The Protection of Human Life Through Provisional Measures Indicated by the International Court of Justice

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Abstract. Recently, the ICJ appears to have been taking into account the protection of human life in its indication of provisional measures. This raises the question of how and to what extent the human life element influences the criteria for indicating provisional measures. After considering the meaning of 'irreparability' in the Court's jurisprudence, the author analyzes recent case law in the light of a link between irreparable harm and those rights of the parties that constitute the subject matter of the dispute in judicial proceedings. In conclusion, the author criticizes the Court's recent approach towards indicating provisional measures, as it raises some problems concerning jurisdiction, as well as the binding character and the nature of provisional measures.

1. INTRODUCTION

The International Court of Justice ('ICJ' or the 'Court') is becoming a *true* 'World Court.' This is evident from the increasing number of cases being referred to it and the flexibility exercised in its decisions. Moreover, some of the cases before the Court may have a great impact on human reality. The *Legality of the Threat or Use of Nuclear Weapons* Opinion is a good example of this.[1] In that case, responding to the request of the General Assembly, the Court had to examine the question of whether the threat or use of nuclear weapons breaches international law. Although the right to life was affected in that context,[2] the Court seemed to confine its consideration to the notion of *the state*, rather than the individual.[3]

This attitude of the Court seems in striking contrast to recent jurisprudence on provisional measures, which shows a growing tendency towards

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1. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, 1996 ICJ Rep. 226.
2. *Id.*, at 239–240, paras. 24–25.
3. *Id.*, at 263, para. 96 and at 266, para. 105(2)(E), 2nd paragraph.

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recognizing the human reality behind inter-state disputes.[4] In other words, the Court appears to be taking into account the protection of human life when it indicates provisional measures, which raises the question of whether that is compatible with the primary judicial function of the Court, which has been established to settle disputes between states.

Against this background, this paper considers the question of how and to what extent the protection of human life influences the criteria underlying the indication of provisional measures. Although the requirements for the indication of provisional measures have evolved through the Court's case law, the human life element essentially relates to two criteria provided for in Article 41 of its Statute.[5]

Firstly, according to Article 41(1) of the Statute, the Court may indicate provisional measures "if it considers that circumstances so require." The risk of irreparable harm (prejudice, damage)[6] is one of the most important of such 'circumstances.'[7] This begs the question of whether the loss of human life can be conceived as 'irreparable harm.'

Secondly, Article 41(1) of the Statute further stipulates that "any provisional measures […] ought to be taken to preserve the respective rights of either party." Therefore, even if the loss of human life is considered an 'irreparable harm,' the question remains whether such 'irreparable harm' is going to be caused, or has been caused, to *those rights of the state parties which constitute the subject matter of the dispute in judicial proceedings*.

Based on the above criteria, this paper is divided into the following sections: Section 2 discusses the meaning of 'irreparability' in the light of the human life element; in Section 3, recent case law is examined from the perspective of a link between 'preservation of *rights*' and 'irreparable harm'; finally, a recent trend in the jurisprudence of the Court and its limitations will be demonstrated in Section 4.

2. 'IRREPARABILITY' AND THE HUMAN LIFE ELEMENT

The idea of 'irreparable harm' occupies a key position in the concept of 'circumstances' requiring the indication of provisional measures. Since the purpose of the measures is to 'preserve' the rights of the parties, it follows that the circumstances must involve some form of anticipated damage to

4. *See* R. Higgins, *Interim Measures for the Protection of Human Rights*, *in* J.I. Charney, D.K. Anton & M.E. O'Connell (Eds.), Politics, Values and Functions: International Law in the 21st Century 87, at 103 (1997).
5. *See* the Statute of the ICJ, ICJ Acts and Documents, No. 4, at 79.
6. The terminology in the Court has not been consistent in this regard. As a matter of convenience, I use the term 'irreparable harm' in this paper except in citations. *See* D. Greig, *The Balancing of Interests and the Granting of Interim Protection by the International Court*, 11 Australian Yearbook of International Law 132 (1991).
7. *See*, *e.g.*, J. Sztucki, Interim Measures in the Hague Court 103 (1983); J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 ICLQ 106 (1995).

those rights. In this regard, there remains the question of what is meant by 'irreparable.' It appears from the Court's jurisprudence that two tests of irreparability exist: irreparability *in law* and irreparability *in fact*. In this section, which will discuss the content of both tests, the human life element is considered in the light of the Court's attitude.

2.1. Irreparability *in law*

A prejudice is deemed to be irreparable *in law* if it cannot "be made good simply by the payment of an indemnity or by compensation or restitution in some other material form."[8] As a result of this, it has been said that the predecessor of the International Court of Justice, the Permanent Court of International Justice ('PCIJ'), introduced a limit on its power to indicate provisional measures, and that it held the award of such measures to be improper in case the eventual remedy for injury to the right concerned could be damages.[9]

Furthermore, this test seems to have been applied in the *Aegean Sea* case, in which the Court rejected the Greek request for provisional measures on the grounds that the risk of irreparable harm was lacking. According to the Court's reasoning, the alleged breach by Turkey, which was seismic exploration to acquire information concerning the natural resources of the continental shelf, "*might be capable of reparation* by appropriate means."[10]

This test highlights the relationship between provisional measures and the remedy of damages: once an act has been committed, it is always – or nearly always – possible to attribute some measure of damages to compensate for it. The problem still remains, however, whether the damage attributable to the act was 'irreparable' or not. Placing the human life element in this context, it may be argued that the loss of human life is 'reparable' in the sense that a payment can efface the injury, even though the factual situation is not thereby restored.[11]

This argument is problematic. First of all, it presumes that there is no violation of rights that cannot be made good in law by reparation.[12] This is true in the sense that reparation can be made *afterwards*. However, it should be noted that this position is not consistent with the Court's position on finding irreparability. Even in the *Denunciation of the Treaty* case,[13]

8. *See* Denunciation of the Treaty of November 2nd, 1865 (Belgium *v.* China), Order of 8 January 1927, 1927 PCIJ (Ser. A) No. 8, at 7. *See also* Sztucki, *supra* note 7, at 108.
9. *See* C. Gray, Judicial Remedies in International Law 71 (1987).
10. *See* Aegean Sea Continental Shelf (Greece *v.* Turkey), Interim Protection, Order of 11 September 1976, 1976 ICJ Rep. 11, para. 33 (emphasis added). *Cf. id.*, at 37, Dissenting Opinion of Judge Stassinopoulos. On 'appropriate means,' *see id.*, at 30, Separate Opinion of Judge Elias.
11. *See*, *e.g.*, J. Sztucki, *Case Concerning Land and Maritime Boundary (Cameroon* v. *Nigeria): Provisional Measures, Order of 15 March 1996*, 10 LJIL 353 (1997).
12. *See* Sztucki, *supra* note 7, at 109.
13. *See* Denunciation of the Treaty, *supra* note 8, at 6.

known as the source of this test, it was not applied strictly. Although the rights in question were arguably those for injury to which damages had typically been awarded by international arbitral tribunals,[14] President Huber did indicate the measures.[15] As a matter of fact, the restriction implied by this test does not amount to a limitation.[16]

Furthermore, a claim for reparation has not been interpreted as an obstacle to finding irreparability. Adopting a position of treating a claim for reparation as an admission that the injury was not irreparable would mean that measures could only be indicated in the unlikely event that no such claim were made. In this regard, Gross pointed out in the context of the *Hostages* case that "a claim for reparation may well be distinguished from the threat of irreparable prejudice."[17]

Finally, this test assumes the point of view of the *state*. It is undeniable that the dead person himself cannot receive any reparation. The question thus remains: *for whom* should the reparation be paid? In that context, the Court's statement that "no reparation could efface the results of conduct which the Court may rule to have been contrary to international law"[18] should not be understood as an application of irreparability *in law*, but as the finding of the *fact* that the loss of human life has an aspect going beyond the inter-state level.

Therefore, it is not appropriate particularly for the loss of human life that a prejudice is irreparable *only if* it cannot be compensated for in the final judgment. In fact, this test, which presumes that a reparation can erase the injury, seems not to have been adopted by the Court in cases involving the element of human life.

2.2. Irreparability *in fact*

A prejudice is deemed to be irreparable *in fact* if it makes impossible full execution of the impending judgment and thereby full restoration of the prejudiced position of the prospective judgment creditor and in principle, regardless of whether he might be compensated for the non-execution of the judgment or not.[19] In other words, provisional measures have been indi-

14. *See* Gray, *supra* note 9, at 71.
15. Gray assessed that as "the Court seems in fact to have been concerned with the general inadequacy of pecuniary compensation and other judicial remedies as a method of repairing non-pecuniary interests." *See id.*
16. *Id.*, at 72.
17. *See* L. Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AJIL 408 (1980). *See also* United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, 1979 ICJ Rep. 8, para. 1, especially para. c of the application submitted by the US (hereinafter 'Hostages case').
18. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, 1993 ICJ Rep. 349, para. 58.
19. *See* Sztucki, *supra* note 7, at 110.

cated to protect the rights in dispute against the prejudice of which the common remedy would have been damages because such remedy cannot *in any real sense* make good the injured right.[20]

It has been said that this test was introduced in the *South-Eastern Greenland* case.[21] In that case, the PCIJ pointed out that circumstances required interim protection of the rights in dispute when "the damage threatening these rights would be irreparable *in fact or* in law."[22]

According to this test, the question turns to appreciation of *fact*. As a matter of fact, nothing could be more irreparable than the taking of life.[23] Consequently, the loss of human life might easily be assessed to be 'irreparable' in the sense that the factual situation that existed before it cannot be re-established. The Court indeed seems to accept this kind of argument in practice,[24] although it has not referred to this matter *explicitly* in all cases concerned.

Therefore, it is possible to say, on the face of it, that the loss of human life constitutes an irreparability *in fact*. This was clear in the declaration of Judge Koroma in the *Armed Activities* case.[25] Having referred to the *Hostages* case and the *Land and Maritime Boundary* case,[26] he stated that "[t]he Court […] held that death and injury to persons are to be considered irreparable damage."[27]

Furthermore, this conclusion seems to coincide with the general tendency of the Court's approach to the finding of irreparability. According to Greig, it was described as follows:

> Although appearing to accept that there must be some prejudice to the legal rights of the State seeking protection (i.e. of irreparable prejudice in law), the Court was primarily influenced by the extent of the prejudice (as a matter of fact). This might

20. *See* Gray, *supra* note 9, at 72.
21. *See* Sztucki, *supra* note 7, at 110.
22. *See* Legal Status of the South-Eastern Territory of Greenland (Denmark *v.* Norway), Order of 3 August 1932, 1932 PCIJ (Ser. A/B) No. 48, at 284 (emphasis added).
23. *See*, *e.g.*, ICJ Pleadings, United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Argument of Mr. Owen, ICJ Pleadings 25, at 30; ICJ Pleadings, Vienna Convention on Consular Relations (Paraguay *v.* United States of America), Argument of Mr. Donovan, ICJ Pleadings 27, at 29; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Verbatim Records, 26 June 2000, CR 2000/20, the argument by M. Corten.
24. *See* Hostages case, *supra* note 17, at 20, para. 42; Frontier Dispute (Burkina Faso/Mali), Provisional Measures, Order of 10 January 1986, 1986 ICJ Rep. 10, para. 21; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Provisional Measures, Order of 15 March 1996, 1996 ICJ Rep. 23, para. 42.
25. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Provisional Measures, Order of 1 July 2000 (not yet published, the text is available on Internet: http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm).
26. *See also* J.G. Merrills, *The Land and Maritime Boundary case (Cameroon* v. *Nigeria), Order of 15 March 1996*, 46 ICLQ 680 (1997), regarding that the case "confirms the case law establishing that threat to life may constitute irreparable damage for the purpose of Article 41 [of the Statute]."
27. *See* Armed Activities, *supra* note 25, Declaration of Judge Koroma.

> suggest that irreparability would be assessed primarily as an issue *of fact rather than one of law*.[28]

This conclusion is provisional, however, as the criterion of irreparability *in fact* has as prerequisite that the damage must be caused to *the rights in dispute*. In other words, the question of whether that factual irreparability has legal consequence or not depends on the relationship between the loss of human life and the rights in dispute. Therefore, one must consider the following question: does the loss of human life directly connect to 'the rights in dispute'? This is the question dealt with in the next section.

3. The Link Between the Rights in Dispute and Irreparable Harm

The function of provisional measures is to safeguard the rights which are in dispute, pending the Court's decision on the merits. Accordingly, the rights to be protected by provisional measures should be, if not identical, linked directly to the rights which the main case is destined to declare or protect. This 'link question' was definitively considered in the *Arbitral Award of 31 July 1989* case.[29]

In that case, Guinea-Bissau was seeking to have the Court declare the 1989 Arbitral Award void, non-existent or invalid, and it asked for provisional measures which essentially sought to preserve the *status quo* in maritime areas which were subject to the Arbitral Award. Against this request, the Court stated that:

> the Application […] asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question. […] [A]ccordingly the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case […].[30]

This position seems to be followed in a later case. In the *Application of the Genocide Convention* case, the Court stated that "[it] ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of

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28. *See* Greig, *supra* note 6, at 134 (emphasis added). In this context, he referred to the Nuclear Tests cases as an example. *See also* Nuclear Tests (Australia *v.* France), Interim Protection, Order of 22 June 1973, 1973 ICJ Rep. 105.
29. *See* Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal), Provisional Measures, Order of 2 March 1990, 1990 ICJ Rep. 64. *See also* Polish Agrarian Reform (Germany *v.* Poland), Order of 29 July 1933, 1933 PCIJ (Ser. A/B) No. 58, at 178; Aegean Sea, *supra* note 10, at 11, para. 34.
30. *See* Arbitral Award, *supra* note 29, at 70, para. 26. *Cf. id.*, at 83, Dissenting Opinion of Judge Thierry. *See also* Fisheries Jurisdiction (U.K. *v.* Iceland), Interim Protection, Order of 17 August 1972, 1972 ICJ Rep. 15, para. 14.

that jurisdiction."[31] Furthermore, this position of the Court appears to be supported by the writings of various legal scholars.[32]

Thus, it is established that provisional measures can only be indicated to protect those rights of the parties that are actually at issue in the dispute. In the context of the present paper, a study of the relationship between the rights exposed to the risk of irreparable harm (the loss of human life) and the rights that are the subject of dispute in judicial proceedings (the subject matter) seems in order. Accordingly, I categorize the subject matter of the merits in the cases and examine in each category a link with the rights exposed to the risk of irreparable harm.

3.1. Cases in which the subject matter relates to the protection of diplomats

First, the protection of diplomats belongs to a category of its own, the *Hostages* case being the sole example.[33] In that case, the United States instituted proceedings against Iran as a result of Iranian demonstrators' invasion of the US Embassy in Tehran, and the claims of the United States can be regarded as *direct* inter-state relations: the sanctity of embassies, diplomats and consular staff. In its request, the United States described "the international legal rights of the United States" for the protection of which the measures were requested as follows:[34]

> [T]he right [of the United States] to maintain a working and effective embassy in Tehran, the right to have its diplomatic and consular personnel protected in their lives and persons from every form of interference and abuse […]. (by the request of 10 December 1979)

In this regard, the Court stated that:

> there is no more fundamental prerequisite for the conduct of relations between States than inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and […] the obligations thus assumed, notably *those for assuring the personal safety of diplomats* and their freedom from prosecution, *are essential, unqualified, and inherent in their representative character and their diplomatic function*.[35]

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31. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, 1993 ICJ Rep. 19, para. 35.
32. *See*, *e.g.*, K. Wellens, *Reflections on some Recent Incidental Proceedings before the International Court of Justice*, *in* E. Denters & N. Schrijver (Eds.), Reflections on International Law from the Low Countries 420–421 (1998); S. Oda, *Provisional Measures: The Practice of the International Court of Justice*, *in* V. Lowe & M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice 551 (1996).
33. *See* Hostages case, *supra* note 17, at 7.
34. *Id.*, at 19, para. 37.
35. *Id.*, at 19, para. 38 (emphasis added).

One could argue that the Court regarded the very importance of diplomatic intercourse to all states as a ground for holding that irreparable harm was being caused or threatened.[36] In other words, irreparable harm had been caused to legal rights in a very general sense.[37] In fact, the Court formulated its Order strictly in terms of the provisions of the Diplomatic and Consular Conventions.[38]

It should be noted, however, that the request of the United States was formulated more broadly. It included "[t]he rights of its nationals to life, liberty, protection and security" or "the right to have its nationals protected and secure."[39] In this respect, the Court stated that:

> continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm.[40]

It is without doubt that "the Court thus moved imperceptibly from the international legal rights of the United States to the injury to the persons, health and life of the individuals concerned."[41]

As this question will be considered in more depth in a later part of this article (Section 3.2.1), I will here concentrate on the question concerning *diplomats*. In this regard, it is possible to point out that the killing of diplomats is a form of violation against the sanctity of embassies, diplomats and consular staff. In this case, the breaches of obligation in issue were violations of duties owed directly to the United States as the sending state of the diplomats, not to the diplomats as US nationals.[42] Accordingly, the loss of diplomats' lives would be conceived as a *direct* injury to the rights conferred by international law on the state. However, it is doubtful whether there is any *irreparable harm to the state* as opposed to the harm to the unfortunate diplomats. Therefore, one cannot deny the fact that the risk to diplomats' lives influenced the finding of irreparability.

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36. *See* Greig, *supra* note 6, at 133.
37. In such a case, it might be necessary to take into account the possibility of relaxing the criteria for indicating measures by reason of a flagrancy of wrong and violation. *See* Sztucki, *supra* note 7, at 112.
38. *See* Hostages case, *supra* note 17, at 21, para. 47(1)(A).
39. *Id.*, at 19, para. 37.
40. *Id.*, at 20, para. 42.
41. *See* H.W.A. Thirlway, *The Indication of Provisional Measures by the International Court of Justice*, *in* R. Bernhardt (Ed.), Interim Measures Indicated by International Court 9 (1994).
42. In this regard, it should also be noted that the Court took note of the provisions of the 1973 Convention on the Prevention and Punishment of Crime against International Protected Persons, including Diplomatic Agents to which both Iran and the United States were parties. *See* Hostages case, *supra* note 17, at 20, para. 43.

3.2. Cases in which the subject matter relates to the protection of 'human rights'

We turn to the second category of cases in which the protection of human life is one of the very issues on which a judgment is sought. In other words, the protection of human rights, especially the right to life,[43] is at the heart of the dispute itself.

It should be noted here that, *prima facie*, human rights themselves are not the rights of state parties, but the rights of *individuals*. Therefore, some reasoning is required in order to connect human rights with the state's rights. Human rights might be conceived as the state's rights by way of two doctrines: the right to diplomatic protection and the rights to respect for the instruments that relate to human rights protection.

3.2.1. Right to diplomatic protection

Both under customary international law and conventions such as the 1963 Vienna Convention on Consular Relations,[44] states have the fundamental right to protect their nationals abroad, if these are injured, or are about to be injured, by acts of another state in violation of an international obligation.[45] The traditional view presents a 'fiction' of law in the sense that by taking up the case of one of its nationals and by resorting to diplomatic action or international judicial proceedings on behalf of that national, a state asserts its *own* rights.[46] One should note, however, that this right, known as diplomatic protection, might be invoked as a means to advance the protection of human rights, although the exercise of diplomatic protection is the right of the state.[47]

This doctrine appears to have been considered in the *Hostages* case with respect to the two US nationals, who were among the hostages seized by Iranian demonstrators invading the US Embassy in Tehran, but who were *not* diplomatic or consular staff. In the context of *prima facie* jurisdiction to indicate provisional measures, the Court justified the extension of its protection to the two US citizens in question as follows:

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43. For the purpose of this paper, it is enough to only deal with the right to life among a variety of human rights. On the right to life, *see* B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, *in* B.G. Ramcharan (Ed.), The Right to Life in International Law 1–32 (1985).
44. In the LaGrand case, the US disputed a concept of diplomatic protection under the Vienna Convention on Consular Relations and argued that "diplomatic protection is a concept of customary international law." *See* LaGrand (Germany *v.* United States of America), Merits, Judgment, Judgment of 27 June 2001 (not yet published, the text is available on Internet; http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm), paras. 40 and 42.
45. *See* W.K. Geck, *Diplomatic Protection*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law 1045–1067 (1992).
46. *See* Mavrommatis Palestine Concessions (Greece *v.* UK), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 12.
47. *See*, *e.g.*, International Law Commission, First report on diplomatic protection (J. Dugard), UN Doc. A/CN.4/506 (7 March 2000), at 3–4.

> [T]he seizure and detention of these individuals in the circumstances alleged by the United States clearly fall also within the scope of the provisions of Article 5 of the Vienna Convention [on Consular Relations] of 1963 expressly providing that consular functions include the functions of protecting, assisting and safeguarding the interests of nationals […].[48]

The existence of this element may have influenced the Court's statement in paragraph 42 of the Order.[49] According to Higgins, paragraph 42 can be assessed as "[e]schewing formalism, the Court thus made the connection between harm to the individuals concerned and obligations owed by Iran to the United States under the Vienna Convention."[50] The Court having done so, it can be said that diplomatic protection played a role in establishing a link between the rights in dispute and irreparable harm with regard to the two private individuals.[51]

It is important in this context to consider the Court's recent capital punishment/consular assistance cases: the *Vienna Convention on Consular Relations (Breard)* case and the *LaGrand* case.[52]

In April 1998 and March 1999, respectively, Paraguay and Germany instituted proceedings against the United States alleging violations of the Vienna Convention on Consular Relations, the object of which is the protection of nationals abroad. Both applicants maintained that nationals of their countries, who had been convicted of serious criminal offences in the United States, had not been informed, as required by Article 36(1)(b) of the Convention, of their rights to contact consular officials in the United States. Furthermore, consular officials had not been notified of the arrests and detentions. In both cases, the accused were, at the time of the Applications, facing the death penalty and all domestic remedies had been exhausted.

In consideration of the imminence of the scheduled executions, Paraguay and Germany respectively requested the Court to indicate provisional

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48. *See* Hostages case, *supra* note 17, at 14, para. 19.
49. *See supra* note 40.
50. *See* Higgins, *supra* note 4, at 95.
51. In this regard, it must be noted that the Court changed the argument concerning this matter at the merit stage: the seizure of the two private individuals was found to be a breach of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, requiring the parties to ensure "the most constant protection and security" of each other's nationals. *See* United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Merits, Judgment of 24 May 1980, 1980 ICJ Rep. 26–27, para. 50 and at 32, para. 67.
52. Certainly, one must point out the distinction between the idea of diplomatic protection in the Mavrommatis sense as involving the assertion of a right of the state, and diplomatic protection in the more procedural sense of a right of the state to have its diplomatic and (in particular) consular staff give support and protection to nationals abroad. However, the legal significance of this distinction would fade away as an effect of the combination between the finding of individual rights and the general jurisdictional clause. *See* LaGrand, Merits, Judgment, *supra* note 44, at para. 42. On 'individual rights' under Art. 36(1) of the Convention, *see id.*, at para. 77.

measures.[53] Neither state explained why and/or how the possible execution would cause an irreparable harm to the rights that constitute the subject of the dispute.[54] They respectively claimed that the stay of execution was needed to protect the life of their national and the ability of the Court to order the relief to which they were entitled.[55] The applicants thus assumed that the re-trial or re-sentencing constituted an appropriate remedy under the Convention.[56]

How did the Court handle the matter? Having established *prima facie* jurisdiction on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes,[57] which accompanies the Vienna Convention, the Court simply stated, in the *Breard* case, that:

> such an execution would render it impossible for the Court to order *the relief that Paraguay seeks* and *thus* cause irreparable harm to the rights it claims.[58]

On this point, the reasoning in the *LaGrand* case was unclear. It stated that "such an execution would cause irreparable harm to the rights claimed by

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53. The Paraguay application was filed on 3 April 1998 and Angel Breard was scheduled to be executed on 14 April 1998. Walter LaGrand was scheduled to be executed on 3 March 1999, the day after Germany filed the application. In both Applications, the grounds for their requests were formulated almost in the same terms, and the measure requested by both applicants was a stay of execution. *See* Request for the indication of provisional measures of protection submitted by Paraguay, ICJ Pleadings, at 11–14; Request for the indication of provisional measures of protection submitted by Germany (not yet published, available at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm).
54. There is no duty for the parties to specify "the rights to be protected." *See* the Rules of Court, adopted in 1978, Art. 73(2). This provision requires that a request for provisional measures "shall specify the reasons thereof, the possible consequences if it is not granted, and the measures requested." *Cf.* Art. 61(1) of the 1936 Rules, renumbered as Art. 66(1) of the 1972 Rules, provided that "[t]he request shall specify the case to which it relates, *the rights to be protected* and the interim measures of which the indication is proposed" (emphasis added). *See* S. Rosenne, Procedure in the International Court 151 (1983), where it is argued that this takes the rule nearer to the wording of Art. 41 of the Statute.
55. *See* Request for the indication of provisional measures of protection submitted by Paraguay, *supra* note 53, at 13, para. 7; Request for the indication of provisional measures of protection submitted by Germany, *supra* note 53, at para. 7.
56. The Court reserved this issue for the merits stage. *See* Vienna Convention on Consular Relations (Paraguay *v.* United States of America), Provisional Measures, Order of 9 April 1998, 1998 ICJ Rep. 256–257, at para. 33 (hereinafter 'Breard'). *Cf.* this statement was omitted in the LaGrand case: LaGrand (Germany *v.* United States of America), Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep. 9–17. *See also* LaGrand, Merits, Judgment, *supra* note 44, at para. 125. At the stage of the merits, the Court affirmed the US's obligation "to allow the review and reconsideration of the conviction and sentence."
57. Done 24 April 1963, 596 UNTS 488 (1963). Art. I of the Optional Protocol provided that

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

58. *See* Breard, *supra* note 56, at para. 37 (emphasis added).

Germany in this particular case."[59] Accordingly, the Court indicated the following provisional measures:

> The United States should take all measures at its disposal to ensure that Angel Francisco Breard [or Walter LaGrand] is not executed pending the final decision in these proceedings […].[60]

In these cases, what rights were exposed to irreparable harm? One may suppose that the Court considered irreparable harm might be caused to the parties' right to receive the relief that they sought.[61] Such a 'right' would, however, not constitute the subject of the dispute before the Court on the merits of the case. In fact, the Court specified neither the rights to which irreparable harm was being caused nor the rights to be protected.

In this regard, Judge Koroma opined that the rights preserved by the measure were the rights of the individual. He insisted that:

> [t]he Order called for the suspension of the sentence of execution of Mr. Breard on 14 April 1998, thereby *preserving his right to life* pending the final decision of the Court on this matter.[62]

The disadvantage of this argument is that, as *prima facie* jurisdiction was established by reason of the Optional Protocol,[63] the Court had to confine itself to the consideration of the rights granted under the Vienna Convention.[64] It is difficult to conceive the right to life as a right under the Convention. On the other hand, Judge Oda argued that:

> [i]n this case […] there is no question of such *rights* [rights of states which constitute the subject matter of the application], as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.[65]

However, in the *Breard* and *LaGrand* cases, the Court may have construed the state's right under the Consular Convention as the right not to have its nationals killed – including the right not to have its nationals executed

59. *See* LaGrand, *supra* note 56, at para. 24.
60. *See* Breard, *supra* note 56, at para. 41, I; LaGrand, *supra* note 56, at para. 29(I).
61. In the Frontier Dispute case, Mali referred to "the right to the implementation of such judgment as the Chamber of the Court may deliver on the merits" as the rights to which irreparable harm had been caused. *See* Frontier Dispute, *supra* note 24, at 5, para. 5.
62. *See* Breard, *supra* note 56, Declaration of Judge Koroma (emphasis added).
63. *See supra* note 57.
64. *See* Application of the Genocide Convention, *supra* note 31, at 19, para. 34 and at 20, para. 38.
65. *See* Breard, *supra* note 56, Declaration of Judge Oda, at para. 5; LaGrand, *supra* note 56, Declaration of Judge Oda, at para. 5 (emphasis in original text).

'arbitrarily.'[66] As a matter of fact, in their main claims the applicants respectively contended that the United States had violated its international legal obligations to Paraguay and Germany, respectively, "in its own right and in the exercise of *its right of diplomatic protection of its national*, as provided by Articles 5 and 36 of the Vienna Convention."[67]

It must be taken into consideration here that the existence of capital punishment itself has not been regarded as an international wrongful act.[68] The national criminal justice system is a domestic matter. On this point, the Court noted that "the function of this Court is […] not to act as a court of criminal appeal."[69] Furthermore, a violation of Article 36(1)(b) of the Vienna Convention on Consular Relations had already occurred.[70] As the United States failed to inform the detained foreign nationals of their rights to consular communication and, consequently, failed to inform the consular authorities concerned of the detention of their nationals, it was obvious that a breach did occur.[71] Accordingly, the real problem relates to the legal *consequence* of the failure of consular notification; in other words, whether capital punishment, pronounced without consular assistance triggers the exercise of diplomatic protection by reason of a violation of the right to life of nationals.

However, as both parties (the applicant and the respondent) took com-

66. In order to exercise diplomatic protection, it is not necessary that there exists a violation of nationals' *rights*, but that there exists an injury to nationals' *interests* as a result of an international wrongful act. *See* the Vienna Convention on Consular Relations, Art. 5. In fact, the applicants respectively stated that "it was unable to protect its detained national's interests as provided for in [Arts. 5 and 36 of the Vienna Convention]." *See* Request for the indication of provisional measures of protection submitted by Paraguay, *supra* note 53, at 13, para. 3; Request for the indication of provisional measures of protection submitted by Germany, *supra* note 53, at para. 4.

67. *See* Application Instituting Proceedings Submitted by the Government of Paraguay, ICJ Pleadings 1, at 8, para. 25(1); the Application of Germany (not yet published, available at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm), at para. 15(1) (emphasis added).

68. *See* Restatement of the Law: Third Restatement of U.S. Foreign Relations Law, Vol. 2, Sec. 702, Comment *f*, at 165 (1987). It stated that "capital punishment, imposed pursuant to conviction in accordance with due process of law, has not been recognized as a violation of the customary law of human rights."

69. *See* Breard, *supra* note 56, at para. 38; LaGrand, *supra* note 56, at para. 25.

70. Art. 36(1)(b) provides as follows:

> [With a view to facilitating the exercise of consular functions relating to nationals of the sending State] if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to a prison or to custody pending trial or is detained in any other manner. […] The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

71. The US and the Court acknowledged that breach. *See* Breard, *supra* note 56, at para. 28. *See also* LaGrand, Merits, Judgment, *supra* note 44, at para. 39.

pletely different views on this point,[72] the answer to that question constituted one of the main issues at the stage of the merits.[73] Therefore, at the stage of provisional measures in the *Breard* and *LaGrand* cases, we can only recognize that the right to diplomatic protection under the Consular Convention was sufficient to establish a link between the rights in dispute and irreparable harm through adopting an extensive interpretation of legal consequences under Article 36 of the Convention.[74]

3.2.2. Rights to respect for instruments relating to the protection of human rights

Two cases before the Court would fall within the human rights category for present purposes: the *Application of the Genocide Convention* case[75] and the *Armed Activities* case.[76] In both cases, irreparable harm was caused by the loss of human life and the subject matter concerned compliance with human rights obligations under the applicable treaties.

On 20 March 1993, Bosnia-Herzegovina brought an action against Yugoslavia (Serbia and Montenegro) in respect of a dispute concerning alleged violations by Yugoslavia of the Genocide Convention. In the main action, Bosnia-Herzegovina claimed that the Court had jurisdiction under Article IX of the Genocide Convention. It argued that Yugoslavia was fully responsible under international law for acts of genocide and asked the Court to make 18 declarations.[77] On the same day, Bosnia-Herzegovina, stating that "[t]he overriding objective of this Request is to prevent further loss of human life in Bosnia Herzegovina," filed its first request for provisional measures.[78] In its request, the applicant asked the Court to order Yugoslavia to cease its acts of genocide and to cease support for military and paramilitary forces operating in or against Bosnia-Herzegovina.[79]

In its Order, having established *prima facie* jurisdiction, the Court

72. The applicant contended that the criminal liability imposed on a person who had not been notified pursuant to Art. 36 of the Vienna Convention was void and that the US should restore the *status quo ante*. (*See* the Application of Paraguay, *supra* note 67, at 8, para. 25; the Application of Germany, *supra* note 67, at para. 15). On the other hand, the respondent argued that when a claim was made for the failure to notify, the only consequence was that apologies were presented by the government responsible. Furthermore, it contended that the accused in question had not been prejudiced by the absence of notification. (*See* Breard, *supra* note 56, at paras. 18 and 20).
73. *See* Breard, *supra* note 56, at paras. 31 and 33.
74. At the merits stage, Germany slightly changed its argument based on diplomatic protection. It contended that the breach of *Art. 36* of the Vienna Convention (the failure of notification) entailed a violation of *individual rights* of the LaGrand brothers. *See* LaGrand, Merits, Judgment, *supra* note 44, at para. 75. And the Court accepted that. *See id.*, at para. 77. *But see id.*, at paras. 2–16, Separate Opinion of Vice-President Shi.
75. Application of the Genocide Convention, *supra* note 31, at 3.
76. Armed Activities, *supra* note 25.
77. *See* Application of the Genocide Convention, *supra* note 31, at 4–7, para. 2.
78. ICJ Press Communiqué 93/4, 22 March 1993.
79. *See* Application of the Genocide Convention, *supra* note 31, at 7–8, para. 3.

pointed out that the legal rights sought to be protected by the provisional measures included "the right of the People and State of Bosnia and Herzegovina to be free at all times from acts of genocide and other genocidal acts […]."[80] After this finding, the Court stated, in relation to the jurisdiction, that:

> [it] is […] confined to the consideration of such rights under [the] Genocide Convention as *might form the subject-matter of a judgment of the Court in the exercise of its jurisdiction under Article IX of that Convention*.[81]

Having observed that, under Article I of the Genocide Convention, contracting parties undertake to prevent and punish genocide, the Court found that "there is a grave risk of acts of genocide being committed."[82] As a consequence, the Court pointed out that it was called upon "to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of *rights under the Genocide Convention*," and that "[it was] satisfied, taking into account the obligation imposed by Article I of the Genocide Convention, that the indication of measures [was] required for the protection of such rights."[83] It therefore ordered Yugoslavia immediately, in pursuance of its undertaking in the Genocide Convention, to "take all measures within its power to prevent commission of the crime of genocide."[84]

Whereas the above-mentioned case was limited to the Genocide Convention, the Application in the *Armed Activities* case was formulated in more general terms.

In June 2000, Democratic Republic of the Congo instituted proceedings against Uganda in respect of a dispute concerning acts of armed aggression perpetrated by Uganda on the territory of the Congo.[85] Invoking Article 36(2) of the Statute as the basis of jurisdiction, the Congo contended, *inter alia*, that the armed aggression by Ugandan troops on Congolese territory had involved violations of international humanitarian law and massive human rights violations,[86] and asked the Court to adjudge and declare that:

> (b) Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocol of 1977, in flagrant disregard of the elementary rules

80. *Id.*, at 19–20, para. 36. In this regard, it should be taken notice the fact that the rights of the *People* of Bosnia-Herzegovina had smuggled into the request for the measures. Although its legal meaning is not clear in terms of *the rights to be protected by the measures*, one could point out that such rights do not mean the right of each individual Bosnian not to be murdered, because the killing of one Bosnian would not affect the continued existence of the rights of People of Bosnia (*e.g.*, the right of the People to be free from acts of genocide).
81. *Id.*, at 20, para. 38 (emphasis added).
82. *Id.*, at 22, para. 45.
83. *Id.*, at 22, para. 46 (emphasis added).
84. *Id.*, at 24, para. 51(A)(1).
85. *See* the Application of Armed Activities on the Territory of the Congo, *supra* note 25.
86. *See* Armed Activities, *supra* note 25, para. 5.

> of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law.[87]

Furthermore, the Congo also requested the Court to indicate the following provisional measures: the discontinuance of an act "having the aim or effect of disrupting, interfering with or hampering actions intended to give the population of the occupied zones the benefit of their fundamental human rights"; respecting the sovereignty of the Congo and the fundamental rights and freedoms of all persons on the territory of the Congo.[88]

In its Order, the Court stated that:

> the rights which […] are the subject of the dispute are essentially its rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources, and its *rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights*.[89]

Having found the fact that as a result of the presence of Ugandan force on the territory of the Congo the fighting had caused a large number of civilian casualties and that there existed grave violations of human rights and humanitarian law,[90] the Court stated that:

> [it] is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case, as noted in paragraph 40 above, may suffer irreparable prejudice.[91]

Consequently, the Court found that "the circumstances require it to indicate provisional measures,"[92] and indicated the following measures:

> (1): Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case […].
> […]
> (3): Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.[93]

As the cases described in this part demonstrate, the states' rights were themselves formulated by reference to the loss of human life: the rights to respect for human rights, most importantly, the right to life. Therefore,

87. *Id.*, at para. 7.
88. *Id.*, at para. 13.
89. *Id.*, at para. 40 (emphasis added).
90. *Id.*, at para. 42.
91. *Id.*, at para. 43.
92. *Id.*, at para. 45.
93. *Id.*, at para. 47.

the Court appears to assume a link between the rights in dispute and irreparable harm to be self-evident.

3.3. Cases in which the subject matter relates to a territorial dispute

To date, two ICJ cases fall within this last category: the *Frontier Dispute* case and the *Land and Maritime Boundary* case. The former was a case in which Burkina Faso (formerly known as Upper Volta) and Mali had agreed to submit to a Chamber of the Court a dispute concerning the delimitation of their common frontier, and the parties in this dispute respectively requested provisional measures.[94] In the latter case, Cameroon instituted proceedings against Nigeria in respect of a dispute described as relating essentially to the question of sovereignty over the Bakassi Peninsula.[95] The declaration made by each of the states pursuant to Article 36(2) of the Court's Statute was invoked by Cameroon as a basis for the jurisdiction and provisional measures were requested in 1996.

Despite some differences,[96] it is important to note that these cases also share some similarities. Firstly, the subject matter in the cases was the boundary line and therefore the rights in dispute were sovereign rights over territory.[97] Secondly, both cases included the loss of human life as a result of armed conflicts. Although, in the *Frontier Dispute* case, neither party explicitly mentioned the loss of human life,[98] the applicant in the *Land and Maritime Boundary* case contended that:

> the continuance of armed clashes would considerably aggravate the injury caused to the Republic of Cameroon […] notably by causing irremediable *loss of life* as well as human suffering and substantial material damage.[99]

This raises the issue of how a link can be established between determining the boundary line (sovereign rights over territory) and the loss of human life (the right to life).

Incidentally, with regard to these cases, one ought to consider the question of whether or to what extent the prevention of aggravation or extension of a dispute influences the indication of provisional measures

94. *See* Frontier Dispute, *supra* note 24, at 3.
95. *See* Land and Maritime Boundary, *supra* note 24, at 14, para. 4 and at 15, para. 7.
96. *E.g.*, on the jurisdictional matter to indicate provisional measures. *See* Frontier Dispute, *supra* note 24, at 8, para. 10; Land and Maritime Boundary, *supra* note 24, at 20–21, paras. 28–31.
97. The Court (or the Chamber) explicitly recognized that. *See* Frontier Dispute, *supra* note 24, at 9, para. 15; Land and Maritime Boundary, *supra* note 24, at 22, para. 39.
98. *See* Frontier Dispute, *supra* note 24, at 4–5, para. 4 (Burkina Faso): *See also id.*, at 7, para. 6(6) (Mali).
99. *See* Land and Maritime Boundary, *supra* note 24, at 18, para. 19 (emphasis added).

by the Court.[100] In this section, however, I shall concentrate on the aspect of 'preservation of the rights.' It is possible to do so because both Orders in these cases included this aspect.[101]

Turning now to the Court's (Chamber's) reasoning concerning a link between the rights in dispute and irreparable harm, in the *Frontier Dispute* case, the Chamber began by finding that the armed actions took place within or near the disputed area.[102] Having made reference to the destruction of evidence material to the Chamber's eventual decision by armed conflicts,[103] the Chamber pointed out that:

> the facts [armed actions] […] expose the persons and property in the disputed area, as well as the interests of both States within this area, to serious risk of irreparable damage.[104]

However, there was no explanation linking the subject matter and irreparable harm. The Chamber only stated, just after the above finding, that "the circumstances consequently demand that the Chamber should indicate appropriate provisional measures in accordance with Article 41 of the Statute."[105]

It could be pointed out, however, that, in contrast to the *Frontier Dispute* case, the link question was dealt with in the *Land and Maritime Boundary* case. In that case, having found that military incidents "caused suffering, occasioned fatalities – of both military and civilian personnel – while causing others to be wounded or unaccounted for […],"[106] the Court stated that:

> the events that have given rise to the request, and more especially to the killing of persons, have caused irreparable damage to *the rights that the Parties may have over the Peninsula* […]. [P]ersons in the disputed area and, *as a consequence*, the rights of the parties within that area are exposed to serious risk of further irreparable damage […].[107]

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100. From the view of the concrete contents of the Orders, which are for example the withdrawal of the army and the preservation of evidence, it might be considered that the Orders attached importance to that aspect.
101. *See* Frontier Dispute, *supra* note 24, at 11–12, para. 32(1)(A). *See also* Land and Maritime Boundary, *supra* note 24, at 24, para. 49(1). In addition, in the Frontier Dispute case the Chamber stated that

> the Chamber, while welcoming the fact that the Parties have been able to reach agreement on a ceasefire, and have thus brought to an end the armed actions which give rise to the request for the indication of provisional measures, is nonetheless faced with its duty under Article 41 of the Statute to ascertain for itself what provisional measures ought to be taken to *preserve the respective rights of either Party* (emphasis added).

See Frontier Dispute, *supra* note 24, at 10, para. 25.
102. *See* Frontier Dispute, *id.*, at 9, para. 16.
103. *Id.*, at 9, para. 20.
104. *Id.*, at 10, para. 21.
105. *Id.*
106. *See* Land and Maritime Boundary, *supra* note 24, at 22, para. 38.
107. *Id.*, at 23, para. 42 (emphasis added).

With respect to the link between sovereign rights over territory and the loss of human life, the above explanation was justified by the reasoning that "these rights [sovereign rights over the territory] also concern persons."[108]

In this regard, there is some controversy over whether the Court's reasoning satisfies the requirement of a link between the rights in dispute and irreparable harm.[109] It seems that the conflict of views would stem from the nature of the right in issue (sovereign rights over territory). Arguments in favor of the existence of a link assume that sovereign rights over territory *include* the protection of inhabitants' lives. As a result, the loss of human life is conceived as an injury to sovereign rights over territory. On the other hand, arguments against the existence of a link distinguish sovereign rights over territory from the right to life because the former are rights of the state, whereas the latter are rights of the individual. According to this view, the loss of human life has nothing to do with the rights at issue in a territorial dispute. In the end, the question concerns whether an armed conflict affects the existence of sovereign rights over territory through the loss of human life.

It is important to note, according to the Court's jurisprudence, that incidents cannot affect the existence or value of sovereign rights over territory. The *Legal Status of the South-Eastern Territory of Greenland* is a leading case on this question: the character of sovereign rights over territory. Contrary to Norway's argument that "the Court [PCIJ] is also competent to indicate interim measures of protection for the sole purpose of preventing regrettable events and unfortunate incidents," the PCIJ held that it was unnecessary to take a final stance on this controversy over the interpretation of Article 41 of the Statute, because:

> [t]he incidents which the Norwegian Government aims at preventing cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by Norway over the territory in question, were these rights to be duly recognized by the Court in its future judgment on the merits of the dispute, and as these are the only rights which might enter into account […].[110]

In addition, this line of argument was adopted in the Aegean Sea case with respect to sovereign rights over continental shelf. There, the Court stated that:

> it is clear that neither concession unilaterally granted nor exploration activity unilaterally undertaken by either of the interested States with respect to the disputed

108. *Id.*, at 22, para. 39.
109. For arguments favoring the link, *see*, *e.g.*, Land and Maritime Boundary, *supra* note 24, at 30, Declaration of Judge Koroma; S. Rosenne, The Law and Practice of the International Court, 1920–1996, Vol. III: Procedure, 3rd Ed., 1456 (1997); Higgins, *supra* note 4, at 97 and 102. For arguments criticizing the Court's reasoning, *see*, *e.g.*, Land and Maritime Boundary, *supra* note 24, at 27 Declaration of Judge Oda; Sztucki, *supra* note 11, at 354.
110. *See* South-Eastern Greenland, *supra* note 22, at 285; *see also id.*, at 288.

areas can be creative of new rights or deprive the other State of any rights to which in law it may be entitled.[111]

According to this, it is virtually impossible to destroy or prejudice this kind of rights, which begs the question of whether provisional measures are necessary to preserve such rights in the first place. It is at least obvious that the idea of sovereign rights relating to the individual rights (in particular, the right to life) is strained reasoning in the case of territorial disputes. The existence of the rights in issue cannot be injured by armed incidents followed by the loss of human life. Thus, it is impossible to recognize a *direct* link between sovereign right over territory and human life.[112]

4. CONCLUSION

Through the above analysis, this article reveals that the Court has relaxed the criteria for indicating provisional measures by taking account of the human life element. First of all, there is a high possibility that the loss of human life is to be considered as 'irreparable harm.' This position is, *prima facie*, justified by the reasoning that irreparable harm means the irreparability *in fact*. Furthermore, it seems that the human life element functions to mitigate the link between the rights at issue in the dispute and irreparable harm. In other words, the Court appears to have relaxed the requirement of the link, which may be called the 'flexible approach.'[113] Although one cannot deny the fact that the gravity of irreparable harm (loss of human life) has been a predominant element,[114] the result would be to take into account the human life element for lowering the threshold for indicating provisional measures.

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111. *See* Aegean Sea, *supra* note 10, at 10, para. 29.
112. Therefore, the above-mentioned Orders might have to be read that they were *solely* based on the power to indicate measures 'to prevent the extension or aggravation of the dispute,' *see* Frontier Dispute, *supra* note 24, at 9, para. 18; Land and Maritime Boundary, *supra* note 24, at 22–23, para. 41. If so, then a link between the rights of the states concerned and the preservation of human life would not be required. However, this raises the question of whether, under Art. 41 of the Statute, the Court has such an independent power to indicate measures having that object. *See also* Aegean Sea, *supra* note 10, at 12, para. 36; South-Eastern Greenland, *supra* note 22, at 284. This question is beyond the scope of this article.
113. In this regard, it is interesting to note that the Arbitral Award case has *not* been cited in all cases concerned. *See* Application of the Genocide Convention, *supra* note 31, at 19, para. 34; Land and Maritime Boundary, *supra* note 24, at 21–22, para. 35; Breard, *supra* note 56, at para. 36; LaGrand, *supra* note 56, at para. 23; Armed Activities, *supra* note 25, at para. 39.
114. *See*, *e.g.*, in the Breard and LaGrand cases Judge Oda voted in favor of the Orders for "humanitarian reasons," although he criticized the Court's reasoning. *See* Breard, *supra* note 56, Declaration of Judge Oda, at para. 8; LaGrand, *supra* note 56, Declaration of Judge Oda, at para. 7.

It is my opinion, however, that were the Court to adopt this approach, the following problems would arise:

Firstly, there would be a jurisdictional problem. In other words, the 'flexible approach' might introduce into the Court's proceedings a new dispute for which a jurisdictional basis is lacking. In particular, when the basis for the jurisdiction is the declaration under Article 36(2) of its Statute (the Optional Clause) attaching to the reservation, that issue becomes acute. We can imagine the following example: State A institutes proceedings against State B in respect of a dispute concerning the question of sovereignty over territory. Armed conflicts have occurred in the territory in question and as a consequence a vast number of inhabitants have been killed or are being killed. Whereas State A requests provisional measures, State B has made a reservation in order to exclude a dispute concerning armed conflicts.[115] In such a situation, is it possible for the Court to indicate provisional measures by reason of the loss of human life?

Furthermore, the problem would also relate to the binding character of provisional measures. In general, the question of whether provisional measures are binding or not has been controversial in the literature.[116] With regard to this issue, on 27 June 2001 the Court affirmed the binding effect of orders made under Article 41 of the Statute in its Judgment on the merits in the *LaGrand* case.[117] Nevertheless, provisional measures should have *no* binding force in cases where the criteria for indicating measures have not been satisfied, including the situation in which the rights to be protected may not fall within the scope of *prima facie* jurisdiction. In such a case, an order on provisional measures should not be conceived as a proper one under Article 41 of the Statute. If it were, it would pose the risk of creating an 'interim judgment' or a binding decision over a matter which might be irrelevant to the actual dispute before the Court.[118] It seems that the *Breard* and *LaGrand* cases include this issue.[119]

Finally, a problem might occur at the merits stage. This issue stems from

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115. *See* J.G. Merrills, *The Optional Clause Revisited*, 64 BYIL 232–234 (1993). *See*, *especially*, Hungary's reservation.
116. *See*, *e.g.*, Sztucki, *supra* note 7, at 221–302; Rosenne, *supra* note 54, at 150; M. Mendelson, *Interim Measures of Protection and the Use of Force by States*, *in* A. Cassese (Ed.), The Current Legal Regulation of the Use of Force 340–345 (1986); L. Collins, *Provisional and Protective Measures in International Litigation*, 234 RdC 216–220 (1992); Thirlway, *supra* note 41, at 28–33; E. Szabo, *Provisional Measures in the World Court: Binding or Bound to be Ineffective?*, 10 LJIL 475–489 (1997); M. Addo, *Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations*, 10 EJIL 723–727 (1999); M. Mennecke & C. Tams, *The Right to Consular Assistance Under International Law: The LaGrand Case Before the International Court of Justice*, 42 GYIL 203–209 (1999).
117. *See* LaGrand, Merits, Judgment, *supra* note 44, at paras. 98–109. *But see id.*, Dissenting Opinion of Judge Oda, at paras. 28–35.
118. On an interim judgment, *see* Chorzow Factory (Germany *v.* Poland), Order of 21 November 1927, 1927 PCIJ (Ser. A) No. 12, at 10.
119. *See*, *e.g.*, Breard, *supra* note 56, Declaration of Judge Oda, at para. 7; LaGrand, *supra* note 56, Declaration of Judge Oda, at para. 6.

the *provisional* nature of the measures. According to the *Arbitral Award* case:

> such measures are provisional and indicated 'pending the final decision' (Article 41, paragraph 2, of the Statute). […] [T]herefore they are to be measures such that they will *no longer be required as such* once the dispute over those rights has been resolved by the Court's judgment on the merits of the case.[120]

In other words, provisional measures must cease their function once the Court renders judgment on the merits. In this regard, one should note that the dispute which the measures address cannot be resolved if the judgment on the merits does not subsume the measures.[121] This risk would increase as a result of relaxing the link. Although this issue might not be so problematic as long as the measures are formulated in general terms, obviously it would be problematic in cases in which the subject matter relates to a territorial dispute.

Indeed, the 'flexible approach' might be consistent with the trend of the Court being used by states, their intention being "less to obtain a judgment on the merits than to obtain the short-term tactical advantage of an Order indicating provisional measures."[122] However, it is strongly doubtful whether this tendency is compatible with *raison d'être* of provisional measures. Without an amendment to Article 41 of the Statute, the answer to this question depends on how the state party requesting provisional measures (normally, the applicant) formulates the 'rights' that constitute the subject matter of the dispute on the merits. The Court has not only the discretionary power to indicate provisional measures, but also its limitation as a 'court of law.'[123]

120. *See* Arbitral Award, *supra* note 29, at 69, para. 24 (emphasis added).
121. *Id.*, at 70, para. 27.
122. *See* Thirlway, *supra* note 41, at 27.
123. *See* R.Y. Jennings, *The Proper Work and Purpose of the International Court of Justice*, *in* A.S. Muller, D. Raic & J.M. Thuránszky (Eds.), The International Court of Justice: Its Future Role After Fifty Years 33–37 (1997). Jennings pointed out that "[a]djudication is a technical, intellectual, artificial method" as it applies legal criteria to legal issues to which disputes have been reduced.