# Provisional Measures by the International Court of Justice – The *LaGrand* Case

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## 1. The General Background

Under article 41 of the Statute the Court has the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. Para. 2 adds that pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.[1]

Several issues arise in the context of this rather brief article. It is not clear to what extent a specific jurisdictional link must exist for the Court to be able to exercise the power laid down in article 41. This matter has been settled by a constant case-law of the Court to the effect that the Court need not, before deciding whether or not to indicate provisional measures, finally satisfy itself that it has jurisdiction on the merits of the case.[2] Yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.[3] This seems to be a satisfactory compromise between the extremes which would otherwise make article 41 meaningless. It would take much too long to achieve the result aimed at by article 41. As article 74 of the Rules of Court specifies a request for the indication of provisional measures by any party shall have priority over all other cases. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

It is indeed the practice of the Court to decide very quickly on provisional measures requested by one of the parties.[4] As under similar procedures in municipal

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[1] J.A. Frowein, The International Court of Justice, in: R.-J. Dupuy (ed.), A Handbook on International Organizations, 1998, 198; K. Oellers-Frahm, Interim Measures of Protection, in: R. Bernhardt (ed.), EPIL, Vol. II, 1995, 1027-1034; R. Bernhardt (ed.), Interim Measures Indicated by International Courts, 1994; J. Sztucki, Interim Measures in the Hague Court, 1983; I. Collins, Provisional and Protective Measures in International Litigation, 234 Recueil des Cours (1992), 19-136; D. Reichert, Provisional Remedies in International Litigation: A Comprehensive Bibliography, International Lawyer 19 (1985), 1429-1457; L. Gross, Some Observations on Provisional Measures, in: Y. Dinstein (ed.), Essays in Honour of S. Rosenne, 1989, 307-323; N.M. Tama, *Nicaragua v. United States*: The Power of the International Court of Justice to Indicate Interim Measures in Political Disputes, Dickinson Journal of International Law 4 (1985), 65-87.

[2] H. Mosler, Chapter XIV, The International Court of Justice, in: B. Simma (ed.), The Charter of the United Nations. A Commentary, 1994, article 92, 999; Frowein (note 1), 198.

[3] Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990, ICJ Reports 1990, 64, 68-69.

systems the Court has frequently stated that it must avoid prejudging the merits by deciding upon provisional matters.[5] It is the purpose of the provisional measures to preserve the respective rights of either party. Therefore, the Court may indicate that no prejudice is caused to rights which are the subject of dispute in judicial proceedings.

## 2. The Formulation of Orders

To give some examples as to the content of decisions on provisional measures the Court stated in the *Anglo-Iranian Oil Company* case, the *Fisheries Jurisdiction* cases and the *Nuclear Test* cases in 1951, 1972 and 1973 respectively, that both parties in dispute should each "ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court".[6] In the *Tehran Hostages* case the Court stated in 1979, that both the United States and Iran "should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution".[7] In 1993 in the application of the *Genocide Convention* case the Court stated that both governments "should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution".[8]

## 3. The Problem of the Binding Force

Until *LaGrand* it had never been clarified whether or not there is a formal obligation by States to comply with orders given by the Court under article 41 of the Statute. The language of article 41 can easily be read as implying that these deci-

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[4] K. Oellers-Frahm, Die einstweilige Anordnung in der internationalen Gerichtsbarkeit, 1975, 29, where it is stated that international courts normally decide within a month. There are, however, cases in which the decision only took several days; in the *Tehran Hostages* case the decision on provisional measures was taken within two weeks, in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) the decision was taken within 19 days.

[5] Frontier Dispute (*Burkina Faso/Republic of Mali*), Provisional Measures, Order of 10 January 1986, ICJ Reports 1986, 3, 11.

[6] *Anglo-Iranian Oil Co.* (*United Kingdom v. Iran*), Interim Measures, Order of 5 July 1951, ICJ Reports 1951, 89, 93. *Fisheries Jurisdiction* (*United Kingdom v. Iceland*) (*Federal Republic of Germany v. Iceland*), Interim Protection, Orders of 17 August 1972, 12, 17; 30, 31. *Nuclear Tests* (*Australia v. France*) (*New Zealand v. France*), Interim Protection, Order of 22 June 1973, ICJ Reports 1973, 99, 106; 135, 142.

[7] United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Provisional Measures, Order of 15 December 1979, ICJ Reports 1979, 3, 21.

[8] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia* [*Serbia and Montenegro*]), Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, 3, 25.

sions are not formally binding. Article 41 uses the rather weak notion of "indicate". Article 41 para. 2 uses an even weaker language when it refers to "measures suggested". It is not surprising that since the adoption of such language in the Statute of the Permanent Court of International Justice there has been disagreement as to the binding nature of those decisions.[9] In legal doctrine and in separate opinions the position has been taken that orders must be seen as binding because of their specific importance for the protection of the judicial procedure.[10] It is frequently seen as inherent in judicial proceedings to protect the procedure against unilateral measures of one of the parties.

However, the Court had not been willing to take that position. It had stated that when the Court finds that the situation requires that measures under article 41 should be taken, "it is incumbent on each party to take the Court's indication seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights".[11] This is particularly so, as the Court stated, in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.[12]

This language used by the Court in *Nicaragua* seemed to show that there is no agreement as to the binding nature of provisional measures indicated under article 41 of the Statute.[13] It may be that the Court had been influenced by the fact that in many cases before it States apparently have not been influenced by the indication of provisional measures at all.

## 4. The New Approach – *LaGrand*

The judgment by the Court in the *LaGrand* case is an enormous step forward concerning provisional measures.[14] Let us look at the reasoning of the Court in some detail. Germany had argued that the measures are binding; the United States had taken the view frequently expressed by States so far that language and history of articles 41 and 94 of the Charter show the contrary.[15]

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[9] Oellers-Frahm (note 1), 1027-1034; E. Hellbeck, Provisional Measures of the International Court of Justice: Are they Binding?, Association of Student International Law Societies International Law Journal 9 (1985), 169-187; Bernhardt (note 1); Collins (note 1), 19-136.

[10] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegowina v. Yugoslavia* [*Serbia and Montenegro*]), Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 325, 374-389.

[11] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, 144.

[12] Ibid.

[13] Ibid., 186-187.

[14] *LaGrand* case (*Germany v. United States of America*), Judgment of 27 June 2001, available under http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

[15] Ibid. at para. 93 (argument by Germany) and at para. 96 (argument by the USA).

Germany had also used the argument of effectiveness stemming from a general understanding of traditional procedures. The United States had answered that argument by saying that in this respect article 41 would be fully superfluous.[16]

The Court starts with an argument from the wording. This argument is astonishing. The Court does not deal with "indicate" but puts the main emphasis on the following half sentence according to which the measures "doivent" or "ought" to be taken. This argument is astonishing because from a grammatical point of view it can hardly be doubted that this part is clearly conditioned by the first part of the sentence. Thus it is clear that the governing verb is "indicate" and "indiquer". If one takes into account that the drafting history shows the discussion around "ordonner" which ended in replacing this word by "indiquer" it is not easy to accept that this is a convincing argument from the wording.[17]

Of course, this does not at all exclude that the result reached by the Court is the correct one. In fact I had taken the view that one should see article 41 as a provision which from the whole context gives the Court the power to make binding orders. In that respect I am fully in line with the Court's argument that the object and purpose of the Statute is in favour of the binding force.[18]

What is also astonishing is that the Court does not with one single word address its earlier practice. Most people had taken from the earlier wording of orders, particularly in the *Nicaragua* case, that the Court did not see its orders as binding.[19] The Court then goes on to discuss the drafting history also with a rather strange introduction. "The Court would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under article 41 have binding force."[20] This seems to indicate that the Court has doubts whether the drafting history is in favour of that result. Only the argument is made that this result is not excluded.

## 5. Some other Doubtful Parts in the Court's Argument

The Court then turns to the order of 3 March 1999 where it had in fact decided as follows:

> "a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed ...
>
> b) The Government of the United States of America should transmit this order to the Governor of the State of Arizona".[21]

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[16] Ibid. at para. 96.

[17] The Court refers to the drafting history at paras. 104-109.

[18] Ibid. at para. 102.

[19] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 187-188.

[20] ICJ, note 11, at para. 104.

[21] *LaGrand* (*Germany v. United States of America*), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, 9.

Already this formulation gives rise to some questions. Why should the Court deal with the internal structure of the United States? However, this issue becomes even more important in the judgment of the Court. The Court indicates that the United States authorities have limited themselves to the mere transmission of the text to the Governor of Arizona.[22] This met the requirement of the second of the two measures indicated. As to the first measure the Court states that it did not create an obligation of result but that the United States was asked to take all measures at its disposal.[23]

The Court observes that the mere transmission of the order without any comment was certainly less than could have been done.[24] And the Court adds that the statement by the Solicitor-General that the provisional measure is not binding is of importance.[25] The Court ends that part of the judgment by stating that the Order did not require the United States to exercise powers it did not have; but it did impose the obligation to take all measures at its disposal. The Court finds that the United States did not discharge this obligation.

This part of the judgment is difficult to read without implying that the United States is limited to the Federal Government, and the Federal Government has limited powers. This, however, would be clearly against general rules of public international law which make no distinction between federal states or other states.[26] I have discussed that matter with President Guillaume. He is of the opinion that one must not read it in that manner. However, I find it extremely difficult to read in any other way.

## 6. Consequences of the Judgment

It is not absolutely clear what the different consequences of the judgment are. In cases where the Court lays down an interim Order stating that armed action should be stopped immediately one would have to interpret it in the same way as Security Council resolutions under chapter VII of the UN Charter. They are conditioned by the abidance of both parties to the conflict.[27] It is clear that no party is under a formal obligation to stop fighting when the other party does not stop. This would seem to be a consequence from the reciprocal character of these procedures.

It is much less clear what sort of reprisals may be taken against a violation of a binding order. These reprisals by themselves may certainly not concern the subject

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22 ICJ, note 11, at para. 111.

23 Ibid.

24 Ibid. at para. 112.

25 Ibid.

26 M.N. Shaw, International Law, 1997, 548-549; K. Ipsen, Völkerrecht, 1999, § 40, at para. 9.

27 Article 59 Statute of the International Court of Justice of June 26, 1945 and article 25 Charter of the United Nations of June 26, 1945. J.A. Frowein, Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, in: Simma (note 2), articles 39-43, pp. 605-639.

matter of the dispute. Because otherwise the non-fulfilment of a provisional Order would open up the possibility of making the judicial process even more difficult.

## 7. Conclusion

In general I think the International Court of Justice has taken an active but fully justifiable step forward in international jurisdictional procedure. One may ask oneself whether the Court was influenced by contextual considerations far beyond the *LaGrand* dispute. I think a good case can be made for such an influence. I would see that different developments in international law and jurisdictional settlement of disputes may be of importance in that context.[28]

However, what I think may be the most important contextual influence is the one coming from the International Tribunal of the Law of the Sea. How could the International Court of Justice accept that the Law of the Sea Tribunal may make binding provisional decisions while the main judicial organ of the United Nations may not?[29] I am happy to offer these thoughts to a famous judge and former Vice President of the International Tribunal of the Law of the Sea, Rüdiger Wolfrum.

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[28] J.A. Frowein, Konstitutionalisierung des Völkerrechts, in: Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System, Berichte der Deutschen Gesellschaft für Völkerrecht, 2000, 427-447; K. Oellers-Frahm, Die Entscheidung des IGH im Fall *LaGrand* – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht, EuGRZ 2001, 265-272.

[29] "If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision", article 290, para. 1, of the United Nations Convention on the Law of the Sea of December 10, 1982, article 25 , para. 1, of Annex VI to the United Nations Convention on the Law of the Sea: Statute of the International Tribunal for the Law of the Sea; R. Wolfrum, Provisional Measures of the International Tribunal for the Law of the Sea, in: P.Ch. Rao/R. Khan (eds.), The International Tribunal for the Law of the Sea, 2001, 173-186.