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Provisional Measures and the Loss of Human Life: An Overview of Recent Practice in the International Court of Justice*

Yoshiyuki Lee**

I. INTRODUCTION

During the period 1979-2000, provisional measures before the International Court of Justice (hereinafter cited as the Court) were requested in fifteen cases[1], of which nine cases involved the loss of human life[2]. In these nine cases, the Court appears to show a growing tendency to recognize the human reality behind disputes between States.[3]

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* This paper is complementary, by way of reviewing the cases chronologically, to the article of which title is "The Protection of Human Life through Provisional Measures Indicated by the International Court of Justice", which has already been submitted to the *Leiden Journal of International Law* (forthcoming).

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1 They include the Border and Transborder Armed Action (Nicaragua *v.* Honduras) case, which was withdrawn by the Applicant. The Lockerbie cases and the Legality of Use of Force cases were counted as one case respectively.

2 In this paper, the question of whether a case involved the human life element depends on the fact that the Applicant (or the Court) referred to 'threats to human life'. According to this, the cases which should be dealt with are as follows: United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Provisional Measures, Order of 15 December 1979, 1979 ICJ Rep. 7; Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Provisional Measures, Order of 10 May 1984, 1984 ICJ Rep. 169; Frontier Dispute (Burkina Faso/Mali), Provisional Measures, Order of 10 January 1986, 1986 ICJ Rep. 3 ; Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Provisional Measures, Order of 8 April 1993, 1993 ICJ Rep. 3; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Provisional Measures, Order of 15 March 1996, 1996 ICJ Rep. 13 ; Vienna Convention on Consular Relations (Paraguay *v.* United States of America), Provisional Measures, Order of 9 April 1998, (not yet published, the text is available on Internet: http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm); LaGrand (Germany *v.* United States of America), Provisional Measures, Order of 3 March 1999 (not yet published, the text is available on Internet: http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm); Legality of Use of Force (Yugoslavia *v.* Belgium) (Yugoslavia *v.* Canada) (Yugoslavia *v.* France) (Yugoslavia *v.* Germany) (Yugoslavia *v.* Italy) (Yugoslavia *v.* Netherlands) (Yugoslavia *v.* Portugal) (Yugoslavia *v.* Spain) (Yugoslavia *v.* U.K.) (Yugoslavia *v.* United States of America), Provisional Measures, Order of 2 June 1999, (not yet published, the texts are available on Internet: for convenience references will be made to the Order in *Yugoslavia* v. *Belgium*; http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm); 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).

3 *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 21th Century 103 (1997).

The indication of provisional measures is governed by Article 41(1) of the Court's Statute, which provides:

> [t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.[4]

Furthermore, the requirements for the indication of provisional measures have evolved through case law. In the *Fisheries Jurisdiction* case, the Court stated, *inter alia,* that:

> the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue.[5]

First of all, 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 prejudice (harm, damage), which was formulated in the *Fisheries Jurisdiction* case, is one of the most important of such 'circumstances'.[6] 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 those rights. In this regard, there remains the question of what is meant by 'irreparable'.[7]

Secondly, Article 41(1) of the Statute stipulates that "any provisional measures [...] ought to be taken to preserve the respective rights of either party". 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

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4 Article 41 of the ICJ Statute, ICJ Acts and Documents, No. 4, at 79.

5 Fisheries Jurisdiction (U.K. *v.* Iceland), Interim Protection, Order, 1972 ICJ Rep. 16, para. 21.

6 *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).

7 It might be useful to reflect on what 'reparable' *actually* means. Sometimes it is used to mean, of an action, that it can be reversed, that the situation that existed before it can be re-established (e.g. if a specific object is wrongfully taken and then returned); sometimes it is used to mean that the complainant can be put in as good a position as if the action had not taken place (e.g. if a sum of money, or a quantity of interchangeable goods is taken, but an equal sum or quantity is given back); and sometimes it is used to mean that a payment can efface the injury, even though the situation is not thereby restored (damage generally). This confusion dogs the whole discussion in and before the Court.

Arbitral Award of 31 July 1989 case.[8]

In that case, Guinea-Bissau, the Applicant, 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 as follows:

> [T]he Application thus 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***; and whereas any such measures ***could not be subsumed*** by the Court's judgment on the merits.
> [M]oreover a decision of the Court that the award is inexistent or null and void would in no way entail any decision that the Applicant's claims in respect of the disputed maritime delimitation are well founded, in whole or in part and [...] the dispute over those claims will therefore not be resolved by the Court's judgment (emphasis added).[9]

Judge *ad hoc* Thierry, however, saw the matter differently: he argued for a broader interpretation of the link required between the question before the Court and the substantive rights which were the subject of the request for provisional measures. Criticizing paragraph 26 of the Order, he contended that:

> [i]t is therefore in order to preserve the rights which ***would flow from*** the decision of the Court on the merits (i.e., on the validity of the award) that Guinea-Bissau has submitted a request for the indication of provisional measure. [...] [T]he Court's decision on the merits will directly ***affect*** the respective rights of the Parties in the maritime zone in question (emphasis added).[10]

After all, the position taken by Judge *ad hoc* Thierry, which might be characterized as the argument for the 'indirect link', has not been adopted. Thus, the position of the Court is that the *direct* link is necessary to indicate

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8 *See* Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal), Provisional Measures, Order, 1990 ICJ Rep. 64. *See also* Polish Agrarian Reform (Germany *v.* Poland), 1933 PCIJ (Ser. A/B) No. 58, 178; Aegean Sea Continental Shelf (Greece *v.* Turkey), Interim Protection, Order, 1976 ICJ Rep. 11, para. 34. In the former case the PCIJ rejected the German request with the motivation that "the interim measures asked for would result in a general suspension of the agrarian reform in as far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim". In the latter case the Court rejected some of the Greek request concerning its right to the performance by Turkey of its undertakings under Article 2(4) and 33 of the Charter, because "the right so invoked is not the subject of any of the several claims submitted to the Court by Greece in its Application [...]".

9 Arbitral Award of 31 July 1989, *supra* note 8, at 70, para 26-27.

10 *Id.*, 83 (Judge Thierry, Dissenting Opinion).

provisional measures.[11] It is well established that provisional measures can only be indicated to protect the parties' rights at issue in the dispute.[12]

This paper aims to reveal recent trends of the Court in indicating provisional measures to the cases involving the loss of human life. In the next section, recent case law will be reviewed in the light of the above-mentioned criteria for granting provisional measures.

II. CASE LAW

The *United States Diplomatic and Consular Staff in Tehran* case was the first case that the Court had been faced with threats to human life in indicating provisional measures. In the Oral pleadings, the counsel for the United States, Mr. Owen, argued that "[i]f the hostages are physically harmed, the Court's decision on the merits cannot possibly heal them", and, furthermore, that "[t]he current Chief of the Iranian State himself has spoken of the possible destruction of the hostages - the ultimate in irreparable injury."[13]

In that case, however, the claims of United States would be regarded as *direct* inter-State relations: the sanctity of embassies, diplomats and consular staff.[14] In its request the United States described as follows "the international legal rights of the United States" for the protection of which the measures were requested:[15]

> [...] the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises. (by the request of 29 November 1979)
>
> the 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)

The measures of protection requested were the release of hostages, the vacation by the Iranian intruders of the Embassy premises, and protection and free movement of diplomatic and consular personnel, none of whom

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11 *See also* Fisheries Jurisdiction, *supra* note 5, at 15, para. 14. In this case the Court found that "the request for provisional measures designed to protect such rights is therefore *directly connected* with the Application (emphasis added)".

12 *See, e.g.*, S. Oda, *Provisional Measures: The Practice of the International Court of Justice, in* V. Lowe and M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice 551 (1996); K. Wellens, *Reflections on Some Recent Incidental Proceedings before the International Court of Justice, in* E. Denters and N. Schrijwer (Eds.), Reflections on International Law from Low Countries 420-421 (1998).

13 *See* ICJ Pleadings, United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), 30.

14 *Id.*, Application submitted by the U.S. at 7-8.

15 *See* United States Diplomatic and Consular Staff in Tehran, *supra* note 2, at 19, para 37.

should be put on trial.[16]

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* (emphasis added).[17]

It is not impossible to say that the Court regarded the very importance of diplomatic intercourse to all States to be a ground for holding that irreparable harm was being caused or threatened.[18] In fact, the Court formulated its Order strictly in terms of the provisions of the diplomatic and consular Conventions.[19]

It should be noted, however, that the request of the United States was formulated more broadly. The request included "[t]he rights of its nationals to life, liberty, protection and security" or "the right to have its nationals protected and secure".[20] In particular, in that case the hostages included the two United States nationals who are *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 two United States citizens in question as follows:

> [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, [...].[21]

As a result, the Court stated that:

> it is likewise manifest that Article I of the Protocols concerning the compulsory settlement of disputes which accompany the Vienna Conventions of 1961 and 1963 furnishes a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States in respect of the two private individuals in question.[22]

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16 *Id.*, 9, para 2.

17 *Id.*, 19, para 38.

18 *See* D. Greig, *The Balancing of Interests and the Granting of Interim Protection by the International Court*, 11 Australian YBIL 133 (1991).

19 *See* United States Diplomatic and Consular Staff in Tehran, *supra* note 2, at 21, para 47, 1, A.

20 *Id.*, 19, para 37.

21 *Id.*, 14, para 19.

22 *Id.*, 14, para 20.

With regard to the two private individuals, the doctrine of diplomatic protection[23] appears to play a role in order to establish a link between irreparable harm and the rights in dispute.[24]

Furthermore, the Court, in relation to 'threats to human life', 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.[25]

Although this statement might be assessed as "the Court [...] made the connection between harm to the individuals concerned and obligations owed by Iran to the United States under the Vienna Convention"[26], 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".[27]

The *Military and Paramilitary Activities in and against Nicaragua* case would be regarded as the same line of the *Hostages* case.[28] Claiming that the United States was using military force and interfering in its internal affairs, Nicaragua requested provisional measures and contended, *inter alia*, that "the rights of Nicaraguan citizens to life, liberty and security" needed to be preserved.[29]

Despite some legal issues concerning the validity of the Nicaraguan declaration of 24 September 1929 and the United States declaration of 26 August 1984, the Court stated, with regard to *prima facie* jurisdiction, as follows:

> [T]he Court finds that the two declarations [the Nicaraguan declaration of 24 September 1929 and the United States declaration of 26 August 1946] do *nevertheless* appear to afford a basis on which the jurisdiction of the Court might be founded. (emphasis added)[30]

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23 *See* Mavromatis Palestine Consession (Greece *v.* U.K.), 1924 PCIJ (Ser. A) No. 2, at 12.

24 In that regard, it must be noted that the Court changed the argument concerning this matter at the merits stage: the seizure of the two private individuals was found to be a breach of the 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, 1980 ICJ Rep. 26-27, para 50 and 32, para. 67.

25 *See* United States Diplomatic and Consular Staff in Tehran, *supra* note 2, at 20, para 42.

26 *See* Higgins, *supra* note 3., at 95.

27 *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).

28 The counsel of Nicaragua argued, in the Oral pleadings, that "the present case is similar to the United States Diplomatic and Consular Staff in Tehran case [..]". *See* ICJ Pleadings, Military and Paramilitary Activities in and against Nicaragua, Vol. I, 56.

29 *See* Request for the Indication of Provisional Measures of Protection Submitted by the Government of Nicaragua, ICJ Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Vol. I, 27-29, *esp.*, para. 8.

30 Military and Paramilitary Activities in and against Nicaragua, *supra* note 2, at 180, para. 26.

In relation to the link between "preservation of rights" and "irreparable prejudice", the Court stated that:

> [...] the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of either party pending the decision of the Court [...].[31]

It should be noted that this formulation was omitted both the reference to "irreparable prejudice" and to non-anticipation of the Court's judgment, to be found in previous Orders.[32] Furthermore, the Court simply found that "the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court, in order to preserve the rights claimed."[33] Consequently, the Court indicated provisional measures, which stated that the United States should immediately cease and refrain from any action blocking access to or from Nicaraguan ports and the laying of mines, and that the right of Nicaragua to sovereignty and to political independence should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which were prohibited by the principle of international law.[34]

The next case was brought before the Court in the context of territorial disputes. The *Frontier Dispute* case 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. Certainly, both Parties did not mention explicitly the loss of human life[35]. Moreover, the Chamber found the subject matter of the dispute as follows:

> [E]ach of them [the Parties] requests the Chamber to decide that the frontier in question follows the line defined by its own submissions; so that *the rights at issue in these proceedings are the sovereign rights of the Parties over their respective territories* on either side of the frontier defined by the judgment which the Chamber is called upon to give (emphasis added).[36]

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31 *Id.*, 182, para. 32.

32 *See* Thirlway, *supra* note 27, at 9.

33 Military and Paramilitary Activities in and against Nicaragua, *supra* note 2, at 186, para. 39.

34 *Id.*, 187, para. 41, B, 1-2.

35 *See* Frontier Dispute, *supra* note 2, at 4-5, para. 4, (Burkina Faso): "The actual situation which might be created on the ground as the outcome of the armed conflict would make it difficult, if not impossible, to implement the Court's judgment. The destruction of evidence during the hostilities would threaten to pervert the course of the proceedings"; *See also id.*, 7, para 6 (6), (Mali): "The resumption and pursuit of the proceedings in a calm atmosphere is in the interest both of justice and of the Parties themselves and their peoples."

36 *Id.*, 9, para.15.

In its Order, the Chamber began by finding the fact that the armed actions took place within or near the disputed area.[37] Having made reference to the destruction of evidence material to the Chamber's eventual decision by armed conflicts,[38] 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.[39]

However, there was no explanation concerning a link between the subject matter and irreparable harm. The Chamber only stated, just after the above-mentioned finding, that "the circumstances consequently demand that the Chamber should indicate appropriate provisional measures in accordance with Article 41 of the Statute".[40] Consequently, the Chamber indicated the measures as follows:

> The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure no action of 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 (emphasis added).[41]

In the *Application of Convention on the Prevention and Punishment of the Crime of Genocide* case, the loss of human life was the very subject of the dispute. 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 Convention on the Prevention and Punishment of the Crime of Genocide. 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", and that "[t]he very lives [...] of hundreds of thousands of people in Bosnia and Herzegovina are right now at stake, hanging in the balance, awaiting the order of this Court"[42], filed its first request for provisional measures. 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.[43] In its first request for provisional

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37 *Id.*, 9, para. 16.
38 *Id.*, 9, para. 20.
39 *Id.*, 10, para. 21.
40 *Id.*, 10, para. 21
41 *Id.*, 11-12, para. 32 (1) A.
42 Press Communiqué 93/4, 22 March 1993.
43 *See* Application of Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, at 4-7, para. 2.

measures the Applicant asked the Court to order Yugoslavia to cease its acts of genocide, to cease support for military and paramilitary forces operating in or against Bosnia-Herzegovina, and to stop its own officials using force in or against Bosnia-Herzegovina.[44]

In its Order, having established the *prima facie* jurisdiction including *ratione personae* and *ratione materiae*, the Court pointed out that the legal rights sought to be protected by the indication of 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 [...]".[45]

In addition, the Court made clear, from the perspective of jurisdiction, that the purpose of provisional measures was to protect rights that are the subject of the dispute. As there was *prima facie* jurisdiction only in respect of the Genocide Convention, the Court found 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 that jurisdiction. [...] [A]ccordingly the Court will confine its examination of the measures requested, and of the grounds asserted for the request for such measures, *to those which fall within the scope of the Genocide Convention* (emphasis added).[46]
> [...]
> the Court is [...] confined to the consideration of such rights under 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* (emphasis added).[47]

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".[48] As a consequence, the Court pointed out that it is 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* (emphasis added)", and that "[it] is satisfied, taking into account *the obligation imposed by Article I of the Genocide Convention*, that the indication of measures is required for the protection of such rights".[49] It therefore ordered Yugoslavia immediately, in pursuance of its undertaking

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44 *Id.*, 7-8, para. 3.

45 *Id.*, 19-20, para. 36. In that 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).

46 *Id.*, 19, para. 35.

47 *Id.*, 20, para. 38.

48 *Id.*, 22, para. 45.

49 *Id.*, 22, para. 46.

in the Genocide Convention, to "take all measures within its power to prevent commission of the crime of genocide."[50]

The *Land and Maritime Boundary between Cameroon and Nigeria* case would be regarded as the direct descendants of the *Frontier Dispute* case. In this case, Cameroon instituted proceedings against Nigeria in respect of a dispute described as relating essentially to the question of sovereignty over the Bakassi Peninsula.[51] Indeed, the Court explicitly recognized that "the rights at issue in these proceedings are sovereign rights which the Parties claim over territory."[52] It should be noted, however, that the Applicant 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 (emphasis added).[53]

Having found the fact that military incidents "caused suffering, occasioned fatalities - of both military and civilian personnel - while causing others to be wounded or unaccounted for [...]",[54] 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 [...] (emphasis added).[55]

With respect to the link between sovereign rights over territory and the loss of human life, the above explanation would be justified by the reasoning that "these rights [sovereign rights over territory] also concern persons".[56] Consequently, the Court indicated provisional measures as follows:

> Both Parties should ensure that no action of any kind, and particularly no action by their armed forces, is taken which might prejudice ***the rights of the other*** in respect of whatever judgment the Court may render in the case or which might aggravate or extend the dispute before it (emphasis added).[57]

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50 *Id.*, 24, para. 51, A (1).

51 Application filed on 29 March 1994 also included the request to determine the course of the maritime boundary between the two States beyond the line fixed in 1975. *See* Land and Maritime Boundary between Cameroon and Nigeria, *supra* note 2, at 14, para. 4. Furthermore, an Additional Application filed on 6 June 1994 extended the subject of dispute to a further dispute, described as relating essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad. *See id.*, 15, para. 7.

52 *Id.*, 22, para. 39.

53 *Id.*, 18, para. 19.

54 *Id.*, 22, para. 38.

55 *Id.*, 23, para. 42.

56 *Id.*, 22, para. 39.

57 *Id.*, 24, para. 49 (1).

It is doubtful, *prima facie*, whether this reasoning fulfills the requirement of a link between the rights in dispute and irreparable harm.[58] The first argument favoring the link between sovereign rights over territory and the loss of human life was presented by Judge Koroma. In his declaration in the *Land and Maritime Boundary between Cameroon and Nigeria* case, he stated that:

> the possibility of a further military engagement resulting in irreparable damage to *the rights of either Party, including further loss of human life*, does, in my considered opinion, provide the Court with sufficient reason to grant the provisional order on its own accord (emphasis added).[59]

Furthermore, S. Rosenne took a similar position about this matter, pointing out some prerequisites in fact. He stated that:

> In territorial disputes the Court will indicate provisional measures if there have been incidents, including incidents involving the use of armed force, if there is a likelihood of their recurrence, or if there is a risk that they could exacerbate the dispute. *In that context the rights of sovereignty to be protected include the rights of persons in the disputed territory to life* (emphasis added).[60]

The argument presented by R. Higgins appears to be along the same line. Having referred to paragraph 42 in the *Land and Maritime Boundary between Cameroon and Nigeria* case, she insisted that:

> it made clear disputes about frontiers are not just about lines on the ground but are about the safety and protection of the people who live there. It was on that ground that both Parties were called on to ensure that no action was taken by their armed forces which might prejudice the rights in respect of a future judgment of the Court.[61]

It should also be noted that her interpretation of the *Frontier Dispute* case has a more radical tone. Having regarded the Court's finding in paragraph 21 as the reliance on "new and broader factors", she believed that:

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58 If one takes a position whereby the Court has the independent power to indicate measures solely 'to prevent the extension or aggravation of the dispute', this kind of link might not be required. However, this raises the question of whether the Court has such a power. *See e.g.*, Legal Status of the South-Eastern territory of Greenland (Denmark *v.* Norway), 1932 PCIJ (Ser. A/B) No. 48, at 284; Aegean Sea Continental Shelf, *supra* note 8, at 12, para. 36; Frontier Dispute, *supra* note 2, at 9, para. 18; Land and Maritime Boundary between Cameroon and Nigeria, *supra* note 2, at 22-23, para. 41. This question is beyond the scope of this paper.

59 *See* Land and Maritime Boundary between Cameroon and Nigeria, *supra* note 2, at 30 (Judge Koroma, Declaration).

60 *See* S. Rosenne, The Law and Practice of the International Court, 1920-1996, 3rd ed., Vol. III: Procedure, 1456 (1997).

61 *See* Higgins, *supra* note 3, at 102.

> [t]he risk of irreparable harm to persons and property was, in the view of the Chamber, enough for provisional measures - ***even though,*** it must be said, ***that harm could not of itself affect*** where the frontier line might run or the implementation of judgment on the frontier line (emphasis added).[62]

According to such an interpretation, the link requirement might not be necessary to indicate provisional measures in case the loss of human life is involved. Indeed, she concluded that:

> they [the above two cases] would seem effectively to overrule the determination by the Permanent Court of International Justice in the *Eastern Greenland* case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.[63]

On the other hand, there are some objections against the Court's reasoning in terms of the link question. In his Declaration, Judge Oda criticized paragraph 42 of the Judgment in the *Land and Maritime Boundary between Cameroon and Nigeria* case. Having pointed out that the statement in the first part of the paragraph in question is simply one of fact, he declared that:

> loss of life in the disputed area, distressing as it undoubtedly is, does not constitute the real subject matter of the present case.[64]

In the same context, J. Sztucki pointed out that the link between the provisional measure and the main claims was lacking. Citing the *Frontier Dispute* case as precedence, he stated that:

> the losses of human lives and physical injuries were ***only incidences of the main dispute*** - about sovereignty over certain territories; and no claims related to the protection of individuals were raised in the respective applications (emphasis added).[65]

Interesting developments had occurred in the next two cases; the *Vienna Convention on Consular Relations* case (known as the *Breard* case) and the *LaGrand* case. As E. Rieter pointed out in the context of the *Breard* case, "[This case] is the first example of a provisional measure by the ICJ for the purpose of postponing an execution."[66]

In April 1998 and March 1999, Paraguay and Germany respectively

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62 *See* Higgins, *id.*, at 97.

63 *See* Higgins, *id.*

64 *See* Land and Maritime Boundary between Cameroon and Nigeria, *supra* note 2, at 27 (Judge Oda, Declaration).

65 *See* J. Sztucki, *Case Concerning Land and Maritime Boundary (Cameroon* v. *Nigeria): Provisional Measures, Order of 15 March 1996*, 10 LJIL 354 (1997).

66 E. Rieter, *Interim Measures by the World Court to suspend the Execution of an Individual: the* Breard *Case*, 16/4 NQHR 492 (1998).

instituted proceedings against the United States alleging violations of the Vienna Convention on Consular Relations, the object of which was the protection of nationals abroad. Both Applicants maintained that nationals of their respective countries, who had been convicted of serious criminal offences in the United States, were not informed, as required by Article 36(1)(b) of the Vienna 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 execution dates, Paraguay and Germany respectively requested the Court to indicate provisional measures.[67] In both Applications, the ground for their requests was formulated almost in the same terms as follows:

> Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before the Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.[68]

As a consequence, the measure requested by both applicants was a stay of execution.[69] Since in their main claims Paraguay required '*restitutio in integrum*' and Germany required restoration of the *status quo ante* in the case of Walter LaGrand,[70] according to the Applicants, a stay of execution would follow from restoration of the *status quo ante.*

Having established *prima facie* jurisdiction on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relation, 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 (emphasis added).[71]

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67 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.

68 *See* Request for the indication of provisional measures of protection submitted by Paraguay, para. 7; Request for the indication of provisional measures of protection submitted by Germany, para. 7.

69 *See* Request for the indication of provisional measures of protection submitted by Paraguay, para. 8(a); Request for the indication of provisional measures of protection submitted by Germany, para. 8.

70 *See* Application of Paraguay, para. 25; Application of Germany, para. 15.

71 *See* Vienna Convention on Consular Relations, *supra* note 2, para. 37.

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 Germany in this particular case".[72] Consequently, the Court indicated the provisional measures as follows:

> 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 [...].[73]

In these cases, while it was clear that the executions of Breard or Walter LaGrand would cause irreparable harm to their human rights (the right to life), it was not so clear that it would cause irreparable harm to any rights granted pursuant to Article 36 of the Vienna Convention.[74] In this respect, Judge Koroma admitted that the rights preserved by the measure were the rights of 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 (emphasis added).[75]

On the other hand, Judge Oda argued that there did not exist a link between them in these cases. He stated that:

> provisional measures are granted in order to preserve ***rights of States*** exposed to an imminent breach which is irreparable and these ***rights of States*** must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the application instituting proceedings or be ***directly*** related to it. In this case, however, there is no question of such rights (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach (emphasis in original text).[76]

The *Legality of Use of Force* cases shed a new light on the relationship between jurisdiction and the loss of human life. In April 1999, Yugoslavia (Serbia and Montenegro) brought cases before the Court against ten NATO member states for illegal use of force. On the same day Yugoslavia requested provisional measures which ordered NATO countries to cease immediately their acts of use of force. Yugoslavia justified its request on the basis that the proposed measures would prevent "new losses of human

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72 *See* LaGrand, *supra* note 2, para. 24.

73 *See* Vienna Convention on Consular Relations, *supra* note 2, para. 41, I.; LaGrand, *supra* note 2, para. 29, I.

74 *See* A. Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, 31 California Western ILJ 167 (2000).

75 *See* Vienna Convention on Consular Relations, *supra* note 2, (Judge Koroma, Declaration).

76 *See* Vienna Convention on Consular Relations, *supra* note 2, (Judge Oda, Declaration, para. 5); LaGrand, *supra* note 2, (Judge Oda, Declaration, para. 5).

life, physical and mental harm, destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia".[77] In this regard, the Court stated, in the Orders, that:

> [it] is deeply concerned with human tragedy, loss of human life, and enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia [...].[78]

Despite the above statement, Yugoslavia application failed on the basis that it could not demonstrate that the Court had *prima facie* jurisdiction.[79] As far as the Genocide Convention was concerned, the Court's main decision that this did not provide *prima facie* jurisdiction over the subject matter of Yugoslavia's claims rested on a crucial determination as to the concept of 'genocide'.[80] As far as the Optional Clause was concerned, the Court central decision was based on an interpretation of the Yugoslavia's reservation *ratione temporis*.[81] In this regard, the Court appears to construe this without giving predominance to Yugoslavia's intentions in making reservation.

The latest case to be dealt with in this paper is the *Armed Activities on the Territory of the Congo* case. In that case, the Court appears to rely on the similar reasoning adopted in the *Application of the Genocide Convention* case, in which the subject matter was compliance with human rights obligation under treaties.

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. 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. In this context, the Congo referred to "the violations of the rules set out in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights of 1996, and of the provisions of the 1949 Geneva Conventions, of the Additional Protocols of 1977".[82] As a result, the Congo, in its submissions, requested 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 of international humanitarian law in conflict zones, and is also guilty of massive

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77 *See* Legality of Use of Force, *supra* note 2, para. 6.
78 *Id.*, para. 16.
79 *Id.*, para. 45.
80 *Id.*, para. 40-41.
81 *Id.*, para. 26-30.
82 *See* Armed Activities on the Territory of the Congo, *supra* note 2, para. 5.

human rights violations in defiance of the most basic customary law.[83]

Furthermore, the Congo also requested the indication of provisional measures. In its request, the Congo asked the Court to indicate the following provisional measures:

> (3) Uganda must take all measures in its power to ensure that units, forces or agents [...] desist forthwith from committing or inciting the commission of war crimes or any other oppressive or unlawful act against all persons on the territory of the Congo.
> (4) Uganda must forthwith discontinue any 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, and in particular their rights to health and education.
> [...]
> (6) Uganda must henceforth respect in full rights of the Congo to sovereignty, political independence and territorial integrity, and *the fundamental rights and freedoms of all persons on the territory of the Congo* (emphasis added).[84]

In terms of the topic under study, it is interesting to note that the Congo contended, at the Oral pleadings, that there was "a sufficient connection between the measures requested and the rights protected". It argued that on the basis of a comparison of the text for the request of the indication of provisional measures with that of the Application instituting the proceedings, the "categories of act referred to are similar" and the "rules of law applicable are similar".[85]

However, the Court did not deal with this argument. Instead, it 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* (emphasis added).[86]

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,[87] the Court stated that:

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83 *Id.*, para. 7.
84 *Id.*, para. 13.
85 *Id.*, para. 21.
86 *Id.*, para. 40.
87 *Id.*, para. 42: "Whereas it is not disputed that at this date Ugandan forces are present on the territory of the Congo, that fighting has taken place on that territory between those forces and the forces of a neighbouring State, that *the fighting has caused a large number of civilian casualties* in addition to substantial material damage, and that the humanitarian situation remains of profound concern; and whereas it is also not disputed that *grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed* on the territory of the Democratic Republic of the Congo (emphasis added)"

> [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.[88]

Consequently, the Court found that "the circumstances require it to indicate provisional measures",[89] 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 (emphasis added).[90]

III. EVALUATION

Recent cases before the Court show that the Court is actively taking into consideration the loss of human life in provisional measures. According to recent jurisprudence, it seems that threats to human life have constituted irreparable harm for the purpose of Art. 41 of the Statute.[91] It might be affected by the fact that the gravity of harm is the predominant element.[92] However, it should be noted that the question remains: in some cases it was not unambiguous - at least not uncontroversial - whether there did exist a link between the rights to which irreparable harm was being caused and the rights to which the main case was destined to have declared or have protected. While the Court has relied on the reasoning such as diplomatic protection, sovereign rights over the territory or the right to respect for the

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88 *Id.*, para. 43.

89 *Id.*, para. 45.

90 *Id.*, para. 47. On the verb "must", *see* J. R. Crook, The 2000 Judicial Activities of the International Court of Justice (in Current Development), 95 AJIL 687 (2001). He pointed out that "[t]he wording used in the Armed Activities (Uganda) provisional measures order - namely, that parties *must* comply - suggested that the Court had concluded that it had the power to impose legal obligations on parties through such orders (emphasis in original text)." With regard to the issue concerning the binding force of orders to indicate provisional measures, the Court affirmed the legal effect of such orders in the merits stage of the *LaGrand* case. See *LaGrand*, (Germany *v.* United States of America), Merits, Judgment, (not yet published, the text is available on Internet; http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm), para. 98-109. *But see, id.*, (Judge Oda, Dissenting Opinion), para 28-35.

91 *See* J. G. Merrills, *The Land and Maritime Boundary case (Cameroon* v. *Nigeria), Order of 15 March 1996*, 46 ICLQ 680 (1997). *See also* Armed Activities on the Territory of the Congo, *supra* note 2, (Judge Koroma, Declaration).

92 *See, e.g.*, in the Breard and LaGrand cases Judge Oda voted in favour of the Orders for "humanitarian reasons", although he criticized the Court's reasoning. Vienna Convention on Consular Relations, *supra* note 2, (Judge Oda, Declaration, para. 8); LaGrand, *supra* note 2, (Judge Oda, Declaration, para. 7)

instrument relating to the protection of human life in order to establish the link, it is interesting to note that the *Arbitral Award of 31 July 1989* case has *not* been cited in all cases concerned.[93] In this regard, it might be said that the Court has been interpreted Article 41 of the Statute in broad and extensive by reason of the effectiveness of preserving the rights.[94]

Furthermore, it is a critically important question of whether *prima facie* jurisdiction is founded or not. Even if there are allegations of substantial loss of life, the Court cannot indicate provisional measure without *prima facie* jurisdiction. Indeed, it should also be pointed out that there has been inconsistency in the Court's handling the matter concerning the extent to which it ought to examine the provisions which might be a basis of jurisdiction in order to establish *prima facie* jurisdiction.[95] It is undeniable, nevertheless, that the most obvious limitation upon the Court is the constraint of jurisdiction.[96]

Therefore, the Court is likely to indicate provisional measures for the protection of human life if it finds *prima facie* jurisdiction and if the Applicant (or the Court) refers to threats to human life as 'irreparable harm'. This new trend of the Court's approach to the indication of provisional measures might imply a transformation of its function. This would mean that the Court acts beyond the strict scope of the inter-State dispute settlement[97] or functions for the maintenance of international peace and security[98]. However, it would rise questions addressing the legal uncertainty concerning the criteria for indicating provisional measures, of which primary purpose is to preserve the respective rights of either party pending the Court's decision on the merits.

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93 *See* Application of Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, at 19, para. 34; Land and Maritime Boundary between Cameroon and Nigeria, *supra* note 2, at 21-22, para. 35; Vienna Convention on Consular Relations, *supra* note 2, para. 36; LaGrand, *supra* note 2, para. 23; Armed Activities on the Territory of the Congo, *supra* note 2, para. 39.

94 *See* A. G. Koroma, *Provisional Measures in Disputes between African States before the International Court of Justice, in* L. Boisson de Chazournes and V. Gowlland-Debbas (Eds.), The International Legal System in Quest of Equity and Universality 599 (2001). Having Koroma argued that "this objective [which is to preserve the respective rights of either party] should not be interpreted in too narrow or respective a sense so as to deprive it of effectiveness", it would be doubtful, in fact, whether the relaxing the link could contribute to the effectiveness of preserving the rights which are the subject of dispute at the merits.

95 On Optional Clause, compare the Nicaragua case with the Legality of Use of Force cases. On Article IX of the Genocide Convention, especially the concept of 'genocide', compare the Application of the Genocide Convention case with the Legality of Use of Force cases.

96 *See* Duxbury, *supra* note 74, at 176.

97 *See e.g.*, LaGrand, *supra* note 2, (Judge Oda, Declaration, para. 6). He criticized such a trend of the Court as follows: "If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court. (emphasis in original text)"

98 *See* Koroma, *supra* note 92, at 599-600 (2001). In the context of the Frontier Dispute case and the Land and Maritime Boundary between Cameroon and Nigeria case, he stated that "apart from the facts of the Court's formal authority to indicate provisional measures if it considers the circumstances so require, such [illegible]