

Provisional Measures and the Authority of the International Court of Justice: Sovereignty vs. Efficiency

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Abstract

Article 41 of the Statute of the International Court of Justice ('the ICJ' or 'the Court') allows the ICJ to indicate provisional measures providing interim protection to the rights of either party to a pending dispute. Provisional measures have rarely received compliance, leading to an apparent lacuna in the authority of the Court. This article will develop an argument from two starting premises: firstly, state consent is the primary value by which we can measure the legitimacy of international law; secondly, that compliance with provisional measures, granted under the 'inherent' jurisdiction of the Court and without the 'ideal' consent provided by both parties, is a stronger indicator of the Court's authority. From this position, the author will advocate an approach for greater clarity, consistency and restraint from the ICJ. In doing so, the article will contend that the Court's jurisprudence has provided an overly broad assertion of authority, leading to recent State and judicial backlash. The article will then consider extensions to Article 41, and argue that whilst the Court has been wise to limit its power to issue orders 'proprio motu', the extent of its authority to prevent the aggravation of a dispute is questionable following the recent *Temple of Preah Vihear* decision. Furthermore, it shall be argued that whilst the binding nature of provisional measures has now been confirmed, the lack of both State compliance and enforcement procedures detracts

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from the authority of the Court. Finally, experience will be drawn from courts of the European Union in order to advocate reform that will be both practical and implementable, clarifying the scope of the Courts' powers and consequently re-injecting legitimacy into its power to indicate provisional measures.

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I. INTRODUCTION

On 18th July 2011, the International Court of Justice ('the ICJ' or 'the Court') indicated provisional measures to preserve the rights of both Cambodia and Thailand pending handing down its final judgment in the *Temple of Preah Vihear* case.¹ In going beyond the request of Cambodia and ordering both parties to establish a provisional demilitarised zone surrounding the titular Temple, the Court reignited the debate as to the scope of its powers, in light of the fundamental conflict between State sovereignty and the efficiency of the ICJ as a forum for international dispute settlement. This article aims to evaluate the authority of the ICJ through an analysis of its power to indicate provisional measures.

The virtue of analysing the ICJ's authority via the power to indicate provisional measures is clear in a brief consideration of State compliance. Compliance with final judgments has been 'generally satisfactory',² notwithstanding the well-documented controversy surrounding the failure of the United States to comply with the *Nicaragua* judgment.³ In direct contrast is compliance with provisional measures, which has been notoriously weak.⁴ This author

¹ *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning The Temple of Preah Vihear (Cambodia v Thailand), Request for the Indication of Provisional Measures, Order of 18 July 2011* [2011] ICJ Rep 537.

² C Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004) 403.

³ A P Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18 EJIL 815.

⁴ *ibid* 821.

submits that such instances, where jurisdiction on the merits is not definitively established, provide a greater measure of the limits of the Courts' authority. In putting forward such an argument, two starting premises are required.

Firstly, this article will adopt a traditional position that State consent is the primary value by which we measure the legitimacy of international law.⁵ Whilst wholly supporting such a view, it must be noted there is no consensus among jurists as to the fundamental nature of consent.⁶ However, consent is the basis of the law of treaties, and arguably customary international law,⁷ two of the three 'primary' sources of international law under Article 38(1) of the Statute of the ICJ.⁸ Furthermore, the contentious jurisdiction of the ICJ is primarily based on State consent.⁹ Complex jurisprudential enquiries into the nature of international law could dominate the present questions of authority and compliance, but for the purposes of this article the argument will be premised on the view that the touchstone of international law is State consent.

Secondly, the reasoning of Llamzon is adopted, endorsing the suggested causal link between the type of jurisdiction and compliance.¹⁰ Llamzon posits a spectrum of types of consensual jurisdiction that correlate to compliance with the judgment or order

⁵ This has been the position adopted by the ICJ on multiple occasions: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] CJ Rep 14,135 ('in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise...'); *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3, 47 ('Here as elsewhere, a body of rules could only have developed with the consent of those concerned').

⁶ See, for example, Buchanan, labeling a view that merely derives the legitimacy of international law from State consent as 'simple': A Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (1st edn, OUP 2010) 90–92.

⁷ N Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' (2011) (Preprints of the Max Planck Institute for Research on Collective Goods) 1 <http://www.coll.mpg.de/pdf_dat/2011_04online.pdf> accessed 18 March 2013.

⁸ Along with general principles of international law under Article 38(1)(a)–(c) respectively of the Statute of the International Court of Justice (26 June 1945) 33 UNTS 993, with 'primary' referring to the fact that sources under Article 38(1)(d) usually must attach to a source under Article 38(1)(a)–(c) in order to be deemed authoritative by the Court.

⁹ See generally Statute of the International Court of Justice (n 8) Article 36.

¹⁰ A P Llamzon (n 2) 843.

granted by the ICJ.¹¹ At one end of the spectrum is the 'ideal' consent, namely where both parties have, as Llamzon argues, the dispute to the Court via a jointly-agreed 'special agreement',¹² which if submitted would yield the greatest likelihood of compliance. At the other end are unilateral applications whereby the respondent State's consent can be derived from either the optional clause of the ICJ statute¹³ or a treaty-based compromissory clause.¹⁴ Empirical research suggests that between 1949 and 2004, in the case of judgments rendered following special agreement, compliance was 85.7 per cent, whereas judgments on the basis of the optional clause or a compromissory clause received 40 per cent and 60 per cent compliance respectively.¹⁵ Provisional measures are almost invariably brought on a unilateral basis, at the weaker end of this consensual spectrum. Consequently, this article will progress on the underlying rationale that an analysis of the Court's ability to issue provisional measures provides a greater measure of the Court's authority due to being based on the 'weak' form of jurisdiction highlighted above. Whilst *prima facie* the basic answer may simply be that States are less willing to comply with unilaterally instigated decisions without their 'ideal' consent, a closer analysis reveals that it is not only the nature of the jurisdiction, but the Court's interpretation of its powers that has resulted in repeated non-compliance.

As such, this article will argue that the ICJ has diminished its authority by applying the power to indicate provisional measures too liberally, resulting in a lack of State compliance. Such State defiance

¹¹ *ibid.*

¹² Statute of the International Court of Justice (n 8) Art 36(1).

¹³ The optional clause allows States to make a unilateral declaration that they will submit to the jurisdiction of the ICJ in all legal disputes concerning: 'the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation; however, this is only with regards to disputes vis-à-vis States bound by a reciprocal declaration, see Statute of the International Court of Justice (n 8) Art 36(2).

¹⁴ Compromissory clauses are found in treaties or conventions to refer disputes under that instrument to the ICJ. Art 37 Statute of the International Court of Justice (n 8) recognizes the validity of such clauses.

¹⁵ E Posner and J Yoo, 'Judicial Independence in International Tribunals' (2005) 93 Cal L Rev 1, 37 citing T Ginsburg and R H McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 William & Mary L Rev (2004) 1229, app.

has withstood repeated attempts by the ICJ to confirm the binding nature of provisional measures, leading this author to advocate for greater clarity, consistency and restraint from the Court in applying its powers. In putting forward such an argument, this article will firstly introduce the basis of the Court's power under Article 41 of its constituting statute, before arguing that the Court's jurisprudence has provided an overly broad statement of authority, leading to recent State and judicial backlash. The article will then consider extensions to Article 41, and argue that whilst the Court has been wise to limit its power to issue orders *proprio motu*,¹⁶ the extent of its authority to prevent the aggravation of a dispute is questionable following the recent *Preah Vihear* decision. Furthermore, it shall be argued that whilst the binding nature of provisional measures has now been confirmed, the lack of enforcement procedures detracts from the authority of the Court. Finally, experience will be drawn from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in order to advocate reform that will be practical and implementable, clarifying the scope of the Courts' powers and consequently re-injecting legitimacy into its power to indicate provisional measures.

II. THE BASIS OF THE COURT'S POWERS

The Court's power to indicate provisional measures derives from Article 41(1) of the Statute of the ICJ, which states that:

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.

Whilst the aims and purposes of Article 41 are clear from the text, namely to preserve the rights of each party to a dispute until the final judgment,¹⁷ it must firstly be noted that the provision left a wide discretion to the Court, allowing the Court to create its own

¹⁶ Literally translating to 'on its own initiative'.

¹⁷ *Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990* [1990] ICJ Rep 64, 69; I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 712.

objective test as to when ‘circumstances so require’ measures to be indicated.¹⁸ The problem with such discretion lies in the fine balance that the ICJ has to strike when indicating provisional measures. The powers conferred under Article 41 have been carefully endowed to prevent frustration of the Court’s decisions,¹⁹ but the idea that incidental jurisdiction is based purely on the ‘objective fact’²⁰ that proceedings are before the Court is inherently at odds with the ‘well established principle of International Law... that the Court can only exercise jurisdiction over a State with its consent’.²¹

As submitted above, this requirement of consent is one that speaks to the very heart of international law itself, and the concepts of the sovereign equality of states and non-interference enshrined in the UN Charter.²² *Prima facie*, such powers conferred on the Court can be seen to present the Court as possessing great authority over international disputes, and the questionable limits of Article 41 have been a problem identified both in academia²³ and by the judiciary, when analysing the true meaning of phrases such as ‘circumstances so require’²⁴ and ‘rights of either party’.²⁵ As such, the Court has been left to decide the extent of its authority through a plethora of case law.

¹⁸ K Oellers-Frahm, ‘Article 41’ in Andreas Zimmermann, Christian Tomuschat and Karen Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (1st edn, OUP 2006) 962.

¹⁹ J G Merrills, *International Dispute Settlement* (5th edn, CUP 2011) 124.

²⁰ S Rosenne, *The Law and Practice of the International Court* (1st edn, Leyden 1965) 422.

²¹ *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954 (1954) ICJ Rep 19, 32; see also *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment (1992) ICJ Rep 240, 259-262; *East Timor (Portugal v Australia)*, Judgment (1995) ICJ Rep 90, 101.

²² In Arts 2(1) and 2(7) respectively of the UN Charter (24 October 1945), 1 UNTS XVI.

²³ H Thirlway, ‘The International Court of Justice’ in Malcolm Evans (ed) *International Law* (3rd edn, OUP 2010) 600; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 110.

²⁴ *Frontier Dispute, Provisional Measures, Order of 10 January 1986* (1986) ICJ Rep 3.

²⁵ *LaGrand (Germany v United States of America)*, Provisional Measures, Order of 3 March 1999 (1999) ICJ Rep 9 (Declaration of Judge Oda).

III. THE INTERPRETATION OF THE POWERS: THE COURT'S JURISPRUDENCE

In the application of its powers, in addition to using factual similarities as a form of quasi-precedent,²⁶ the ICJ has formulated a set of requirements that must be fulfilled in order to indicate provisional measures. Whilst members of the Court have been quick to acknowledge that there must be limits on such a wide discretionary power,²⁷ the cumulative²⁸ triggers have been interpreted very broadly by the majority of the Court, suggesting a desire not to inhibit its powers by bowing ceremoniously to sovereignty. The position taken in this article is that the fundamental concerns raised by various individual judges throughout the Court's jurisprudence should be granted greater weight, and the continued broad interpretation of the triggers provides a very real risk of undermining the overall authority of the ICJ. The Court's interpretation of these triggers, as most recently enunciated in the *Preah Vihear* case,²⁹ will now be analysed in turn.

The primary requirement is that the Court must have *prima facie* jurisdiction to hear the merits of the case.³⁰ This requirement, utilised from the earliest case law of the Court,³¹ speaks most

²⁶ *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996* (1996) ICJ Rep ICJ 13, 22 citing *Frontier Dispute* (n 24) (Declaration of Judge Mbaye) ('the court has consolidated its jurisprudence').

²⁷ *Anglo-Iranian Oil Co Case, Order of July 5th, 1951* (1951) ICJ Rep 89, 97 (Dissenting Opinion of Judges Winiarski & Badawi Pasha) ('The power given to the Court by Article 41 is not unconditional').

²⁸ *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976* (1976) ICJ Rep 3, 16 (Separate Opinion of President Jimenez de Arechaga) ('To refuse interim measures it suffices for only one of the relevant circumstances to be absent').

²⁹ *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning The Temple of Preah Vihear (Cambodia v Thailand), Request for the Indication of Provisional Measures, Order of 18 July 2011* (n 1) [33]–[57].

³⁰ I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 712.

³¹ *Anglo-Iranian Oil Co Case, Order of July 5th, 1951* (1951) ICJ Rep 89, 93; *Interhandel Case (Interim Measures of Protection), Order of October 24th 1957* (1957) ICJ Rep 105, 118 (Separate Opinion of Judge Lauterpacht). Whilst in the latter case the majority of the ICJ implicitly applied the criteria of *prima facie* jurisdiction, refusing to fully examine the jurisdictional arguments posited by the US regarding its reservation to the Court's compulsory jurisdiction, it was only in the Separate Opinion of Judge Lauterpacht where the criterion was enunciated in such a way. Whilst serious doubts as to the legitimacy of the Court's jurisdiction were

strongly to the consensual problems with incidental jurisdiction, as it requires only a brief consideration as to the Court's competence in regards to the merits. Even noting these deep-rooted problems, the Court has generally been unreceptive to arguments challenging its jurisdiction at this stage of proceedings, with Judge Singh in the *Nuclear Tests (New Zealand v France)* case³² stating that a more thorough examination of jurisdiction 'comes into conflict with the urgency of the matter coupled with the prospect of irreparable damage to the rights of the parties'.³³ He further developed this argument by stating that 'it is this situation [of urgency] which furnishes the "raison d'être" of interim relief'.³⁴ This is a view notably willing to sacrifice state sovereignty in the name of fulfilling the Court's view of justice in a particular case.

Furthermore, members of the Court have justified this derogation from state consent by reasoning that the root of its powers in relation to provisional measures is based in the inherent fact that Article 41 'is a provision which has been accepted by all parties to the Statute and in such acceptance lies the element of consent by States to this special form of jurisdiction'.³⁵ Such a rationale finds further support in the work of Rosenne, referring to incidental jurisdiction as 'inherent jurisdiction'.³⁶ Referring to such 'inherent jurisdiction' allows a comparison to the doctrine of *Kompetenz-Kompetenz*, which states that the 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.³⁷ Recourse to *Kompetenz-Kompetenz* provides a strong argument for the Court to justify its actions, particularly noting the doctrine's confirmed status as a general principle of international law.³⁸

swept aside, in this case provisional measures were rejected on a different ground, namely urgency.

³² *Nuclear Tests (New Zealand v France)*, *Interim Protection*, Order of 22 June 1973 (1973) ICJ Rep 135.

³³ *ibid* 146 (Declaration of Judge Nagendra Singh).

³⁴ *ibid*. [emphasis added].

³⁵ *Aegean Sea Continental Shelf*, *Interim Protection*, Order of 11 September 1976 (1976) ICJ Rep 3 (Separate Opinion of President Jimenez de Arechaga).

³⁶ S Rosenne, *The Law and Practice of the International Court*, (1st edn, Leyden 1965) 423.

³⁷ Statute of the International Court of Justice (n 8) Art 36(6).

³⁸ *Nottebohm*, *Preliminary Objection* (1953) ICJ Rep 111, 119–120.

Such justifications may hold weight if used proportionately, but the Court's liberal interpretation of 'prima facie' has brought into question the extent that derogation from State sovereignty can be legitimate. By the 1970s, the Court was ignoring explicit arguments against asserting jurisdiction.³⁹ *Nicaragua v USA*⁴⁰ exemplifies this point, where the Court granted provisional measures even though there were fundamental questions as to the validity of Nicaragua's declaration accepting compulsory jurisdiction under Article 36(2).⁴¹

On the turn of the millennium, tensions finally reached breaking point in the cases of *LaGrand*⁴² and *Avena*,⁴³ resulting in some wise warnings being given by Judge Oda, despite each time voting with the majority. In both cases, the Court indicated measures to stay the execution of individuals on death row in the USA, even in the face of many jurisdictional concerns, particularly concerning the extension of the ICJ to becoming a court of criminal appeal, therefore derogating from purely inter-state disputes. Judge Oda in *LaGrand* made a pertinent statement:

[Exercising jurisdiction] to intervene directly in the fate of an individual... would mean some departure from the function of the principal judicial organ of the United Nations... to settle inter-State disputes concerning the rights and duties of States.⁴⁴

Judge Oda went one step further in his Declaration in *Avena*, stating that Mexico had seized the opportunity to subject the USA to the compulsory jurisdiction of the Court in order to show their

³⁹ eg *Case Concerning United States Diplomatic & Consular Staff in Tehran (US v Iran), Provisional Measures* (1980) ICJ Reports 3, 11; *Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973* (1973) ICJ Rep 328, 328–29; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Interim Protection, Order of 17 August 1972* (1972) ICJ Rep 30, 30–32.

⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Provisional Measures, Order of 10 May 1984* (1984) ICJ Rep 14, 169.

⁴¹ *ibid* 175.

⁴² *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999* (1999) ICJ Rep 9.

⁴³ *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures, Order of 5 February 2003* (2003) ICJ Rep 77.

⁴⁴ *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999* (1999) ICJ Rep 9 (Declaration of Judge Oda, 19 [emphasis added]).

abhorrence towards capital punishment.⁴⁵ If members of the Court were wise to such potential abuse of its process, the question remains as to why it indicated measures when jurisdiction was so inconclusive? Whilst the Court in both of these cases undoubtedly harboured humanitarian motives, this alone would provide a hypocritical stance in light of the aforementioned statement of Judge Oda in *LaGrand*.⁴⁶

Decisions such as *LaGrand* chip away at modern legal positivism, and whilst the ICJ cannot be devoid of all humanitarian concerns, it can be strongly argued that it is not a Court of criminal appeal or human rights.⁴⁷ In comparison, the European Court of Human Rights has a system of indicating interim measures,⁴⁸ and despite the Court's compulsory jurisdiction for 'all matters concerning the interpretation and application of the Convention',⁴⁹ there has been a development of similar requirements to the ICJ through jurisprudence to limit such powers. Harby notes that the flexible application of these requirements is necessary for a Court built on humanitarian concerns,⁵⁰ but for a court empowered to adjudge on a purely consensual basis, this cannot be the case without seriously undermining its own authority. Judge Oda's reservations pose important questions regarding the true scope of the Court's authority, and more broadly regarding the future of the ICJ as a forum of purely inter-state dispute settlement. However, to continue to make decisions on such bases without facing the issue head-on can only diminish the authority of the Court, and for such

⁴⁵ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Provisional Measures, Order of 5 February 2003 (2003) ICJ Rep 77, 94 (Declaration of Judge Oda).

⁴⁶ Sloane questions the propriety of such measures; R. Sloane, 'Measures Necessary to Ensure: The ICJ's Provisional Measures Order in *Avena and Other Mexican Nationals*' (2004) 17 LJIL 673, 683.

⁴⁷ Indeed the Court itself stated that 'it is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form'; *South West Africa, Second Phase, Judgment* (1966) ICJ Rep 6, 34.

⁴⁸ Rules of Court, European Court of Human Rights (entered into force 1 May 2012), Rule 39.

⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (entered into force June 2010), Art 32.

⁵⁰ C Harby, 'The changing nature of interim measures before the European Court of Human Rights' (2010) EHRLR 73.

reasons this author submits that the Court needs to take a more restrained approach to its application of this criteria, at least for the time being.

In order to define its authority to a greater extent, the Court has indicated further conditions to be satisfied, the first being that the measures requested must link to the rights to be determined upon at the merits stage of proceedings.⁵¹ This is in order to adjudge only on the rights placed before it and prevent the court encroaching on to the territory of the United Nations' political organs by 'clarify[ing] the legal situation for the entire international community'.⁵² The Court must be commended for the generally conservative way it has approached this limit, such as the *Frontier Dispute (Burkina Faso v Mali)* case.⁵³ The Court in that case accepted Mali's argument that ordering an unconditional removal of troops from an area whose boundary was the source of the dispute in question would be 'in fact tantamount to requesting the Court to grant immediately its claim on the merits'.⁵⁴

In direct contrast is the way the Court has interpreted the trigger that there must be a 'real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision'.⁵⁵ Without this urgency, the Court would be effectively ruling on the merits, and as such this requirement speaks to the core of the Court's authority,⁵⁶ yet in recent history the Court has constructed this requirement widely to cover situations where the 'irreparable prejudice' could be months away,⁵⁷ or where there

⁵¹ *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976* (1976) ICJ Rep 3, 11.

⁵² *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, 345.

⁵³ *Frontier Dispute, Provisional Measures, Order of 10 January 1986* (n 24).

⁵⁴ *ibid* 7; the Court instead compromised by ordering a withdrawal of troops behind such lines as to be determined by an agreement of the respective governments in the next 20 days.

⁵⁵ *Passage through the Great Belt (Finland v Denmark), Provisional Measures, Order of 29 July 1991* (1991) ICJ Rep 17.

⁵⁶ *Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973* (1973) ICJ Rep, 328, cf *LaGrand* (n 42) where the required imminence was mere hours.

⁵⁷ *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures, Order of 5 February 2003* (2003) ICJ Rep 77 (where measures were granted to stay the executions of three Mexican nationals even though execution

is merely on going vulnerability.⁵⁸

In light of the foregoing considerations, recent jurisprudence suggests an ICJ struggling to decide whether to define a more restrictive approach with the requirement that the rights said to be in risk of irreparable harm must be 'plausible'. This was first enunciated in the *Belgium v Senegal* case,⁵⁹ and has been cited in subsequent cases.⁶⁰ Whilst this may appeal to supporters of orthodox state sovereignty, it is not without its critics, even internally. Scathing comments were made in the *Nicaragua* Separate Opinions of Judge Koroma⁶¹ and Judge Sepulveda-Amor, with the latter emphasising that the imprecise nature of 'plausible' cannot be merely consigned to the realm of 'academic subtleties' and that the 'Order should not be read as introducing a new requirement under Article 41 of the Statute'.⁶²

It remains to be seen whether this requirement of plausibility will withstand further judicial scrutiny, though a strong argument remains as expressed by Judge Koroma that a clear standard to *prima facie* evaluate parties' rights would ensure the provisional measures process is not abused,⁶³ thus more clearly defining the authority of the ICJ.

In consideration of all the triggers, whilst the Court has been wise to fetter its own power at times in refusing measures where there is a complete and manifest lack of jurisdiction,⁶⁴ it has manipulated its self-imposed requirements to assert its authority very

dates had not been fixed).

⁵⁸ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) Provisional Measures, Order of 15 October 2008* (2008) ICJ Rep 353, 396.

⁵⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Provisional Measures, Order of 28 May 2009* (2009) ICJ Rep 139, 151.

⁶⁰ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Provisional Measures, Order of 8 March 2011* (2011) ICJ Rep 6, 18; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning The Temple of Preah Vihear (Cambodia v Thailand), Request for the Indication of Provisional Measures, Order of 18 July 2011* (n 1) 9.

⁶¹ *ibid* Separate Opinion of Judge Koroma, [2].

⁶² *ibid* Separate Opinion of Judge Sepulveda-Amor, [13]–[16].

⁶³ *ibid* Separate Opinion of Judge Koroma, [13].

⁶⁴ See, for example, the *Interhandel Case (Interim Measures of Protection), Order of October 24th, 1957* (n 31) 105, 107 (where it was stated the issue was 'a matter essentially within its [the USA's] domestic jurisdiction').

widely. In doing so, the Court has led States such as the US to challenge its authority in making excursions into their domestic affairs,⁶⁵ and it must be considered whether any future attempts to assert wider jurisdiction will serve to undermine rather than amplify the Court's authority.

Furthermore, with the creeping judicial criticism against asserting such wide authority also becoming apparent throughout the aforementioned various separate and dissenting opinions, the prospect of a higher, or at least clarified, threshold for provisional measures would do much in settling the debate as to the extent of the Court's powers under Article 41. In the Court of Justice of the European Union (CJEU), a similar power to grant interim measures in any case before it is present, under similarly wide provisions.⁶⁶ However, for the CJEU, limits are stated in the official rules of procedure. Article 83(2) states that alongside the requisite urgency, there must be 'pleas of act and law establishing a *prima facie* case for the interim measures applied for'.⁶⁷ Not only has the CJEU provided a higher threshold in terms of establishing a '*prima facie case*', as opposed to merely *prima facie jurisdiction*, but also its case law has consistently reminded parties of this standard.⁶⁸ Whilst academic calls for the ICJ to match such a standard have not been answered,⁶⁹ in light of recent developments the ICJ should revisit the area and provide some certainty to its own powers at a more suitable threshold.

⁶⁵ Highlighted by Sloane in reference to the *Avena* hearings; R Sloane, 'Measures Necessary to Ensure: The ICJ's Provisional Measures Order in *Avena* and Other Mexican Nationals' (n 46) 680.

⁶⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Arts 278–279.

⁶⁷ Rules of Procedure, European Court of Justice (Adopted and entered into force on 19 June 1991), Art 83(2).

⁶⁸ Case C-213/89 *R v Secretary of State for Transport ex parte Factortame Ltd* [1990] E.C.R. 2433; Case C-87/94 *Commission v Belgium* [1994] ECR I-1395; Case C-272/91 *Commission v Italy* [1992] ECR I-00457.

⁶⁹ P A Essoff, 'Finland v Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures' (1991) 15(3) *Fordham International Law Journal* 839, 878.

IV. CLARIFYING THE COURT'S POWER: *Proprio Motu*

A further extension of the powers of the ICJ to issue interim measures can be found in the official Rules of Court. These are annexed to the Statute, pursuant to Article 30,⁷⁰ and they are a statement of the procedural rules that apply in the ICJ. Article 75 states that:

The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.⁷¹

This far-reaching power under Article 75 allows the Court to issue provisional measures *proprio motu*, literally 'on its own initiative', and without oral hearings. Whilst the rule suggests potential conflicts with the *non ultra petita* rule,⁷² Sztucki argues to the contrary, that authority is added to such measures on the basis that they are without the 'inspiration' of the parties and thus 'prompted exclusively by considerations of objective judicial necessity'.⁷³

Whilst this argument may hold weight theoretically, in the single instance that the Court has used this power,⁷⁴ namely the *LaGrand* case,⁷⁵ the order not to execute Mr LaGrand was ignored by the USA. In addition to stressing that this was a situation of 'extreme urgency',⁷⁶ it must be noted that certain members of the Court far from relished using this option both when issuing provisional measures and deciding on the merits.

⁷⁰ UN Charter (24 October 1945), 1 UNTS XVI, Art 30.

⁷¹ ICJ Rules of Court (Adopted on 14 April 1978 and entered into force on 1 July 1978), Art 75(1).

⁷² Literally translating to 'not beyond the request', therefore preventing the consideration of any matters not submitted by the parties seizing the Court; see, for example, *Request for interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950* (1950) ICJ Rep 395, 402 ('it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions').

⁷³ J Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (1st Edn, Kluwer Law International 1983) 154.

⁷⁴ As noted in G Zyberi, 'Provisional Measures of the ICJ in Armed Conflict Situations'. (2010) LJIL 570, 572.

⁷⁵ *LaGrand* (n 42) 9.

⁷⁶ *ibid* 14.

Whilst it is clear that Article 75 bestows upon the Court great authority, it is the scepticism and regret shown by both Judge Oda⁷⁷ and Judge Schwebel⁷⁸ in the *LaGrand* case alongside the State disobedience that must draw the focus. Such power may purport to enlarge the authority of the Court, but sovereignty demands this power should be used sparingly, if not consigned back to academic discourse.

V. ADDITIONAL POWERS TO PREVENT THE 'AGGRAVATION OF A DISPUTE'

A further facet to the authority of the Court is the power to indicate interim measures in order to prevent the aggravation of a dispute. The first, modern authoritative statement from the ICJ was made in the *Frontier Dispute* case in 1986, where it was held:

Independently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require.⁷⁹

Where this power derives from is a topic of contention, with Oellers-Frahm in the commentary to Article 41⁸⁰ arguing that the power is merely giving emphasis to the Court's *proprio motu* powers.⁸¹ On the other hand, a stronger argument states that not only is the concept of the prevention of aggravation 'broader than the notion of irreparable harm',⁸² but the corresponding case law pre-dates the inception of any powers *proprio motu*.⁸³

⁷⁷ *ibid* 20 (Declaration of Judge Oda) ('I reiterate and emphasize that I voted in favour of the Order solely for humanitarian reasons').

⁷⁸ *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999* (1999) ICJ Rep 9, 22 (Separate Opinion of Judge Schwebel).

⁷⁹ *Frontier Dispute, Provisional Measures, Order of 10 January 1986* (n 24) 9.

⁸⁰ K Oellers-Frahm, 'Article 41' in Zimmerman et al (eds) *The Statute of the International Court of Justice: A Commentary* (1st edn, OUP 2006) 924.

⁸¹ *ibid* 932.

⁸² P Palchetti, 'The Power of the ICJ to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21(3) LJIL 623, 634.

⁸³ Whilst the corresponding case law can be traced back to *Electric Company of Sofia & Bulgaria (Argentina v Uruguay), Provisional Measures, Order of 5 December*

Following either of the preceding viewpoints highlights, at the very minimum, the fact that the Court has once again interpreted its authority very widely. Whilst Palchetti argues that the Court has issued such measures only when all of the appropriate conditions are fulfilled,⁸⁴ therefore reflecting a restrained assertion of authority, the recent *Preah Vihear* case⁸⁵ has brought into question the extent to which the Court may unilaterally interfere in these situations. After setting the tone by ordering the withdrawal of troops on two separate requests for provisional measures,⁸⁶ the ICJ in the *Preah Vihear* case ordered the creation of a demilitarized zone of its own construction, reminding the parties that it had the authority to issue orders different to those requested.⁸⁷

The fact that the measure was voted 11 to 5 instantly speaks to its controversial nature,⁸⁸ and President Owada in his Dissenting Opinion made a pertinent statement to the effect that the creation of a demilitarized zone goes beyond the essential characteristic that provisional measures are incidental to the main dispute.⁸⁹ Furthermore, Judge Al-Khasawneh stated that such a measure is 'both unnecessary for the protection of the rights at issue and infinitely open to accusations of arbitrariness'.⁹⁰

This decision provides a very strong declaration of authority by the Court, but the concerns stated by some of the judges speak to an air of caution. It does stretch the limits of incidental jurisdiction, even more so when considered this was also on the new grounds of measures attached to a request for interpretation of a judgment,

1939 PCIJ Rep (Series A/B) No 79; Noting that the Statute of the ICJ was a fundamentally unchanged base from the PCIJ Statute, leaving no questions as to authority, the power to issue measure *proprio motu* was only inserted by the Rules of Court on 14 April 1978.

⁸⁴ P Palchetti (n 82) 642; see also M N Shaw, *International Law* (6th edn, CUP 2008) 1095 in reference to *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment (2002) ICJ Rep 303.

⁸⁵ *Temple of Preah Vihear* (n 22).

⁸⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Provisional Measures, Order of 1 July 2000 (2000) ICJ Rep 128; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures, Order of 8 March 2011 (2011) ICJ Rep 6, 26.

⁸⁷ *Temple of Preah Vihear* (n 1) 15–16.

⁸⁸ *ibid* 19.

⁸⁹ *ibid* Dissenting Opinion of President Owada, 1.

⁹⁰ *ibid* Dissenting Opinion of Judge Al-Khasawneh, 1.

but it remains to be seen whether this will be a single occurrence or a new precedent.

In addition, measures of this type bring into context the debate as to the proper separation of powers between the ICJ and the Security Council. Situations requiring a declaration to prevent the aggravation of a dispute have been characterised by armed conflict, and they are invariably intertwined with a complex political backdrop, as was stated in the *Tehran Hostages* case.⁹¹ It may therefore be argued that such decisions should be at the behest of the Security Council, as the political organ with the 'primary responsibility for the maintenance of international peace and security'.⁹²

In support of this view, the Court has showed deference to the powers of the Security Council in the *Aegean Sea* case,⁹³ by refusing to grant measures where the Security Council was already seized of the matter. The rationale in this case was that the Security Council had established a dialogue-based system based on fostering negotiations, which the Court ruled was a better alternative than ordering unilateral measures.⁹⁴

On the other hand, the Security Council is not an all-powerful 'sovereign authority',⁹⁵ and the argument of Akande that the ICJ should not ignore its responsibilities by over-deference⁹⁶ holds strong weight. Refusal to grant provisional measures to stay an urgent conflict may have catastrophic humanitarian consequences, and as such the Court has been more than justified in making positive assertions as to its authority. This was exemplified in the *Nicaragua* case,⁹⁷ where it was stated that the Court should not decline an essentially judicial task due to political issues.⁹⁸

⁹¹ *Case Concerning United States Diplomatic & Consular Staff in Tehran (US v Iran)*, *Provisional Measures* (1980) ICJ Rep 3, 11.

⁹² UN Charter (24 October 1945), 1 UNTS XVI, Art 24(1).

⁹³ *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976* (1976) ICJ Rep 3.

⁹⁴ *ibid* 12–13.

⁹⁵ D Akande, 'The ICJ and the Security Council: Is There Room for Judicial Control of Decisions of the Political Nations of the United Nations?' (1997) 46 ICLQ 309, 342.

⁹⁶ *ibid*.

⁹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Provisional Measures, Order of 10 May 1984* (1984) ICJ Rep 169.

⁹⁸ *ibid* 186.

The middle ground of such a debate is arguably the best approach, nothing that both the Court and the Security Council are primary organs of the UN,⁹⁹ and as such should work harmoniously. As was stated in *DRC v Uganda*, 'Both organs can perform their separate but complementary functions with respect to the same event',¹⁰⁰ but this is prefaced on the currently idealistic¹⁰¹ notion that there is a clear separation of powers between political and judicial organs. Until the relationship between the ICJ and Security Council is clarified, the fact that both organs may issue provisional measures will provide a caveat to the authority of the Court.

VI. THE BINDING NATURE OF PROVISIONAL MEASURES

A final consideration when analysing the authority of the Court is the effect of provisional measures orders, and how the international community has received them. For over eighty years¹⁰² whether or not such orders were binding was at the best 'unclear',¹⁰³ and consigned to academic debate,¹⁰⁴ until in 2001 the ICJ finally made a definitive statement in the *LaGrand* case.¹⁰⁵ In this case, the US once again failed to comply with an order to stay the execution of a foreign national on death row following allegations that consular rights had been denied.¹⁰⁶ It was consequently stated that 'orders

⁹⁹ UN Charter (24 October 1945) 1 UNTS XVI, Art 7.

¹⁰⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Provisional Measures, Order of 1 July 2000 (2000) ICJ Rep 111, 126.

¹⁰¹ K R Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship' (2006) Colum L Rev 435, 463.

¹⁰² Highlighted by G Naldi, 'International Court of Justice declares provisional measures of protection binding' (2002) LQR 35, 35. The first use of provisional measures was by the PCIJ in *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium/China)*, Request of 25 November 1926, Order of 8th January, PCIJ, Series A, No 8, 6.

¹⁰³ J G Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 ICLQ 90, 116.

¹⁰⁴ Vice President Weeramantry provides a useful summary of such debates in his Separate Opinion in *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.

¹⁰⁵ *LaGrand (Germany v United States of America)*, Judgment (2001) ICJ Rep 466.

¹⁰⁶ 'Once again' is in reference to *Vienna Convention on Consular Relations (Paraguay v United States of America)*, Provisional Measures, Order of 9 April 1998 (1998) ICJ

on provisional measures under Article 41 have binding effect'.¹⁰⁷

Such an indication was well overdue, particularly noting the poor record of States ignoring post-World War II measures.¹⁰⁸ But even with this purported binding effect, in the following (and factually similar) case of *Avena and Other Mexican Nationals*¹⁰⁹ Mexico was quick to argue that a stronger lexical construction was required from the Court if measures were deemed to be necessary. In response to this request, the Court directed the USA to 'take all measures necessary'¹¹⁰ to prevent the executions, providing a more unequivocal command than to 'take all measures at its disposal', as in *LaGrand*.¹¹¹ In providing such a direction to 'take all measures necessary', the Court's language mirrors that provided in binding Security Council resolutions made under Chapter VII UN Charter.¹¹² It would appear that the Court intended to bestow upon its own orders the same binding quality as Security Council Resolutions. Recent jurisprudence has provided subsequent statements as to affirm the emergence of this principle,¹¹³ and consequently it must be argued that this provides greater certainty as to the authority of the Court.

Whilst the underlying argument of this article remains that the Court has interpreted its authority under Article 41 to a questionable width, it is conceded that this clarification is indeed essential to the ability of the ICJ to guide parties to settle disputes peacefully. As was most eloquently put by Vice-President Weeramantry in the *Genocide Convention* case,¹¹⁴ 'to view procedural measures as not binding on the parties is to enable the ground to be cut under the

Rep 248.

¹⁰⁷ *LaGrand (Germany v United States of America), Judgment* (n 105) 506.

¹⁰⁸ J Sztucki, *Interim Measures in The Hague Court: An Attempt at a Scrutiny* (1st edn, Kluwer Law International 1983) 144.

¹⁰⁹ *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures, Order of 5 February 2003* (2003) ICJ Rep 77.

¹¹⁰ *ibid* 91–92 [emphasis added].

¹¹¹ *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999* (1999) ICJ Rep 9, 16.

¹¹² UN Charter (24 October 1945), 1 UNTS XVI, Chapter VII.

¹¹³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment* (2005) ICJ Rep 258, [263]; *Temple of Preah Vihear* (n 1) [67].

¹¹⁴ *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.

feet not only of the opposite party but also of the court itself'.¹¹⁵ Further support is highlighted in *LaGrand*, stating that any assertion that they were not binding 'would be contrary to the object and purpose of that Article'.¹¹⁶

Whilst in *Avena* the Court appeared to grant itself supervisory jurisdiction over the implementation of its measures,¹¹⁷ an essential caveat that has divided the judiciary and academia is the lack of enforcement proceedings should a state fail to comply,¹¹⁸ and whether this detracts from the authority of the ICJ. It is conceded that under Article 94(2) of the UN Charter, states may call upon the Security Council to take measures to implement judgments, but such an argument faces tough criticism in light of the approach of the US to both provisional measures and final judgments.

Whilst the above example of *LaGrand* highlights the US approach to provisional measures, the US approach to ICJ judgments as a whole is instructive as to the overall problems that result from the lack of an effective enforcement system. In *Medellin v Texas*,¹¹⁹ the US Supreme Court ruled that decisions of the ICJ are not binding in domestic courts, and furthermore that international legal obligations must be statutorily enacted in order to be binding. Even more striking was its reasoning that since the US has a permanent veto in the Security Council, any measures requested by opposing states under Article 94(2) can be blocked.¹²⁰ By logical extension, Vasquez argues that any of the five permanent members of the Security Council could avoid measures for ignoring an interim order.¹²¹ Such arguments hold strong weight, and therefore whilst the Court

¹¹⁵ *ibid* Separate Opinion of Vice-President Weeramantry, 376.

¹¹⁶ *LaGrand (Germany v United States of America), Judgment* (n 105) 503 accepting an argument based on Art 36(2) of the Vienna Convention on Consular Relations.

¹¹⁷ *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures, Order of 5 February 2003* (2003) ICJ Rep 77, 92.

¹¹⁸ Cf. Vice-President Weeramantry in *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, stating that the lack of enforceability does not make measures any less binding; Y Tanaka, 'A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011' 11 CJIL (2012) 191, 211, stating this weakens provisional measures.

¹¹⁹ 552 US 491 (2008).

¹²⁰ *ibid* 13.

¹²¹ C M Vasquez, 'Less Than Zero?' (2008) 102 AJIL 563, 572.

has purported to expand its authority by declaring provisional measures to be binding, this caveat in enforcement leaves measures akin to a hollow threat.

Furthermore, these arguments are compounded by further consideration of the jurisprudence of the US domestic courts following *Medellin v Texas*, namely the cases of *Leal Garcia v Texas*¹²² and *Gutierrez v State of Nevada*.¹²³ In the former, whilst Bryer J issued a strong dissent stating that the Supreme Court was ignoring its international obligations by failing to grant a stay over the execution of Mr Leal Garcia, the majority were content to follow the precedent set in *Medellin* and ignore the ICJ judgment.¹²⁴ However, in the latter case, the Nevada Supreme Court distinguished both *Medellin* and *Leal Garcia* and applied the decision of the ICJ in *Avena*. Even so, this was only the second US state to implement the ICJ's decision, thus compounding the aforementioned problems regarding the lack of effective enforcement measures.¹²⁵ The optimists among us might argue that such cases seem to highlight a slowly-increasing propensity to utilise decisions of the ICJ as highly persuasive authority in the domestic courts, however it must once again be noted that these decisions were made following the final judgment of the ICJ in *Avena*, and, as noted above, compliance with final judgments has been generally satisfactory. What can be extrapolated from this situation is that whether provisional measures are truly binding in practice as well as in rhetoric is something that needs further clarification, and requires an effective enforcement procedure that is currently lacking for both provisional measures and final judgments. In the *Avena* case, the US has not truly complied in good faith with the provisional measures order *or* the final judgment, and yet faced no negative consequences. For the authority of the ICJ to be maintained, an effective enforcement procedure is truly

¹²² 564 US 131 S. Ct. 2866, 2867 (2011).

¹²³ Unpublished Order of Reversal and Remand no 53506 (Supreme Court of Nevada, 19 September 2012) <http://develop.temple.edu/lawschool/faculty/2012-09-19GutierrezOrderofRemand_Hollis.pdf> accessed 17 March 2013.

¹²⁴ *Leal Garcia v Texas* 564 US 131 S. Ct. 2866, 2867 (2011), (Dissent of Bryer J.)

¹²⁵ D Hollis, 'Avena Lives! Supreme Court of Nevada Cites ICJ in Granting Gutierrez Evidentiary Hearing' *Opinio Juris* (October 5 2012) <<http://opiniojuris.org/2012/10/05/avena-lives-supreme-court-of-nevada-cites-icj-in-granting-gutierrez-evidentiary-hearing/>> accessed 17 March 2013.

required.

VII. REFORM

Alongside showing greater restraint in the use of Article 41, the ICJ should seek to instil clarity and consistency in its application, which it is submitted would be most effective through a formal reform of the power in the ICJ Statute. Under Article 70 of the ICJ Statute,¹²⁶ the Court has the power to propose amendments to its constituting statute via the Secretary-General, which will then be considered in the same way as amendments to the UN Charter.¹²⁷ An attractive approach to propose would be to follow suit of the European Union in a three-stage reform:

Firstly, the standard of *fumus boni iuris* ('presumption of sufficient legal basis' for the right claimed) should be used, as advocated for by Judge Abraham in the Pulp Mills case,¹²⁸ so as to provide a higher threshold of admissibility, more in line with the delicacies of incidental proceedings. Such a threshold could also be compared with the requirement of plausibility considered above. This author sees great strength in the argument of Judge Abraham that it is impossible to order a State to comply with unilaterally instigated measures, 'unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated'.¹²⁹ And yet, this is the result of the Court's firm separation between incidental proceedings and the merits stage. This approach would require greater restraint on behalf of the ICJ, consequently providing a smaller incursion into State sovereignty and creating a desirable solution to incentivise compliance, particularly following the confirmation in *LaGrand* that provisional measures are binding.

Secondly, this new threshold should be enunciated in both the Statute of the ICJ and the official Rules of Court so as to provide greater clarification and certainty for both the Court itself and any parties wishing to bring an application for provisional measures.

¹²⁶ Statute of the International Court of Justice (n 8) Art 70.

¹²⁷ Statute of the International Court of Justice (n 8) Art 69.

¹²⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, *Provisional Measures, Order of 13 July 2006* (2006) ICJ Rep 113, 140.

¹²⁹ *ibid.*

Finally, and most pertinent to the external authority of the Court, there should be solid enforcement procedures should a state choose to ignore provisional measures, similar to the pecuniary principle enshrined in the Treaty on the Functioning of the European Union.¹³⁰ In a world still attempting to recover from a global financial crisis, surely pecuniary measures provide the greatest method to ensure compliance.

As a final consideration, it must be emphasised that the theory underpinning this article, namely the primacy of State consent, is reconcilable with the argument that a pecuniary enforcement procedure is required for incidental proceedings. The above three-stage reform is one that must be taken as a whole in order to ensure consistency, clarity and the requisite level of respect for State sovereignty from the Court. When these essential requirements are fulfilled, it is submitted that the Court moves close enough to the 'ideal' form of consent to grant it the requisite authority to make pecuniary penalties and receive compliance.

VIII. CONCLUSION

The jurisprudence of the ICJ in relation to provisional measures paints a picture of a court struggling to balance the concept of state sovereignty with its role alongside the Security Council to maintain international peace and security. Whilst 'the requirements for the indication of provisional measures have evolved over the years',¹³¹ they have mainly done so without due regard to the underlying governing principles of international law, resulting in the Court facing backlash both internally from its own members, and externally from states unwilling to cooperate with the Court trampling on their sovereignty.

For the Court to maintain its authority, surely reform is due, and this author would submit that the proposals advocated above are the most practical and implementable. A higher threshold that is identifiable within the Court's constituting statute would

¹³⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Art 260.

¹³¹ R Higgins, 'Interim Measures for the Protection of Human Rights' (1997) *Colum J Transnat'l Law* 91, 106.

seek to address the identified issues of consistency and compliance whilst ensuring judicial restraint. Furthermore, the addition of a pecuniary principle would allow the Court to provide a short, sharp shock to deter disobedience. Over 65 years have passed without amendment to the UN Charter or ICJ Statute, so such calls for reform may be considered idealistic, but until such change occurs the true authority of the ICJ will remain in question. Whilst *prima facie* the Court would appear to have granted itself great authority, the ICJ now finds itself walking the tightrope between fading into ineffectiveness via inactivity or conversely succumbing to a withdrawal of state support through over-activism.