the text it results in. These are two different things.

Treaty interpretation (and a matter of treaty interpretation is the topic of this paper) proceeds from a given text. This text must be the basis and limit for any

106. M. Koskenniemi, *From Apology to Utopia* (1989), at 291–292.
107. I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), at 121.
108. K. Zemanek, 'Das Völkervertragsrecht', in H. Neuhold, W. Hummer, and C. Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, (2nd edn, 1991), 55, at 71.
109. Sinclair, *supra* note 107, 115.
110. Koskenniemi, *supra* note 106, 293–4.
111. Jennings and Watts, *supra* note 89, 1268.

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interpretation. Whatever the outcome of an interpretation, the text will remain in place, indelible and *unchanged* by the interpretation. Why should anything but the text of a treaty be decisive as to what the treaty means? Going beyond the text is not an option which is commensurate with the rule of law, but there is enough uncertainty within the text. These uncertainties cannot be resolved by using the methods of interpretation at hand.[112] Any input from outside the text (*telos*, intent) has no legitimacy besides that of the writer or tribunal which imports it into their work; it is in fact a determination by that entity, not a clarification of something existing before the act of interpretation, which throws light on what meaning the text has.

The inherent uncertainty of any written text gives a margin of interpretative 'creativity'. Hans Kelsen has explained the consequence eloquently in his standard book on legal theory:

> Das anzuwendende Recht bildet in allen diesen Fällen nur einen Rahmen, innerhalb dessen mehrere Möglichkeiten der Anwendung gegeben sind, wobei jeder [rechtsanwendende] Akt rechtmäßig ist, der sich innerhalb dieses Rahmens hält, den Rahmen in irgendeinem möglichen Sinn ausfüllt.[113]

There cannot be a 'correct' interpretation, there can only be *an* interpretation.[114] How far one can stretch this 'margin' and how broad this margin is cannot be ascertained.

4.4. General principle of law

It is, of course, perfectly possible that interim protection by provisional measures has become a general principle of law. There are, however, fundamental doubts as to the probability that such a norm is applicable to this question.

The ICJ is an institution which is based on a treaty, and that treaty supplies its procedural law. General principles are not treaties,[115] and the relationship between the formal sources of law is highly contentious. I shall assume that the norms created by the sources of the classical *trias* are not connected in a hierarchical pattern. All three are independent, and conflicts between them may or may not exist. Even if one were to assume a hierarchical relationship it is highly unlikely that general principles would trump customary law or treaties and I have not seen any evidence that general principles and treaties are connected. Surely an 'external' norm cannot legalize (or invalidate) a procedural act according to the Statute. Provisional measures would need some basis within the Statute in order for the measure to be legal – whatever the situation with respect to 'general principles'. It is for this

112. *Cf.*: 'Another result of this activity is that today for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule to serve as an equally attractive antidote.' McNair, *supra* note 104, 365.
113. H. Kelsen, *Reine Rechtslehre* (2nd edn, 1960), 348. Author's translation: 'In all these cases the law to be applied only provides a margin, within which there are more than one possibility of application. Any act [by a system official] that stays within this margin and gives the frame any sense possible is legal.'
114. *Contra*: R. Bernhardt, 'Interpretation in International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. II (1995), 1416, at 1417.
115. Thirlway, *supra* note 27.

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reason that I feel that a general principle would have no bearing on the matter of the binding nature of provisional measures.

5. Conclusion

We started out with a contentious question and a substantial amount of academic discussion and, since 27 June 2001, a decision which purports to close the matter once and for all. However, the arguments on the issue are still not resolved, and such a judgment is no final determination. Within the limits of 'orthodox' international legal discussion we cannot achieve easy results. Arguments will always rage back and forth on whether the language is binding, whether there is a general principle on interim protection, or even whether the Court has decided the issue once and for all. Why is this? The issues under discussion so far merely represent a manifestation of more basic problems of (international) law and legal theory. My attempt at formulating an independent view fares no better, not because I have overlooked 'realities' of law, but because the disagreements are an expression of insoluble higher-level problems. Language is the necessary medium between the 'ontology' of laws and the humans who live with it. Language is flexible and uncertain; attempts at interpretation will in all probability reveal that there is no true meaning which needs only to be discovered.[116] There cannot be proven facts in international law, since international law is based on a fiction, the fiction that it exists. This epistemological uncertainty is, as it were, the reason why there has not yet been a 'knock-down argument' in the matter of the binding nature of provisional measures.

As a matter of pragmatism, however, the *LaGrand* case has 'solved' the question, because absent any better indication we international lawyers will conveniently argue from this case. Whatever the law may be, we now have a point of reference. So, to all intents and purposes, the question of the binding nature of provisional measures has been solved.

116. R. Dworkin, *Law's Empire* (1986), *passim*.

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