THE LAGRAND CASE (FEDERAL REPUBLIC OF GERMANY V UNITED STATES OF AMERICA)*

THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE UNDER THE *VIENNA CONVENTION ON CONSULAR RELATIONS*: A RIGHT FOR WHAT PURPOSE?

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I INTRODUCTION

On 3 March 1999 a German national, Walter Burnhart LaGrand, was executed by cyanide gas in a correctional facility in Arizona in the United States for a criminal offence he committed in the mid 1980s. The execution took place at its scheduled time, just four hours after the International Court of Justice ('ICJ'), at the request of the Federal Republic of Germany, indicated provisional measures to halt the execution.[1] It was only a week after Walter LaGrand's half-brother, Karl Hinze LaGrand, also a German citizen, was executed by lethal injection for his involvement in the same felonies.[2] The executions themselves

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* *LaGrand (Germany v United States of America) (Merits)* 27 June 2001 <http://www.icj-cij.org> at 30 April 2002. The phrase 'Right to Information on Consular Assistance' is borrowed from the title to a recent Advisory Opinion of the Inter-American Court of Human Rights: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, below n 71. It is used here as a catch-all description of the various information and communication rights that attach to individuals described in art 36 of the 1963 *Vienna Convention on Consular Relations*, below n 5.

1 *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9 ('*LaGrand Case (Provisional Measures)*'). The ICJ indicated provisional measures at 7.15pm (The Hague time) on 3 March 1999 on the basis of Germany's application, submitted less than 24 hours earlier.

2 Karl LaGrand was executed on 24 February 1999, the first German citizen to be executed in the US since the founding of the Federal Republic of Germany in 1949. See Monica Tinta, 'Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the *LaGrand* Case' (2001) 12 *European Journal of International Law* 363.

were not unusual; 17 foreign nationals have been executed in the US since 1976[3] and over 110 are presently on 'death row'.[4] What was remarkable was that the executions proceeded despite claims by Germany that the US had breached international law by failing, until well after conviction and sentencing, to accord the LaGrand brothers rights to information on consular assistance under article 36 of the *Vienna Convention on Consular Relations* ('*VCCR*').[5] Even more remarkably, the execution of Walter LaGrand proceeded in the face of provisional measures ordered by the ICJ to stay the execution pending the hearing of the merits of Germany's application.

On 27 June 2001 the ICJ handed down its judgment on the merits.[6] This was an opportunity for the ICJ to consider Germany's various claims that the US had breached its obligations, both to Germany and to the LaGrand brothers themselves, under article 36 of the *VCCR*. In this respect the ICJ was faced with significant questions as to the intersection of individual rights and the rights of States Parties to the *VCCR*. It was also an unprecedented opportunity for the ICJ to consider whether it was a toothless tiger so far as its interlocutory orders were concerned. Whether provisional measures are binding was an issue upon which

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3 After a period of uncertainty, in 1976 the US Supreme Court in *Gregg v Georgia*, 428 US 153 (1976), *Jurek v Texas*, 428 US 262 (1976) and *Proffitt v Florida*, 428 US 242 (1976) (together referred to as the '*Gregg Decision*') upheld the constitutionality of death penalty statutes in three states (Florida, Georgia and Texas) and the death penalty itself.

4 Death Penalty Information Centre, *Foreign Nationals and the Death Penalty in the United States* (2001) <http://www.deathpenaltyinfo.org/foreignnatl.html> at 30 April 2002.

5 Opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967). Article 36 provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
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> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
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> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

6 *LaGrand (Germany v United States of America) (Merits)*, 27 June 2001 <http://www.icj-cij.org> at 30 April 2002 ('*LaGrand Case*').

the ICJ had not previously been required to adjudicate, and which has been a source of considerable controversy among commentators.[7]

This case note provides an overview of the parties' arguments and the judgment of the ICJ in the *LaGrand Case*. It explores in more detail two aspects of the decision: first, the landmark conclusion that provisional measures ordered by the ICJ are binding on litigants; and second, the implications of the finding that the *VCCR* confers rights not only on States Parties but also on their nationals. In relation to the latter, it is suggested that the reasoning of the ICJ adheres to a teleological interpretation of article 36 rights. The ICJ has effectively concluded that these rights are not bare rights to consular communication, notification and access, but serve broader purposes and ends, such as allowing a detained person's state of nationality to provide thorough legal assistance in domestic criminal proceedings. To this extent article 36 rights can give practical effect to fundamental human rights concerning fair criminal trial processes.

II BACKGROUND FACTS

The LaGrand brothers were born in Germany and as children moved with their mother to the US where they remained permanently.[8] Later they were adopted by a US citizen, although neither brother ever acquired US nationality.[9] The brothers were arrested in January 1982 in Arizona and convicted by a jury on 17 February 1984 of first degree murder and other felonies arising out of an unsuccessful armed robbery of the Valley National Bank in Marana, Arizona.[10] They were sentenced to death on 14 December 1984.[11] At no time during this process were the brothers provided with any information by the relevant US authorities as to the provisions of the *VCCR* regarding consular communication.[12] Indeed the US contended that law enforcement officials were not aware of the German nationality of the brothers until well after their arrest.[13] Germany, on the other hand, provided evidence to the ICJ that officials of the State of Arizona were aware from as early as April 1982 of the German nationality of both brothers.[14]

The LaGrand brothers unsuccessfully appealed to the Supreme Court of Arizona[15] and were denied certiorari by the US Supreme Court.[16] A second

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7 See generally Jerzy Sztucki, *Interim Measures in The Hague Court* (1983) 260–302. Sztucki describes the scholarly views on the topic as being 'partly divided, partly vacillating' and cites an impressive list of jurists in support of each side of the debate: at 280.

8 *LaGrand Case,* above n 6, [13].

9 Ibid.

10 See the facts outlined in the decision of the Supreme Court of Arizona: *State v LaGrand (Walter)*, 734 P 2d 563 (1987); *State v LaGrand (Karl)*, 733 P 2d 1066 (1987).

11 *LaGrand Case,* above n 6, [14].

12 Ibid [15].

13 Ibid [16].

14 Ibid.

15 *State v LaGrand (Walter)*, 734 P 2d 563 (1987); *State v LaGrand (Karl)*, 733 P 2d 1066 (1987).

16 *Karl LaGrand v Arizona*, 484 US 872 (1987); *Walter LaGrand v Arizona*, 484 US 872 (1987).

round of post-conviction proceedings was also unsuccessful.[17] The failure to provide the required information to the LaGrand brothers under the *VCCR* was not raised at their trial, nor was it raised in these two sets of proceedings, as the LaGrand brothers had not yet been made aware of the provisions of the *VCCR*. Germany attached great significance to this failure, pointing to a causal connection between what it viewed as inadequate representation of the LaGrand brothers and their ultimate death sentences:[18]

> If the United States had abided by [its article 36 obligations] and promptly notified Germany of the situation of the LaGrand brothers, Germany would have arranged for competent counsel to represent them and helped in the preparation of their defence. Thus, their case would have been thoroughly investigated at the trial stage of the criminal proceedings, and essential mitigating evidence mainly located in Germany would have been presented during the sentencing phase. There are compelling reasons to believe that the LaGrands' sentences would have been reduced had this evidence been introduced. Hence, the lack of consular advice was decisive for the infliction of the death penalty.[19]

Germany was only made aware of the detention of the LaGrands by the brothers themselves in 1992.[20] Subsequently, a fresh round of proceedings for habeas corpus was commenced which specifically referred to alleged violations of the *VCCR*.[21] In early 1995 the US District Court for the State of Arizona rejected the claim on the basis of the doctrine of 'procedural default'.[22] This is a stringent rule of federal US law, emerging out of the federal division of powers, that prevents a criminal defendant from obtaining relief in federal courts unless his or her claim for relief has been presented to a state court.[23] Relief in relation to a new claim made in a federal court may only be had where a defendant can show both that an external impediment prevented the claim being made to a state court ('cause') and prejudice.[24] An appeal to the Court of Appeals of the 9th Circuit was dismissed, the Circuit Court noting:

> It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the [*VCCR*]. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted.[25]

A subsequent petition to the US Supreme Court for certiorari was denied.[26] Further proceedings in February 1999 were again unsuccessful.[27]

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17 *LaGrand Case,* above n 6, [20].

18 Memorial of the Federal Republic of Germany, *LaGrand Case*, above n 6, [4.73]–[4.81].

19 Ibid [4.82].

20 *LaGrand Case,* above n 6, [22].

21 Ibid [23].

22 *LaGrand v Lewis*, 883 F Supp 451 (Ariz, 1995); *LaGrand v Lewis*, 883 F Supp 469 (Ariz, 1995).

23 '[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts': *Wainwright v Sykes,* 433 US 72, 81 (1977).

24 *LaGrand Case,* above n 6, [23].

25 *LaGrand v Stewart*, 133 F 3d 1253, 1261 (1998).

26 *LaGrand v Stewart*, 525 US 971 (1998).

27 *LaGrand v Stewart*, 170 F 3d 1158 (9th Cir, 1999); *LaGrand v Stewart*, 173 F 3d 1144 (9th Cir, 1999); *Stewart v LaGrand*, 525 US 1173 (1999).

After high level diplomatic efforts by Germany to prevent the execution of Karl LaGrand failed, Germany filed its application in the Registry of the ICJ instituting the proceedings and seeking provisional measures in relation to his brother, Walter. On 3 March 1999, by 13 votes to one, the ICJ indicated two provisional measures,[28] the first occasion on which the ICJ has done so in the absence of an oral hearing of the parties.[29]

The ICJ ordered, first, that the US 'take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings'.[30] Secondly, the ICJ required the US to 'transmit this Order to the Governor of the State of Arizona'.[31] Armed with the Order, Germany applied to the US Supreme Court for a stay of Walter LaGrand's execution less than two hours before he was scheduled to die.[32] The Supreme Court dismissed the application and Walter LaGrand was executed shortly afterwards.[33]

III THE JUDGMENT ON THE MERITS

There was an unmistakable sense of deja vu in the proceedings before the ICJ in the *LaGrand Case*; in 1998 Paraguay had brought similar proceedings in the Court for violations of the *VCCR* by the US[34] in relation to a Paraguayan national, Angel Francisco Breard, who was scheduled to be executed nine days later in Virginia.[35] As with the LaGrand brothers, Breard was not notified of the provisions of the *VCCR* on his arrest and Paraguay was not notified of Breard's conviction and sentence until some time afterwards.[36] Even though he had not been informed by the US authorities of article 36 and therefore was unaware of its content, Breard's claim relating to the violation of the *VCCR* was held by the US Supreme Court to be 'procedurally defaulted' because he had not raised it in proceedings in the Virginia courts.[37]

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28 *LaGrand Case (Provisional Measures)* [1999] ICJ Rep 9, [29].

29 In a separate opinion President Schwebel was troubled by the ICJ proceeding on the basis of Germany's application and questioned whether in such circumstances the Rules of Court permit the ICJ to indicate provisional measures *proprio motu*: *LaGrand Case (Provisional Measures)* [1999] ICJ Rep 9 (Separate Opinion of President Schwebel).

30 *LaGrand Case (Provisional Measures)* [1999] ICJ Rep 9, [29].

31 Ibid.

32 *Federal Republic of Germany v United States*, 526 US 111, 112 (1999). For a discussion of the relationship between international courts and American courts in light of the US Supreme Court decision in *Breard v Greene*, 523 US 371 (1998), see Mark Weisburd, 'International Courts and American Courts' (2000) 21 *Michigan Journal of International Law* 877.

33 *LaGrand Case,* above n 6, [29].

34 In a formal statement issued on 3 November 1998, the US admitted that it had violated the *VCCR* by failing to notify Angel Breard of the provisions of the Convention: James Rubin, US Department of State, *Text of Statement Released in Asuncion, Paraguay* <http://secretary.state.gov/www/briefings/statements/1998/ps981104.html> at 30 April 2002.

35 Angel Breard was a dual citizen of Paraguay and Argentina: see Christopher van der Waerden, 'Death and Diplomacy: Paraguay v United States and the Vienna Convention on Consular Relations' (1999) 45 *Wayne Law Review* 1631, 1634.

36 Weisburd, above n 32, 880.

37 *Breard v Greene*, 523 US 371 (1998).

On Paraguay's application the ICJ unanimously ordered provisional measures to halt the execution.[38] However, despite the order and last-minute domestic petitions, Breard was executed on 14 April 1998 at the state prison in Jarratt, Virginia.[39] As a consequence Paraguay formally discontinued its proceedings in the ICJ on 10 November 1998.[40]

In light of the discontinuance of the Breard proceedings, the ICJ's final judgment in the *LaGrand Case* was eagerly awaited. Naturally of special interest was whether the ICJ would find that provisional measures ordered by it were binding, such that failure to observe the ICJ's order would constitute an internationally wrongful act. It should be noted that although the *LaGrand Case* also excited interest because European protestations as to the inhumanity of capital punishment appeared to have finally acquired an international legal vehicle, the case did not involve an examination of the merits or demerits of this form of punishment.[41]

A *The Issues before the ICJ*

Germany made four submissions to the ICJ:

1 That the US, by failing to inform the LaGrand brothers of their rights under article 36(1)(b) and by preventing Germany from providing consular assistance, breached its obligations to Germany, both directly under the *VCCR* and also in respect of Germany's right to exercise diplomatic protection in relation to the LaGrand brothers[42] (hereafter the 'consular assistance submission');

2 That the US breached article 36(2) by applying rules of municipal law that prevented the LaGrand brothers from raising claims under the *VCCR* and by executing the LaGrand brothers (hereafter the 'illegal municipal law submission');

3 That the US breached its obligation to comply with the provisional measures indicated by the ICJ by failing to take all measures to prevent the execution of Walter LaGrand pending the decision on the merits by the ICJ (hereafter the 'provisional measures submission'); and

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38 *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248 ('*Breard Case*').

39 Van der Waerden, above n 35, 1644.

40 Ibid 1659. Paraguay had filed memorials; however, no memorials in reply were filed by the US.

41 For a discussion of the position of the Council of Europe and the European Union with respect to the use of the death penalty in the US, see Dorian Koenig, 'International Reaction to Death Penalty Practices in the United States' (2001) 28 *Human Rights* 14.

42 The notion of diplomatic protection was explained by the Permanent Court of International Justice in *The Mavrommatis Palestine Concessions (Greece v United Kingdom)* [1924] PCIJ (ser A), No 2, 12:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, for whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

4 That the US be required to provide Germany with a guarantee of 'non-repetition' of its acts in breach of international law and an assurance that in future cases the municipal law of the US would not prevent the effective exercise of article 36 rights (hereafter the 'assurance and guarantee submission').[43]

The ICJ's responses to all four submissions were significantly influenced by the conclusion that the *VCCR* rights were personal rights possessed by the LaGrand brothers themselves. Prior to considering the substantive submissions that led it to this crucial finding, the ICJ dealt with objections by the US concerning the admissibility of Germany's submissions and the jurisdiction of the ICJ to deal with them. The most important of these may be dealt with briefly.

B *Jurisdiction and Admissibility*

Germany asserted that the jurisdiction of the ICJ with respect to all four submissions rested on article I of the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes* ('*Optional Protocol*')[44] to which both Germany and the US were party. Although the US had not raised preliminary objections to jurisdiction, as it was entitled to do under article 79 of the Rules of Court,[45] it nonetheless contested the jurisdiction of the ICJ at the hearing of the merits in relation to the consular assistance submission and the assurance and guarantee submission.[46]

The ICJ considered that it had jurisdiction over the remedies requested by Germany in its assurance and guarantee submission as it was clear that a dispute over the appropriate relief arose out of the interpretation or application of the *VCCR*.[47] However, more weighty issues were raised by the US objection to the ICJ's jurisdiction over Germany's first submission.

The US accepted that it had breached its obligation under article 36(1)(b) to inform the LaGrand brothers of their entitlement to request the notification of a German consular post of their arrest and detention.[48] It was also accepted that this violation of the *VCCR* permitted the ICJ to exercise jurisdiction in relation to the *rights of Germany* under the *VCCR*.[49] However, the US rejected the suggestion that the ICJ had jurisdiction to adjudicate the complaint by Germany,

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43 These shorthand titles for the submissions are my own and are used solely for convenience.

44 Opened for signature 24 April 1963, 596 UNTS 487 (entered into force 19 March 1967). Article I of the *Optional Protocol* provides (emphasis added):

> Disputes arising out of the *interpretation or application of the* [*VCCR*] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

45 ICJ Rules of Court, adopted 14 April 1978 (commenced operation 1 July 1978), <http://mail.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt.html> at 30 April 2002. Prima facie, the Rules of Court require objections to jurisdiction to be communicated to the ICJ prior to the hearing of the merits. No objection was taken by Germany in respect of this apparent breach by the US of art 79.

46 *LaGrand Case,* above n 6, [40], [46].

47 Ibid [48].

48 Ibid [39].

49 Ibid.

on behalf of the LaGrands, that their *rights as individuals* had been violated.[50] There was a 'world of difference', the US argued, between disputes concerning consular assistance and disputes concerning diplomatic protection and that the *Optional Protocol* only provides for compulsory jurisdiction in relation to the former.[51]

The ICJ rejected these objections. It found that the dispute between the parties as to whether paragraph 1(b) created individual rights, and as to whether Germany was entitled to espouse the claims of its nationals with respect to them, did relate to the interpretation and application of the *VCCR*.[52] In particular, the ICJ considered it no impediment to the commencement of proceedings under a general jurisdictional clause in relation to the claimed injury to its nationals that Germany's asserted right to diplomatic protection derived from customary international law.[53]

The diametrically opposed views of Germany and the US on this issue reflect a divergence of views at a more fundamental level.[54] The US appears to hold the view that international law is made up of numerous separate 'watertight' compartments such that treaty law must be interpreted and applied separately from customary norms and that the jurisprudence of individual rights should not infect other areas of international law.[55] On the other hand, Germany takes the view, previously affirmed by the ICJ itself,[56] that customary norms may affect the operation of treaty law, and that international human rights law, in particular, does not exist in isolation from conventional law.[57] These opposing views were also reflected in the submissions of the parties concerning whether article 36 rights amount to human rights.

In addition to challenging jurisdiction, the US also challenged the admissibility of all four submissions on a number of bases. It was emphatically said of the second, third and fourth submissions that they sought to make the ICJ 'an ultimate court of appeal in national criminal proceedings'[58] by asking the ICJ to determine whether there had been violations of municipal US law. The ICJ refused to uphold this objection, noting that although Germany made extensive reference to the administration of justice in the US, such reference was only in relation to submissions as to the application of relevant rules of international law by the ICJ to the issues in dispute. In no way could it be said that the ICJ was converted into an appellate court in relation to domestic criminal proceedings.

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50 Ibid [42].
51 Ibid [40].
52 Ibid [42].
53 Ibid.
54 Tinta, above n 2, 363.
55 Ibid.
56 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 9.
57 For a general discussion of the relationship between treaty and custom, particularly in the fields of human rights and environmental law, see Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights and Development Law Journal* 85.
58 *LaGrand Case,* above n 6, [50].

C *Substantive Arguments*

Germany made four submissions, as outlined above. Each of those submissions is considered below in turn. It is apparent that the ICJ's conclusions on the consular assistance, illegal municipal law, and assurance and guarantee submissions all turned on the finding that article 36 confers rights on individuals and not only States Parties, and the conclusion that a core purpose of article 36 is to protect substantive rights of detained foreign nationals. Issues of a different order were raised by the provisional measures submission — the ICJ was essentially concerned there with procedural issues. Nonetheless, in cases such as the *LaGrand Case* and *Breard Case*, where the rights of a state and its nationals are intertwined, these essentially procedural orders may, in the future, be a more effective mechanism for protecting substantive rights now that the ICJ has found that compliance with such interim orders is obligatory.

1 *Consular Assistance Submission*

The US conceded that it had breached article 36(1)(b), however, no such concession was made with respect to subparagraphs (a) and (c).[59] The ICJ nonetheless found that the US had violated the entirety of article 36(1). It was said that when a sending state is unaware of the detention of its nationals due to the failure of the host state to provide the requisite notification, it follows that the sending state will be prevented from exercising its specific rights of communication and access contained in subparagraphs (a) and (c).[60] The US had effectively prevented Germany, and the LaGrand brothers themselves, from exercising their subparagraph (a) and (c) rights by the violation of the obligation to provide consular notification under subparagraph (b).

More controversially, Germany submitted that the breach of article 36(1) entailed not only a violation of the *VCCR* vis-a-vis Germany but also the violation of individual rights conferred on the LaGrand brothers themselves.[61] In relation to the latter, Germany was therefore espousing the claims of the LaGrands and exercising its right of diplomatic protection. Under this rule of international law one state may take up the claim of its nationals in relation to international wrongs committed by another state. In so doing the state exercising diplomatic protection is in reality asserting its own right to have its nationals treated consistently with international law.[62] By this submission not only Germany, but also the LaGrand brothers, were expressed to be the subjects or sites of *VCCR* rights. The submission was disputed by the US on the grounds that, while individuals may be the beneficiaries of obligations owed under article 36, they could not be endowed with any individual rights the infringement of which would permit Germany to assert diplomatic protection. There was a certain cynicism in this submission, given that in the *Tehran Hostages Case*[63] the US had submitted in its memorial that '[a]rticle 36 establishes rights not only

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59 Ibid [40].
60 Ibid [74].
61 Ibid [75].
62 See above n 42.
63 *Case Concerning United States Diplomatic Staff in Tehran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3.

for the consular officer but, perhaps even more importantly, for the nationals of the sending State.'[64]

Without having to resort to other sources, such as norms of customary international law, the ICJ considered that the explicit reference to the rights of individuals in article 36(1)(b) 'admits of no doubt'[65] as to the interpretation to which the ICJ must adhere. The ICJ did not, therefore, examine the extent to which customary international human rights law affected the interpretation or operation of article 36. Nor did the ICJ examine other extrinsic material, some of which, as Judge Shi pointed out in his separate opinion, tended to suggest that it is 'questionable' whether article 36 confers individual rights.[66] By reaching the conclusion that the text of article 36 clearly and obviously conferred rights on the LaGrand brothers, the ICJ was able to sidestep difficult questions concerning the interaction between treaty law and customary international law.

Germany made an additional and more contentious claim in relation to the individual rights of the LaGrand brothers, namely that the right of consular notification under article 36 of the *VCCR* had acquired the character of a human right which made 'the effectiveness of this provision even more imperative.'[67] This was yet another submission by which Germany pointed to the interaction between the *VCCR* and general international law. The ICJ considered it unnecessary to deal with the detailed submissions by Germany on this issue in light of its conclusion that article 36, in terms, conferred individual rights the breach of which Germany could vindicate by exercising its rights of diplomatic protection.[68]

This was an important opportunity missed. This is not because the correctness of Germany's submission was without doubt, but rather because it provided the ICJ with a suitable occasion to consider what types of individual treaty rights in an apparently 'non-human rights treaty' might attract the label of a 'human right' and the consequences of such a categorisation.

In contrast to the rights contained in instruments such as the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[69] article 36 rights are reciprocal in nature and are not conferred at large to all persons within a State Party's jurisdiction. States Parties to the *VCCR* are only required to extend the benefits of article 36 to nationals of other parties. However, despite this apparent limitation in the scope of article 36, there are compelling reasons for regarding

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64 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Pleadings 174. Cited by Paraguay in Memorial of the Republic of Paraguay, *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Pleadings 128, [4.10].

65 *LaGrand Case,* above n 6, [78].

66 Ibid (Separate Opinion of Vice President Shi) [3], [16]. But see Mark Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul' (1997) 18 *Michigan Journal of International Law* 565, 612, who argues that preparatory work for article 36 'indicates that the drafters intended to create an individual private right'.

67 *LaGrand Case,* above n 6, [78]. This claim was not made in Germany's written submissions, but was raised at the oral hearing.

68 Ibid [77]–[78].

69 Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (1967) (entered into force 23 March 1976).

article 36 as conferring rights that have the character of human rights.[70] The Inter-American Court of Human Rights ('IACHR') has recently held, in an advisory opinion requested by Mexico, that '[a]rticle 36 of the [*VCCR*] *concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law'.[71] The IACHR reasoned that the individual rights contained in article 36(1)(b) make 'it possible for the right to due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases.'[72] In other words, the minimum guarantees contained in article 14 are 'amplified' by the article 36 rights 'which expand the scope of the protection afforded to the accused.'[73] Article 36 rights and *ICCPR* rights are viewed as being closely related; it is the former which can give content to the latter.

There is a remarkable similarity between the logic and reasoning of both the IACHR advisory opinion and the ICJ's decision in the *LaGrand Case*. As will be seen below in the discussion of the ICJ's response to Germany's illegal municipal law submission, the ICJ has adopted a teleological or purposive interpretation of article 36, which emphasises that consular information and access rights may enable detained foreign nationals to gain substantial assistance from their state of nationality, such as competent legal representation. However, while the IACHR advisory opinion makes such a purposive link explicit using the language of human rights, the ICJ found it unnecessary to venture into a discussion of human rights jurisprudence.[74]

Should provisions conferring human rights be interpreted and applied differently from other individual rights? Should a treaty as a whole, if it is partly concerned with human rights, be interpreted and applied differently?[75] A pronouncement by the ICJ on both the relationship of article 36 rights with human rights jurisprudence and the consequences, if any, of the conclusion that they are synonymous or closely related to human rights, may have helped to clarify the boundaries of international human rights law and its relationship with general international law. While the ICJ explicitly refused to consider whether article 36 rights are human rights, it nonetheless adopted a similar human rights approach to that utilised by the IACHR, without making clear how the approach informed its reasoning.

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70 The right to information on consular access as an individual human right is discussed in detail in Tinta, above n 2. See also *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, GA Res 40/144, 40 UN GAOR Supp No 53 (116th plen mtg), UN Doc A/Res/40/144 (1985).

71 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion)*, OC-16/99, 1 October 1999, (1999) ser A, 16 Inter-American Court of Human Rights Reports; (2000) 7 International Human Rights Reports 766, 818 (emphasis in original).

72 Ibid 815.

73 Ibid 818.

74 *LaGrand Case,* above n 6, [78].

75 See Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *European Journal of International Law* 489.

2 *Illegal Municipal Law Submission*

The response to this submission clearly reveals the ICJ's teleological interpretation of article 36. The ICJ has adopted an interpretation that emphasises the purposes and ends served by article 36, rather than simply the basic procedural rights the article mandates. In this claim Germany focused upon the domestic laws of the US, arguing that those laws manifestly failed to give effect to the requirements of article 36(1) as expressly required by article 36(2), which provides that:

> The rights referred to in [article 36(1)] shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the *purposes* for which the rights accorded under this Article are intended.[76]

Germany's specific target was the doctrine of procedural default, outlined above, which has regularly been applied in death penalty cases in the US to prevent offenders from successfully raising issues as to irregularities in state trial proceedings in federal appellate proceedings. Germany submitted that the procedural default rule 'deprived the brothers of the possibility to raise [sic] the violations of their right to consular notification in U.S. criminal proceedings.'[77] In its memorial, Germany stated that

> United States domestic law, as applied to the case of the LaGrand brothers, has not met the requirements of Art. 36(2) of the Vienna Convention: Although the brothers were undeniably prejudiced by the lack of consular assistance – and, ultimately their death sentence was due to the breaches of Art. 36(1) of the Convention … U.S. domestic law did not provide any remedy for these violations of the Convention.[78]

The US argued that, as the *VCCR* does not specifically require States Parties to fashion a provision of criminal law to permit the making of claims in relation to *VCCR* rights, there can be no breach of the *VCCR* in failing to provide for such a legal mechanism. In particular, it was argued that the types of laws to which article 36(2) are directed are those relating to rights under article 36(1), such as communication and access, and not rules of criminal law permitting convicted persons to raise breaches of the *VCCR* in appellate proceedings.

This argument was one of the most compelling raised by the US, given the ostensible objects and purposes of the *VCCR*. However, it was rejected by the ICJ, which noted that the contention rested on the faulty assumption that article 36(2) is applicable only to the rights of the sending state as opposed to individual nationals themselves. The ICJ went on to state that the procedural default rule did not 'in itself' violate international law.[79] However, its application in the LaGrand cases prevented counsel in later proceedings (after the LaGrand brothers were informed of the *VCCR* provisions) from 'attaching any legal significance' to the fact that, among other things, the breach of article 36

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76 Emphasis added.

77 *LaGrand Case,* above n 6, [81].

78 Memorial of the Federal Republic of Germany, above n 18, [4.79].

79 *LaGrand Case,* above n 6, [90].

precluded Germany from assisting in the brothers' defence.[80] Accordingly, the procedural default rule was said to violate the requirement in article 36(2) that 'full effect … be given to the *purposes* for which the rights accorded under this article are intended'.[81]

Conspicuously, the ICJ failed to outline these purposes. However, it can clearly be inferred that the ICJ considered those purposes to include allowing states every opportunity to assist in the representation of accused nationals before municipal criminal courts. This interpretation of article 36, which suggests that the provision is designed to protect substantive human rights, rather than simply afford basic procedural rights of information and access, is not without controversy. In his dissenting opinion, Judge Oda described what he saw as the ICJ's finding that article 36 conferred 'substantive rights of the individual, such as the rights to life, property, etc' as being 'devoid of any convincing explanation'.[82] In his separate opinion Judge Koroma also appeared to doubt the purposive interpretation of article 36(2). In his view the issue was whether the particular obligations outlined in article 36(1) were denied 'irrespective of the criminal process.'[83]

It follows from the *LaGrand* decision that a core purpose of article 36 of the *VCCR* is to ensure fair criminal trial and sentencing, and not simply procedural rights of information and access. Such a purposive provision takes on much of the character of a human right, although, as has been seen, the ICJ did not make this characterisation explicit.

3 *Provisional Measures Submission*

As in the case of interlocutory injunctions granted by many municipal courts, an international court or tribunal must weigh 'the *protection of the rights asserted* (but not yet established) by the Applicant State and respect for the position of the Respondent State *ex hypothesi* not yet held to have been acting unlawfully (at all or in the relevant respect)' when deciding whether to grant interim orders pending its final judgment.[84] Article 41 of the *Statute of the International Court of Justice* provides the ICJ with the power to indicate such interim or provisional measures and the procedural aspects of the power are set out in articles 73 to 78 of the Rules of Court.[85] The power to order provisional measures is part of the ICJ's incidental jurisdiction, and is independent of the ICJ's substantive jurisdiction to determine the merits of a dispute.[86]

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80 Ibid [91].

81 Ibid (emphasis added).

82 *LaGrand Case,* above n 6, (Dissenting Opinion of Judge Oda) [27].

83 *LaGrand Case,* above n 6, (Separate Opinion of Judge Koroma) [5].

84 James Crawford, Special Rapporteur, International Law Commission, *Third Report on State Responsibility* (2000), UN Doc A/CN.4/507/Add.1, [141] (emphasis added).

85 ICJ Rules of Court, above n 45.

86 John Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 *International and Comparative Law Quarterly* 90, 91. The power of the ICJ to grant provisional measures is probably better described as being derived from the ICJ's 'incidental jurisdiction', independent of the direct consent of states: Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) 533. It has been argued that the jurisdiction of the ICJ should not be regarded as either *sui generis* under the *Statute of the ICJ* or based upon jurisdiction on the merits, but rather a

Although the ICJ, like its predecessor, the Permanent Court of International Justice ('PCIJ'), has been requested to indicate interim measures on numerous occasions, it has done so in far fewer instances.[87] The *LaGrand Case* was decided in the context of the recent increase in the number of applications seeking provisional measures.[88] Although some aspects of the ICJ's jurisprudence on provisional measures are ambiguous,[89] the criteria for their indication have been greatly clarified by recent jurisprudence of the ICJ.[90] It is not the purpose of this case note to traverse in detail the basis of the ICJ's jurisdiction to make such orders, or the criteria with which it must be satisfied before acceding to a request. Rather, attention will be focused on the unprecedented conclusion that provisional measures are binding on States Parties. Some remarks will also be made regarding the relationship between the ICJ's Order of 3 March 1999 and the conclusions of the ICJ with respect to the individual article 36 rights of the LaGrand brothers.

'procedural power that does not require an indisputed [sic] consensual jurisdictional base before being exercised': J Peter Bernhardt, 'The Provisional Measures Procedure of the International Court of Justice through *US Staff in Tehran: Fiat Iustitia, Pereat Curia?*' (1980) 20 *Virginia Journal of International Law* 557, 559.

87 Six applications seeking provisional measures were made to the PCIJ and it granted such orders on two occasions: *In Denunciation of the Treaty of November 2, 1865, between China and Belgium (Belgium v China) (Interim Measures)* [1927] PCIJ (ser A), No 8; *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Provisional Measures)* [1939] PCIJ (ser A/B), No 79 ('*Electricity Case*'). Applications seeking provisional measures have been made to the ICJ in 22 cases. They have been granted by the ICJ in 11 cases: *Anglo Iranian Oil Co Case (United Kingdom v Iran) (Interim Protection)* [1951] ICJ Rep 89; *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Provisional Measures)* [1972] ICJ Rep 12; *Fisheries Jurisdiction Case (Germany v Iceland) (Provisional Measures)* [1972] ICJ Rep 30; *Nuclear Tests Case (Australia v France) (Interim Protection)* [1973] ICJ Rep 99; *Nuclear Tests Case (New Zealand v France) (Interim Protection)* [1973] ICJ Rep 135; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Interim Protection)* [1979] ICJ Rep 7; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Provisional Measures)* [1984] ICJ Rep 169; *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali) (Provisional Measures)* [1986] ICJ Rep 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep 325; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Provisional Measures)* [1996] ICJ Rep 13; *Breard Case* [1998] ICJ Rep 248*; LaGrand Case (Provisional Measures)* [1999] ICJ Rep 9; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 39 ILM 1100 (2000).

88 However, despite the more frequent use of the procedure, compliance has not improved. The US failure to comply with the orders in both the *Breard Case* and the *LaGrand Case* is typical of an 'abysmal' record of compliance: Michael Addo, '*Vienna Convention on Consular Relations* (Paraguay v United States of America) ('Breard') and *LaGrand* (Germany v United States of America)*,* Applications for Provisional Measures' (1999) 48 *International and Comparative Law Quarterly* 673, 680.

89 Patricia Esoff, '*Finland v Denmark*: A Call to Clarify the International Court of Justice's Standards for Provisional Measures' (1992) 15 *Fordham International Law Journal* 839, 840.

90 Merrills, above n 86.

(a) The Bindingness of Provisional Measures

The issue of whether provisional measures are binding was one of the most controversial aspects of the *LaGrand Case*. Ultimately, however, it appears to have raised little dissent on the bench. Thirteen of the 15 judges joined in the order that the US had breached obligations imposed upon it by the ICJ's Order of 3 March 1999 indicating provisional measures.[91]

Germany argued that there were three specific breaches by the US of the ICJ's Order: first, by the US Solicitor General expressing an opinion in a letter to the Supreme Court that orders for provisional measures were not binding; secondly, by the Supreme Court itself refusing to grant a stay of execution; and thirdly, by the failure of the Governor of Arizona to order a stay of the execution.[92] For its part the US argued that it had done all that it could to comply with the Order in light of the extremely short time between the Order and the scheduled time for execution of Walter LaGrand, and given the fact that the US is a federation where the powers in relation to such matters reside in state governments.[93] Furthermore, the US argued that the Order could not, in the terms in which it was expressed, give rise to any legal obligation.[94]

Clearly these were invitations to the ICJ to avoid the thorny question as to whether provisional measures could ever bind a state the subject of an order. The invitation was refused. The ICJ gave short shrift to the argument that the US had complied with the Order for provisional measures.[95] Notably, the ICJ referred to the judicial arm of the US Government as having failed to grant a stay of the execution though such a course was open to it. Clearly there were a number of bases on which such a stay could have been granted by the Supreme Court.[96] Having disposed of the primary submissions of the US, attention was squarely focussed on whether provisional measures could ever give rise to binding obligations.

The ICJ noted that neither it nor the PCIJ had ever needed to resolve the question of bindingness, but that it was required to do so in this case.[97] In

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91 Judges Oda and Parra-Aranguren dissented: *LaGrand Case,* above n 6, (Dissenting Opinion of Judge Oda) [34]; (Separate Opinion of Judge Parra-Aranguren) [15].

92 *LaGrand Case,* above n 6, [94].

93 Ibid [95].

94 Ibid [96].

95 Ibid [111]–[115].

96 Jehanne Henry, 'Overcoming Federalism in Internationalized Death Penalty Cases' (2000) 35 *Texas International Law Journal* 459, 476–82. But see Molora Vadnais 'A Diplomatic Morass: An Argument against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations' (1999) 47 *UCLA Law Review* 307.

97 Previous jurisprudence of the ICJ on the issue is virtually non-existent. The ICJ has commented on a number of occasions on the compliance or otherwise with its orders for provisional measures: *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Provisional Measures)* [1972] ICJ Rep 12, 16–17; *Fisheries Jurisdiction Case (Germany v Iceland) (Merits)* [1972] ICJ Rep 188; *Nuclear Test Case (Australia v France) (Merits)* [1974] ICJ Rep 253, 258–9; *Nuclear Test Case* (*New Zealand v France) (Merits)* [1974] ICJ Rep 457, 462; *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Merits)* [1980] ICJ Rep 3, 35. Significantly, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 143–4, the ICJ came very close to considering the issue of bindingness:

resolving this dispute in the *LaGrand Case*, the task the ICJ set itself was almost exclusively one of interpretation of article 41 of the *Statute of the ICJ*. That article provides, in the English version:

> 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 parties and to the Security Council.[98]

The terms of article 41 do not, on their face, appear to have a mandatory character. However, the French version of the article, which is equally authoritative,[99] uses the words '*doivent être prises*' instead of the less imperative 'ought to be taken' in the English version.[100] As the two texts lend themselves to quite different interpretations, and neither the *Statute of the ICJ* nor the *UN Charter* provided any guidance, the ICJ turned to the *Vienna Convention on the Law of Treaties* ('*VCLT*'),[101] which states that in such situations the interpretation to be preferred is that which 'best reconciles the texts, having regard to the object and purpose of the treaty'.[102]

What then is the object and purpose of the *Statute of the ICJ*, and are there any other bases for concluding that provisional measures are binding? The ICJ's conclusions were twofold. First, it was concluded that the basic purpose of the *Statute of the ICJ* was to facilitate judicial settlement by binding decisions and that article 41 is designed to 'prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved.'[103] Hence

> the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.[104]

> When the Court finds that the situation requires measures … should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly this is so 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.

In the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep 325, [59], the ICJ referred to this passage and noted that 'this is particularly so in such a situation as now exists in Bosnia-Herzegovina where no reparation could efface the results of conduct which the Court may rule to have been contrary to international law.'

98 Emphasis added.

99 *Charter of the United Nations*, art 111 ('*UN Charter*').

100 The phrase '*doivent être prises*' means 'must be taken'.

101 Opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1969) (entered into force 27 January 1980).

102 Ibid art 33(4).

103 *LaGrand Case,* above n 6, [102].

104 Ibid.

Second, the ICJ noted that there was a principle of international law, recognised many years earlier by the PCIJ in the *Electricity Case*, that 'parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given'.[105] Quite how this principle could inform an interpretation of article 41 was neither explored nor explained by the ICJ, although it was said to be a 'related reason which points to the binding character of orders … under Article 41'.[106] Presumably this means that the principle arises independently of article 41, either by necessary implication from the *Statute of the ICJ* or as a general principle of international law. However, as Hugh Thirlway has noted, it is one thing to suggest that parties *should not frustrate* the judicial process, and quite another to suggest that parties are *bound to follow* a decision of the ICJ not to do so.[107] The ICJ appears to be suggesting that the latter view is supported by the general principle.

Given the ICJ's conclusions on the interpretation of article 41, it was not strictly necessary for it to examine the preparatory work for the *Statute of the ICJ*. For abundance of caution the ICJ did so nonetheless, and found nothing in the material that militated against the construction it had reached.[108] In one short paragraph the ICJ also dealt with the argument that provisional measures should not be regarded as binding because they are not 'judgments' within the meaning of article 94 of the *UN Charter*, which provides a machinery for Security Council enforcement of such decisions.[109] The ICJ concluded that neither a broad nor narrow reading of article 94[110] prevents provisional measures from having binding force.[111] Curiously, in this context, the ICJ did not consider article 41(2) of the *Statute of the ICJ*, which provides that notice of provisional measures must be given to the Security Council. This requirement seems highly relevant to the question of the status of provisional measures and their amenability to enforcement by the Security Council.

As a remedy for the breach by the US of the ICJ's order, Germany requested a declaration that the US had breached its obligations to comply with the provisional measures. Had Germany claimed compensation, the ICJ indicated that it would have been necessary to consider the extreme time pressures under which the US was required to operate, and the controversy that 'had' existed on

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105 *Electricity Case* [1939] PCIJ (ser A/B), No 79, 199, cited by the ICJ in the *LaGrand Case,* above n 6, [103].

106 *LaGrand Case,* above n 6, [103].

107 See Hugh Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' in Rudolf Bernhardt (ed), *Interim Measures Indicated by International Courts* (1994) 1, 30.

108 *LaGrand Case,* above n 6, [104]–[107], [109].

109 Ibid [93].

110 Article 94 provides (emphasis added):

> 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*.'

111 *LaGrand Case*, above n 6, [108].

the issue as to the binding nature of orders indicating provisional measures.[112] The use of the past tense by the ICJ indicates that it expects its conclusion on this issue to have resolved this controversy once and for all.

The implications of the ICJ's conclusion for future judicial settlement of interstate disputes may be significant. Before ordering provisional measures the ICJ need only satisfy itself that it has prima facie jurisdiction. However, this preliminary finding may cause serious consequences for a respondent state. A respondent may be seriously prejudiced if it complies with the Order, yet be in breach of international law if it does not. Moreover, while in common law systems the price for an interlocutory injunction is usually an undertaking as to damages, which must be made good on threat of contempt, no such price is paid by a successful applicant for interim measures of protection on the international plane. Should the ICJ determine in the merits phase that it does not have jurisdiction, a respondent state against which a provisional order has been made would seem to be without recourse or remedy.

In the *Passage through the Great Belt Case*,[113] Denmark sought indemnification against loss from complying with provisional measures sought by Finland.[114] Finland resisted this argument, suggesting that the ICJ had no power to order compensation under article 41 of the *Statute of the ICJ*.[115] Thirlway has posited a solution to this dilemma, as yet untested, that the ICJ impose a condition on the indication of provisional measures that the applicant for such measures undertake to pay compensation in the event that the judgment goes against it.[116] The limited scope of the ICJ's reasons in the *LaGrand Case* provided no room for consideration or resolution of this issue, which has undoubtedly been rendered more problematic by the conclusion that provisional measures are binding. Accordingly, it might be expected that some states will withdraw their acceptance of the ICJ's jurisdiction rather than risk adverse orders.[117] States will presumably weigh the potential benefits of compulsory jurisdiction with the obvious disadvantages of being subject to a binding order, the compliance with which may seriously prejudice its rights, while non-observance may amount to an internationally wrongful act.

While there can be little criticism of the ICJ's reasoning in rejecting the primary submission of the US that it had in fact complied with the Order, the apparent simplicity and straightforwardness of the ICJ's finding that provisional measures are binding belies the controversy that continues to exist among jurists. The issue as to whether or not such orders are binding is part of a much broader issue as to the precise juridical nature of interim orders. As provisional measures are designed to preserve rights of parties that have not been definitively shown to exist, their bindingness cannot rest on the fact of the order alone. Hence they may be distinguished from final judgments which may declare the existence of certain obligations under international law. Are provisional measures only

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112 Ibid [116].
113 *(Finland v Denmark) (Provisional Measures)* [1991] ICJ Rep 12.
114 Thirlway, above n 107, 33.
115 Ibid.
116 Ibid.
117 *LaGrand Case*, above n 6, (Separate Opinion of Judge Oda) [10].

binding as a matter of treaty law? Are they binding by operation of a general principle of law of civilised nations?[118] It is regrettable that, although the ICJ alluded to these issues, it did not engage in any close analysis of its jurisprudence or the many scholarly works on the subject. Hence, although the ICJ's conclusion has clarified the operation of article 41, its reasoning will not assist other international courts in grappling with the nature and consequences of an order for interim relief. Unless such orders are given express binding force by the special agreement of the parties in submitting a case, or by the treaty establishing the court or tribunal, it is not at all clear that such orders derive binding force from general international law.[119]

(b) Provisional Measures and Article 36 Rights

The ICJ's Order of provisional measures in both the *LaGrand Case* and the *Breard Case* should be acknowledged as being entirely consistent with the ICJ's conclusion on the merits in the *LaGrand Case* that article 36 confers individual rights. For the same reason that the procedural default rule prevented full effect being given to the purposes of the article 36 rights, so too does the deprivation of life when it follows a breach of article 36 and the refusal to permit review or reconsideration of conviction and sentencing. Where a person has been deprived of their rights under article 36, protection of his or her life is a necessary corollary of protecting the purpose for which those rights were conferred; namely as an important procedural safeguard.

The ICJ's willingness to grant provisional measures to preserve the lives of Angel Breard and Walter LaGrand has prompted analysis of the effectiveness of provisional measures as a mechanism to protect fundamental human rights.[120] Such work builds upon previous surveys of the ICJ's jurisprudence on provisional measures that is said to display a 'growing tendency to recognize the human realities behind disputes of States.'[121] Exemplars of that tendency are the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*[122] and the *Case Concerning the Frontier Dispute.*[123] Both cases concerned disputed territory, yet, in the order of provisional measures in both, reference was made to the risk of irreparable harm to persons and property. The *LaGrand Case* and *Breard Case* may be regarded as further examples of this tendency. However, there is an important point of distinction. While the order of

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118 See Jerome Elkind, *Interim Protection: A Functional Approach* (1981) 23.

119 See Daniel O'Connell, *International Law* (2nd ed, 1970) 1094.

120 Alison Duxbury, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights' (2000) 31 *California Western International Law Journal* 141.

121 Rosalyn Higgins, 'Interim Measures for the Protection of Human Rights' in Jonathan Charney, Donald Anton and Mary O'Connell, *Politics, Values and Functions: International Law in the 21st Century, Essays in Honor of Professsor Louis Henkin* (1997) 87, 103. Judge Higgins argues that the orders in the *Frontier Dispute Case*, below n 123, and the *Land and Maritime Boundary Between Cameroon and Nigeria*, below n 122, 'seem effectively to overrule the determination by the Permanent Court of International Justice in the *Eastern Greenland* case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute': at 102. See also *Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ (ser A/B), No 53.

122 *(Cameroon v Nigeria) (Provisional Measures)* [1996] ICJ Rep 13.

123 *(Burkina Faso v Mali) (Provisional Measures)* [1986] ICJ Rep 3 ('*Frontier Dispute Case*').

provisional measures in the *LaGrand Case* parallels closely the ICJ's interpretation of the nature and scope of article 36 rights, in *Cameroon v Nigeria* and the *Frontier Dispute Case*, concerns as to loss of life were further removed from the territorial issues there in question.

Do *binding* provisional measures ordered by the ICJ offer greater promise as a mechanism for protecting human rights? The conclusion of the ICJ in the *LaGrand Case* that interim measures are binding does not alter the fact that the ICJ is an inherently unsuited forum for vindicating human rights. The jurisdiction of the ICJ over contentious cases may be exercised only with the consent of the parties, and individuals have no standing before the ICJ as claimants or respondents. Accordingly, cases in which human rights arise as a subject of proceedings are rare, and those issues arise only indirectly. As the *LaGrand Case* aptly illustrates, it is only where individual rights are coterminous with, or closely related to, the rights of states that there exists any opportunity, however imperfect, for interim measures ordered by the ICJ to be used to protect such individual rights. The LaGrand brothers could never have brought proceedings before the ICJ themselves. It was only because the rights of the LaGrand brothers and Germany coincided that Germany was able to assert its customary international law right to espouse the claims of its nationals.

Furthermore, a distinction needs to be drawn between the bindingness of orders and their enforcement. The ICJ did not express the view that provisional measures are amenable to enforcement by the Security Council in the same way as judgments of the ICJ. Where a human life is in the balance, enforcement assumes a particular importance. Restitutio in integrum, the normal remedy in international law, is obviously impossible in relation to breach of an obligation, imposed under an order of interim measures, to delay the execution of a foreign national. At least with respect to certain subject matter that is susceptible to irreversible prejudice, a compelling moral argument may be made that provisional measures to preserve such subject-matter should be enforceable and enforced. It remains a point of contention whether the Security Council could act to enforce orders in such circumstances, unless it is in a position to determine the existence of a threat to international peace and security and act pursuant to Chapter VII of the *UN Charter*.

4 *Assurance and Guarantee Submission*

Germany did not seek reparation for the illegal acts of the US in respect of the LaGrand brothers. Rather, in its fourth and final submission, Germany sought an assurance by the US of 'non-repetition'.[124] Germany also sought specific provision in US law and practice for the effective exercise of article 36 rights such that, in cases where a conviction 'was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing.'[125] Germany asserted that '[i]n particular in cases involving the death penalty, this requires the US to provide effective review of and remedies for criminal convictions impaired by a

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124 *LaGrand Case*, above n 6, [120].
125 Ibid.

violation of the rights under Article 36.'[126] The US attacked the submission as demanding relief beyond the jurisdiction of the ICJ and without precedent in the ICJ's jurisprudence.[127] It was also pointed out that the US had 'energetically embarked' upon efforts to ensure that officials at all levels of government were aware of the *VCCR* obligations.[128]

The ICJ considered that the 'vast and detailed programme' to which the US made repeated reference 'must be regarded as meeting Germany's request for a general assurance of non-repetition.'[129] As for the specific request by Germany in relation to US domestic law, the ICJ noted that article 36(2), which requires that effect be given in domestic law to article 36 rights, was violated not by the procedural default rule, but rather by its application in the particular circumstances. In one of the most important passages of its judgment the ICJ stated

> that if the United States … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.[130]

The conclusion of the ICJ on Germany's fourth submission illustrates most clearly how individual rights may intersect with those of a state such that vindication of the latter may protect the former. The ICJ has effectively concluded that where a national of a sending state has been subject to prolonged detention or has been sentenced to severe penalties it is only by belated attention to the purposes for which article 36 rights were conferred that there can be an effective remedy for the prior breach of those rights. In his separate opinion Vice President Shi appeared to lay bare the ICJ's reasoning:

> I should like to make it clear that it was not for reasons relating to the legal consequences of the breach of Article 36, paragraph 1(b), that I voted in favour of [the ICJ's conclusion on Germany's assurance and guarantee submission]. This [conclusion] is of particular significance in a case where a sentence of death is imposed, which is not only a punishment of a severe nature, but also one of an irreversible nature. Every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing. Out of this consideration, I voted in favour.[131]

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126 Ibid.

127 Ibid [119].

128 Ibid [121]. Amongst other things this involved the distribution of leaflets outlining the rights of detained nationals and the obligations of State and Federal US officials under the *VCCR*.

129 Ibid [123]–[124].

130 Ibid [125].

131 Ibid (Separate Opinion of Vice President Shi) [17].

IV CONCLUSIONS

By reaching the conclusion that provisional measures ordered by it are binding the ICJ has significantly enhanced its standing as the principal judicial organ of the UN. It has now found itself to possess an essential incident of an effective judicial body: the capacity to make binding interlocutory orders to preserve the rights of parties pending hearing and disposition of a dispute. As has been seen, the ICJ's conclusion rests primarily on a close interpretation of article 41, which effectively provides a solid conventional basis for the ICJ's jurisdiction to indicate interim measures. It remains to be seen whether the ICJ's conclusion will have any impact on the business of the ICJ, either in increased applications for provisional measures, or withdrawal by states of their consent to the jurisdiction of the ICJ. In order to ensure that the system remains workable, the ICJ will need to consider proposals such as that by its former Registrar, Thirlway, for imposing conditions on the grant of such measures so as to protect the rights of respondent states.

Although the ICJ now looks more like a court than it ever has before, it remains an unsuitable forum for protecting human rights or for vindicating their breach. It is only where the rights of states and those of individuals substantially coincide that provisional measures may be available to offer some protection for the rights of individuals, whether they be human rights or otherwise. In this respect the *LaGrand Case* is notable for the absence of any discussion of human rights, in the language of human rights. Nonetheless the decision of the ICJ must be regarded as a significant development of the ICJ's jurisprudence on individual rights derived from treaty law. The ICJ has found certain rights that appear, on their face, to be fairly limited in scope, to exist for broader purposes, and has affirmed that effective remedies, including provisional measures, must take cognisance of such purposes. Although the ICJ eschewed human rights jurisprudence, it answered the question posed in the title to this case note by implicitly characterising the rights contained in article 36 as important procedural safeguards attaching to individuals. They must now be regarded as serving the critical purpose of ensuring the fair trial and sentencing of foreign nationals. Article 36 rights may well fall short of the descriptor 'human rights', but it is clear that in operation they may in fact serve to protect rights, such as the right to life, that unquestionably attract that appellation.

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