


The *LaGrand* effect: changes in the demand and supply of ICJ provisional measures

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Abstract

Observers of the International Court of Justice (ICJ) have noted a rise in requests for provisional measures since the *LaGrand* Judgment, which declared provisional measures orders to be legally binding. Several ICJ judges have maintained that the Court should accordingly become more cautious in its consideration of such requests. Yet systematic evidence on any possible changes in the behaviour of litigating states and the Court remains limited. This article examines patterns in both the demand for and the supply of provisional measures before and after *LaGrand*. We argue that the declaration that such measures are binding may encourage states to make more requests, and the Court to address them with greater caution. Using an original dataset with information on each requested measure, we find patterns that are broadly consistent with our theoretical expectations. Our findings advance the scholarship on the use and significance of provisional measures in international adjudication.

1. Introduction

The *LaGrand* Judgment of the International Court of Justice (ICJ) is often hailed as the watershed in the international law on provisional measures. The case concerns the US's failure to notify two German nationals sentenced to death of their rights to consular assistance,

which prompted Germany to institute proceedings and request urgent provisional measures. The Court granted the order requiring the US to take all measures to ensure the suspension of the execution. In the 2001 Judgment, the ICJ famously opined that its orders on provisional measures have a binding effect and create legal obligations for the relevant states.¹ Already in 2002, Judge *ad hoc* Dugard suggested that the *LaGrand* Judgment would provide a greater incentive for states to request provisional measures.² This has been confirmed by the observable increase in requests for provisional measures since then. For example, President Iwasawa of the ICJ, in his 2025 speech to the International Law Commission, reported ‘a noticeable increase in the number of incidental proceedings being submitted to the Court, in particular requests for the indication of provisional measures’.³ Judge *ad hoc* Dugard also argued in the same context that the Court should become more cautious and strict in its response to the requests.⁴ This, again, has been reaffirmed by many doctrinal writings on the increasingly stringent conditions for indicating provisional measures after *LaGrand*.⁵ Judge Nolte recently argued in a similar vein that the need for a proper and consistent application of conditions for indicating provisional measures has become particularly clear after *LaGrand* and especially acute in light of the increased number of requests.⁶ The concerns of the judges and scholars here typically centre on the abuse of the request for provisional measures and the potential disruption of the Court’s hearing schedule, since the Rules of Court require the request to be given ‘priority over all other cases’.⁷ To quote President Iwasawa again, ‘[w]hile the Court understands the importance and value of this expedited procedure, which aims to offer urgent interim relief to parties when there is a risk of escalation, it also wishes to stress that this procedure should not be used as a litigation tactic to advance arguments on the merits’.⁸

Despite such widespread perception of post-*LaGrand* changes, state behaviour as regards ICJ provisional measures has rarely been systematically investigated. In 1994, Hugh

¹ *LaGrand (Germany v United States of America)* (Merits) [2001] ICJ Rep 466, paras 98–109.

² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Provisional Measures: Order) [2002] ICJ Rep 265, Separate Opinion of Judge Dugard 286, para 2.

³ Yuji Iwasawa, ‘Speech of HE Mr Iwasawa Yuji, President of the International Court of Justice, at the Seventy-Sixth Session of the International Law Commission’ (8 May 2025) <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20250508-sta-01-00-enc3.pdf>> accessed 14 April 2026.

⁴ *Armed Activities (DRC v Rwanda)*, *Separate Opinion of Judge Dugard* (n 2).

⁵ See eg Yoshiyuki Lee-Iwamoto, ‘The Repercussions of the *LaGrand* Judgment: Recent ICJ Jurisprudence on Provisional Measures’ (2012) 55 *Japanese Yearbook of International Law* 237; Massimo Lando, ‘Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice’ (2018) 31 *Leiden Journal of International Law* 641 (characterising the debate on plausibility of rights as ‘the perplexing legacy of *LaGrand*’); Robert Kolb, ‘Provisional Measures’ in Carlos Espósito and Kate Parlett (eds), *The Cambridge Companion to the International Court of Justice* (CUP 2023) 147, 151–52, 155–59 (using the *LaGrand* Judgment as an important mark in his periodisation of the World Court’s practice). As will be discussed later in the paper, apart from the debates on conditions for indication of provisional measures, the *LaGrand* Judgment has added fuel to the doctrinal debates on the legal consequences for non-compliance with provisional measures orders. This point was noted by Judge Crawford in his extrajudicial writing in 2017: see James Crawford, ‘Foreword’ in Cameron Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) xvi, xvii.

⁶ *Embassy of Mexico in Quito (Mexico v Ecuador)* (Provisional Measures: Order) [2024] ICJ Rep 613, Declaration of Judge Nolte, para 16.

⁷ ICJ Rules of Court, art 74(1).

⁸ Iwasawa (n 3). It is noteworthy that these words echo those of Judge Salam, former President, which reflects how these are the current preoccupations of the Court. See eg Nawaf Salam, ‘Speech by HE Judge Nawaf Salam, President of the International Court of Justice, before the Sixth Committee of the General Assembly’ (25 October 2024) <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20241025-sta-01-00-en.pdf>> accessed 14 April 2026.

Thirlway noted that ‘a trend has been observed over the last 20 years or so for proceedings to be instituted before the Court ... to obtain the short-term tactical advantage of an order indicating provisional measures’.⁹ If this is accurate, how has such a trend changed after the *LaGrand* Judgment, when presumably provisional measures have greater strategic bite for litigants? At the same time, despite a great deal of doctrinal scholarship on the ICJ’s decisions on requests for provisional measures, how the ICJ responded to the significant increase in requests for provisional measures post-*LaGrand*, while also taking into account broader consequences for the parties and the Court itself, has rarely been the subject of an empirical study. The empirical investigation into behavioural changes of both litigants and the Court has become increasingly pertinent, as the legal literature has begun to discuss the changing roles of ICJ provisional measures in recent years.¹⁰ The more precise, empirically grounded understanding will provide a solid foundation for the conceptual inquiry about the dynamic functions of ICJ provisional measures.

A cursory look at court statistics shows that provisional measures requests have become a common feature of ICJ cases. This is what we show in Fig. 1, where we present the cumulative number of ICJ cases and the cumulative number of cases with a request for provisional measures. By 1970, there were only two cases with provisional measures requests out of 40 ICJ cases (5 per cent). Two decades later, there were 13 out of 62 (21 per cent). By 2010, already one third of ICJ cases included a provisional measures request (41 out of 123). As of March 2024, this percentage stood close to 37 per cent, with 60 out of 164 cases having at least one such request. At a time when these tools are seen as part and parcel of litigation before the ICJ, as well as other international courts and tribunals, it is important to understand how states employ such requests and how the Court responds to them, as well as how both may have changed over time.

Blending doctrinal analysis with empirical research, this article aims to sharpen our understanding of the increase in requests for ICJ provisional measures and of how the Court responded over time. Instead of a general survey of what is being asked and what is being granted, it focuses the investigation on a possibly key moment in ICJ jurisprudence. It offers an empirical study of what we call the ‘*LaGrand* effect’ on both the demand and supply sides of ICJ provisional measures, which is informed by a thorough analysis of relevant legal arguments in the ICJ cases. Our central claim is two-fold. We argue that the *LaGrand* effect has translated into both an incentive to demand more on the part of the states and a more cautious treatment of requests as far as the ICJ is concerned. This, we also suggest, has been partially enabled by the legal uncertainty created by the post-*LaGrand* jurisprudence.

Using a new dataset on all provisional measure requests and decisions made about them by the Court until the end of 2024, we lay out and test a series of hypotheses about changes in the demand for and supply of provisional measures after the *LaGrand* Judgment. As

⁹ Hugh Thirlway, ‘The Indication of Provisional Measures by the International Court of Justice’ in Rudolph Bernhardt (ed), *Interim Measures Indicated by International Courts* (Springer 1994) 1, 27.

¹⁰ See eg Michael Ramsden and Jiang Zixin, ‘The Dialogic Function of ICJ Provisional Measures Decisions in the UN Political Organs: Assessing the Evidence’ (2023) 37 *American University International Law Review* 90 (examining the interactions between the ICJ and other two principal organs of the United Nations, the General Assembly, and the Security Council, through provisional measures); Matei Alexianu, ‘Effectiveness Beyond Compliance: Examining the Goal-Based Impact of the International Court of Justice’s Provisional Measures’ (2025) 38 *Hague Yearbook of International Law* (forthcoming) (arguing that rather than focusing on compliance, one should analyse provisional measures in the context of the institutional goals of the ICJ). Also, Miłos Gapsa, *The Content of Provisional Measures in Inter-State Proceedings* (2025, PhD thesis submitted to University of Lodz).

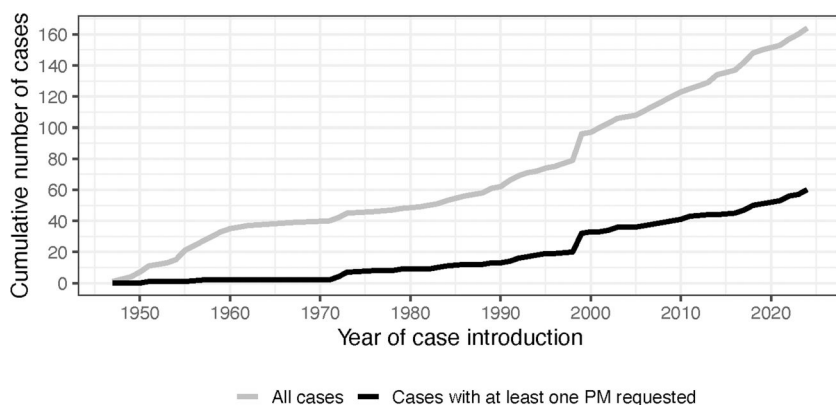


Figure 1 The evolution of ICJ caseload over the years. The continuous lines trace the cumulative number of all cases (grey), and of those with provisional measure requests (black).

regards the demand side, we test two hypotheses about litigants' behaviour: after 2001, compared to the period before 2001, litigant states (i) are more likely to make requests for the indication of provisional measures in the cases they initiate and (ii) are likely to ask for the indication of a *greater number of measures* in their requests. To our knowledge, this is the first article that focuses on specific measures within each request, which we divide into distinct *items*. As regards the supply side, we test the following four hypotheses about the ICJ's behaviour: after 2001, compared to the period before 2001, the ICJ is more likely (i) to grant fewer requests, (ii) to grant fewer requests in full as formulated by the requesting party, (iii) to grant more requests partially, and (iv) to indicate fewer measures that are wholly different from what the parties ask.

Our findings are broadly consistent with our expectations, especially when we treat each measure in a granular manner and consider different decisions that the ICJ may make on requests beyond the *Accept* versus *Reject* dichotomy. Our analysis identifies associations between the time period and observed patterns in both demand and supply. The share of cases that include a provisional measure request is slightly greater after *LaGrand*, and states have requested more items in the post-*LaGrand* period. As for the ICJ's treatment of the requests, we find that it has granted fewer requests *fully*—that is, as requested by the party—and more requests *partially*. It has also granted fewer measures that are entirely different from what parties ask, an additional piece of evidence attesting to the increased caution with which the ICJ treats requests after 2001. Our findings appear more clearly when we take the type of dispute before the Court into account—in cases that do not involve imminent threat to human life or active armed hostilities, the Court's behaviour changes markedly, with *fewer* requests being granted. Overall, our analysis provides evidence consistent with a change in the behaviour of both the states on the demand side and the Court's behaviour on the supply side around 2001.

We proceed as follows. Section 2 discusses key doctrinal changes in the post-*LaGrand* period that help shape incentives for both the demand and supply sides of provisional measures. An analysis of these changes leads us to the hypotheses summarized above, which are formally stated in Section 3. Section 4 presents our data and method, and Section 5 presents our findings. Section 6 concludes by discussing alternative explanations and issues that warrant further investigation. We highlight two issues of broader significance: the incentive of states to litigate, and the changing conception of provisional measures.

2. Post-*LaGrand* legal uncertainty and the new incentives

The *LaGrand* Judgment is well known for having definitively settled the long-standing debate on whether the ICJ orders on provisional measures are legally binding. But it has also fuelled debates on other aspects of the law of provisional measures. The voluminous literature on the debate about the binding effect does not need to be repeated here, and yet, three observations are still noteworthy.

First, the debate featured more frequently in academic writings than in diplomatic practice.¹¹ The *LaGrand* Judgment itself specifically remarked that the binding effect of provisional measure orders ‘has been the subject of extensive controversy in the literature’.¹² Secondly, there was a recurring pattern of legal arguments in this debate.¹³ Participants in the debate would typically point to the soft language in the English text of Article 41 of the Statute and the discrepancy between the English and French texts. They would also repeat similar competing legal principles and considerations in their reasoning, such as respect for state sovereignty, non-aggravation of the dispute, necessity of preserving the party’s right at issue while the case is pending, and effective functioning of the ICJ as a judicial organ. Thirdly, *LaGrand* presented an opportunity for the ICJ to join this debate and enhance its authority at a time when international adjudication was blossoming.¹⁴ The ICJ’s interpretation that its provisional measure orders are binding was largely predictable, as the momentum had already been built by other international adjudicative bodies, such as the order of the International Tribunal for the Law of the Sea (ITLOS) in *M/V ‘Saiga’*, which is clearly binding under the United Nations Convention on the Law of the Sea,¹⁵ and the 2000 Award in *Maffezini* by an investment tribunal (in which Judge Buergenthal of the ICJ in *LaGrand* also sat).¹⁶ Additionally, the *LaGrand* Judgment, affirming the same legal position, also helps soothe the anxiety from the fragmentation of international law.¹⁷ It serves as a salutary reminder of the ICJ’s institutional role in the broader landscape of international adjudication.

If the *LaGrand* Judgment rapidly blew away the ‘extensive controversy in the literature’ about the ICJ orders’ binding effect, some other aspects of the law of provisional measures have come to be widely debated. The *LaGrand* Judgment has raised the stakes in the pre-existing debate about the conditions for the indication of provisional measures. President Owada, for example, explained to the Sixth Committee that while the plausibility of the rights is not a new requirement first appearing in the 2009 Order in *Belgium v Senegal*, it

¹¹ Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2004) 39.

¹² *LaGrand* (n 1) para 99 (emphasis added).

¹³ For an extensive survey of pre-*LaGrand* literature, see Jeremy Sztucki, *Interim Measures in the Hague Court* (Kluwer 1983) 280–294; Robert Kolb, ‘Note on New International Case-law Concerning the Binding Character of Provisional Measures’ (2005) 74 *Nordic Journal of International Law* 117, 126–128.

¹⁴ The same opportunity first appeared a few years earlier in *Breard*, but the case was withdrawn. See Donald Francis Donovan, ‘Preserving the Judicial Function: Provisional Measures in International Adjudication’ in Charles N Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration—Essays in Honour of David D Caron* (OUP 2024) 341, 343–45.

¹⁵ *The M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Provisional Measures: Order) [1998] ITLOS Rep 24.

¹⁶ *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID Case No ARB/97/7, Decision on Request for Provisional Measures, 28 October 1999) para 9.

¹⁷ The term is from Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Post Modern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

‘took on added importance’ after *LaGrand*.¹⁸ But perhaps more importantly, academics continue to discuss the full meaning and practical consequences of two other positions taken by the ICJ in *LaGrand*: that a breach of the obligation under a provisional measure order entails international responsibility; and that ‘[w]here the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.’¹⁹ In what follows, we explore these issues to analyse how the legal uncertainty both enables and is shaped by new incentives for litigant states and the ICJ.

2.1. Conditions for indicating provisional measures

The wording of Article 41 (1) of the Statute expressly provides the ICJ with a large measure of discretion in indicating provisional measures—‘if it considers that circumstances so require’. To justify how it exercises such discretion, the ICJ has developed a set of conditions that must be cumulatively fulfilled before it orders provisional measures.²⁰ The current list of conditions to be considered when the ICJ indicates provisional measures appears stable. Recent orders typically enumerate five requirements²¹: (i) prima facie jurisdiction over the merits of the case; (ii) plausibility of the rights claimed to be preserved; (iii) a link between the requested measure and the rights whose protection is sought; (iv) a risk of irreparable prejudice to the rights that cannot be remedied by reparation in a final judgment; (v) urgency in the sense that the risk is real and imminent.²² The ICJ may also consider the prima facie standing of the applicant, especially when the respondent challenges it.²³ Very recently, the Court rejected the requests without spelling out the full list in some cases,²⁴ but

¹⁸ Hisashi Owada, ‘Speech by HE Judge Hisashi Owada, President of the International Court of Justice, to the Sixth Committee’ (28 October 2011) <<https://www.icj-cij.org/sites/default/files/press-releases/5/16755.pdf>> accessed 14 April 2026.

¹⁹ *LaGrand* (n 1) para 45.

²⁰ Peter Tomka and Gleider I Hernández, ‘Provisional Measures in the International Tribunal for the Law of the Sea’ in Holger P Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2011) 1763, 1764.

²¹ See eg *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures: Order) [2023] ICJ Rep 619. In the interpretation proceedings under art 60, the requirements are identical except the formulation of prima facie jurisdiction over the merits. See *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Provisional Measures: Order) [2011] ICJ Rep 537, paras 19–57.

²² This default list is a recent development, with the requirements (2) and (3) being explicitly added some 15 years ago. The plausibility of rights was clearly spelled out in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures: Order) [2009] ICJ Rep 139, para 57. The link requirement was clearly articulated in *Avena (Interpretation) in Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Mexico v United States of America) (Provisional Measures: Order) [2008] ICJ Rep 311, para 58.

²³ See eg *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures: Order) [2023] ICJ Rep 587. In the Gaza case, Israel did not challenge South Africa’s standing, but the ICJ still considered it, implying that the Court may consider the issue *proprio motu*. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures: Order) [2024] ICJ Rep 1, paras 33–34.

²⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures: Order) [2023] ICJ Rep 36; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Provisional Measures: Order) [2024] ICJ Rep 529; *Embassy of Mexico in Quito (Mexico v Ecuador)* (Provisional Measures: Order) [2024] ICJ Rep 613.

separate opinions clarified that less elaborate reasoning does not alter the list of conditions to be considered by the Court.²⁵

While the current list of conditions for the indication of provisional measures appears stable, how they should be interpreted and applied in concrete cases remains disputed. The disagreements over the content and the concrete application of these conditions preceded *LaGrand*, but intensified after the final judgment in this case. In *Georgia v Russia*, for example, seven dissenting judges expressly noted that because ‘these measures are binding on both Parties (*LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 506, para. 109), the Court must be all the more vigilant in assessing whether the conditions required for their indication have been met.’²⁶ Each of the conditions has received uneven scholarly attention,²⁷ but by far the most controversial one is the plausibility of rights.²⁸ The general thrust of this requirement is that the party requesting provisional measures must establish that the rights it claims to be protected by the requested measures are at least plausible, and the *raison d’être* is to protect the party whose freedom may be restricted by provisional measures from baseless allegations.²⁹ However, since its first formal introduction in *Belgium v Senegal*, what exactly needs to be established to fulfil this requirement continues to confound judges and academics. In the ICJ practice so far, the plausibility test seems to be ‘oscillating wildly’.³⁰ A closer look at the case law on this point, as well as the parties’ arguments, suggests how the ICJ has become more cautious in considering provisional measures requests since *LaGrand*.

The evolution of the plausibility requirement can be traced relatively easily. While the notion that the right must plausibly exist is implicit in the purpose of an ICJ provisional measure as explained by the Statute itself (‘to preserve the respective rights of either party’),³¹ it was only in *Pulp Mills* (2006) that the parties directly debated the issue at some length. In *Pulp Mills*, the respondent, Uruguay, argued that one of the requirements for

²⁵ *Mexico v Ecuador* (n 24), Separate Opinion of Judge Iwasawa; *Mexico v Ecuador* (n 24), Declaration of Judge Nolte. On the active role of the President and legal officers in drafting the orders, see comments by Judge Donoghue in Katerina Linos and Joan Donoghue, ‘Behind the Bench with ICJ’s Former President Joan Donoghue’ (Berkeley Law Podcast, 2024) <<https://www.law.berkeley.edu/podcast-episode/behind-the-bench-with-icjs-former-president-donoghue>> accessed 14 April 2026.

²⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures: Order) [2008] ICJ Rep 400, Dissenting Opinion of Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, para 2.

²⁷ For example, the ‘link’ requirement has been little discussed. See further, Cameron Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) 356–362 (discussing cases where the requirement is attenuated); Massimo Lando, ‘Provisional Measures and the Link Requirement’ (2020) 19 *Law and Practice of International Courts and Tribunals* 177 (convincingly questioning the added value of the link requirement).

²⁸ See the discussion in Lando (n 5) 64; Cameron Miles, ‘Provisional Measures and the “New” Plausibility in the Jurisprudence of the International Court of Justice’ (2018) *British Yearbook of International Law*; Robert Kolb, ‘Digging Deeper into the “Plausibility of Rights” Criterion in the Provisional Measures Jurisprudence of the ICJ’ (2020) 19 *Law and Practice of International Courts and Tribunals* 365; Tom Sparks and Mark Somos, ‘The Humanisation of Provisional Measures? Plausibility and the Interim Protection of Rights before the ICJ’ in Fulvio Maria Palombino and others (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 77.

²⁹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures: Order) [2006] ICJ Rep 113, Separate Opinion of Judge Abraham, paras 8–9.

³⁰ Nataša Nedeski, Tom Sparks and Gleider Hernández, ‘The World Is Burning, Urgently and Irreparably—a Plea for Interim Protection against Climatic Change at the ICJ’ (2023) 22 *Law and Practice of International Courts and Tribunals* 301, 318.

³¹ The condition has surfaced in judges’ opinions before *LaGrand*: see, eg *Passage through the Great Belt (Finland v Denmark)* (Provisional Measures: Order) [1991] ICJ Rep 12, Separate Opinion of Judge Shahabuddeen, 28–31; *Questions of Interpretation and Application of the 1971 Montreal Convention arising*

indicating provisional measures is *fumus boni juris*: ‘the Court cannot grant provisional measures to preserve rights in cases where the alleged rights relied on would already at first sight appear to be based on clearly inadequate legal grounds’.³² The tactic is to heighten the requirement, rendering it more difficult for the applicant to obtain provisional measures. Argentina replied that while ‘this condition ... has never been required by the Court’, the rights it claimed are clearly recognized under the 1975 Statute.³³ The 2006 Order was silent on this issue, holding instead that the urgency requirement was not fulfilled. Judge Abraham appended a declaration, famously arguing that the ICJ missed the opportunity to settle this unresolved issue. In his view, since the *LaGrand* Judgment expressly held that an order indicating provisional measures is legally binding, the ICJ must take into account the sovereign right of the party to be restricted by such an order, which would then require the ICJ to review the merits of the claim even at the stage of provisional measures. He predicted that ‘the Court itself will inevitably be required sooner or later’ to pronounce on this issue.³⁴ That day indeed came very soon: the 2009 Order in *Belgium v Senegal*.

Since *Belgium v Senegal*, the ICJ has fluctuated between two approaches in considering the plausibility requirement. On the one hand, the Court would examine whether the asserted right appears to have a legal basis in international law. For example, in *Belgium v Senegal*, which concerns Belgium’s request for Hissène Habré’s extradition or Senegal’s prosecution under the Convention against Torture, it held that the right claimed by the applicant, being grounded in ‘a possible interpretation’ of the Convention, appears plausible,³⁵ which was in effect reaffirmed recently in *Canada and the Netherlands v Syria*.³⁶ In *Certain Activities Carried out by Nicaragua and Guyana v Venezuela*, the Court found that the claimed right could be derived from an arbitral award.³⁷ In *Certain Documents and Data*, the right to confidentiality of communications with legal advisers claimed by Timor-Leste was plausible because it could be derived from the principle of sovereign equality and equality of arms.³⁸

On the other hand, in most of the recent cases, the ICJ adopted a more stringent approach that examines the plausibility of the claim in addition to the legal basis of the asserted right; that is, whether the alleged violation of the right (which must plausibly exist) is supported by some evidence. Thus, in *The Gambia v Myanmar*, the Court did not solely base its decision on whether the Rohingya’s right to be protected from genocide was derived from a possible interpretation of the Genocide Convention, but referred to various resolutions and reports of the UN organs that record and condemn atrocities in

from the *Aerial Incident at Lockerbie (Libya v United States of America)* (Provisional Measures: Order) [1992] ICJ Rep 3, Dissenting Opinion of Judge Bedjaoui, paras 8–15.

³² *Pulp Mills (Argentina v Uruguay)* (Provisional Measures: Verbatim Record) CR2006/47, 8 June 2006, 26 (Condorelli).

³³ *Pulp Mills (Argentina v Uruguay)* (Provisional Measures: Verbatim Record) CR2006/48, 9 June 2006, 31–33 (Pellet).

³⁴ *Pulp Mills, Separate Opinion of Judge Abraham* (n 29) para 2.

³⁵ *Belgium v Senegal* (n 22), para 60.

³⁶ *Canada and the Netherlands v Syria* (n 23), paras 56–57 (characterizing Syria’s argument that the Applicants did not present evidence of alleged torture as the issue of a risk of irreparable prejudice and urgency).

³⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures: Order) [2011] ICJ Rep 6, paras 58–59; *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Provisional Measures: Order) [2023] ICJ Rep 655, para 23.

³⁸ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures: Order) [2014] ICJ Rep 147, para 27.

Myanmar.³⁹ In two cases against Russia brought by Ukraine, the ICJ considered both legal arguments and the evidence supporting the claim on the merits.⁴⁰ In *Qatar v UAE*, it noted ‘on the basis of the evidence presented to it by the Parties, that the measures adopted by the UAE on 5 June 2017 appear to have targeted only Qataris and not other noncitizens residing in the UAE’, and that it therefore found that some of the asserted rights are plausible.⁴¹

The oscillation between the ‘legal-basis’ approach and the ‘plausibility-of-claim’ approach has been driven, in part, by the arguments of the parties. *Equatorial Guinea v France*, often regarded as the first case under the second approach, is a case in point. Aiming to further heighten the condition for provisional measures, France argued that ‘it is not sufficient to invoke treaty provisions constituting vaguely conceivable bases of jurisdiction for the Court’ and stressed that the building on Avenue Foch did not constitute ‘premises of the diplomatic mission’ on the date of its attachment by French authorities.⁴² Thus, the ICJ may continue to swing between two approaches to the plausibility requirement, depending on the parties’ argumentation. The signal to potential litigant states is nevertheless clear: to err on the safe side, potential applicant states must be ready to produce some evidence to support their case even at the early stage of the proceedings.

2.2. State responsibility for non-compliance with provisional measure orders

Legally binding orders on provisional measures necessarily raise the question of the legal consequences of their breaches. In particular, academics focus on the issue of remedies. Some argue that the violation of a provisional measure order should, in itself, entitle the applicant to compensation, while others suggest that the compensation for the violation can be added to the compensation arising from the claim on the merits.⁴³ The discussion is sometimes framed more broadly as how to institutionally improve the effectiveness of the ICJ provisional measures.⁴⁴ However, in its practice so far, the ICJ has gravitated towards a declaratory judgment as the most appropriate form of reparation.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures: Order) [2020] ICJ Rep 3, paras 54–55.

⁴⁰ *Ukraine v Russia (I)* (Provisional Measures: Order) (n 23) paras 72–75, 80–83; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures: Order) [2022] ICJ Rep 211, paras 56–59.

⁴¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures: Order) [2018] ICJ Rep 406, para 54.

⁴² *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures: Verbatim Record) CR 2016/15, 18 October 2016, 23–24 (Pellet).

⁴³ For different views, see eg Maurice Mendelson, ‘State Responsibility and the International Court of Justice’ in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 35, 42–43 (maintaining that incident jurisdiction alone is unlikely to be sufficient for granting remedies); Paolo Palchetti, ‘Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function’ (2017) 100 *Rivista di Diritto Internazionale* 71, 80–84 (arguing that breaches of a provisional measure order may affect the determination of compensation); Karin Oellers-Frahm and Andreas Zimmermann, ‘Article 41’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1135, 1188–90 (summarising key issues on the subject); Pierre d’Argent, ‘Preliminary Objections and Breaches of Provisional Measures’ (2021) 104 *Rivista di Diritto Internazionale* 115, 132–33 (arguing for the possibility for the ICJ to award compensation if the ‘provisional obligations are stricter than the substantive obligations’).

⁴⁴ See eg Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22; Ewa Sałkiewicz-Munierlyn, *Jurisprudence of the PCIJ and the ICJ on Interim Measures of Protection* (Springer 2022) 100–09; Catherine

Yet the seeds of post-*LaGrand* legal uncertainty are already discernible in the field of state responsibility in *Certain Activities by Nicaragua*. The case concerns Nicaragua's occupation of the disputed territory, the construction of a canal from the San Juan River to Harbour Head Lagoon, and the dredging activities. Costa Rica submitted the case and filed a request for provisional measures, which the ICJ has indicated. Nicaragua nevertheless violated the Court's initial provisional measures order, which led to Costa Rica's request for the second provisional measures order, as well as the costs of the second provisional measures proceedings. While the ICJ accepted that Nicaragua's violation of the first order necessitated the new provisional measure proceedings, it summarily held that, 'taking into account the overall circumstances of the case, an award of costs to Costa Rica ... would not be appropriate'.⁴⁵ The Joint Declaration of Judges Tomka, Greenwood, Sebutinde, and Judge *ad hoc* Dugard disagrees: it insists that the matter falls within the Court's discretion, and that if the state's failure to comply with provisional measures necessitates a further hearing, 'it is only right that that State should bear the costs incurred'.⁴⁶ This decision confirms the ICJ's common practice regarding a declaratory judgment as satisfaction and the rule that the award of costs is exceptional. At the same time, it remains possible for future litigants to distinguish this case on the facts and seek to request costs again.

The recent *Ukraine v Russia (I)* Judgment provides the more revealing example. In its Order of 19 April 2017, the Court ordered Russia 'in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination' (CERD), to refrain from maintaining or imposing limitations on the ability of the Mejlis, the representative body of the Crimean Tatars, to conserve its representative institutions.⁴⁷ Russia continued to impose the ban on the Mejlis. On the merits, Ukraine characterized it as non-compliance with the Order while Russia argued that the ban is consistent with CERD. In its 2024 Judgment, the Court held that Ukraine has not provided convincing evidence to establish that the ban of the Mejlis constitutes an act of discrimination within the meaning of CERD. Yet it also found that by maintaining the ban on the Mejlis, Russia has violated the Order of 19 April 2017. The Court reasoned that obligations arising from provisional measures bind the parties independently of the factual or legal situation which the provisional measure in question aims to preserve, and that the reference to CERD in the Order 'does not qualify the measure nor confers discretion upon the Party addressed to decide whether or not to implement the measure indicated'.⁴⁸ While the Court's position affirms what academics call the 'autonomy of provisional measures',⁴⁹ it seems to have, in

Amirfar and Floriane Lavaud, 'Reinforcing the International Court of Justice' in Mona Ali Khalil and Florian Lavaud (eds), *Empowering the UN Security Council: Reforms to Address Modern Threats* (CUP 2024) 127, 137–39.

⁴⁵ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Merits) [2015] ICJ Rep 665, para 144.

⁴⁶ *ibid*, Joint Declaration of Judges Tomka, Greenwood, Sebutinde, and Judge *ad hoc* Dugard, at 757.

⁴⁷ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures: Order) [2017] ICJ Rep 104, para 86.

⁴⁸ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Merits) [2024] ICJ Rep 78, para 391. Judge Tomka dissented on this point, arguing that the right to be protected by provisional measures has been preserved and the purpose of this provisional measure was achieved. See *Ukraine v Russia (I)* (Merits), Declaration of Judge Tomka, para 6.

⁴⁹ Eva Reiter, 'Autonomy of Provisional Measures' in Fulvio Maria Palombino and others (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 55; Zhenni Li, 'Autonomy of Provisional Measures or Autonomy of the International Court of Justice?' (2023) 22 *Chinese Journal of International Law* 39. Also, *Certain Activities* (n 37), Separate Opinion of Judge Cançado Trindade, at

effect, lowered the standard of proof for an applicant state and altered states' litigation strategy in future cases: when it is likely that the respondent will violate the anticipated provisional measure order, the potential applicant will need to establish only the 'plausibility' of its rights that are threatened by an imminent risk of irreparable harm, and, provided that the ICJ has jurisdiction on the merits, it can obtain a judgment finding the respondent's state responsibility. ICJ judges often remark that the Court's provisional measure orders should not prejudice the merits of the case. Yet *Ukraine v Russia (I)* shows that, as regards state responsibility, even if the Court manages to avoid prejudgment on the merits, the party can still transform an order indicating provisional measures that have not been complied with into something equivalent to a final judgment.

The 2017 Order in *Ukraine v Russia (I)* additionally requires both parties to 'refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'.⁵⁰ In the merits phase, it found that Russia's invasion of Ukraine 'severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve'⁵¹ and therefore violates the obligation under the Order. Judge Yusuf raised doubt about this reasoning, arguing that non-aggravation measures are conceptually subordinate to the principal measures indicated by the Court.⁵² In any event, the ICJ's finding on violations of the non-aggravation measure, too, seems to widen the window for states that seek to establish responsibility for non-compliance with provisional measures, especially in disputes involving armed conflicts. While Ukraine's victory on the provisional measure point might appear small, it remains significant because it is the very first victory over Russia in the history of the World Court. As Lauri Mälksoo aptly argues, 'the ICJ judgment must be assessed not just on its own technical terms but also in light of the history of international adjudication and Russia's (and before it, the Soviet Union's) role in it.'⁵³

While these developments brought about some legal uncertainty, they have also reinforced the ICJ's authority and the sanctity of its orders on provisional measures. The Court signals to the parties that its order must be complied with, regardless of the substantive outcome on the merits. The 'proceed at your own risk' principle, articulated in *Passage Through the Great Belt* as advice,⁵⁴ is now tied to international responsibility for wrongful acts. This stance of the ICJ goes hand in hand with the establishment of a new monitoring system. In 2020, the ICJ adopted the Resolution concerning the Internal Judicial Practice of the Court, empowering it to elect three judges to form an *ad hoc* committee. This committee will examine information from the parties regarding the implementation of provisional measures and recommend potential options for the Court, and the Court may take a further decision on the matter. Such a system may put further pressure on the addressee of

760–64 ('In effect, the evolution of provisional measures in recent years has, in my perception, made very clear that they operate within an autonomous legal regime of their own ... It is now the duty of contemporary international tribunals to elaborate on such autonomous legal regime, and to extract the legal consequences ensuing therefrom.').

⁵⁰ *Ukraine v Russia (I)* (Provisional Measures: Order) (n 47) para 86.

⁵¹ *Ukraine v Russia (I)* (Merits) (n 48) para 397.

⁵² *ibid*, Declaration of Judge Yusuf, paras 1–4.

⁵³ Lauri Mälksoo, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v Russian Federation*), Judgment' (2024) 118 *American Journal of International Law* 519, 519–20.

⁵⁴ For discussion, see Shouvik Bhattacharya, "'Proceeding at Your Own Risk": Evaluating a New Principle of International Law for Provisional Measures' (2013) 38 *Yale Journal of International Law* 511, 519–24; Miles (n 27) 463–66.

the provisional measure order.⁵⁵ In 2025, the Court further amended Article 78 of the Rules of Court, which now requires the ICJ to ‘make the report or parts thereof accessible to the public as soon as possible, unless, in case of an objection by a party, it decides otherwise’.⁵⁶ Even before the entry into force of these amended Rules on 2 February 2026, the Court had already made public Myanmar’s report and The Gambia’s observations on its website.

A related issue that has attracted significant academic attention is the scope of jurisdiction of the ICJ in determining a state’s compliance with provisional measure orders. As noted above, the ICJ held in *LaGrand* that ‘[w]here the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures ... has not been complied with.’⁵⁷ It also exercised that jurisdiction and determined that the USA breached the provisional measures order, even when it found that the US’s commitment to ensure implementation of the Vienna Convention on Consular Relations meets Germany’s request for an assurance of non-repetition. Since *LaGrand*, it is well established that if the Court has jurisdiction over the merits of a case, it may determine a breach of obligations under the order on provisional measures.⁵⁸ Academics nevertheless continue to debate whether the ICJ may determine non-compliance with the provisional measure order when it lacks jurisdiction to decide the merits of the case.⁵⁹

In *Georgia v Russia*, *Qatar v UAE*, and *Ukraine v Russia (II)*, the ICJ was simply silent on non-compliance with provisional measure orders when it determined that it lacked jurisdiction over the merits. However, some academics argue that the ICJ may assess non-compliance with the provisional measure order even without jurisdiction over the merits of the case.⁶⁰ The main line of reasoning is that the legal bases of these two types of jurisdiction are different: the jurisdiction to indicate provisional measures (and to determine non-compliance with the provisional measure order) is derived from Article 41 of the Statute, while the jurisdiction to decide the case is based on mutual consent given by the parties in a specific case. It follows that even if the Court has no jurisdiction to hear the merits of the case, it still has jurisdiction to indicate provisional measures in a binding order, to assess its compliance, and to decide on state responsibility and the appropriate form of reparation accordingly. To support this view, some would point to the *Avena (Interpretation)* case where the ICJ held categorically that ‘[t]he Court’s competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures.’⁶¹ This can be regarded as part of the above-mentioned autonomy of the legal regime on provisional measures. Some have

⁵⁵ Kolb (n 5) 161. The idea of such a monitoring system was first raised in *Lando* (n 44).

⁵⁶ ICJ Rules of Court, art 78(2).

⁵⁷ *LaGrand* (n 1) para 45.

⁵⁸ See eg *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303, paras 321–22.

⁵⁹ Relatedly, there arises a question about the appropriate stage in the proceedings where the ICJ may determine responsibility for non-compliance with the provisional measure order. For a thorough discussion, see *d’Argent* (n 43) 115–35.

⁶⁰ See eg *Palchetti* (n 43) 77–89; *d’Argent* (n 43) 137–46. For a thorough recent discussion, see Nikiforos Panagis, ‘Jurisdictional Entanglement: the Relationship between the Jurisdiction over the Dispute and the Jurisdiction to Assess Compliance with Provisional Measures’ (2024) 23 *Law and Practice of International Courts and Tribunals* 7, 7–35.

⁶¹ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)* (Merits) [2009] ICJ Rep 3, para 51.

sought to qualify such autonomy by adding some scenarios where the ICJ should not exercise its jurisdiction to assess non-compliance with the provisional measure order when it lacks jurisdiction over the merits of the case. In particular, Nikiforos Panagis argues that, in light of judicial propriety, the ICJ should not determine state responsibility for non-compliance if the obligations imposed by the provisional measure order are essentially identical to the obligations at issue in the principal proceedings, for otherwise, the party can circumvent the principle of consent.⁶² But this cautious view means that even if the ICJ does not have jurisdiction to hear and decide the case, it can nevertheless decide on breaches of provisional measure obligations that are different in character and nature from the obligation in the principal proceedings, such as non-aggravation and preservation of evidence. With the constantly increasing requests for provisional measures, it seems only a matter of time before these arguments will be tested before the ICJ.

2.3. New incentives for litigant states and the ICJ

Even before *LaGrand*, provisional measures have been part of states' litigation strategy⁶³ to test legal and factual arguments (such as *Passage through the Great Belt*),⁶⁴ to bring quick attention to ongoing events and maintain momentum and pressure (such as *Tehran Hostages*),⁶⁵ and to secure an ICJ order that can be used in other domestic and international fora (such as *Anglo-Iranian Oil Co.*).⁶⁶ By the same token, the Court would always have to carefully consider the requests to discharge its function under Article 41. But the *LaGrand* Judgment, coupled with the legal uncertainty it brought about as discussed in the previous section, creates additional incentives and expands the argumentative space in the field of provisional measures in which relevant actors can move.⁶⁷

For litigating states, the *LaGrand* Judgment generates a greater incentive to request provisional measures. This greater incentive leads us to expect that: states (i) are more likely to make requests for the indication of provisional measures and (ii) are likely to ask for the indication of a *greater number of measures* in their requests. These inform our demand-side hypotheses, as formally stated in the next section. The primary reason is that states can obtain a binding decision against the opposing party while the case is pending, and they can do so expeditiously under the Rules of Court. The fact that the law is in flux generates further incentive to request more measures and to do so more frequently, as states can experiment with new arguments with some chance of success and devise new litigation tactics, and the Court itself, as discussed above, has accommodated new arguments put forward by the parties. Obviously, the autonomy of provisional measures creates additional incentives for states to request provisional measures, even when they are not fully certain about the

⁶² Panagis (n 60) 30–33. The author uses the term 'consubstantial' to express this threshold.

⁶³ On litigation strategy involving provisional measures broadly, see Erlend M Leonhardsen, 'Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when Non-Compliance is to be Expected' (2014) 5 *Journal of International Dispute Settlement* 306; Miles (n 27) 443–72.

⁶⁴ Martti Koskenniemi, 'Case Concerning Passage through the Great Belt' (1996) 27 *Ocean Development & International Law* 225, 275–79.

⁶⁵ Terry D Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v United States Dispute* (Martinus Nijhoff 1989) 58.

⁶⁶ Shabtai Rosenne, *The Law and Practice of the International Court of Justice* (Martinus Nijhoff 2005) 216 (noting that the ICJ Order was used as evidence of the Anglo-Iranian Oil Company's title in domestic court cases when the Company applied for an injunction prohibiting movement of a cargo).

⁶⁷ On how legal uncertainty created in the course of international law making gives states opportunities and incentives to formulate extensive claims, see Umut Yüksel, 'The Law Behind Dispute Onset: How Legal Uncertainty Drives Maritime Boundary Disputes' (2025) 69 *Journal of Conflict Resolution* 1172.

Court's jurisdiction on the merits. It is tempting for litigants to take this even further. For example, Carlos Argüello, who served as Agent for Nicaragua in almost all cases, has recently argued that the ICJ could order provisional measures even when an applicant seeks to establish the jurisdiction *forum prorogatum*.⁶⁸ Although his argument is unlikely to persuade the judges, it suggests that one of the repeat players at the ICJ might consider testing this new argument.

The two hypotheses about the demand side are further supported by the uncertainty surrounding the consequences of an unsuccessful request. When the party that secures the provisional measure order loses on the merits, the legal situation remains unclear as to whether the other party may claim any remedy.⁶⁹ So far, the ICJ has never sanctioned a party that does not succeed on its request. Some of the main risks for the applicant are that its case might be removed from the General List for the manifest lack of jurisdiction as early as the provisional measures phase, and that it loses the opportunity to present its case more fully in the preliminary objections phase. But in such a scenario, it is likely that it will lose in the later phase anyway (unless there are intervening events, such as a change in the composition of the bench).

The heightened conditions for provisional measures post-*LaGrand* also support the incentive to request more provisional measures and to do so more frequently. Uncertainty about plausibility puts potential litigants on alert that their request for provisional measures should be sufficiently grounded in both law and fact, even at an early stage of the case. To be sure, this may add more burden on the state seeking provisional measures. But it also allows the state to obtain the ICJ's pronouncement that the right it claims is plausible and there is a real and imminent risk of irreparable harm against that right without awaiting the final judgment in the case (on which it may not succeed). That pronouncement coming from the World Court can be invoked in other fora, including the media, domestic courts, and international organizations. This use of provisional measure orders, as explained earlier, was attempted already in the very first order of the ICJ in the *Anglo-Iranian Oil* case, but the binding effect, which was made clear in *LaGrand*, has surely added more weight to them. *South Africa v Israel* vividly illustrates this strategic point. The successive orders found that the Palestinians' rights to be protected from genocide and other prohibited acts are plausible and that there is a real and imminent risk against those rights.⁷⁰ That risk triggers the obligations of every state party to the Genocide Convention to take appropriate measures at its disposal to prevent genocide,⁷¹ which may include terminating arms sales to Israel, as Nicaragua recently contended in *Nicaragua v Germany*.⁷² As Dannenbaum and

⁶⁸ Carlos Argüello, 'The International Court of Justice's Intrinsic Powers to Decide all Cases Brought before it' (CIL-Dialogue, 2024) <<https://cil.nus.edu.sg/blogs/the-international-court-of-justices-intrinsic-powers-to-decide-all-cases-brought-before-it/>> accessed 14 April 2026.

⁶⁹ On this under-explored issue, see Hugh Thirlway, 'Provisional Measures: How "Provisional" Is "Provisional"?' in Fulvio Maria Palombino and others (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 9, 9–17; Jean-Baptiste Merlin, 'Unduly Indicated? Provisional Measures and Subsequent Adverse Findings at the International Court of Justice' (2023) 21 *Law and Practice of International Courts and Tribunals* 90, 90–118.

⁷⁰ For the controversy around 'plausibility of genocidal acts', see Mike Becker, 'Crisis in Gaza: South Africa v Israel at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)' (2024) 25 *Melbourne Journal of International Law* 182, 203–204.

⁷¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 431.

⁷² *Nicaragua v Germany* (n 24).

Dill convincingly argue, the ICJ Orders in *South Africa v Israel* should caution third states against their complicity in provisional measure violations and their breaches of pre-existing obligations under the Genocide Convention and international humanitarian law. Thus, ‘courts’ provisional products can provide a key epistemic resource in real-time legal assessments of war’.⁷³

Legal uncertainty about the consequences of non-compliance further increases incentive to request provisional measures and supports the two hypotheses. Even though there are only two concrete and potentially impactful examples discussed above (*Certain Activities by Nicaragua* and *Ukraine v Russia (I)*), the possibility of arguing non-compliance with provisional measures in the later phase might prompt states to consider requesting provisional measures more enthusiastically. The *Ukraine v Russia (I)* Judgment concretely illustrates the argumentative added value of non-compliance with provisional measures to the merits phase.

Turning to the supply side, for the ICJ, the *LaGrand* Judgment incentivizes the Court to treat requests with more caution, as expressly noted by many judges. We consider four hypotheses: that the ICJ is likely (i) to grant fewer requests, (ii) to grant fewer requests in full as formulated by the requesting party, (iii) to grant more requests partially, and (iv) to indicate fewer measures that are wholly different from what the parties ask. The first hypothesis alone—that the Court is more likely to reject provisional measure requests—is too simplistic, as it overlooks the delicate balance that the ICJ has to strike between the right of the party and the authority of the Court itself. Now that it may create legal obligations incumbent on the parties by provisional measure orders, the Court should demonstrate more sensitivity towards sovereignty and freedom of the addressees of the orders. As suggested by Judge Abraham, the ICJ thus has a new incentive to be more cautious in granting provisional measures. The increasingly stringent conditions discussed in Section 2.1, in particular the plausibility requirement, the link to prima facie jurisdiction, and the tests of irreparable prejudice and urgency, provide the Court with concrete legal tools to exercise this caution, enabling it not only to reject requests that fall short of these thresholds but also to calibrate its response by granting them only in part. However, the deference for state sovereignty and freedom must be balanced with the necessity to preserve applicants’ rights so that its judgment does not become futile. Legal uncertainty about non-compliance can be seen in this regard. The possibility that the ICJ will find state responsibility for breaching provisional measures and impose appropriate sanctions serves to maintain the authority and reputation of the ICJ.

As such, post-*LaGrand* legal uncertainty in the field of provisional measures enables the Court to calibrate what it regards as the most appropriate response to the party’s request in a specific case while maintaining its status as the ‘Master of its own procedure’,⁷⁴ and some flexibility in light of the (changing) conception of the Court’s function⁷⁵ and the landscape of international adjudication in which the ICJ is situated.⁷⁶ As a consequence, we also

⁷³ Tom Dannenbaum and Janina Dill, ‘International Law in Gaza: Belligerent Intent and Provisional Measures’ (2024) 118 *American Journal of International Law* 659, 682.

⁷⁴ Judge Cançado Trindade invoked this concept in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures: Order) [2014] ICJ Rep 147, Separate Opinion of Judge Cançado Trindade, paras 59–62.

⁷⁵ Iain Scobbie, ‘Interim Measures: International Tribunals as International Organisations’ in Eric de Brabandere (ed), *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (CUP 2021) 141, 141–59.

⁷⁶ eg see the discussion on jurisprudential interaction between the ICJ and ITLOS in Loris Marotti, ‘A “Game of Five and Take”’: The ITLOS, the ICJ and Provisional Measures’ in Fulvio Maria Palombino and others (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 131, 131–46.

hypothesize that the ICJ is likely to grant fewer requests in full as formulated by the requesting party and to grant more requests partially because this will allow the Court to maintain the appropriate balance.

The broader point is that the law of provisional measures matters for the ICJ as well as disputing states. The chief purpose of provisional measures, as the wording of Article 41 makes clear, is to ‘preserve the respective rights of either party’ from irreparable harm, pending the final judgment in the case. But to preserve the rights claimed by the party before the final judgment is also to preserve the full effect of that judgment and the credibility of the Court itself. A judgment ordering restitution of the right that has been extinguished while the case is pending is simply meaningless. Compensation for injury may be ordered, but depending on the significance of the rights, it is more desirable to preserve the rights in the first place (and in this sense, ‘irreparable harm’ cannot be interpreted literally). Such institutional interest of the Court is enhanced by the view that the ICJ’s power to order provisional measures is based not on mutual consent of the parties in a case but on Article 41 of the ICJ (to which they have consented).⁷⁷ Additionally, in cases concerning armed activities or when human life is at stake, the ICJ might be inclined to accede to the requests. As the principal judicial organ of the UN, the ICJ is expected to play a role in maintaining international peace and security. This role perception is confirmed by extra-judicial writings of some judges.⁷⁸

The incentives discussed in this section, on both the demand and supply sides, form the basis of the formal expectations we set out below. In the next section, we translate these incentives into testable hypotheses about how the behaviour of both states and the Court may have changed after *LaGrand*.

3. Expectations

We foreground our hypotheses based on the general expectation that *LaGrand* was a cut-off point around which we can expect to see changes in the behaviour of both the ICJ and litigants. Having said this, we are careful not to attribute every change to the decision. Our research design identifies correlations between the time period and observable patterns in state and court behaviour, but it does not establish a causal relationship. Other factors, including the professionalization of interstate litigation, learning effects, and changes in the composition and docket of the Court, may also have contributed to the patterns we observe. We return to these alternative explanations in Section 6. The *LaGrand* Judgment provides us with a theoretically justified moment that changes the strategic environment both states and the Court operate in, with possible consequences on their behaviour. In what follows, we formally state our hypotheses.

After 2001, litigants, or applicant states, may be more likely to *ask for provisional measures* and *ask for a broader set of measures* for the reasons discussed above. These are captured in the following hypotheses:

After 2001, litigants are more likely:

⁷⁷ See eg Rosenne (n 11).

⁷⁸ For references and discussion, see Christine Gray, ‘The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua’ (2003) 14 *European Journal of International Law* 867, 897–903; Hugh Thirlway, ‘Peace, Justice, and Provisional Measures’ in Giorgio Gaja and Jenny Grote Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice* (Brill 2014) 75, 75–86.

- H₁. To make requests for the indication of provisional measures in the cases they initiate.
- H₂. To ask for more items of provisional measures in their requests.

Court behaviour may also change after 2001 as the question of the measures' binding nature is settled, and the legal uncertainty surrounding some of the remaining issues makes provisional measures potentially more impactful. Moreover, judges are likely to pay increased attention to not only what they indicate but also how their orders are received and the extent to which they are followed by the parties. Non-compliance with provisional measures that are binding presents a challenge for the credibility and reputation of the ICJ. Reputational costs may be heightened as the Court is seeking to keep track of how the addressees of the order implement the measures they indicate. Observable implications of such caution may involve fewer indications, fewer measures, fewer measures indicated without being requested, or more measures that stop short of granting the party what it requested. Based on these, we suggest the following hypotheses:

After 2001, the ICJ is more likely:

- H₃. To grant fewer requests,
- H₄. To grant fewer requests fully,
- H₅. To indicate fewer measures that are not requested by the party.

We do not have strong expectations about requests that are partially granted. It may be conceived, however, that the Court may balance its reluctance to grant requests fully (ie, as formulated by the parties) with the need to indicate a measure that partially addresses the party's request. Thus, we can further propose that, after 2001, the ICJ is more likely:

- H₆. To grant more requests partially.

While the increased caution on the part of the ICJ can be attributed to the bindingness of provisional measures declared in 2001 and the heightened possibility that its orders will affect state sovereignty, there is, as discussed in Section 2, a countervailing interest that prevents the ICJ from being too cautious, at least in some cases. This interest can be called *effectiveness of a judgment*—in some types of cases, the ICJ has to provide in provisional measures an effective tool for parties to obtain a quick remedy to protect their rights. We suggest that in cases involving *active armed hostilities*, or which concern an *imminent threat to human life or physical integrity* outside of the context of armed hostilities, we are less likely to observe any post-*LaGrand* increase in the caution of the ICJ in indicating provisional measures, not least because the Court, as the principal judicial organ of the United Nations, is expected to play a role in maintaining international peace and security. We thus suggest the following, final hypothesis:

- H₇. The increase in the ICJ's caution will be most clearly marked in cases that do not involve active armed hostilities or imminent threat to human life or physical integrity.⁷⁹

⁷⁹ Our categorization of each ICJ case according to whether it concerns armed hostilities, an imminent threat to human life or integrity, or neither is available on request.

4. Data

Our dataset includes information on all the ICJ contentious cases since the *Corfu Channel* case, initiated on 22 May 1947. We collect additional information on cases where at least one provisional measure request is made by one of the parties, which constitute our set of ‘cases’ (in the sense of object of analysis) with requests. For these cases, we note all the measures that were requested and the Court’s decisions relative to them, also noting those instances where, in cases with at least one request, the Court indicates measures that are different from what parties requested.

One of the innovations of our approach is that we analyse each request in a granular manner. To our knowledge, we are the first to provide an item-by-item treatment of provisional measures requests and orders. We divide up requests in distinct *items* in line with how the parties in the proceedings definitively formulate their request.⁸⁰ For instance, in *Cameroon v Nigeria*, Cameroon requests three distinct measures: (i) that armies be withdrawn to their position before the Nigerian attack, (ii) that both parties abstain from acts along the border until the judgment of the Court, and (iii) that parties abstain from acts that may hamper the gathering of evidence.⁸¹ Once these items are identified, we make note of the position taken by the ICJ on each of the items included in the request. When available, we also make note of the number of votes by judges voting in favour of indicating a measure requested in an item.⁸²

With respect to each requested item, we consider four possible outcomes: *Fully granted*, *Partially granted*, *Not granted*, and *No decision*. In addition, if the ICJ indicates a measure that is entirely different from all the items that the party has requested, we categorize it as *Not requested but indicated*. We briefly define the outcome categories as follows:

- *Fully granted* refers to the measures that the ICJ ordered in the operative part of the order that match the substance of an item that a disputing party had requested, notwithstanding the possibility that the operative part may not use the same wording as the request.
- *Partially granted* refers to the measures that the ICJ ordered in the operative part of the order that partially correspond to an item requested by the litigant in the sense that (a) the request is granted with a qualification that limits the *geographical, material, quantitative, or temporal* scope of the measures requested by the litigant; (b) the indication *distributes or concentrates the burden* that must be borne by the parties (creating obligations for both parties when the request only asked for constraining one party, or creating obligations for only one party when the request was for mutual obligation); or (c) the indicated measure simply *reaffirms the relevant rules of international law in general terms* when the requested measures are relatively specific.
- *Not granted* refers to requested measures that the ICJ rejected and that do not appear in the operative part of the order.

⁸⁰ The requests thus take the form of a list of items that designate different provisional measures that the parties ask the Court to indicate. We respect the parties’ enumeration. Even if the party’s request contains an item that can be divided into subitems, it will count as one item if it was presented as such by the party. This is also in line with how the ICJ refers to the measures.

⁸¹ *Land and Maritime Boundary between Cameroon and Nigeria* (Provisional Measures: Order) [1996] ICJ Rep 1996, 13, para 20.

⁸² The breakdown of the vote is not always reported. When we are not clear on how the judges have voted on a specific item, we leave the vote and unanimity variables uncoded. We only populate them in cases where there is a blanket refusal to indicate measures by some vote, in which case we apply that vote to all items in question.

- *Not requested but indicated* refers to a measure that the ICJ ordered even though the party had not requested it.
- *No decision* refers to requests on which the ICJ made no decision regarding provisional measures in the operative part.

The codebook that accompanies this article (see the data supplement) contains descriptions and examples for each category, as well as our coding decision for each item. Each coding decision was made following the rules in our codebook by one of the authors, and was reviewed by another author to ensure consistency.

Constructed as such, our dataset includes 164 cases introduced between 1947 and 2024. Sixty of these cases included a provisional measure request, and 104 of them did not. The first request dates from 1951, in the *Anglo-Iranian Oil Co (United Kingdom v Iran)* case. These 60 cases included 74 distinct instances of requests, where each instance can be an initial request by the applicant or any additional request made by the applicant or respondent for the addition or modification of provisional measures. For instance, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* includes two instances of requests: the initial request by Argentina and a request by Uruguay.

One of our contributions is the consideration of requests in specific items depending on how parties enumerate the measures they ask for in each request. We have 252 items requested, but the Court made a decision on 285 items. This means that 33 items were *Not requested but indicated*. The other outcomes include 135 requests that were *Not granted*, 67 that were *Partially granted*, 38 that were *Fully granted*, and 12 items on which *No decision* was reached.⁸³

Figure 2 shows cumulative requests and decisions over time, counting each item separately.⁸⁴ In the upper panel, capturing requests, we observe that the number of items requested increases substantially after 2000, and even more so after 2010. While there are less than 50 items requested between 1951 and 1992, this number reaches 101 by 2003. Between 2003 and 2022, this number doubles to arrive at 203, and it reaches 252 by 2024. In terms of decisions (lower panel), when we only focus on decisions that are *Fully granted*, *Partially granted*, and *Not granted*, the cumulative number of items that are *Not granted* exhibits the most similar pattern to items requested. The *Partially granted* category also shows recent exponential growth tendencies, whereas the *Fully granted* items stagnate relative to the other two categories.

In the next section, we provide an analysis using 2001 as the cut-off date around which we expect to find changes in court and litigant behaviour.

5. Analysis

We first test our hypotheses about changes in litigant and court behaviour around 2001, relying on our original dataset of provisional measures requests before the ICJ. Conveniently, there are no requests in 2001 itself, so we are able to divide the periods neatly as *Before 2001* and *After 2001*. In a subsequent subsection, we consider other possible manifestations of change in litigant and court behaviour in several areas: an increase in the requests for modifications and counter-requests, qualifications used when the Court

⁸³ 2 items in *Trial of Pakistani Prisoners of War (Pakistan v India)*, 4 items in *Border and Transborder Armed Actions (Nicaragua v Honduras)*, 3 items in *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v Italy)*, and 3 items in *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v France)*.

⁸⁴ See Figs A2 and A3 for items granted over time, both globally and broken down into different outcomes.

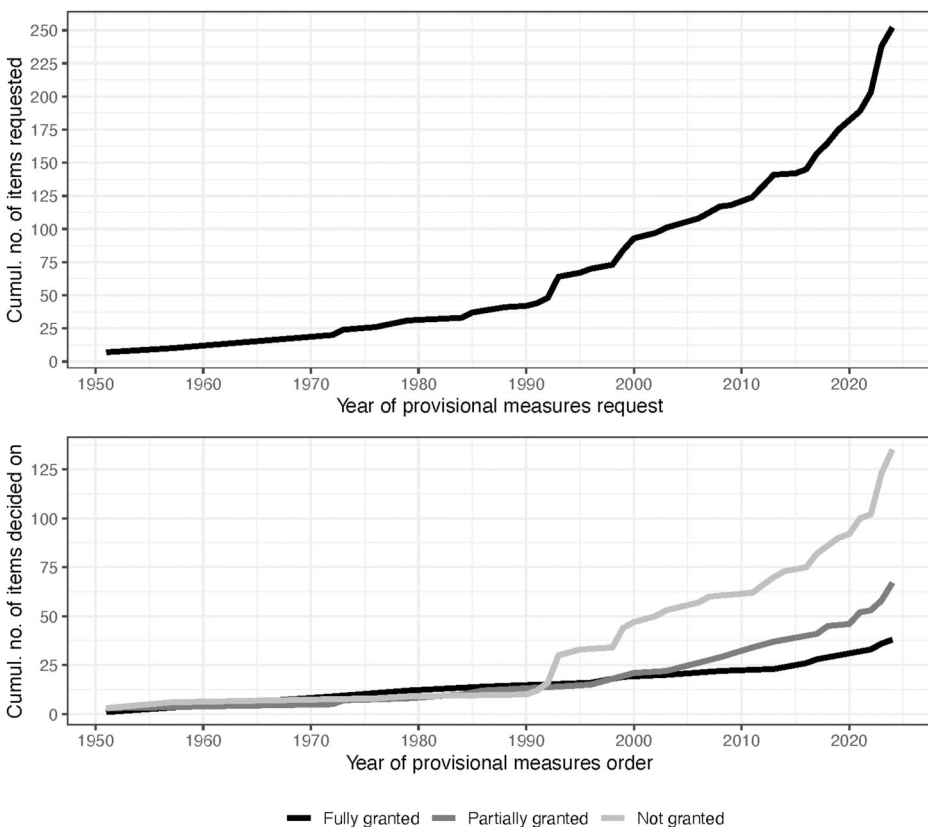


Figure 2 Cumulative number of provisional measures items requested and decided on.

partially granted a request, changes in the patterns of indication of non-aggravation, and changes in the voting patterns, especially, unanimity.

We note that the findings we present below identify associations between the pre- and post-2001 periods and observed patterns in both the demand for and supply of provisional measures. They are consistent with the theoretical expectations we have set out, though they are correlational in nature and, as we discuss in Section 6, we cannot rule out alternative explanations.

5.1. Main hypotheses

We begin by considering our first two hypotheses, namely, that litigants will be more likely to make provisional measure requests after 2001 (H_1) and will request more items (H_2). [Figure 3](#) presents plots that compare the proportion of cases with requests (left) as well as the mean number of items requested before and after 2001 (right). We can make two observations. First, the share of cases with provisional measure requests rises from 33 per cent (33 in 100 cases) to 42.2 per cent (27 in 64 cases). This difference of 9.2 per cent is not statistically significant, however. Although this difference is in the right direction, we cannot conclude that litigants are more likely to request provisional measures after 2001 (H_1). Secondly, the average number of items requested per case also increases from 2.82 to

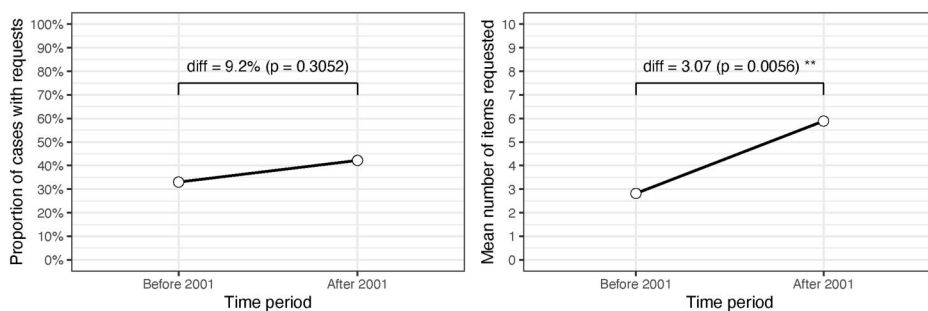


Figure 3 Comparison of provisional measure requests before and after 2001. The left panel compares the proportion of cases with requests, and the right panel compares the mean number of items requested per case before and after 2001. The difference calculated and the results of statistical tests for differences in proportions and means across the two periods are indicated in each panel. Note that requests can be made more than once in a single case (with requests for modification or additional requests), in which case the items are simply added up for each case.

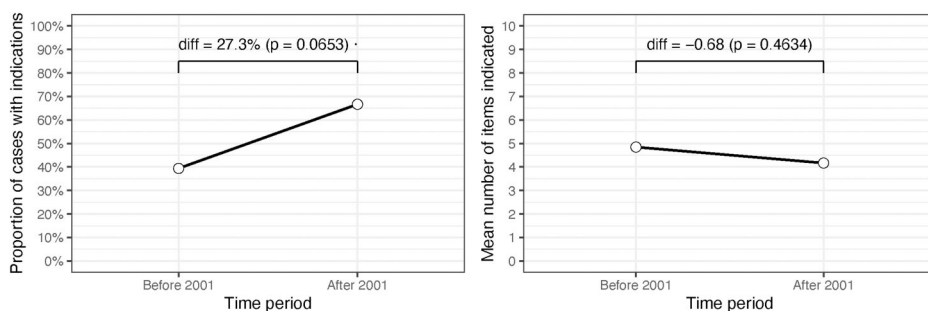


Figure 4 Comparison of the proportion of cases with a provisional measures request where the ICJ granted at least one provisional measure, and the mean number of items granted before and after 2001. To be counted as granted, items need to be fully granted, partially granted, or indicated without being requested. There can be more items granted than requested in each case.

almost 5.89. This difference of 3.07 is statistically significant at the 0.01 level. Thus, there is evidence for H_2 that more items are requested per case after 2001.⁸⁵

We next examine whether the ICJ has become less likely to indicate provisional measures. Figure 4 shows that this is not necessarily the case. Indeed, among cases where at least one provisional measure was requested, the proportion of cases where at least one provisional measure was indicated increases from 39.4 per cent to 66.7 per cent. Our expectation that the court will indicate measures less often (H_3) does not find support, at least at this level of aggregation. If anything, there is a slight *increase* in the proportion of cases in which the court grants a provisional measure. At the same time, the Court does seem to indicate fewer items than before, although the difference is small and not statistically significant. Thus, we do not have enough support for H_4 .

⁸⁵ See Fig. A1 in the Appendix for tallies of cases and items by requesting country.

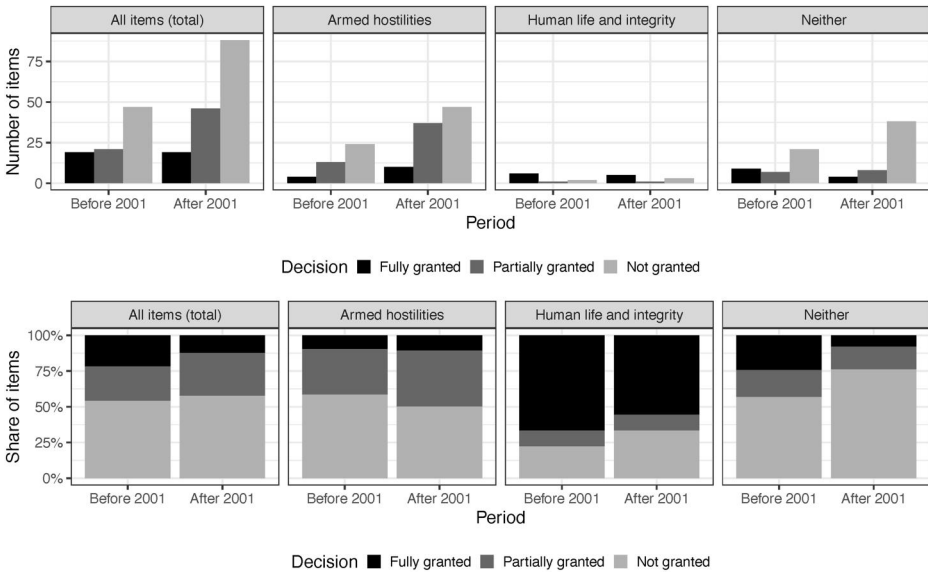


Figure 5 Distribution of items according to the outcome, excluding indications without being requested and cases in which no decision was made with regard to provisional measures by type of case.

We now take a closer look at requests broken down into *items* to assess the hypothesis about the behaviour of the Court, as well as H_7 , which suggests that the Court may become more careful in certain types of cases.

We look at these patterns both in the aggregate and broken down by the type of case in Fig. 5. The global picture (the left-most panel) shows that there were as many items *Fully granted* before 2001 as after. However, both *Partially granted* and *Not granted* items increase drastically after 2001. When we break down decisions by case type (the three other panels), we observe that the *Partially granted* outcome grew substantially for cases involving armed hostilities and slightly for cases not involving armed hostilities or human life and physical integrity. What is also striking is the drop in the *Fully granted* outcome when it comes to cases categorized as ‘Neither’, and the important increase in the *Not granted* outcome in both ‘Neither’ and ‘Armed hostilities’ types. To get a better sense of the proportions, the bottom panel of Fig. 5 includes the same information but reflects the share of each outcome within each type of case. This provides clear evidence for H_7 : the decrease in the share of items granted is evident and striking in the ‘Neither’ category, while the proportions are remarkably similar for the two other types of cases.

To test our expectations about the joint role of the time period and case type, we estimate a multinomial logistic regression, a statistical model that is commonly used for outcomes that can take more than two distinct categories with no specific or consistent ranking between them. The dependent variable is the outcome of the ICJ’s order with regard to a specific item. We focus on four mutually exclusive outcomes: *Fully granted*, *Partially granted*, *Not granted*, and *Not requested but indicated*.⁸⁶ Because these outcomes are

⁸⁶ We thus exclude outcomes that are *No decision*, which are instances in which the ICJ did not render a decision, essentially because the case was withdrawn.

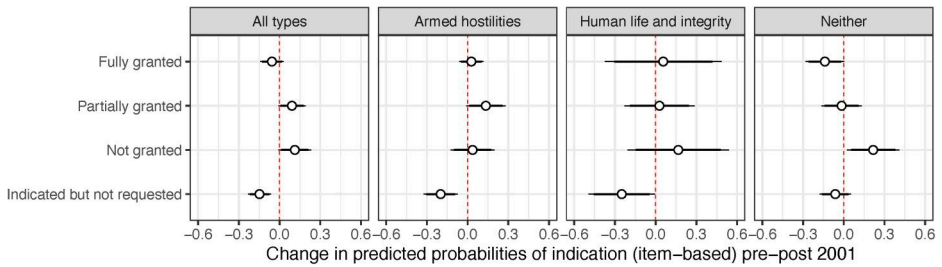


Figure 6 Predictions based on the multinomial logistic model with decision on specific items as the dependent variable.

qualitatively distinct and cannot be reduced to a simple binary distinction (*Accepted* versus *Rejected*), a multinomial model is suitable in this setting.

The model allows us to examine how the probability of each possible outcome varies as a function of our explanatory variables, including time period and case type. It does so by estimating how the likelihood of each outcome changes relative to a reference category. We then translate these estimates into predicted probabilities using the *marginal effects* package in R, which evaluates the model at different values of the explanatory variables (in our case, the time period and type of case) and generates predicted probabilities for each outcome, averaging over the observed values of other covariates. This enables us to compare, for example, how the probability of a *Fully granted* item differs across time periods or case types.

In addition to the binary period variable (*Pre-2001* versus *Post-2001*), our model also includes the interaction between period and case type (with the possible values of ‘Armed hostilities’, ‘Human life and integrity’, and ‘Neither’). This specification allows the possible effect of the time period to vary across different types of cases. In other words, it enables us to assess whether changes in outcomes after *LaGrand* differ depending on the substantive nature of the case, allowing us to assess H_7 . Based on the model, we compute the change in predicted probabilities for each outcome across the two periods, conditional on the type of case.

These predictions are presented in Fig. 6. Points indicate estimated changes in predicted probabilities when we compare the pre-2001 period to the post-2001 period, and horizontal lines denote 90 per cent and 95 per cent confidence intervals. Positive estimates correspond to an increase after *LaGrand*, and negative ones indicate a decrease. Estimates whose confidence intervals cross zero are not statistically distinguishable from zero.

What we observe is that the probability of the *Fully granted* outcome recedes by about 15 percentage points in cases that are not about ‘Armed hostilities’ and ‘Human life and integrity’ (ie ‘Neither’). For the same category, the probability of the *Not granted* outcome increases after 2001 by about 30 percentage points. The ICJ’s indication patterns in this category provide evidence for our hypotheses about how the ICJ is likely to grant fewer requests fully (H_4) and fewer requests than before (H_3). Moreover, the *Not requested but indicated* outcome decreases when we consider *all* types of cases in a manner that is statistically significant, providing strong support for the hypothesis that the ICJ would indicate fewer measures without being requested (H_5).⁸⁷

⁸⁷ There are only 10 *Not requested but indicated* items after 2001, compared to 23 before 2001.

The results also shed light on the differential approach of the ICJ depending on the type of case, or, to put it in another way, the issue at hand, in support of H_7 . When the case involves armed hostilities, the probability of fully granting requests after 2001 is similar to its pre-2001 levels, while the *Partially granted* outcome increases by about 15 percentage points. In cases involving human life and integrity, the probabilities do not change significantly for any type of outcome, except for those that are *Not requested but indicated*. Yet the clearest support for our hypotheses comes from cases that do not involve armed hostilities or an imminent threat to human life and integrity. This suggests that while the Court has become more cautious after 2001, effectiveness concerns have probably prevented it from exercising such caution and granting fewer requests in certain types of cases, in line with H_7 . It still indicated measures in cases where we would most expect to see them. Yet, those that are *Not requested but indicated* have gone down in these types of cases too. Finally, the Court's reluctance to indicate measures is clear in the increase in the *Not granted* outcome for all types of cases to different extents (most visibly in cases that are not about armed hostilities or human life and integrity, then those about armed hostilities, and finally, those about human life and integrity). Part of this may be because states are becoming more maximalist in the number of items they request, which can drive an increase in the *Partially granted* and *Not granted* categories even if the Court's criteria do not change significantly.

5.2. Additional evidence

We now present one additional piece of evidence on the demand side, and three on the supply side that support the notion that both states and the Court are more concerned about these measures. On the demand side, one sign that suggests that states are more involved in their and others' provisional measures requests is that they more often use counter-requests, additional requests, and requests for modification. An additional request was only used in one case before 2001, in the *Bosnia and Herzegovina v Serbia and Montenegro*. However, additional requests, counter-requests, and requests for modification were used in five cases after 2001. This additional concern may stem from the increased importance of the exact wording and meaning of provisional measures after 2001, once there is no doubt about their binding quality.

On the supply side, three patterns suggest that the ICJ is erring on the side of caution after 2001: qualifications in partially granted requests, non-aggravation requests and indications, and voting patterns.

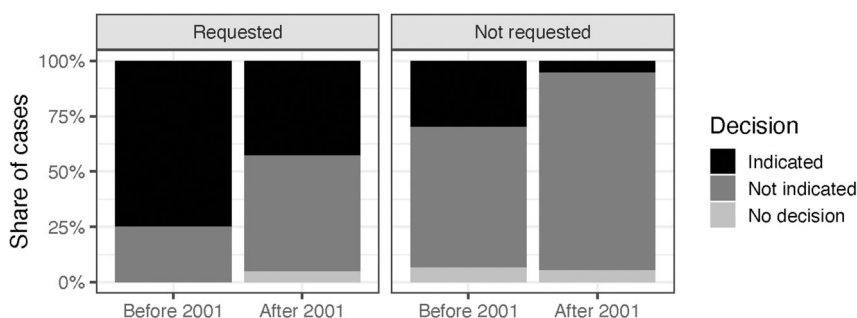
An area in which the ICJ appears to have changed its behaviour after *LaGrand* is that of qualifications it uses when it indicates a provisional measure that only partially corresponds to what was requested by the party.⁸⁸ We categorize these qualifications and present a breakdown of them in [Table 1](#) for the two periods under study.⁸⁹ We observe that almost 80 per cent of the qualifications after 2001 involved *Material qualification* or *Burden distribution*. The important increases in both *Material qualification* and *Burden distribution* may suggest that the ICJ has become more reluctant to impose obligations on only one side or more careful about delimiting the material scope of its orders. Compared to before 2001, it is also interesting to note that the ICJ does not qualify measures by way of *Affirmation of the law*. This may be indicative of judicial economy: the Court appears to be

⁸⁸ See the codebook for detailed description of each category and examples. There may be more than one qualification in one decision.

⁸⁹ The presentation of these qualification over time can be found in the [Appendix, Fig. A4](#).

Table 1 Prevalence of different qualifications when a provisional measure was indicated such that it partially granted the request of the litigant, before and after LaGrand.

Qualification Type	Before 2001	After 2001	Absolute difference	Percentage difference
Material qualification	4	19	+ 15	+ 375
Burden distribution	8	20	+ 12	+ 150
Quantitative qualification	2	5	+ 3	+ 150
Burden concentration	2	3	+ 1	+ 50
Temporal qualification	0	1	+ 1	
Geographical qualification	3	2	-1	-33
Affirmation of the law	9	0	-9	-100
Total	28	50	+ 22	+ 79

**Figure 7** Requests for and decisions on **non-aggravation measures** across the two periods.

more careful about making claims about the law in general beyond the context of indicating a specific measure.

The differential use of non-aggravation measures also supports the conclusion that the Court has erred, after 2001, on the side of caution. We have already seen that the Court has indicated fewer measures that would fully meet the party's request, and that it has indicated more measures with qualifications, presumably to delimit their scope and target carefully. We can also show that the ICJ has shown more restraint after 2001 in its indication of *non-aggravation* as a provisional measure. Figure 7 shows that non-aggravation is now less likely to be indicated and is almost never indicated without being requested. Before 2001, the Court often indicated non-aggravation even when this was not requested by the litigant, doing so nine times without it being requested; after 2001, the Court indicated a non-aggravation measure without being asked to do so in only *one* case, in *Georgia v. Russia*, and with a very close margin, with eight votes for and seven votes against. This is consistent with the broader finding that the Court has become more reticent to indicate measures without being requested to do so. It also goes hand in hand with the ICJ's new position in *Pulp Mills*⁹⁰ that non-aggravation is not a stand-alone measure, but, to quote the

⁹⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures: Order) [2007] ICJ Rep 3, para 49 ('where as in those cases provisional measures other than measures directing the parties not to

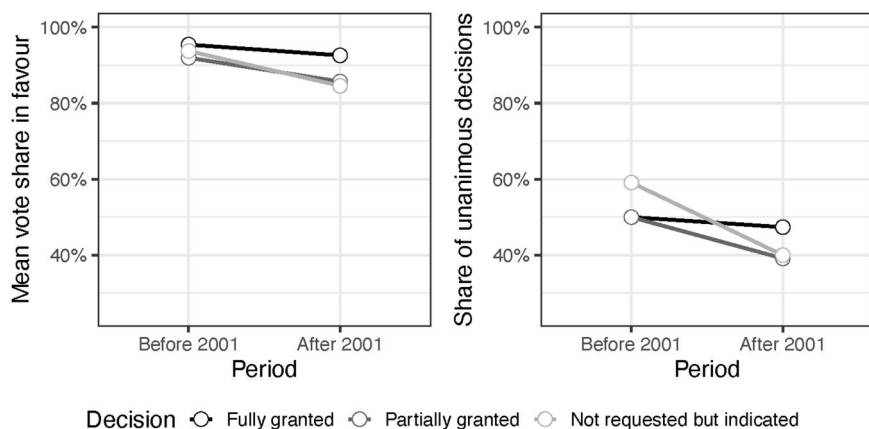


Figure 8 Mean vote share in favour (left) and the proportion of unanimous decisions (right) in the two time periods. When a decision is unanimous its mean vote share in favour is taken to be 100 per cent; one vote against and 9 votes for would be a vote share of 90 per cent.

Court in the recent case, it ‘can only be indicated as an addition to specific measures to protect rights of the parties’.⁹¹

Since *Pulp Mills*, the ICJ always indicated non-aggravation together with at least one substantive measure (*Georgia v Russia*, *Certain Activities*, *Preah Vihear (Interpretation)*, *Ukraine v Russia (I)*, *Qatar v UAE*, *Treaty of Amity*, *Armenia v Azerbaijan*, *Azerbaijan v Armenia*, *Allegations of Genocide*, and *Guyana v Venezuela*). In no case after *Pulp Mills* did the Court indicate non-aggravation on its own. Where the Court rejected the main request for provisional measures, it also declined non-aggravation (*Certain Activities* [Nicaragua’s request for modification], *Qatar v UAE* [UAE’s request], and *Embassy of Mexico*). Moreover, in 13 instances, the Court granted substantive measures but did not indicate non-aggravation. In eight of these, non-aggravation had not been requested. In the remaining five, the party did request non-aggravation, but the Court declined to indicate it despite granting other measures. Taken together, these patterns confirm the dependent nature of non-aggravation in the Court’s post-*LaGrand* jurisprudence and increased reluctance to include it in more recent years, especially when the party does not request it. It also fits the broader pattern of indicating fewer measures that are not requested.

A final sign of the Court becoming more cautious after 2001 could be the relatively greater reluctance of individual judges to vote in favour of indicating provisional measures or granting a specific request compared to the pre-*LaGrand* period. In Fig. 8, we present

take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated’).

⁹¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures: Order) [2019] ICJ Rep 361, para 28. This position is new in the sense that prior to *Pulp Mills*, the ICJ did not clearly conceptualize non-aggravation as only additional or ancillary. Indeed, in the order in *Burkina Faso/Mali* (1986), the first measure the ICJ indicated is that ‘The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure that no action or any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case’. For reasoning, see *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures: Order) [1986] ICJ Rep 4, paras 16–31.

how the mean vote share in favour of granting a measure and the share of unanimous decisions have evolved for different types of outcomes.

In terms of the mean vote share in favour, we find that votes in favour of granting measures have slightly decreased on average, but still remain high.⁹² In terms of the share of unanimous decisions, it globally decreases from 53 per cent to 41 per cent when we consider outcomes with an indication (measures that are indicated *fully*, *partially*, or *without being requested*). When we look at this by outcome, the proportion of unanimous decisions when it comes to *Fully granted* requests slightly goes down from 50 per cent to 47 per cent, for those that are *Partially granted*, unanimous decisions drop from 50 per cent to 39 per cent. The most significant decrease in the share of unanimous decisions is in the case of indications in the absence of requests (*Not requested but indicated*): from 59 per cent to 40 per cent, a drop of 19 percentage points. Although the number of observations is too small for these differences to be statistically significant, this provides some evidence that there may be more opposition to granting requests than before within the Court. This seems to be the case especially when the majority wants to qualify the measure (as in the case of a *Partially granted* request) and when the majority wishes to indicate a measure wholly different from those that are requested (*Not requested but indicated*).

6. Conclusion and further research questions

We have analysed the extent to which what we call the ‘*LaGrand* effect’ has translated into the rise in requests for provisional measures by the disputing parties, especially at the level of the number of requested items, and the increased caution with which the ICJ may treat these requests, given its decisions and qualifications. Yet, there are alternative explanations that may account for part of what we observe on both the demand and the supply side. On the demand side, it may be that we are capturing a consequence of the professionalization of interstate litigation in which states work with law firms that have come to commonly use these requests as part of their litigation strategy.⁹³ Similarly, there may be learning effects: over time, states may observe that such requests are effective and could ask them more often. Both may have contributed to the increase in the number of items asked after 2001. Interviews with practitioners and state officials should help explore these possibilities further. As far as the Court is concerned, the changes in its behaviour may simply be driven by changes on the demand side—states are introducing more requests to see which are successful, and some of their requests may be simply of lower quality and more experimental. However, this still does not explain why the Court has become visibly more reticent in indicating measures that are completely different from what the parties request, and more likely to include qualifications.

Notwithstanding these alternative explanations and other factors that may contribute to shaping the patterns we observe, the role we attribute to the *LaGrand* judgment is plausible in light of the evidence, although our findings provide correlational and not causal evidence. The data and the analysis help us provide a first test of many of the claims made about how *LaGrand* may have changed litigant and court behaviour, focusing on simple

⁹² Our codebook makes note of all the votes that are specified.

⁹³ On this phenomenon, see further Sara Dezalay, ‘Law Firms and International Adjudication’ (2021) Max Planck Encyclopedia of Public International Law (online edition) <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3489.013.3489/law-mpeipro-e3489?rskey=wbN9sG&result=1&prd=MPIL>> accessed 14 April 2026; Tommaso Soave, ‘The Social Field of International Adjudication: Structures and Practices of a Conflictive Professional Universe’ (2023) 36 Leiden Journal of International Law 565.

outcomes such as the number of requests and decisions. More can be done in the future to focus more on either the demand side or the supply side. For instance, on the demand side, one can examine the *types* of measures states request, how they may have changed over time, and whether some types are more successful than others. At a more micro-level, one could examine specific states active both before and after *LaGrand* and trace how they have adjusted their litigation strategy over time. On the supply side, one can analyse in greater detail the legal reasoning provided by the ICJ, as well as the votes of individual judges, including those expressed in separate and dissenting opinions. A complementary micro-level analysis could track how individual judges' views evolve in light of the specific jurisprudential developments we discuss. Such studies would complement the macro-level picture we offer here.

Going beyond the demand and supply of provisional measures, our study gestures towards some other potential implications brought about by the *LaGrand* Judgment that deserve further research. By way of conclusion, we offer our thoughts on two related sets of these questions.

The first set of questions concerns the relation between the incentive to litigate and the role of provisional measures. Why states decide to litigate before international courts and tribunals remains a topical and politically relevant research agenda.⁹⁴ If the *LaGrand* Judgment gives states greater incentive to request provisional measures, a further question to be systematically examined is whether a binding order indicating provisional measures incentivizes states to bring the case to the ICJ. A narrower study can focus specifically on the litigation strategy according to which litigant states seek to secure provisional measures as the primary objective in the case. This can be put in the current context where some disputing parties repeatedly request the Court to modify provisional measure orders as the situation in the dispute evolves. A case study of some frequent clients of the ICJ comparing their behaviour before and after *LaGrand* might be illuminating. Additionally, the empirical study on compliance with provisional measures orders seems also instructive, either in its own right or as part of the broader analysis of litigation strategy.⁹⁵

The *Avena (Interpretation)* case vividly illustrates such an increased incentive to bring the case to the ICJ. In the 2004 Judgment, the Court held *inter alia* that the US must provide review and reconsideration of convictions and sentences of relevant Mexican nationals. To pressure the US to comply with this Judgment, Mexico brought another case requesting the ICJ to interpret the 2004 Judgment together with a request for provisional measures in 2008. It asked the Court to order the US to ensure that five Mexican nationals are not executed while this case is pending, unless they receive review and reconsideration of the convictions and sentences as required by the 2004 Judgment. The Court, by seven to five, decided to grant this request. Dissenting judges levelled strong criticisms as they were of the view that the Court lacked jurisdiction even *prima facie*. Judges Owada, Tomka, and Keith remarked that '[h]umanitarian considerations which clearly underlie the decision cannot override the legal requirements of the Statute',⁹⁶ while Judge Skotnikov noted that

⁹⁴ See Natalie Klein (ed), *Litigating International Law Disputes* (CUP 2014); Douglas Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' (2023) *British Yearbook of International Law* (advanced access).

⁹⁵ For the burgeoning research on this topic, see Matei Alexianu, 'Provisional, but Not (Always) Pointless: Compliance with ICJ Provisional Measures' (*EJIL: Talk!*, 2023) <<https://www.ejiltalk.org/provisional-but-not-always-pointless-compliance-with-icj-provisional-measures/>> accessed 14 April 2026; also Alexianu (n 10).

⁹⁶ *Avena (Interpretation)* (n 39) Dissenting Opinion of Judges Owada, Tomka and Keith, para 1.

‘[t]he real issue is compliance with the Judgment rather than its interpretation’.⁹⁷ Judge Buergenthal cautioned that ‘the Court establishes a dangerous precedent’.⁹⁸ Many commentators, however, applaud Mexico’s strategy.⁹⁹ As Judge Donoghue rightly noted in *Preah Vihear (Interpretation)*, the combination of Article 60 jurisdiction and binding provisional measures may be regarded ‘as a new-found tool whereby the Court can protect human lives and property’.¹⁰⁰

The incentive to litigate in *Avena (Interpretation)* is also discernible in contentious cases where states institute proceedings to obtain the provisional measure order even if the legal basis of the ICJ jurisdiction is uncertain. The clear example is when an applicant invokes a compromissory clause even if the respondent has made a reservation thereto. Such examples exist before the *LaGrand* Judgment (such as the cases against the North Atlantic Treaty Organization (NATO) members brought under the Genocide Convention) but continue in the post-*LaGrand* period (such as *DRC v Rwanda*, and very recently, *Sudan v UAE*). But the more common strategy is to shoehorn the subject of the dispute into the jurisdiction *ratione materiae* of the Court, which in the provisional measure proceedings is easier to achieve, as the party is expected to prove prima facie jurisdiction, plausibility of the rights to be protected, and/or plausibility of the claim.¹⁰¹ In this scenario, an applicant may find it sufficient to win in the provisional measure phase, as they can invoke the order to pressure the other party to settle the dispute and to gain political points at home.¹⁰² Such an incentive to litigate increases if combined with the tactic of litigating in multiple fora to secure some advantage in settlement negotiations, as can be seen in the cases between Qatar and its neighbouring countries.¹⁰³

A narrower study in this line of inquiry can focus on the cases where states are incentivized to bring cases against the more powerful disputing parties. An even more specific research design is to focus on the role of states in the Global South,¹⁰⁴ as it constitutes one of the most salient features of the contemporary scene at the ICJ.¹⁰⁵ A recent paper empirically confirms that weaker states increasingly resort to the ICJ as the ‘weapon of the weak’.¹⁰⁶ One key reason is that in the ICJ proceedings, power disparity between disputing

⁹⁷ *ibid*, Dissenting Opinion of Judge Skotnikov, para 11.

⁹⁸ *ibid*, Dissenting Opinion of Judge Buergenthal, para 5.

⁹⁹ See eg Karin Oellers-Frahm, ‘Provisional Measures in Interpretation Proceedings’ in Charles Chernor Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G Koroma* (Brill 2015) 61.

¹⁰⁰ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)* (Provisional Measures: Order) [2011] ICJ Rep 613, Dissenting Opinion of Judge Donoghue, para 28.

¹⁰¹ For a comprehensive doctrinal discussion on prima facie jurisdiction, see Massimo Lando, ‘Provisional Measures and the End of Prima Facie Jurisdiction’ (2025) 71 *International and Comparative Law Quarterly* 319, 319–48.

¹⁰² Tullio Treves, ‘Litigating Global Crises. Setting the Scene: Legal and Political Hurdles for State-to-State Disputes’ (2021) 85 *QIL Zoom-Out* 5, 9.

¹⁰³ Laurence Boisson de Chazournes, ‘Plurality of International Legal Proceedings in an Era of Multiple Courts and Tribunals’ in Vessilin Popovski and Ankit Malhotra (eds), *Reimagining the International Legal Order* (Routledge 2025) 226, 231; Nikolas Voulgaris, *The ICJ and the Multi-Forum Litigation Strategy* (Martinus Nijhoff 2025) 85–153.

¹⁰⁴ On the concept of the Global South, see Siba Grovogui, ‘A Revolution Nonetheless: The Global South in International Relations’ (2011) 5 *The Global South* 175.

¹⁰⁵ Ntina Tzouvala, ‘The “High Politics” at the International Court of Justice’ (*CIL Dialogue*, 2024) <<https://cil.nus.edu.sg/blog/symposia/high-politics-at-the-international-court-of-justice/>> accessed 14 April 2026 (rightly notes that ‘[the] role of Global South states in this shift is impossible to ignore, as the Court becomes a forum for them to highlight their priorities, but also to demonstrate their approach to international legal argumentation as a whole’).

parties is significantly reduced: as Fuad Zarbiyev notes, ‘in a judicial forum, all force seems excluded except the force of the better argument’ because judges are expected to focus on meanings of the law, not on the forces that stabilize those meanings.¹⁰⁷ One can thus hypothesize that the litigation strategy driven by provisional measures gives small states greater incentive to litigate.

The second set of questions, related to the first one, raises the conceptual issue about provisional measures. A litigation strategy driven mainly by provisional measures has occasionally been characterized as ‘abuse’.¹⁰⁸ Such labelling presupposes that there is a consensus on what the appropriate exercise of the right to request provisional measures is and what functions provisional measures are legitimately expected to serve.¹⁰⁹ Yet, the answers to these questions are subject to change, and the concept of provisional measures is therefore a dynamic one. Like most institutions, the ICJ might have changed its behaviour in the course of its operations, as its purposes expanded; unintended consequences of the initial design materialized; new constituencies appeared; new interests emerged; and existing constituencies changed their behaviour.¹¹⁰ The law of provisional measures is, then, a living law. If this is true, it is reasonable to expect the functions of provisional measures before the ICJ to also change over time. Indeed, President Iwasawa observes in his 2022 treatise that provisional measures indicated by the ICJ have expanded beyond the narrow meaning of provisional measures derived from the plain reading of Article 41 of the Statute.¹¹¹ Some of the recent studies thoughtfully discuss the varied functions of ICJ provisional measures, paying attention to a seemingly paradoxical phenomenon: why did the requests for provisional measures increase despite the low rate of compliance?¹¹²

An in-depth study of the provisional-measure-driven strategy together with the changing functions of provisional measures before the ICJ has broader implications. It may illuminate the changing role-perception of the ICJ in international dispute settlement in the post-*LaGrand* period. It may also shed light on the behaviour of judges and arbitrators in other international courts and tribunals, since they may borrow from the ICJ jurisprudence regarding provisional measures, especially those that are in competition with the ICJ. Put differently, some broader *LaGrand* effects can be productively further investigated to enhance our understanding of the contemporary landscape of international adjudication.

¹⁰⁶ Jill I Goldenziel, Sean Michael Blochberger and Tyler Granholm, ‘Weapon of the Weak: International Law and State Power in the International Court of Justice’ (2025) 66 *Harvard International Law Journal* 563.

¹⁰⁷ Fuad Zarbiyev, ‘On the Judge Centredness of the International Legal Self’ (2021) 32 *European Journal of International Law* 1139, 1152 (citing Jürgen Habermas). The ICJ President recently averred that ‘In this Great Hall of Justice, equality is not merely an aspiration but a reality.’ See, ‘Speech by HE Judge Iwasawa Yuji, President of the International Court of Justice, at the solemn sitting held to mark the Court’s eightieth anniversary, The Hague, 17 April 2026’ at <https://www.icj-cij.org/sites/default/files/2026-04/court_speeches_discours_iwasawa_20260417_e_80th_anniversary_standalone_speech.pdf> accessed 14 April 2026.

¹⁰⁸ For discussion, see Karin Oellers-Frahm, ‘Use and Abuse of Interim Protection before International Courts and Tribunals’ in Holger P Hestermeyer and others (eds), *Coexistence, Cooperation, and Solidarity* (Brill 2011) 1685, 1685; Marie Lemey, ‘Incidental Proceedings before the International Court of Justice: The Fine Line between “Litigation Strategy” and “Abuse of Process”’ (2021) 20 *Law and Practice of International Courts and Tribunals* 5.

¹⁰⁹ On the varied functions of the ICJ provisional measures, see Jerome Elkind, *Interim Protection: A Functional Approach* (Marinus Nijhoff 1981); Bernard H Oxman, ‘Jurisdiction and the Power to Indicate Provisional Measures’ in Lori Fisler Damrosch (ed), *The International Court of Justice at a Crossroad* (Transnational Publisher 1987) 323, 324–31.

¹¹⁰ For a theoretical framework on institutional changes, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2011).

¹¹¹ Yuji Iwasawa, *International Law* (2nd edn, University of Tokyo Press 2022) 642 [in Japanese].

¹¹² See eg Ramsden and Zixin (n 10); Alexianu (n 10).

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Data availability

The data, codebook, and replication materials necessary to reproduce the results in this article are available in a Harvard Dataverse repository: <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/KJFKWW>

Appendices

A1. Requests by countries

In **Figure A1**, we present requests by country, arranging them from most to least items requested.

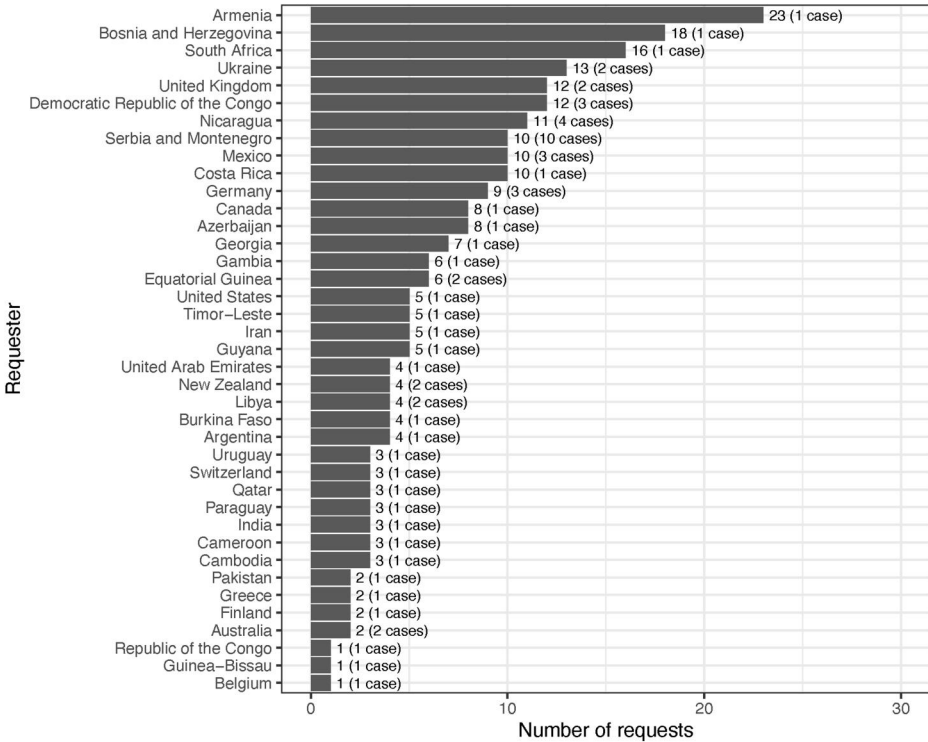


Figure A1 Number of cases with requests and number of items requested by requesting country.

A2. Items decided over time

Figure A2 and Figure A3 present number of items decided over time, with 2001 indicated with a vertical, dashed line.

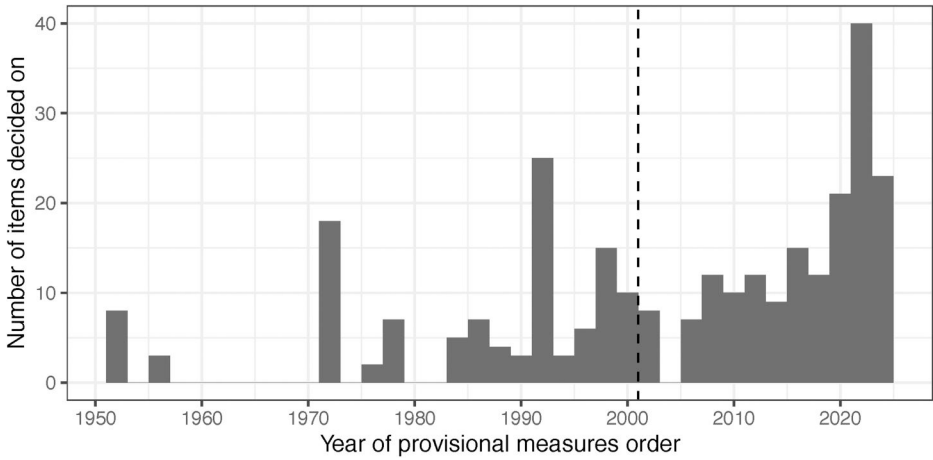


Figure A2 Number of items decided on per year (excluding No decision).

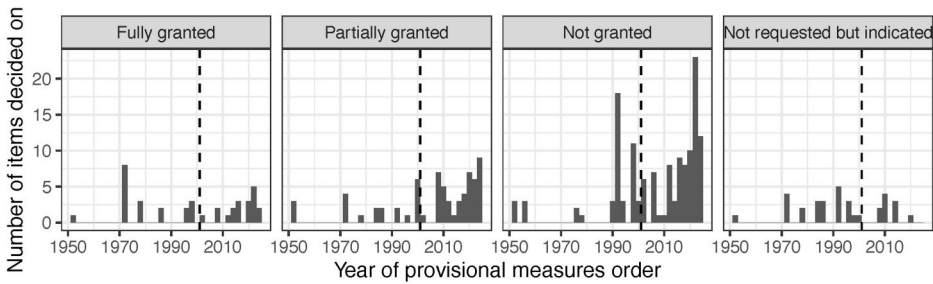


Figure A3 Number of items per outcome (excluding No decision).

A3. Qualifications of partially granted items

In [Figure A4](#), we present annual data on requests that were only partially granted, with the corresponding qualification. A two-period comparison of these qualifications is shown in the main text, in [Table 1](#).

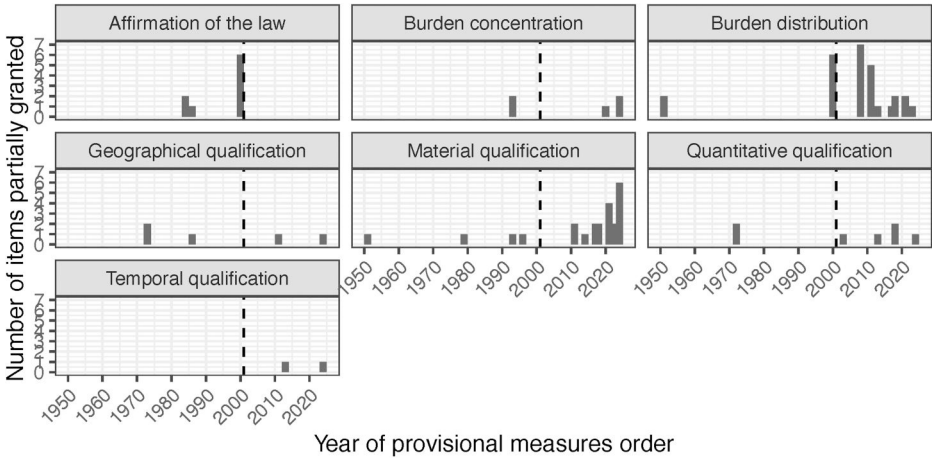


Figure A4 Breakdown of qualifications over time for partially granted items.