Page 1069 - 1077 **DOI:** *https://doij.org/10.10000/IJLMH.113455*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Binding Value of the ICJs order of Provisional Measures

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ABSTRACT

The significance of temporary restraining orders, sometimes known as provisional measures of protection, is rising in international law. These steps are intended to safeguard the parties' rights until a dispute is settled definitively. It has been disputed whether the Court has the authority to issue temporary remedies since the Permanent Court of International Justice was established in 1921 until it was replaced by the International Court of Justice (ICJ) in 1945. By ruling that it imposes binding responsibilities on the parties and that non-compliance might result in an instance of state responsibility and a cause of action, the ICJ put an end to that issue in 2001. However, there have still been lingering doubts on the overall efficacy of such interim orders. This article makes an attempt to understand the binding value of such measures and their efficacy.

I. INTRODUCTION

Since Provisional measures happen to be one of the most hotly debated topics in the realm of the International Court of Justice. As the name itself suggests, provisional measures are such measures which are interim in nature or in simple language measures existing for the time being. These are such measures which are given by the ICJ before the court pans out the final order hence they are provisional in nature. The final order may continue, reverse or change in any manner the provisional measure given earlier.[2] They are a tool of procedural mechanism which can be used by the litigants in the ICJ.

Provisional measures are mentioned both in the Statute of the ICJ as well as the Rules of Court. It has been dealt with under Chapter III titled as Procedure in Article 41 of the Statute of the Court. In the Rules of the Court, they have been dealt in part III, Section D, sub-section 1 under the title of 'interim protection'.

The rationale behind the court awarding any provisional measures is that generally a suit takes a considerable time to be settled finally by the court. It is through various stages that the ICJ arrives at a final decision. However, there are a lot of times when the subject matter of the suit

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[2] Article 76, Rules of Court ICJ, 1978, http://www.icj-cij.org/en/rules.

 [ISSN 2581-5369]

or the rights of the litigating parties is at stake. At such cases, where there the parties would want a status quo, it is important that the court gives out some protection to the rights of the parties and prevents from making the final court order futile.[3] The parties have been given the power to request for provisional measures at any given time of the proceeding.[4]

There are a few basic criteria, however, which the requesting part would have to prove before the court.[5] These are :

Firstly, establishing a prima facie jurisdiction over the case,[6]

Secondly, the parties have to establish a relation between the measures sought and the rights being claimed for through the judgment, [7]

Thirdly, they have to prove the urgency of the matter at hand and an actual probability of irreversible damage,[8]

And lastly, a recent development is the requirement, to prove that the rights contended are plausible. This was developed when the Court was giving provisional measures in the *Temple of Preah Vihear Case*.[9]

However, there have been confusions regarding the binding value of the provisional measures. This article seeks to examine this issue. It deals with the drafting history of Article 41 of the ICJ statute, the approaches to the interpretation of Article 41, the judicial cases dealing with provisional measures and finally a short discussion of the LaGrand case.

II. THE BINDING VALUE OF THE PROVISIONAL MEASURES

To ascertain the binding value of the provisional measures, it is indeed important to analyse Article 41 of the ICJ statute which deals with the provision. The Article reads as under: [10]

(1) The Court shall have 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.

(2) Pending the final decision, notice of the measures suggested shall forthwith be given to the

[3] Karin Oellers-Frahm, *Expanding the Competence to Issue Provisional Measures-Strengthening the InternationalJudidaFl unction*, 12 GERMAN LJ 1279, 1279 (2011).
[4] International Court of justice Rules of Court, Art 73 (adopted 1978, amended 2005), online at http://www.icj-cij.org/documents/index.php?pl=4&p2=3&p3=0 (visited Apr 3, 2012) (JCJ Rules).
[5] https://www.ejiltalk.org/recent-developments-with-regard-to-icj-provisional-measures/
[6] Yugoslavia v. US (Legality of Use of Force), Provisional Measures, 1999 ICJ 916, 923 (June 2, 1999).
[7] Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, http://www.icj-cij.org/docket/files/151/16564.pdf.
[8] Finland v Denmark, Provisional Measures, 1991 ICJ 12, 17.
[9] *Ibid*.
[10] Article 41, International Court Of Justice Statute, http://www.icj-cij.org/en/statute

parties and to the Security Council.

A simple reading of the bare text of the Article shows that the Court has been vested with the 'power' to issue provisional measures. This gives a hint that the court has been given much authority. However, this feeling of authority of power soon dissipates on reading the word 'indicate' placed in the same line. Unlike various other provisions, where the court has a power to issue orders, in regard to Provisional measures, it only has a power to indicate such measures. The dictionary meaning of the word 'indicate' is to merely point out or to show.[11]

At this juncture, it would be interesting to study the origin of the concept of 'provisional measures' vis-a-vis ICJ. The first instance of these measures was visible in Article 2*bis* the draft statute of the Permanent Court of Justice, which is considered to be the predecessor of the ICJ. This draft was prepared by the Advisory Committee of Jurists.[12] At the debate, one of the members from Brazil, Mr. Raul Fernandes, intended to make the provisional measures effective by enforcing them with penalties, however, this suggestion was voted down by other members.[13] He had also suggested that the Court should have the power to 'order' such provisional measures, which was also not accepted.[14] This is one strong instance which shows that the makers of the statute originally did not want the measures to be legally binding. The finally accepted Article 2*bis* read as follows:

"If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that the circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council."[15]

In a further amendment to the Article, the word 'suggest' was replaced by the word 'indicate' and 'should' was replaced by 'ought to.' It was considered that the word 'indicate' would fulfil and match the corresponding word '*indiquer*' in the French verison of the statute. Moreover, indicate was thought to be more impactful than the word suggest.[16] The amended provision was made Article 41 of the statute and it read as follows:

"The Court shall have the power to indicate, if it considers that the circumstances so require,

[11] http://dictionary.cambridge.org/dictionary/english/indicate
[12] *M. O. Hudson*, The Permanent Court of International Justice 1920-1942, 1943, 93; *Sh. Rosenne* (note 35), 21.
[13] Procès-Verbaux of the Proceedings of the Committee, 1920 (Procès-Verbaux).
[14] Ibid at pg. 588.
[15] Procès-Verbaux (note 153), 567 et seq.
[16] ZIMMERMANN, A., & INTERNATIONAL COURT OF JUSTICE. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 925(2006).

any provisional measures which ought to be taken to reserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council."

Later, with the formation of the ICJ, Article 41 was retrieved except the spelling errors in the earlier version which were corrected and the word Council was substituted by the word Security Council.

However, despite all these, the most important point which creates confusion in the mind of the scholars is the difference between the French and the English version of Article 41. An important point to note is that all the preparatory work for Article 41 ever since its drafting days was done in French language and as already stated that despite debates, the drafters did not use the word *'ordonner'*. The reason for this as discussed was that the drafters did not want to limit the states' sovereignty in any manner whatsoever. Also, the drafters mulled over the fact that the Court did not have any means to comply with the execution of such measures, hence they should not be legally binding.[17] This chain of thought seems rather erroneous on the part of the makers since lacking the tools to enforce execution does not necessarily render these measures non binding. Hence, the drafting history of Article 42 suggests that the provisional measures are not binding in nature.

The second point is the consideration of Article 94 of the U.N. Charter. It reads as follows:

1. *Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.*
2. *If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*

This provision can be interpreted in two ways. One view is that this Article also hints at the non-binding nature of provisional measures because the states have to comply with the decision of the Court and the word decision is interpreted to be 'judgments'. Since provisional measures are not actually judgments but orders, they cannot be enforced. Moreover, the language of Article 94 is similar to that of Article 59 in which the term 'decisions' have been widely interpreted as judgments. However, the conflicting view is that orders are also decisions as mentioned in para1, though not judgments as mentioned in para. 2 of Article 94 and hence they

[17] Ibid at pg. 954.

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can also be enforced. Also, there is instance of decisions which though not judgments having biding value such as the orders which are given by the ICJ under Article 48 of the ICJ statute. [18] However, the reality is quite contrary. In the case of *Medellin v Texas*[19], the Supreme Court of USA, categorically stated that the provisional measures are not binding since US being a permanent member can veto down any proceeding under Article 94(2) for the execution of provisional measures. This is in fact true for all the nations having the power to veto.[20]

The third point in this series is Article 78 of the Rules of the ICJ. It states that the Court may request information from the parties concerned regarding the implementation of the provisional measures. This again gives the feeling that the measures may have binding value. Though, the ultimate enforceability of Article 78 is itself questionable.

The International Court of Justice (ICJ) declared the adoption of a new Article 11 of its Internal Judicial Practice on December 21, 2020. In cases when the Court authorises temporary measures, the revised text calls for the establishment of an ad hoc committee of three judges to help with the monitoring of their execution. The purpose of the ad hoc committee is to review the data provided by the parties, provide a report to the Court, offer suggestions, and the Court will make the final decisions. It however, remains to be seen exactly how effective even that this new practice would be.

III. SCHOLARLY APPROACHES

Various legal scholars and judges have also been debating the binding value of the provisional measures since a long time.

The most common problem which attacks the binding capacity of provisional measures is that since these measures are given on pressing and urgent circumstances, the Court need not establish full fledged jurisdiction. It can issue such measures based on a prima facie jurisdiction, which may later be found out as faulty. In such cases, the binding value of such measures will compel the states to follow the measures even though there may not be proper jurisdiction. Also generally the parties are not given the option to appeal.[21] This assumption gives a serious blow to the whole notion of state sovereignty. The sovereign aspect of the states forms a vital component in International law.

[18] Supra note 15 at pg. 954.
[19] 552 US 491.
[20] Jake W Rylatt, Provisional Measures and the Authority of the International Court of Justice: Sovereignty vs. Efficiency, Leeds Journal of Law & Criminology, Vol. 1 No. 1.
[21] Peter J. Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 Am. J. Int'l L. 258, 277 (1974).

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Those who deny binding value also lay their basis on the drafting history of Article 41.

Another argument advanced is the positioning of Article 41 in the ICJ statute. The scholars argue that since it is in the part containing procedures of the court, the measures are not substantive law and hence not binding in nature.

On the other hand, are those scholars who argue in the favour of the binding value of Article 41. They believe in the functional approach. According to this approach, the ICJ has been created by the states with all the necessary power to help them achieve the aims vested them. Further by abiding by the statute of the Court and ratifying it, the states have also assented to the provisions of the statue. Hence they have to abide by it.

Regarding the issue that such measures are taken without establishing proper jurisdiction, it would be useful to note the view of Judge Nagendra Singh in the *Nuclear Tests case*.[22] He was of the view that examining the jurisdiction in detail would make the whole purpose of issuing provisional measures redundant, i.e., of giving effective relief urgently.

Also just because Article 41 is in the procedures section does not by itself make it non-binding, because Article 59 is also contained in the same section and it is binding. The general principle of international law also states that the parties in an international dispute where the case is pending in a court should not do anything which would make the final judgment futile. In the Genocide Convention case, Vice-President Weeramantry stated, "*to view procedural measures as not binding on the parties is to enable the ground to be cut under the feet not only of the opposite party but also of the court itself*"[23]

Also, making the provisions non binding makes no sense. It would make the provisions merely moral obligations upon the states and it would be useless to even go for such a measure then.

IV. JUDICIAL CASES

The first time that provisional measures were issued was by the PCIJ in the case of *Belgium v. China*[24] in 1927.

After that there has been an array of cases where the provisional measures were issued by the PCIJ as well as the ICJ. However, despite this the compliance of such measures by the states has been rather disappointing. This was generally where the cases were brought before the court

[22] New Zealand v France, Interim Protection, Order of 22 June 1973 (1973) ICJ Rep 135.
[23] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993 (1993) ICJ Rep 325, 374–389.
[24] Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China), PCIJ Ser. A, No. 8 (1927).

unilaterally, by one party. Till the *LaGrand* case,[25] the ICJ never seriously dealt with issue of the binding nature of the provisional measures. It meekly suggested implementation in the *Icelandic Fisheries case*[26]. Again in the *Tehran Hostages case*[27], the ICJ disapproved the non execution of its measures, however, it did not deal with the issue in detail. The issue whether such measures could be dealt as decision under Article 59 and 94 was discussed inconclusively in the *Anglo-Iranian Oil Company Case*[28]. In the *Nicaragua case*[29], the court stated, "*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*".

Finally the binding nature of the provisional measures was explained in positive in the *LaGrand case*.[30]

Facts: This case concerns one German individual named, Mr. Walter LaGrand who along with his brother was sentenced to death in the crime of murder and robbery in U.S.A. in the year 1984 by the Court of Arizona. This was challenged by the convicts before the Court in Arizona and Supreme Court of U.S.A, which denied any relief. However, the main contention in this case was that the U.S. authorities, namely the U.S. law enforcement agent failed to inform Mr. LaGrand about his rights under the *Vienna Convention on Consular Relations (1963)* ('VCCR'). According to this convention, under Art. 36 (1) (b), rights are given to an alien national to have communication with his consular authorities on his arrest. The German consular was also not informed about Mr. LaGrand and his brother's conviction. This was a clear violation of their consular rights under VCCR. Later in June 1992, the LaGrand finally came to know about his consular rights from a source and communicated to the German authorities. The authorities then tried to help the LaGrand brothers and raised the issue of violation of VCCR however, this was not taken into consideration by the U.S. Courts. After exhausting all legal proceedings, Karl was executed and Walter's was set to be executed on 3 March, 1999. Germany filed application to the ICJ just a day before LaGrand's scheduled execution asking for provisional measure for a stay on the execution of LaGrand. Sensing the gravity of the situation, the court granted provisional measures on the 3rd March, 1999[31]. However, the U.S. government neglected the measures and LaGrand was executed as

[25] LaGrand (Germany v. United States of America), Judgement, I. C. J. Reports 2001, p. 466
[26] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3.
[27] United States Diplomatic and Consular Staff in Tehran, Judgment, 1. C. J. Reports 1980, p. 3.
[28] Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952 : I.C. J. Reports 1952, p. 93
[29] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.
[30] *Supra* note 24.
[31] LaGrand [Germany v United States of America] [Provisional Measures])

scheduled.

This led to an enraged Germany filing a case against the U.S. and the governor of Arizona. Germany made four contentions among which the first dealt with the violation of the VCCR, the second dealt with the doctrine of procedural default and the fourth one dealing with reparations. The third submission was concerning the blatant violation of the provisional measures by U.S., which made the court decide on the issue at hand.

The German party contended that U.S. failed to comply with the provisional measure and should be held responsible. The U.S.A., on the other hand, contended that provisional measures were no binding, basing its claim on the intention of the drafting committee to keep it non- binding in nature and the usual state practice of not following the measures.

The Court while interpreting Article 41 first went to analyse the drafting history. It stated that even though the word used was 'indicate' and not 'order' however, the 'ought to' was sufficient to imply at the binding value of Article 41. Also, the word '*indiquer*' was only used because of the court lacked the means to enforce such measures but that did not imply that the measures were non- binding. Further according to the court, the Article was to help the court in fulfilling its objective of settling disputes and that could only happen if the provisions were of a binding nature. While the court did not deal with the issue of Article 94 in detail, the court stated that the measures were binding, whether they could be enforced through Article 94 or not.

Even though this case strongly and clearly rested the doubts for sure, there were still cases where states argued for stronger wordings for compliance.[32] However, non compliance has drastically decreased now. The recent example being the compliance of provisional measure by Pakistan in the *Jadhav case*.[33]

Also, what are the consequences which a state will face in case it fails to comply with the provisional measures is still in question.

V. CONCLUSION

After years of non-compliance of the provisional measures and decades of confusion persisting among scholars regarding their binding nature, the ICJ declared that the provisional measures were indeed binding. This case came as a relief and was much needed to establish the diminishing authority of the ICJ as well as that of the provisional measures. It was also needed because provisional measures are given in cases of gravity and urgency and the whole concept

[32] Avena and Other Mexican Nationals
[33] India v. Pakistan.

of issuing such measures would become worthless if they were not binding. A lot of provisional measures in the past have been rendered completely futile when the states ignored the execution of such measures. The U.S.A. in a number of cases ignored such measures and went ahead with executing people.

Though through the LaGrand case, the ICJ was successful in declaring that provisional measures are binding, the actual implementation of the same still requires a few steps to be taken. Given the confusing history in the drafting of Article 41 and the difference between the French and the English versions, it is advisable that changes are made in the language of Article 41 though proper amendments. This power has been given to the Court under Article 70 of the ICJ statute. Along with this there should be tools to check the implementation of the provisional measures. The court should plan to build a mechanism to enforce the measures, which could be complemented by imposing penalties to the erring states. This would ensure that the binding value of provisional measure is practiced in reality.

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 [ISSN 2581-5369]