SAVING LIVES IN THE INTERNATIONAL COURT OF JUSTICE: THE USE OF PROVISIONAL MEASURES TO PROTECT HUMAN RIGHTS

ALISON DUXBURY*

I. INTRODUCTION

The circumstances surrounding death penalty cases in the United States of America are not usually argued in the International Court of Justice (ICJ or "the Court"), located in The Hague. The ICJ is not a human rights court, nor is it a final court of criminal appeal. The Court's jurisdiction to hear contentious disputes may only be invoked by states,[1] while its advisory jurisdiction is limited to giving opinions on legal questions asked by the General Assembly, the Security Council, or other organs and specialized agencies of the United Nations that have been granted such a right.[2] Thus, individuals, non-governmental organizations, and corporations cannot appear before the Court to argue violations of rights accorded by international law.[3]

Despite these limitations to the ICJ's jurisdiction, twice in a period of twelve months the United States confronted requests for interim protection measures from nations arguing that the ICJ should order the delay of an execution in America.[4] The first case involved Angel Francisco Breard, a thirty-two year-old Paraguayan national found guilty of murder and sen-

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* B.A., LL.B. (Melb.), LL.M. (Cantab.), Lecturer, Faculty of Law, Monash University. The author wishes to thank Sarah Joseph for her helpful comments on an earlier draft of this article.

1. *See* Statute of the International Court of Justice, June 26, 59 Stat. T.S. No. 993, chap. II, art. 34(1) (1945) ("Only States may be parties in cases before the Court.") [hereinafter Statute of the ICJ].

2. *See id.* chap. IV, art. 65. *See generally* U.N. CHARTER art. 96, §§ 1-2.

3. *See* Stephen M. Schwebel, *Human Rights in the World Court,* 24 VAND. J. TRANSNAT'L L. 945, 946 (1991).

4. *See* International Court of Justice (last visited Mar. 15, 2001) <http://www.icj-cij.org> (Vienna Convention on Consular Relations (Para. v. U.S.) *and* LaGrand Case (F.R.G. v. U.S.)). See <http://www.icj-cij.org> for the full text of the applications, requests for provisional measures, orders, pleadings, and judgments.

tenced to death in Virginia (*Breard*).[5] The second application, *Germany v. United States* (*LaGrand*),[6] concerned the trial and sentencing of a German national, Walter LaGrand, in Arizona.[7] In both cases it was alleged that the United States breached its treaty obligations pursuant to the Vienna Convention on Consular Relations[8] by failing to inform the two defendants of their right to communicate with their respective consulates.[9]

Expediency was crucial in both cases—Paraguay instituted proceedings nine days before Breard's scheduled execution.[10] In the *LaGrand* case, Germany filed its application for provisional measures in the Court's Registry at The Hague hours before LaGrand's scheduled execution the next day.[11] Due to the urgency of each matter, Paraguay and Germany applied for provisional measures to prevent the executions from taking place, as the merits of the cases had not been heard.

Interim protection is defined as a suspensory remedy by which the ICJ can ask "parties to a dispute before it to perform or to refrain from performing certain acts pending the settlement of the dispute at bar."[12] In recent years, numerous requests for provisional measures have come before the Court.[13] Such requests cover a variety of subjects, including the protection of human rights. In such cases, states have resorted to applications for provisional measures to prevent the ultimate in irreversible injury—the loss of life. Traditional human rights law provides few binding options for providing immediate protection to a person in imminent danger,[14] particularly where a state is not a party to an individual communications procedure. This is demonstrated by the fact that Paraguay and Germany brought urgent applications in a court designed to settle disputes between states, rather than in a human rights institution, such as the Human Rights Committee.

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5. *See* Vienna Convention on Consular Relations (Para. v. U.S.), Memorial of the Republic of Paraguay, Oct. 9, 1998, ¶ 2.1, <http://www.icj-cij.org> [hereinafter Memorial of Paraguay].

6. *See* LaGrand Case (F.R.G. v. U.S.), Application of the Federal Republic of Germany, Mar. 2, 1999, <http://www.icj-cij.org> [hereinafter Application of Germany].

7. *See* LaGrand Case (F.R.G. v. U.S.), Memorial of the Republic of Germany, Sept. 19, 1999, ¶ 1.01 <http://www.icj-cij.org>.

8. Vienna Convention on Consular Relations, *opened for signature* Apr. 18, 1961, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).

9. *See* Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Interim Protection Order of Apr. 9) [hereinafter *Paraguay*]; LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9, 10 (Interim Protection Order of Mar. 3) [hereinafter *LaGrand*].

10. Paraguay filed its application on April 3, 1988 and Breard's execution was scheduled for April 14, 1998. *See Paraguay*, Application of the Republic of Paraguay, Apr. 3, 1998 <http://www.icj-cij.org> [hereinafter Application of Paraguay].

11. Germany filed its application on March 2, 1999 in The Hague and LaGrand's execution was scheduled for 3 p.m. MST the next day. *See* Application of Germany, *supra* note 6.

12. JEROME B. ELKIND, INTERIM PROTECTION—A FUNCTIONAL APPROACH 3 (1981).

13. *See* International Court of Justice, *supra* note 4.

14. *See* Jo M. Pasqualucci, *Provisional Measures in the American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803, 806 (1993).

While there are many interesting aspects of the *Breard* and *LaGrand* cases that involve United States federal and state power over foreign relations and the status of the Vienna Convention in domestic law, the purpose of this article is not to examine the place of treaty obligations in the United States legal system. Instead the focus will be on the effectiveness of using a request for provisional measures in the ICJ to protect the ultimate human right—the right to life. Part II of this article examines the factual background and legal arguments behind Paraguay's and Germany's applications to the ICJ, in the *Breard* and *LaGrand* cases (collectively the *Vienna Convention Cases*). Part III considers the difficulties in using a request for provisional measures to protect human life with regard to the purposes underlying a grant of interim measures and the requirements for a successful application. Finally, part IV examines the outcome of *Breard* and *LaGrand* to determine whether the use of such procedures to protect human life is appropriate considering the limitations imposed by the ICJ's Statute and jurisprudence.

II. BACKGROUND TO THE CASES

A. *The Vienna Convention on Consular Relations and the United States of America*

The factual circumstances of *Breard* and *LaGrand* demonstrate the numerous applications and lengthy delays that often accompany death penalty cases in the United States. The United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Bacre Waly Ndiaye, recently criticized the administration of the death penalty in the United States. Key among his criticisms is that there is a significant degree of unfairness and arbitrariness in its administration.[15] The detailed report expressed concern about the execution of juveniles and mentally retarded persons.[16] Significantly, the report alleged a lack of awareness amongst United States officials of their international obligations, at both the state and federal level.[17] For example, government officials and members of the judiciary at both the state and federal level were ignorant of the fact that the U.S. was bound by the International Covenant on Civil and Political Rights (ICCPR).[18] The U.S. government had signed the treaty, but appears to have failed to disseminate its terms, which effects both the federal government as well as individual states.[19]

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15. *See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Commission on Human Rights, 54th Sess., Agenda Item 10, at §§ V(A)(148) & (150), U.N. Doc. E/CN.4/1998/68/Add.3 (1998) [hereinafter *Executions Report*].

16. *See id.* § V(A)(145).

17. *See id.* § V(A)(142).

18. *See id.*

19. *See id.*

The ICCPR[20] is particularly important in the context of death penalty cases, as it states that "[e]very human being has the inherent right to life. This right shall be protected by law [and] no one shall be arbitrarily deprived of his life."[21] While this language would seem to give added protection to those on death row, the United States reserves the right, under Article 6, "to impose capital punishment."[22] Nevertheless, international law imposes a number of safeguards on the administration of the death penalty not provided for by the laws of the several states and the federal government.[23] The "serious gap in the relations between [U.S.] federal and state governments [regarding] international obligations undertaken by the U.S. Government,"[24] however, has prevented application of these additional safeguards. This is particularly troubling because typically state courts administer the death penalty.

This gap is most evident with respect to the primary conventional obligation contained in the Vienna Convention on Consular Relations (Vienna Convention),[25] adopted in 1963 following the United Nations Conference on Consular Relations. The Preamble states that all parties to the Vienna Convention believe that "an international convention on consular relations, privileges and immunities [will] contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems."[26] The primary function of the consulate and its consular officers is to represent nationals of a sending state and to attend to the needs of

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20. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 3, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR].

21. *Id.* art. 6(1). See also Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), which entered into force July 11, 1991. "The State Parties to the present Protocol . . . shall take all necessary measures to abolish the death penalty within its jurisdiction." ICCPR, *supra* note 20, art. 1(2).

22. *Executions Report, supra* note 15, ¶ 28. "[T]he United States reserves the right, subject to its constitutional constrains (sic), to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." United Nations Website Rights (last visited Mar. 19, 2001) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/partboo/ivboo/iv4.html#refBsD230OLAA > (discussing International Convention on Civil and Political).

23. *See* ICCPR, *supra* note 20, art. 6(2).

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Id. art. 6(2).

24. *Executions Report, supra* note 15, ¶ 108.

25. *See* Vienna Convention on Consular Relations, *supra* note 8, art. 36.

26. *Id.* at *Preamble.*

a sending state's nationals.[27] It has been stated that a country's "right to communicate and to have access to the nationals of the sending state is of vital importance because the fulfillment of all other consular protective duties depends on their exercise."[28] The Convention outlines the relationship between consular officials and the state to which they are posted, including any immunities which may be enjoyed by consular officials, their communications, and their premises.[29] At present, 163 states are parties to this Convention.

Article 36 of the Vienna Convention, which governs the consular communication and contact with nationals of the sending state,[30] is of particular significance in *Breard* and *LaGrand.* The negotiations on Article 36 at the United Nations Conference have been described as "so tortuous as to threaten the successful conclusion of the Convention as a whole."[31] Under the International Law Commission's Draft Convention, if a state detained a foreign national the authorities of a receiving State had an unqualified obligation to immediately inform the consuls of the detention of their nationals.[32] However, a number of objections to this absolute provision were raised during the Vienna Conference by delegates who were concerned about an individual's liberty and ability to refuse consular assistance if it was not desired.[33] The final version of Article 36 is a compromise between these two positions. Under the adopted version, consular officers have the right to visit a national of a sending state who is detained in another country and to arrange for legal representation.[34] Further, if the detainee requests, Article 36 demands that state authorities notify a consulate that a national has been arrested or is in custody.[35] The relevant state authorities also must inform the person concerned of these rights "without delay."[36] Importantly, Article

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27. *See id.* art. 5(e), (i).

> Consular functions consist in: . . . (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State [and,] (i) . . . representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining . . . provisional measures for the preservation of the rights and interests of these nationals, where . . . such nationals are unable at the proper time to assume the defence [sic] of their rights and interests.

Id.

28. Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice,* 19 HOUS. J. INT'L L. 375, 387 (1997).

29. *See* Vienna Convention on Consular Relations, *supra* note 8, chs. I-II.

30. *See id.* art. 36.

31. LUKE T. LEE, CONSULAR LAW AND PRACTICE 138 (2d ed. 1991).

32. *See id.*

33. *See id.*

34. *See* Vienna Convention on Consular Relations, *supra* note 8, art. 36(1)(c).

35. *See id.* art. 36(1)(b).

36. *Id.*

36(2) provides that domestic laws must enable "full effect to be given to the purposes for which the rights accorded under this Article are intended."[37]

In essence, the protection Article 36 provides is crucial to the human rights of nationals who are arrested and detained abroad. Depriving foreign nationals of their liberty involves several basic human rights, including the right to adequate legal representation, the right to due process, and the right to an interpreter.[38] Mark J. Kadish highlighted that Article 36 is an awkward place to enumerate the rights of an individual national, as the preamble to the Vienna Convention[39] states that the purpose of the privileges and immunities granted "is not to benefit individuals but to ensure the efficient performance of functions by consular posts."[40] This language "weigh[s] heavily against an interpretation that the Treaty grants an individual right."[41] However, in the *Case Concerning United States Diplomatic and Consular Staff in Teheran (Hostages),*[42] the United States argued that Article 36 not only establishes rights for consular officers, but also for nationals of the sending state who are assured access to such officials, and through them to others.[43] The failure by a state's authorities to comply with Article 36 has significant human rights consequences, particularly with respect to the right to fair trial guaranteed in the ICCPR.[44]

Paradoxically, the United States "is both a leading champion and violator of the right to consular protection."[45] For example, in 1973 the U.S. Department of State noted that "Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[46] In the opinion of the Department, the obligation to inform a consular post of a national's detention, if the national so requests, should occur as soon as possible, and at the latest within the passage of a few days.[47] The Department of

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37. *Id.* art. 36(2).

38. *See* Uribe, *supra* note 28, at 376.

39. *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul,* 18 MICH. J. INT'L L. 565, 593 (1997). Specifically, if the receiving state detains a foreign national, it is required to immediately inform the consular post of the national's sending state. *See id.* Further, it shall inform the detainee of all rights granted under Article 36 and deliver any communication from the detainee to the sending state's consular post. *See id.*

40. Vienna Convention on Consular Relations, *supra* note 8, *Preamble.*

41. Kadish, *supra* note 39, at 593.

42. (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15) [hereinafter *Hostages*]. *See also* Application of the United States of America, 1979 I.C.J. 1 (Nov. 29).

43. *See* Memorial of the Government of the United States of America (U.S. v. Iran), 1980 I.C.J. Pleadings 121, 174 (Jan. 15) [hereinafter Memorial of the U.S.].

44. See Uribe, *supra* note 28, at 408 for a more detailed explanation of the relationship between the obligations contained in Article 36 and international human rights law.

45. Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities,* 78 MINN. L. REV. 771, 803 (1994).

46. LEE, *supra* note 31, at 143 (1991) (quoting Department of State File L/M/SCA; DEP'T ST. DIGEST, 1973, at 161).

47. *See id.*

State periodically sends notices to state and local officials reminding them of their obligations under the Convention.[48] The U.S. insists on the application of this right in relation to American nationals abroad.[49] In contrast, the United Nations Special Rapporteur has pointed to allegations that approximately sixty foreign nationals were sentenced to death in the U.S. without having had the assistance of their consulate.[50] Foreign criminal defendants facing capital charges in U.S. state courts have recently raised violations of Article 36 in habeas corpus petitions.[51] Additionally, amicus briefs have been filed by the foreign national's home state in such cases, and requests for injunctive relief have been brought against the relevant United States state officials.[52] Such challenges have been defeated in U.S courts on two grounds. First, the Vienna Convention does not confer on an individual an enforceable personal right. Second, a violation of Article 36 can only form the basis of relief in a federal court if it has been raised in the state courts below.[53] In response to such decisions, both Paraguay and Germany were forced to apply for provisional measures before the ICJ.

B. The Breard *Case*[54]

Angel Francisco Breard, a Paraguayan national, arrived in the U.S. in 1986 at age twenty. He was arrested and indicted in Virginia on September 1, 1992 on allegations of the attempted rape and murder of a Virginian woman. Although the authorities involved were aware of his nationality, they neglected to inform Breard of his right to consular assistance pursuant to Article 36 of the Vienna Convention.[55] Furthermore, Paraguayan consular officials were not informed of Breard's detention. It appeared that significant problems for Breard were his language difficulties and his inability to understand certain features of the U.S. justice system that were very different than that of Paraguay. Against legal advice, he refused to plead guilty to the prosecution's offer of a reduced sentence and instead insisted on confessing on the stand as he believed that it would lead to greater jury leniency.[56] On June 24, 1993, Breard was convicted of murder, and on August

48. *See* Kadish, *supra* note 39, at 599.

49. *See* Uribe, *supra* note 28, at 386-87.

50. *See Executions Report*, *supra* note 15, ¶ 118.

51. *See e.g.*, Faulder v. Johnson, 81 F. 3d 515, 520 (5th Cir. 1996); Miguel Angel Flores v. Johnson, No. 99-40064 (5th Cir. 2000).

52. *See* Faulder v. Johnson, 81 F. 3d 515 (amicus curiae brief filed by Canadian government). *See also* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996); Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

53. *See* Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996); Breard v. Greene 523 U.S. 371, 375-76 (1998).

54. See Vienna Convention on Consular Relations (Para. v. U.S.), *supra* note 4, and accompanying text.

55. *See* Application of Paraguay, *supra* note 10.

56. *See* Memorial of Paraguay, *supra* note 5, ¶ 2.8. Breard believed that he had commit-

22, he was sentenced to death.[57] Breard petitioned the court for relief via writ of habeas corpus but was denied. He then appealed to the Supreme Court of Virginia, which denied his petition for rehearing and appeal, thus affirming the judgment.[58] His appeals were unsuccessful.

Paraguay first learned of Breard's conviction in 1996—three years after sentencing. In 1996, Breard filed suit in federal district court, alleging his rights under the Vienna Convention had been violated by the Commonwealth of Virginia when it did not inform him of his right to contact the Paraguayan consulate.[59] This was the first time Breard introduced such an argument, and it therefore failed. Separately, the Republic of Paraguay filed suit in the federal district court claiming its own Article 36 rights had been violated. This too failed on the basis that because there was not a continuing violation of federal law, the court did not have subject matter jurisdiction.[60] Finally, Breard petitioned the U.S. Supreme Court for a writ of certiorari and submitted an application for a stay of execution.[61] The case was heard on April 14, 1998, the day scheduled for his execution.[62] At this stage, the ICJ had also been seized of jurisdiction and had ordered the United States to stay Breard's execution pending its final decision.[63] In the Supreme Court, Breard argued that, although he had "procedurally defaulted his claim . . . under the Vienna Convention by failing to raise [it] in the state courts . . .," the Vienna Convention, as the "supreme law of the land," trumps the procedural default doctrine.[64] The Supreme Court, while acknowledging the status of treaties under the U.S. Constitution, disregarded this argument.[65] Three justices dissented on the basis that the Court should have had more time to

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ted the crimes under a satanic curse, from which he was now freed. *See id.* He thought that if the jury knew about the curse and his subsequent rebirth, they would understand that he was not responsible for his actions and would find him not guilty. *See id.*

57. *See id.* at 260.

58. *See id.*

59. *See* Shana F. Marbury, *Breard v. Green: International Human Rights and the Vienna Convention on Consular Relations,* 7 TUL. J. INTERNAT'L & COMP. L. 505, n.11 (1999).

60. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269 (1996). See Shana F. Marbury, *supra* note 59, for a detailed account of the appeals of Breard and Paraguay in the U.S. *See also* Jonathan I. Charney & Michael Reisman, *Breard—The Facts,* 92 AM. J. INT'L L. 666 (1998).

61. *See Breard,* 523 U.S. at 377.

62. *See id.*

63. *See id.* at 374.

64. *Id.* at 375.

65. *See id.* at 375-77. The Supreme Court found that

> [e]ven were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial . . . [N]o such showing could even arguably be made [in this case].

Id. at 377.

consider its opinion.[66] The Supreme Court delivered its decision a mere thirty-eight minutes prior to the scheduled time for Breard's execution.[67]

Although the Supreme Court denied Breard's application, it acknowledged that the Executive Branch, "in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussions with Paraguay."[68] In fact, Secretary of State Madeleine Albright had already asked Virginia Governor James Gilmore, to stay the execution[69] due to the harm it might cause to Americans "accused of crimes in foreign countries."[70] "[C]oncerned about the possible negative consequences for the many U.S. citizens who live and travel abroad,"[71] she sought to protect reciprocity to ensure that American citizens would be accorded their rights if they found themselves in trouble.[72] However, the governor failed to act on these pleas.[73] Instead, Breard was executed by lethal injection and was pronounced dead at 10:39 p.m. E.S.T. on April 14, 1998.[74]

C. *The* LaGrand *Case*[75]

The *LaGrand* case followed a similar procedural matrix to that of *Breard*. Karl and Walter LaGrand, brothers and German nationals, were convicted of the murder of a bank manager, the attempted murder of a bank employee, and the kidnapping of the two during an attempted bank robbery in Arizona in 1982.[76] They were sentenced to death for the murder of the bank manager.[77] Despite diplomatic interventions on the part of the German government, Karl LaGrand was executed in February 1999.[78] His brother's execution was scheduled for March 3, 1999.[79] With only months to Walter LaGrand's scheduled execution, the German consular officers finally became aware of the LaGrand's situation.[80]

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66. *See id.* at 379-81 (dissenting opinions of Stevens, Breyer and Ginsburg, JJ.).
67. *See* Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas: World Tribunal, State Department Had Urged Delay*, WASH. POST, Apr. 15, 1998, at B1.
68. *Breard*, 523 U.S. at 378.
69. *See* Letter from Madeleine Albright, U.S. Secretary of State, to James Gilmore, the governor of Virginia (Apr. 13, 1998).
70. Masters & Biskupic, *supra* note 67, at B1.
71. *Id.*
72. *See id.*
73. *See id.*
74. *See id.*
75. *See* Application of Germany, *supra* note 6.
76. *See* Arizona v. LaGrand, 734 P.2d 563, 565 (1987).
77. *See id.*
78. *See* Application of Germany, *supra* note 6, pt. II, ¶ 8.
79. *See id.*
80. *See id.* ¶ 4.

It was not disputed that the Arizona authorities had deprived the LaGrands of their rights under the Vienna Convention.[81] In 1995, the LaGrands petitioned for habeas corpus in the U.S. District Court for the District of Arizona, basing their petition on ineffective assistance of counsel.[82] In 1998, the LaGrands appealed, claiming a violation of their Vienna Convention rights. They argued that the failure to notify them of the their right to contact the German consulate precluded any opportunity to gather exculpatory or mitigating evidence relating to their abusive childhood and the difficulties children of mixed marriages face in Germany.[83] However, as in the *Breard* case, LaGrand's appeal in federal court failed on procedural grounds because the issue had not been raised at the state level.[84]

Germany claimed that it did not become fully aware of the facts of the case until February 24, 1999, and from that date it pursued its action on a diplomatic level.[85] Despite a recommendation from the Board of Executive Clemency in Arizona for a reprieve for Walter LaGrand, the governor of Arizona, Jane Dee Hull, decided to allow the execution to proceed after consultations with the German Ambassador, the Attorney-General and one of the victims of LaGrand's crime.[86]

D. The Applications Before the International Court of Justice

While these actions were being pursued in the domestic courts, Paraguay and Germany initiated separate actions in the International Court of Justice claiming that the U.S. had breached its treaty obligations pursuant to the Vienna Convention.[87] In both cases, the Court had jurisdiction pursuant to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.[88] Article I of the Protocol provides 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 a Party to the present Protocol."[89] In *Breard*, Paraguay asked the Court to declare the U.S. was un-

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81. *See id.* ¶ 5.

82. *See* LaGrand v. Lewis, 883 F. Supp. 451 (D. Ariz. 1995) *and* 883 F. Supp. 469 (D. Ariz. 1995), *affirmed* LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).

83. *See* LaGrand, 133 F.3d at 1262.

84. *See* LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1999). *See also* Application of Germany, *supra* note 6, pt. II, ¶ 7.

85. *See* Application of Germany, *supra* note 6, pt. III, ¶ 9.

86. *See* Governor Jane Dee Hull, Statement on the Case of Walter LaGrand (Mar. 2, 1999).

87. *See* Application of Paraguay, *supra* note 10; Application of Germany, *supra* note 6.

88. *See* Optional Protocol to the 1963 Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487 (entered into force Mar. 19, 1967).

89. *Id.* art. I.

der an international legal obligation not to apply the domestic doctrine of procedural default, which precludes the exercise of a foreign national's Vienna Convention rights.[90] Under the law of treaties, a state cannot invoke its domestic law to justify the failure to perform a treaty obligation.[91] In addition, Paraguay requested the following declarations from the Court: (1) any criminal liability imposed on Breard in violation of the United States' international obligations is void, (2) the United States should "re-establish the situation that existed before the detention" and proceedings against Breard, and (3) "the United States should provide Paraguay with a guarantee of non-repetition of the illegal acts."[92] Germany claimed similar remedies in its application and, additionally, requested reparation in the form of compensation from the U.S. for the execution of Karl LaGrand.[93] Due to the imminence of the death sentences, Paraguay and Germany requested provisional measures to prevent the executions from taking place before the merits of their substantive applications were heard.[94] The extreme urgency of Germany's request was clear by its reliance on Article 75(1) of the Rules of Court, which enables the ICJ to indicate provisional measures *proprio motu*.[95]

While the two applications were phrased in terms of damage to both the states and their nationals, the nationals' rights were paramount. The importance of the nationals' lives in these cases is suggested by the invocation of the right to life in the applications, and confirmed by Paraguay's withdrawal of the case from the Court following Breard's execution.[96] Given the varied nature of the rights the applicant states were attempting to enforce, the issue arises as to the extent to which provisional measures in the ICJ are an effective means of protecting people rather than states. The problems inherent in the use of a request for provisional measures to protect human rights will be examined in the next section in the context of the Statute of the Court and its case law.

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90. *See Paraguay*, 1998 I.C.J. at 250.

91. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 115 U.N.T.S. 331. "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.*

92. Application of Paraguay, *supra* note 10, ¶ 25.

93. *See* Application of Germany, *supra* note 6, ¶ 15.

94. *See Paraguay*, 1998 I.C.J. at 251; *LaGrand*, 1999 I.C.J. at 12.

95. *See LaGrand*, 1999 I.C.J. at 13; International Court of Justice Rules of Court (1978), (last amended Dec. 5, 2000) <http:www//icj-cij.org> [hereinafter ICJ Rules of Court].

96. *See Paraguay*, 1998 I.C.J. at 426 (Discontinuance Order of Nov. 10).

III. PROVISIONAL MEASURES AND PROTECTION OF LIFE IN THE INTERNATIONAL COURT OF JUSTICE

A. The Statute and the Rules of Court

Municipal courts throughout the world can order provisional measures to preserve the rights of the parties pending a final determination of the dispute. Similarly, in the area of international law, courts and tribunals can order provisional measures.[97] However, the position at the international level is somewhat complicated by the fact that the parties involved are sovereign nations, as opposed to individuals. The ICJ's power to grant an order of interim measures is located in Article 41 of the Statute of the International Court of Justice (the Statute).[98] Article 41 provides that:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.[99]

Article 41 of the Statute is derived from its predecessor, the Statute of the Permanent Court of International Justice (PCIJ).[100] While a few minor alterations were made in the revision of the Statute reflecting the creation of the United Nations, the substance of Article 41 was not affected.[101] The 1978 Revised Rules of Court elaborate on the Court's power to grant interim measures in Articles 73 through 78, section D, "Incidental Proceedings" (as opposed to mainline jurisdiction).[102] The description of provisional measures as "incidental" to the main proceedings logically implies that the Court has jurisdiction over the matter and that there is a connection between the requested interim protection and subject matter of the underlying dispute.[103] In

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97. *See* Treaty Establishing the European Economic Community, *opened for signature* Nov. 23, 1957, 1958 U.N.T.S. 11. "The [European] Court of Justice may, in any cases referred to it, make any necessary interim order." *Id.* art. 186. *See also* American Convention on Human Rights: "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1979 U.N.T.S. 123. "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons" the Inter-American Court of Human Rights has the ability to grant provisional measures. *Id.* art. 63(2).

98. *See* Statute of the ICJ, *supra* note 1, art. 41.

99. *Id.*

100. *See* Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 390.

101. *See* JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT—AN ATTEMPT AT A SCRUTINY 27 (Netherlands, Kluwer Law & Taxation Publishers 1983). "The present Article 41 differs from the original text only in that . . . the words 'Security Council' are substituted for the 'Council'." *Id.* at 28

102. ICJ Rules of Court, *supra* note 95, § D(1), arts. 73-78.

103. [3 Procedure] SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL

the past, the Court has invoked Article 41 to grant interim protection measures in a diverse range of circumstances, including requests that states refrain from conducting atmospheric nuclear tests,[104] the release of hostages,[105] and efforts to prevent and punish the crime of genocide.[106] Any orders for provisional measures must be communicated to the Secretary General of the United Nations, which in turn are transmitted to the Security Council.[107] This does not imply that the Security Council will automatically consider the matter, as the agenda of the Security Council is governed by its own rules of procedure.[108]

B. Purpose of Provisional Measures

When considering cases brought to protect human rights—particularly the right to life—Article 41 poses two initial questions regarding the objectives underlying a grant of provisional measures. First, who may apply for such measures, and second, what is the purpose behind an order for interim protection? The objective of provisional measures under Article 41 is to preserve the rights of "either party"[109] to a case; "party" meaning state. A state may bring a case before the ICJ in two situations; first if its own rights have been violated or second, if it wishes to protect the rights of one of its nationals via a grant of diplomatic protection. In the latter case, it is a well recognized principle that "a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[110] Thus the question arises whether an order for provisional measures can extend to protecting the rights of the individual national; whether the state is bringing the claim on its own behalf or via its right of

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COURT, 1920-1996, 1424 (Martinus Nijhoff Publishers 2d ed. 1997).

104. *See* Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99 (June 22); Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135 (June 22).

105. *See Hostages*, 1979 I.C.J. at 7.

106. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia and Montenegro)) 1993 I.C.J. 3 (April 8); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herzegovina v. Yugo. (Serbia and Montenegro)) 1993 I.C.J 325 (Sept. 13).

107. *See* ICJ Rules of Court, *supra* note 95, art. 77.

108. *See* 3 ROSENNE, *supra* note 103, at 1459. As of 1997,

> the Security Council has only once taken on its agenda the question of compliance with an order indicating provisional measures [and] [t]hat was in 1951. . . If, however, the provisional measures are indicated in a case relating to a matter already on the Security Council's agenda, the Security Council may adopt a resolution concerning compliance with them without further action regarding its agenda.

Id. at 1459-60.

109. Statute of the ICJ, *supra* note 1, art. 41.

110. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) [hereinafter *Palestine Concessions*].

diplomatic protection for the national. The answer to this question requires an understanding of the purpose behind an order for provisional measures.

Article 41 emphasizes that provisional measures are designed to "preserve" rights.[111] International legal scholars have commented that the function of interim protection is "to safeguard the rights which are in dispute, pending the Court's decision on the merits."[112] Such a broad interpretation suggests that the object of provisional measures could be manifold: to preserve the rights of the state parties (as stated in Article 41),[113] to maintain the "status quo,"[114] "to promote the satisfactory conduct of the proceedings,"[115] and to "ensure that no action is taken which might aggravate or extend the dispute."[116] While the first stated purpose clearly focuses on the rights of a state as a party, the remaining objectives could be more widely construed to include the protection of an individual. These purposes will be examined in the context of the rights provisional measures can protect as well as the prohibition against using such applications as a means of obtaining an interim judgment.

1. Rights that May be Protected

Rights protected by the provisional measures must clearly be the same as those forming the basis of the main dispute before the Court. The PCIJ, in the *Polish Agrarian Reform Case*, emphasized that "the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures . . . is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court."[117] More recently, the ICJ has reiterated this condition in the *Case Concerning the Passage through the Great Belt,*[118] stating that "it is the purpose of provisional measures to preserve 'rights which are the subject of dispute in judicial proceedings.'"[119] The possibility of subsidiary rights being protected was rejected in the *Arbitral Award of 31 July 1989 Case,*[120]

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111. Statute of the ICJ, *supra* note 1, art. 41.

112. J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice,* 44 INT'L & COMP. L.Q. 90, 100 (1995) [hereinafter Merrills, *Recent Jurisprudence of the International Court of Justice*].

113. *See* SZTUCKI, *supra* note 101, at 70.

114. *Id.* at 72.

115. *Id.* at 73 (quoting Aegean Sea Continental Shelf Case (Greece v. Turk.) 1976 I.C.J. 3 (Sept. 11)).

116. *Id.* at 74 (quoting Nuclear Tests (Austr. v. Fr.) 1973 I.C.J. at 106).

117. Polish Agrarian Reform and the German Minority (F.R.G. v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 58, at 177 (July 29).

118. (Fin. v. Den.) 1991 I.C.J. 12 (July 29).

119. *Id.* at 17 (quoting *Hostages,* 1979 I.C.J. at 19).

120. (Guinea-Bissau v. Sen.) 1990 I.C.J. 64, 69-70 (Mar. 2). The main dispute concerned the validity of an arbitral award, rather than any dispute over the maritime territory with which the award was concerned. *See id.* at 64. However, Guinea-Bissau requested an interim order that the parties refrain from all acts in the disputed maritime territory that was the subject of

which concerned the validity of an arbitral decision between Guinea-Bissau and Senegal.

Accordingly, the Court in the *Vienna Convention Cases* reaffirmed the requirement of "coincidence": "[T]he Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent . . ."[121] The treatment of this requirement, however, was complicated by the applications before the Court. Both Paraguay and Germany indicated their entitlement to a remedy from the ICJ on the basis that the United States had violated international legal obligations the United States owed to Paraguay and Germany both, "in [their] own right and in the exercise of [their] right of diplomatic protection of [their] national[s]."[122] Paraguay reiterated this in its Request for the Indication of Provisional Measures, filed concurrently with its application.[123] This distinction between the rights of a state and the rights of its nationals should not affect the ICJ's ability to grant provisional measures to protect nationals. According to international law, once a state exercises diplomatic protection, the state is the "sole claimant" in the eyes of the international tribunal.[124] As Michael K. Addo has commented, "[d]iplomatic protection has to take account of the developments in international human rights law."[125]

While Paraguay and Germany argued for new trials,[126] the United States viewed the reparation of violations of the Vienna Convention quite differently. Counsel for the United States, during oral proceedings in *Breard,* acknowledged that Article 36 required and that Virginia authorities failed to notify Breard of his Vienna Convention rights.[127] However, according to counsel for the United States, "the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation."[128] At that time, senior U.S.

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the arbitral award. *See id.* at 65. On the basis that the rights sought to be made the subject of the provisional measures were not the same as the rights in dispute on the merits, the Court rejected Guinea-Bissau's request. *See id.* at 84.

121. *Paraguay,* 1998 I.C.J. at 257; *LaGrand,* 1999 I.C.J. at 14-15.

122. Application of Paraguay, *supra* note 10, ¶ 25. *See also* Application of Germany, *supra* note 6, ¶ 15.

123. *See Paraguay,* 1998 I.C.J. at 249-50.

124. *See Palestine Concessions,* 1924 P.C.I.J. at 12.

125. Michael K. Addo, *Vienna Convention on Consular Relations (Paraguay v. United States of America) ("Breard") and LaGrand (Germany v. United States of America), Applications for Provisional Measures,* 48 INT'L & COMP. L.Q. 673, 680 (1999) [hereinafter *Vienna Convention on Consular Relations*].

126. *See* International Court of Justice (last visited Mar. 15, 2001) <http://www.icj-cij.org> (*Paraguay,* Oral Pleadings of Paraguay of Apr. 7, 1998, ¶ 1.8 [hereinafter Oral Pleadings (Para.)]; *LaGrand,* Oral Pleadings of Germany of Nov. 11, 2000, ¶ 37 [hereinafter Oral Pleadings (F.R.G.)]).

127. *See id.* (*Paraguay,* Oral Pleadings of United States of Apr. 7, 1998, ¶ 2.6 [hereinafter Oral Pleadings (U.S.)]).

128. Oral Pleadings (U.S.), ¶ 3.19.

officials had already conveyed such an apology to the Republic of Paraguay.[129] Furthermore, the United States argued that the Vienna Convention protected only Paraguay's rights as a nation, not Breard's rights as an individual. Therefore, it was inappropriate to set aside Breard's conviction as a remedy for the breach of Paraguay's rights. In sum, under the United States' view the right to consular assistance pursuant to Article 36 of the Vienna Convention belongs only to the sending state rather than to the individual accused of a crime. The grant of Paraguay's requested provisional measures (to set aside Breard's conviction), therefore, would not aid in the preservation of the rights within the meaning of Article 41 of the Statute. This illustrates a divergence in the interpretation of the rights granted pursuant to the Vienna Convention.

The divergence of opinion on the rights that formed the basis of the claim between Paraguay and the United States raises the question: what do a sovereign state's "rights" encompass according to Article 41 of the Statute of the International Court of Justice? Proceedings such as the *Frontier Dispute*[130] and the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua*),[131] illustrate that a state's sovereign rights are clearly affected in relation to territorial matters. What is less clear is whether persons, in particular nationals, can also be protected via a grant of interim measures, which was the effect of the two orders in the *Vienna Convention Cases.*

In *Nicaragua*, the applicant claimed that "the rights of Nicaraguan citizens to life, liberty and security" needed to be preserved.[132] The Court did not specifically comment on this point, and instead dealt with the United States' claim that Nicaragua's application would impede the Contadora process.[133] In its final order the Court never specifically referred to the Nicaraguan's right to life, but it did require that both the United States and Nicaragua ensure that no action would be taken which would prejudice the rights of either party.[134] In an order for provisional measures made only two years later, a Chamber of the Court in the *Frontier Dispute*, dealt with this issue. The Chamber found a serious risk of irreparable prejudice to persons and property as well as the interests of both States on the facts and ordered provisional measures of protection.[135] Again, in the application for provisional measures in another territorial dispute, the *Land and Maritime Boundary between Cameroon and Nigeria* case,[136] the Court indicated that the sovereign rights at issue also concerned persons, yet, the Court was concerned with the

129. *See id.* ¶ 3.18.
130. (Burk. Faso v. Mali), 1986 I.C.J. 3 (Jan. 10) [hereinafter *Frontier Dispute*].
131. (Nicar. v. U.S.) 1984 I.C.J. 169 (May 10).
132. *Id.* at 182.
133. *See id.* at 183.
134. *See id.* at 187.
135. *See Frontier Dispute*, 1986 I.C.J. at 10.
136. (Cameroon v. Nig.), 1996 I.C.J. 13, 22 (Mar. 15).

lives of citizens in general, rather than identifiable individuals. Rosalyn Higgins suggests that these two cases represent a more radical approach in the Court's jurisprudence; although the disputes were about territory, the Court nonetheless adjudicated on the rights of people.[137] They demonstrate that the Court has accepted its ability to protect human life via a grant of provisional measures, at least where other sovereign rights are also at issue.

Additional support for the Court's power directly to protect human life can be found in the applications for provisional measures in the *Hostages* case[138] and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case* (*Application of the Genocide Convention*).[139] In the *Hostages* case, the United States initiated suit in the ICJ following the seizure of its embassy and diplomatic staff in Teheran by Iranian student protesters in 1979.[140] Two of the hostages were not diplomatic officials but were private persons who were present in the embassy at the time it was overrun by the students.[141] The U.S. argued that provisional measures were necessary to protect "the rights of its nationals to life, liberty, protection and security."[142] The Court subsequently ordered that "Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the [U.S.] Embassy."[143] The threat of death to United States citizens, most of whom the Vienna Convention on Diplomatic Relations protected, was perceived as a potential injury to the U.S. and thus capable of being redressed under international law. While it is clear that the diplomats and consular officials had immunity under the two Vienna Conventions,[144] the Court here made no distinction between diplomatic and private persons in the Order.[145] The Court found that the violation of the rights of the two private American nationals fell within the scope of Article 5 of the Vienna Convention on Consular Relations.[146] Thirlway notes that the Court "moved imperceptibly from the in-

137. *See* Rosalyn Higgins, *Interim Measures for the Protection of Human Rights, in Politics, Values and Functions—International Law in the 21st Century, in* ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 101 (Jonathan I. Charney et al. eds. 1997).

138. *See Hostages*, 1979 I.C.J. at 7.

139. (Bosn. & Herz. v. Yugo.) (Application of Mar. 20), International Court of Justice (visited Mar. 6, 2001) <http://www.icj-cij.org>.

140. *See Hostages*, 1979 I.C.J. at 17-18.

141. *See id.* at 14.

142. *Id.* at 19.

143. *Id.* at 21.

144. *See* Vienna Convention on Diplomatic Relations, Apr. 14, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964). "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." *Id.* art. 29. See also Vienna Convention on Consular Relations, *supra* note 8, art. 41(1), which states that "Consular officials shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority."

145. *See Hostages*, 1979 I.C.J. at 21.

146. *See id.* at 14.

ternational legal rights of the United States to the injury to the persons, health and life of the individuals concerned."[147]

Perhaps the clearest indication of the Court's ability to protect human life is its Order at the provisional measures stage in the *Application of the Genocide Convention*.[148] Bosnia and Herzegovina requested a number of provisional measures of the Court, including the cessation of "all acts of genocide and genocidal acts against the People and State of Bosnia and Herzegovina, including but not limited to murder; summary executions; torture; rape; mayhem; [and] so-called 'ethnic cleansing.'"[149] While the Court did not accede to all elements of Bosnia's request it did order that the Federal Republic of Yugoslavia should "take all measures within its power to prevent the commission of the crime of genocide."[150] Thus the Order, citing the Genocide Convention, specifically protected human life in the territory of Bosnia and Herzegovina.

In the *Vienna Convention Cases*, the applicant states phrased their requests in terms of the need to protect the lives of their nationals, in order that the remedy of restitution could be ordered on the merits.[151] However, unlike the Genocide Convention, there is some dispute as to whether Article 36 of the Vienna Convention is phrased in terms of protecting, specifically, human life. Kadish argues that the drafters of the Vienna Convention intended to create an individual private right, and that the remedy for breaching this treaty obligation would be a return to the status quo ante, including the reversal of a criminal conviction and new trial.[152] However, this does not necessarily translate into a state's right to utilize the ICJ to uphold this right and delay a death sentence. Previously the United States has argued that Article 36 does protect the right of nationals of the sending State to have access to consular officers.[153] In the *Vienna Convention Cases*, the Court agreed with the applicants' interpretation of a paramount interest in the life and liberty of their respective nationals, without considering whether the Vienna Convention did in fact enunciate an obligation to protect such a right.[154] As in the *Hostages* case,[155] the Court implicitly acknowledged that

147. H.W.A. Thirlway, *The Indication of Provisional Measures by the International Court of Justice*, *in* INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 9 (Rudolph Bernhardt ed.,1994).

148. *See* Application of the Genocide Convention, 1993 I.C.J. 3 (Interim Protection Order of Apr. 8).

149. *Id.* at 8.

150. *Id.* at 24.

151. *See* International Court of Justice, (last visited Mar. 15, 2001) <http://www.icj-cij.org> (*Paraguay*, Request of the Republic of Paraguay, Apr. 3, 1998, ¶ 7 [hereinafter Request of Paraguay]; *LaGrand*, Request of the Federal Republic of Germany, Mar. 2, 1999, ¶ 7 [hereinafter Request of Germany]).

152. *See* Kadish, *supra* note 39, 610-12.

153. *See* Memorial of the U.S., *supra* note 43, at 174.

154. *See Paraguay*, 1998 I.C.J. at 257; *LaGrand*, 1999 I.C.J. at 12-16.

155. *See Hostages*, 1979 I.C.J. 7.

the legal rights of the applicant states could be harmed by a threat to the lives of their nationals.[156] If the Court, on the merits of Germany's application, affirms this interpretation of the Vienna Convention, it will significantly expand the ability of states to use the ICJ as a court of human rights.

While the majority of the Court did not consider this issue in detail during the request for provisional measures, Judge Oda, in a separate opinion, dealt with the point more fully. Due to the urgency of the situation, Judge Oda voted for the Court's order in both cases "for humanitarian reasons," while simultaneously expressing disquiet regarding the extent to which a stay of execution would protect the rights of Paraguay and Germany under the Vienna Convention.[157] Regarding the *Breard* case, he believed that Paraguay's rights as a state (as distinct from Breard's rights as an individual) were not exposed to an imminent irreparable breach such that could be remedied by the grant of provisional measures.[158] In *LaGrand,* Judge Oda went a step further and stated:

> 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 . . . . I cannot condone the use of the Court for such matters as the above under the pretext of the protection of human rights.[159]

Judge Oda keenly perceived the problem that the Court faced. The ICJ has frequently referred to international human rights principles in its contentious cases and advisory opinions. In these two orders the Court has gone one step further by assuming first, the existence of an individual right vested in the Vienna Convention for the purpose of provisional measures, and second, that one potential method of remedying a breach of that right would be to stay an execution. Legal scholars have commented that Judge Oda is "swimming against the tide because the *LaGrand* and *Breard* cases are a predictable and . . . justifiable development from the [*Hostages* case and the *Application of the Genocide Convention* case]."[160] While the two orders in the *Vienna Convention Cases* represent a justifiable development in the ICJ's jurisprudence, the United States' lack of compliance with such orders indicates that the utility of orders for provisional measures as a means of protecting human rights, as distinct from states' rights, must be questioned.

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156. *See Paraguay*, I.C.J. at 257-58; *LaGrand*, 1999 I.C.J. at 15.

157. *See Paraguay*, 1998 I.C.J. at 260-62 (separate opinion of Judge Oda); *LaGrand*, 1999 I.C.J. at 18-20 (separate opinion of Judge Oda).

158. *See Paraguay*, 1998 I.C.J. at 261 (separate opinion of Judge Oda).

159. *LaGrand*, 1999 I.C.J. at 19-20 (separate opinion of Judge Oda).

160. Addo, *Vienna Convention on Consular Relations, supra* note 125, at 680.

2. *An Interim Judgment?*

Judge Oda's final objection to the orders in the *Vienna Convention Cases* was that applicants should not use requests for provisional measures for the purpose of obtaining interim judgment, in effect predetermining the main dispute.[161] The order for provisional measures in *Application of the Genocide Convention* also highlighted the distinction between a legitimate request for provisional measures and an attempt to obtain an interim judgment, which is beyond the power granted to the Court in Article 41 of the Statute of the ICJ. Yugoslavia argued that Bosnia was in fact asking the Court for an interim judgment on the merits of the case, which would essentially prejudge the dispute at the provisional measures stage.[162] While the Court agreed that it could not make a definitive finding of fact on Yugoslavia's responsibility for the alleged genocide, it did order provisional measures, taking into consideration the grave risk of aggravating or extending the dispute.[163]

Commentators note a trend in the last twenty years "for proceedings to be instituted before the Court in circumstances suggesting that the intention was less to obtain a judgment on the merits than to obtain the short-term tactical advantage of an order indicating provisional measures."[164] This trend has been criticized.[165] The *Nuclear Tests* cases,[166] where Australia and New Zealand requested provisional measures, as well as the United States' re-

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161. *See Paraguay*, 1998 I.C.J. at 261 (separate opinion of Judge Oda); *LaGrand* Case, 1999 I.C.J. at 19 (separate opinion of Judge Oda).

162. *See* Application of the Genocide Convention, 1993 I.C.J. at 21. Yugoslavia based its argument on the Permanent Court of International Justice's order in the *Case Concerning the Factory at Chorzów*. *Id.* There the Court held that a request for advance payment in part satisfaction of the primary claim was not a request for provisional measures, but rather was "designed to obtain an interim judgment in favour of a part of the claim formulated in the Application." Factory at Chorzów (F.R.G. v. Pol.) 1927 P.C.I.J. (Ser. A), No. 12, at 10 (Nov. 21).

163. *See* Application of the Genocide Convention, 1993 I.C.J. at 23.

164. Thirlway, *supra* note 147, at 27.

165. *See* Shigeru Oda, *Provisional Measures—The Practice of the International Court of Justice, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE—ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 541, 554 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). Oda stated, "It is my view that proceedings on provisional measures must essentially constitute a type of proceeding *incidental to, not coincidental with,* the proceedings on the merits of such contentious disputes as fall within the jurisdiction of the Court." *Id.*

166. (Austr. v. Fr.), 1973 I.C.J. 99; (N.Z. v. Fr.), 1973 I.C.J. 135. At the interim protection stage of the *Nuclear Tests Case,* Australia asked the Court to order France to "desist from any further atmospheric nuclear tests pending the judgment of the Court." (Austr. v. Fr.), 1973 I.C.J. at 100. Similarly, New Zealand asked the Court to order France to "refrain from conducting any further nuclear tests that give rise to radio-active fall-out while the Court is seized of the case." (N.Z. v. Fr.), 1973 I.C.J. at 136. Both Australia and New Zealand's main claim was that France should desist from all atmospheric testing. Judges Forster and Gros dissented from the Court's order for interim protection stating that only by a final judgment could the Court order the cessation of French nuclear testing. *See* (Austr. v. Fr.) 1973 I.C.J. at 113 (Forster, J., dissenting); (N.Z. v. Fr.) 1973 I.C.J. at 123; (Austr. v. Fr.) 1973 I.C.J. at 158 (Gros, J., dissenting).

quest for provisional measures in the *Hostages* case,[167] exemplify the trend. In the *Hostages* case the United States, in both the request for interim measures and its main application, asked the Court to order Iran to release the hostages.[168] Commenting on the coincidence between the two applications, the Court held that "the purpose of the United States request . . . [was] not to obtain a judgment, interim or final, on the merits of its claim but to preserve the substance of the rights which it claim[ed] pendente lite."[169] Indeed, the Court emphasized that "a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party [involved]."[170]

In *Breard*, the United States, as respondent, utilized the same argument made against it in the *Hostages* case. In oral argument, counsel for the United States argued that "provisional measures should not be indicated in terms or in circumstances where they constitute a disguised adjudication on the merits."[171] Counsel stated that,

> [i]f the measures sought by Paraguay are indicated and implemented, Paraguay will have won, at least for a period of however many years may be required for the Court to arrive with its final judgment. Paraguay will have advanced its key objective through a hurried and unbalanced proceeding that cannot adequately address the serious legal issues that are at stake.[172]

In response, Paraguay emphasized that its request for provisional measures was extremely narrow and that if the United States prevailed on the merits Virginia could schedule a new execution date.[173] Both Paraguay and Germany, in their requests for provisional measures highlighted that if the executions went ahead they would be denied the opportunity to have the *status quo ante* restored in the event of a judgment in their favor.[174] It is certainly true that if the Court did ultimately find in favor of the applicants, the execution of Breard and LaGrand has cancelled out the possibility of a remedy based on restitution. On this basis, the *Vienna Convention Cases* can be distinguished from suggestions made in earlier decisions that a coincidence of remedies in the applications for provisional measures and on the merits may contain hints of a disguised interim judgment.

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167. *See Hostages*, 1979 I.C.J. at 7.

168. *See id.* at 8; *Hostages*, 1979 I.C.J. Pleadings 1, at 6 (Nov. 29).

169. *Hostages*, 1979 I.C.J. at 16.

170. *Id.*

171. Oral Pleadings (U.S.), *supra* note 127, ¶ 3.36.

172. *Id.* ¶ 3.34.

173. *See* Oral Pleadings (Para.), *supra* note 126 (argument of Ambassador Manuel Maria Caceres).

174. *See* Request of Paraguay, *supra* note 151, ¶ 7; Request of Germany, *supra* note 151, ¶ 6.

The fact that Paraguay withdrew its case against the United States subsequent to Breard's execution may suggest that Paraguay was merely pursuing an interim judgment. Certainly Paraguay did not pursue its claim for a guarantee from the United States of non-repetition of the allegedly illegal acts. The result in *Breard* adds credence to Judge Oda's suggestion that in such cases a solution should be arrived at via an expeditious proceeding on the merits, rather than through an application for provisional measures.[175] A discussion of the efficacy of ICJ proceedings and areas for potential reform has been attempted elsewhere but is beyond the scope of this article.[176] It is enough to note that given the impending death sentences and the extremely lengthy process involved in ICJ merits deliberations, it would have been unrealistic for Paraguay or Germany to pursue any other course of action to obtain the remedy sought. The urgency of the situation, combined with the possibility that a potential remedy could not be ordered resulted in orders favoring the applicant states, thus ensuring the international legal protection of two men on death row in the United States. These factors will be discussed in the next section.

C. Requirements for a Grant of Interim Measures

The ICJ has identified three main requirements for the indication of provisional measures: (1) a prima facie demonstration of jurisdiction, (2) the risk of irreparable prejudice to the rights of either party, and (3) urgency.[177] At times, other suggestions have been added, such as the existence of a prima facie case on the merits.[178] The Court in the *Vienna Convention Cases,* however, reaffirmed the necessity of proving three criteria.[179] Indeed, at least two of the three criteria significantly impacted upon the Court's order in favor of the applicants at the interim protection stage. The *Vienna Convention Cases* demonstrate that humanitarian considerations were paramount to the ICJ when it granted provisional measures in those cases.[180]

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175. *See* Oda, *supra* note 165, at 554.

176. *See* D.W. Bowett, et al., *The International Court of Justice—Efficiency of Procedures and Working Methods—Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law*, 45 INT'L & COMP. L.Q. S1 (1996); Gavan Griffith, *Modernising the General Business of the International Court of Justice: A Critical Evaluation*, 17 AUSTL. Y.B. INT'L L. 75 (1996).

177. *See* Patricia A. Essoff, Comment, *Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures*, 15 FORDHAM INT'L L.J. 839 n.5 (1991).

178. *See id.* at 840 (citing Case Concerning Passage Through the Great Belt (Finland v. Denmark), 1991 I.C.J. 12 (Provisional Measures Order of July 29)).

179. *See Paraguay*, 1998 I.C.J. at 257, *LaGrand,* I.C.J. at 14-15.

180. *See* Legality of the Use of Force (Yugo. v. Belg.), ¶ 5 (Kreca, J., dissenting) (Interim Protection Order of Apr. 28, 1999), International Court of Justice (visited March 6, 2001) <http://www.icj-cij.org> [hereinafter Legality of the Use of Force]. See also the corresponding paragraphs in the Orders of the same date in the several cases collectively referred to as the Legality of the Use of Force cases. Yugoslavia filed applications requesting the indica-

1. Jurisdiction

The question of interim measures ordinarily arises before the Court has determined that it has jurisdiction on the merits. Because of this, the relevance of jurisdiction to an interim protection order has received much comment and discussion.[181] It has frequently been stated that interim measures are part of the Court's incidental jurisdiction and do not derive from Article 36 of the Statute, which deals with substantive jurisdiction.[182] However, the issue of substantive jurisdiction is not irrelevant in proceedings for provisional measures. Commentators note that, given the potentially exacting consequences of provisional measures, the Court cannot ignore the question of substantive jurisdiction.[183] Among recent cases, the most serious consideration was given to jurisdiction in the *Application of the Genocide Convention* case, where the issue was complicated by the question of whether Yugoslavia was a member of the United Nations and therefore a party to the Statute of the International Court of Justice.[184] Indeed, the United States raised the issue of jurisdiction in *Breard* despite the existence of a clear treaty obligation in the Optional Protocol to the Vienna Convention requiring states to submit disputes concerning the interpretation of the Convention to the ICJ.

The formula most constantly relied upon in recent case law is clearly articulated in *Application of the Genocide Convention*:

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that is has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established . . .[185]

This relatively straightforward test appears to have replaced controversial discussions in earlier cases concerning the need to prove the existence of jurisdiction before considering a request for provisional measures.[186] In

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tion of provisional measures against ten countries (United States, Belgium, Canada, the Netherlands, Portugal, France, Germany, Italy, the United Kingdom, and Spain). For practical purposes, except where expressly indicated otherwise, reference is to the documents rendered in the case between Yugoslavia and the United States, as the documents referred to contain similar language.

181. *See generally* Dr. M. H. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction* 46 BRIT. Y.B. INT'L L. 259 (1972-73); J.G. Merrills, *Interim Measures of Protection and the Substantive Jurisdiction of the International Court*, 36 CAMBRIDGE L.J. 86 (1977).

182. *See* Mendelson, *supra* note 181, at 320; Thirlway, *supra* note 147, at 18.

183. *See* Merrills, *Recent Jurisprudence of the International Court of Justice*, *supra* note 112, at 92.

184. *See* Application of the Genocide Convention, 1993 I.C.J. at 12.

185. *Id.* at 11-12.

186. *See, e.g.*, Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. at 111 (June 22) (Forster, J., dis-

the *Application of the Genocide Convention* case, the Court established jurisdiction pursuant to the Genocide Convention, and thereby ordered provisional measures to uphold the rights established in the Convention.[187] However, the Court did not order provisional measures to protect a number of other human rights, such as those contained in the Geneva Conventions of 1949, the Additional Protocol I of 1977, the Universal Declaration of Human Rights, and the United Nations Charter.[188] Thus the Order did not protect rights other than those that were the subject of the dispute. In the *Application of the Genocide Convention* case, the need to demonstrate a prima facie showing of jurisdiction did not prevent the order of any provisional measures.[189] The lack of jurisdiction, however, was detrimental to Yugoslavia's request in the *Legality of the Use of Force* cases.[190] In these cases, Yugoslavia requested that the Court order NATO countries to immediately cease their acts of force.[191] Yugoslavia justified its request on the basis that the proposed measures would prevent "new losses of human life, further physical and mental harm inflicted on the population of the Federal Republic of Yugoslavia, further destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia."[192] Despite evidence of the continued loss of human life, Yugoslavia's application failed on the basis that it could not demonstrate that the Court had prima facie jurisdiction over the dispute.[193]

In the *Vienna Convention Cases,* the Court based its jurisdiction on the existence of a dispute between the parties as to whether the relief sought was available under the Vienna Convention.[194] The Optional Protocol to the Vienna Convention, at least in the short term, was instrumental in the applicants' ability to protect life.[195] This can be contrasted to the inability of the Court to act in the *Legality of the Use of Force* cases, where more substan-

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senting). Judge Forster argued that "[t]o exercise this power conferred by article 41, the Court must have jurisdiction. Even when it considers that circumstances require the indication of provisional measures, the Court, before proceeding to indicate them, must satisfy itself that it has jurisdiction." *Id.*

187. *See* Application of the Genocide Convention, 1993 I.C.J. at 4-5.

188. *See id. See also* Higgins, *supra* note 137, at 100.

189. *See* Application of the Genocide Convention, 1993 I.C.J. at 19.

190. *See* Legality of the Use of Force, *supra* note 180, ¶ 5.

191. *See id.*

192. *Id.* ¶ 7.

193. *See id.* ¶ 28.

194. *See Paraguay*, 1998 I.C.J. at 256-57; *LaGrand*, 1999 I.C.J. at 18.

195. *See* Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 500 U.N.T.S. 241.

> Disputes 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 a Party to the present Protocol.

Id. art.1.

tial losses of life were alleged.[196] A jurisdictional clause in a treaty was also the basis of the Court's jurisdiction in both the *Hostages* case[197] and the *Application of the Genocide Convention* case.[198] The requirement of jurisdiction is thus fundamental in determining whether human life threatened by imminent harm can be protected, whatever the severity of the alleged loss.

2. *Irreparable Prejudice*

The divergence of views concerning the remedies afforded for a breach of Article 36 of the Vienna Convention is evident when considering whether "irreparable prejudice" could be demonstrated by Paraguay and Germany. The concept of irreparable prejudice appears to be uncertain as to its exact meaning and its adequacy as a criterion for determining the indication of provisional measures.[199] The test articulated by the Court in *Fisheries Jurisdiction* and repeated in subsequent cases provides that the power under Article 41 "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings."[200] The most important question that must be addressed is what is meant by "irreparable prejudice" to a state's rights?[201] On one level, damage would only be irreparable if it could not be adequately compensated for in a final judgment on the merits.[202] For instance, in the *Aegean Sea Continental Shelf Case,*[203] the Court denied Greece's application for provisional measures on the basis that "the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf . . . is one that might be capable of reparation by appropri-

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196. *See* Legality of the Use of Force, *supra* note 180, ¶ 28 (Order, June 2, 1999).

197. *See Hostages*, 1979 I.C.J. at 13-14. The Court based its jurisdiction on the Vienna Convention on Diplomatice Relations of 1961, and Article I of its accompanying Optional Protocol Concerning the Compulsory Settlement of Disputes as well as the Vienna Convention on Consular Relations of 1963, and Article I of its accompanying Optional Protocol concerning the Compulsory Settlement of Disputes. *See id.*

198. *See* Application of the Genocide Convention, 1993 I.C.J. at 4.

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

199. *See* SZTUCKI, *supra* note 101, at 106.

200. (U.K. & N. Ir. v. Ice.) 1972 I.C.J. 12, at 16 (Aug. 17); Fisheries Jurisdiction (F.R.G. v. Ice.) 1972 I.C.J. 30, at 34 (Aug. 17). *See also Frontier Dispute*, 1986 I.C.J. at 8.

201. *See* SZTUCKI, *supra* note 101, at 108; Merrills, *Recent Jurisprudence of the International Court of Justice*, *supra* note 112, at 108.

202. *See* Merrills, *Recent Jurisprudence of the International Court of Justice, supra* note 112, at 108.

203. (Greece v. Turk.) 1976 I.C.J. 3 (Sept. 11).

ate means on the merits."[204] This principle could operate to limit the type of cases in which provisional measures are available as "there are no violations of rights which could not be made good *in law* by a reparation."[205] Recent cases, however, have taken into account whether damage to these rights would be irreparable in fact as well as at law for the purposes of Article 41 of the Statute of the International Court of Justice.[206]

"[I]n human rights law, irreparable injury to persons traditionally refers to torture or death."[207] But the Statute to the ICJ defines the test in terms of irreparable prejudice to a state's rights, rather than human rights. This distinction, however, did not prevent the United States from arguing in the *Hostages* case that the loss of individual human life was the ultimate in irreparable injury.[208] The Court endorsed this view when it stated that the continuation of the hostage situation in the U.S. embassy in Tehran exposed "the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm."[209] In the *Legality of the Use of Force* cases, the Court again expressed its concern over "the human tragedy, the loss of life, and the enormous suffering in Kosovo . . . and with the continuing loss of life and human suffering in all parts of Yugoslavia."[210] While the Court denied Yugoslavia's request for lack of jurisdiction, it simultaneously suggested that "the parties should take care not to aggravate or extend the dispute" as they would still be responsible for any actions that violated international law.[211] Vice-President Weeramantry dissented in four of the cases brought by Yugoslavia and suggested that the Court should have made a wider order, in which the attention of the parties was directed to the Universal Declaration of Human Rights and other relevant human rights instruments.[212] Neither the majority of the Court nor Vice-President Weeramantry considered whether such a loss of life would be an irreparable injury to Yugoslavia.

In the *Vienna Convention Cases*, the question arose whether pecuniary damages would be an appropriate and adequate remedy for a breach of the right contained in Article 36, or whether it was necessary to order a stay of execution to prevent irreparable prejudice. The Court found that the execution of Breard and LaGrand "would render it impossible for [it] to order the

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204. *Id.* at 11.

205. SZTUCKI, *supra* note 101, at 109.

206. *See* Merrills, *Recent Jurisprudence of the International Court of Justice, supra* note 112, at 108.

207. Pasqualucci, *supra* note 14, at 842.

208. *See Hostages*, 1979 I.C.J. at 20.

209. *Id.*

210. Legality of the Use of Force, *supra* note 180, ¶ 15 (Order, June 2, 1999).

211. *Id.* ¶¶ 31-32.

212. *See id.* (Vice-President Weeramantry, dissenting *in* (Yugo. v. Belg.), (Yugo. v. Can.), (Yugo. v. Neth.), *and* (Yugo. v. Port.)). *See also* separate declaration of Vice-President Weeramantry in (Yugo. v. Fr.), (Yugo. v. F.R.G.), (Yugo. v. Italy), *and* (Yugo. v. U.K.).

relief [sought] and thus cause irreparable harm to the rights [claimed]."[213] Thus the Court equated the prejudice to a potential remedy (a stay of execution) with the prejudice to the right granted in Article 36 of the Vienna Convention. While it is clear that execution of LaGrand and Breard would cause irreparable prejudice to their human rights, it was not so clear that it would cause irreparable prejudice to any right granted pursuant to Article 36. Considering the time available, all members of the Court were motivated by humanitarian concerns when they granted such an order. As Judge Kreca suggested in his dissenting opinion in the *Legality of the Use of Force* cases, when a high degree of humanitarian concern is present, both procedural and material rules governing the institution of provisional measures have been brushed aside.[214]

3. Urgency

Perhaps of all the requirements for an order of provisional measures, the level of urgency in Paraguay's and Germany's applications forced the Court to err on the side of caution when it came to protecting human life. The need for an applicant state to demonstrate that provisional measures will only be justified in situations of urgency was spelled out in both orders.[215] Article 74(2) of the Rules of Court highlights the urgency of such requests, stating the Court "shall be convened forthwith" if it is not sitting at the time the request is made.[216] Further, such requests have priority over all other cases.[217] The Court also has the power "to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures."[218]

In the *Case Concerning the Passage through the Great Belt,*[219] the Court defined the requisite urgency as "urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given."[220] In that case Finland requested interim measures to halt Denmark's planning of a suspension bridge that would prevent the clear passage of Finnish drill and oil ships through the Great Belt.[221] The Court found the planned construction schedule did not justify the indication of provisional measures, as the proposed timetable did not impose any imminent physical

213. *Paraguay*, 1998 I.C.J. at 257. *See also LaGrand*, 1999 I.C.J. at 15.

214. *See* Legality of the Use of Force, *supra*, note 180 (Kreca, J., dissenting) ¶ 5 (Order, June 2, 1999).

215. *See Paraguay*, 1998 I.C.J. at 257; *LaGrand*, 1999 I.C.J. 14-15.

216. ICJ Rules of Court, *supra* note 95, art. 74(2).

217. *See id.* art. 74(1).

218. *Id.* art. 75(1).

219. (Fin. v. Den.) 1991 I.C.J. 12 (July 29).

220. *Id.* at 17.

221. *See id.* at 13.

hindrance.[222] Adjudication on the merits of the case would be completed prior to any potential obstruction of the waterway, therefore, Finland could not establish urgency.[223]

The degree of urgency may also influence when the Court will convene to hear an application for provisional measures. For instance, in the *Case Concerning the Passage through the Great Belt,* a hearing was held forty days after the request was filed, whereas in the *Hostages* case the Court convened ten days after the request was filed.[224] In *Breard*, Paraguay filed its application and the Court heard argument on the matter four days later, demonstrating that it can act swiftly when required.[225] In *LaGrand,* Germany's request for provisional measures stressed the "extreme gravity and immediacy of the threat" facing the life of its national and thus asked the Court to treat the matter with the "greatest urgency."[226] With only a day to spare before the scheduled execution, the Court exercised its power to examine a situation *proprio motu,* dispensed with oral hearings, and issued an order granting the requested provisional measures just one day after Germany filed its request.[227]

In a separate opinion, Judge Schwebel criticized Germany's tactics: "Germany could have brought its Application years ago, months ago, weeks ago, or days ago," in which case the Court could have heard argument from each party.[228] Instead, Germany filed its application and request for provisional measures on the "eve of execution," while simultaneously urging the Court to act *proprio motu* without hearing argument on behalf of the United States.[229] Despite these reservations, he voted for the substance of the Court's Order to stay the execution.[230] The speed in which the Court issued its order in *LaGrand* is emphasized by the fact that, to a large extent, it replicates the Order made in Paraguay's earlier application. While the majority of the Court did not explicitly weigh urgency against other factors, it was certainly relevant in determining how quickly the Court acted.

The speed in which the Court acted in the *Vienna Convention Cases* is arguably a positive development with respect to protecting human life. As Jo M. Pasqualucci notes, "a time-consuming approach to justice is inadequate in . . . situations that may result in death or torture."[231] The matter of days the Court took to grant orders in the *Vienna Convention Cases*, how-

222. *See id.* at 18.

223. *See id.*

224. *See* Thirlway, *supra* note 147, at 26.

225. *See* International Court of Justice, <http://www.icj-cij.org> (Application of Paraguay, *supra* note 10; *Paraguay* Interim Protection Order of Apr. 9).

226. Request of Germany, *supra* note 151, ¶ 9.

227. *See* International Court of Justice, <http://www.icj-cij.org> (*LaGrand*, Interim Protection Order of Mar. 3, 1999).

228. *LaGrand*, 1999 I.C.J. at 22 (separate opinion of Judge Schwebel).

229. *Id.*

230. *See id.*

231. Pascqualucci, *supra* note 14, at 806.

ever, has been compared to the month-long deliberation of the applications for provisional measures in the *Legality of the Use of Force* cases.[232] Judge Vereshchetin emphasized that the extraordinary circumstances of these cases required the Court to act quickly and declare its concern over the "human misery, loss of life and serious violations of international law" that occurred.[233] Certainly the *Legality of the Use of Force* cases involved loss of life on a much larger scale than that presented in the *Vienna Convention Cases*. While Yugoslavia pointed out the urgency of the threat to human lives, the Court did not feel pressed to act with the same speed as it did in the *Vienna Convention Cases*. Given the complicated questions of jurisdiction involved in the *Legality of the Use of Force* cases, it is not surprising the Court took time to deliberate. These latter cases do indicate, however, that the potential loss of life alone does not motivate the Court to act quickly. Requesting provisional measures is therefore not always the appropriate method of protect life in a situation of urgency.

IV. THE EFFECTIVENESS OF USING INTERIM MEASURES AS A MEANS OF PROTECTING LIFE

The outcome of the *Vienna Convention Cases* exposes numerous difficulties in using applications for provisional measures as a means of protecting human life. First, the result reveals the lack of the ICJ's enforcement power in relation to both its provisional measures orders and final judgments.[234] The possibility of Security Council action to enforce an ICJ judgment is an empty threat when the respondent is a member of the "Permanent Five."[235] This is particularly the case given that in her letter to the governor of Virginia, Madeleine describes the ICJ's order as "non-binding."[236] Opti-

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232. *See* Legality of the Use of Force, *supra* note 180 (declaration of Judge Vereshchetin).

233. *Id.*

234. U.N. CHARTER art. 94 provides that:

> Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 94(2) refers to judgments rather than orders, which suggests that there is some dispute as to the extent to which article 94 encompasses orders for provisional measures. *Compare* Thirlway, *supra* note 147, at 30 *with* Michael K. Addo, *Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations*, 10 EUR. J. INT'L L. 713, 724 (1999) [hereinafter Addo, *Interim Measures*].

235. The Permanent Five refers to the 5 permanent members of the U.N. Security Council (U.S., France, U.K., China, and Russia).

236. Addo, *Interim Measures*, *supra* note 234, at 727 (citing Letter from Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia (Apr. 13,

mistically, some scholars have suggested this "must not be interpreted to suggest that the order was not legally binding per se but should rather be seen as a reflection of its broad character, leaving room for the United States to take the necessary action to comply with it."[237] This question of whether provisional measures are binding as a matter of treaty law or as a general principle of international law has been discussed by a number of commentators.[238] Sztucki concludes that the Court's orders do not indicate that interim measures are formally binding at law.[239] Louis Henkin, however, in a discussion of the outcome of *Breard*, described U.S. Department of State's characterization of the Court's language in the order as non-binding "regrettable."[240] In his view the order was legally binding, and the United States was required to take the measures indicated in the Court's order.[241] Additional legal scholarship has also suggested that the United States administration's position regarding the "nonbinding quality" of the order is "unconvincing" considering "in international law the consequences of non-compliance with binding norms do not differ nearly as much as they do in domestic law from the consequences of noncompliance with nonbinding norms."[242] The United States' position is at odds with its own behavior in the *Hostages* case, where it insisted on Iran's compliance with the ICJ's decision.[243] Regardless of the result of such a debate, the fact that doubts are expressed about the binding nature of provisional measures orders in the ICJ ensures that such applications are an uncertain method of protecting human life.

Second, the outcome of the *Vienna Convention Cases* serves to focus attention on the "abysmal record of compliance" with orders for provisional measures.[244] This is another reason to doubt the efficacy of requests for provisional measures in situations where the result of non-compliance is irreversible. Michael K. Addo has noted that, given the "credibility gap" demonstrated by state practice in this respect, it may be better to "speed up proceedings in which provisional measures have been ordered."[245] An alter-

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1998)).

237. *Id.* at 726-27.

238. *See* Thirlway, *supra* note 147, at 28-33; SZTUCKI, *supra* note 101, at 260-302; ELKIND, *supra* note 12, at 153-64.

239. *See* SZTUCKI, *supra* note 101, at 273-75.

240. Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 683 (1998).

241. *See id.* at 680.

242. Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 686 (1998).

243. *See* Lori Fisler Damrosch, *Judicial Authority to Give Effect to ICJ Provisional Measures*, 92 AM. J. INT'L L. 697, 703 (1998). *See also* Statement *Amicus Curiae* of International Law Professors in Support of Petitioners' Supplemental Application for Stay of or Injunction Against Execution, Paraguay v. Gilmore, 523 U.S. 1068 (1998).

244. Addo, *Vienna Convention on Consular Relations*, *supra* note 125, at 680. "In the ten cases in which provisional measures were ordered, only in two of them can one confidently say that they have been complied with fully." *Id.* & n.41.

245. *Id.* at 681. "The gap that currently exists between incidental proceedings and the

native would be to hear valid substantive arguments prior to the merits stage of the proceedings.[246] While these suggestions may pose solutions in situations where the loss of life is not profoundly imminent, it does not aid the Court in situations where it has but one day to make a decision, as in *LaGrand.* The lack of compliance with the Order in *Breard* is due to the governor of Virginia's failure to enforce the international legal obligations of the United States, thus demonstrating the problems of implementing international law in a federal system. Although this fact does not excuse the United States from the performance of its obligations, it demonstrates that individuals are particularly vulnerable where their fate is in the hands of a state within a federal system and that state does not wish to implement the nation's international obligations. The governor of Virginia's action in allowing Breard's execution to proceed was condemned by human rights organizations,[247] yet this did not prevent LaGrand from undergoing a similar fate in Arizona.

Third, the result in the *Vienna Convention Cases* demonstrates that, as a states' court, the ICJ is not the most effective forum for dealing with the rights of individuals under immediate threat. As stated in both *Vienna Convention Cases*, the ICJ is not a court of criminal appeal[248] and is therefore an inappropriate forum for the consideration of the decisions of United States courts. Furthermore, it is not a court established to protect human rights. In the *Application of the Genocide Convention* case, the Court refused to order measures that would safeguard human rights not protected by the Genocide Convention,[249] yet in the *Vienna Convention Cases,* the Court stayed two executions to ensure Paraguay and Germany's requested remedies would be available in the future. While the Court certainly had prima facie jurisdiction pursuant to the Optional Protocol to the Vienna Convention, it is not clear whether the Convention actually protected individual rights. Judge Rosalyn Higgins commented that orders for provisional measures in cases such as the *Application of the Genocide Convention Case,* the *Hostages* case, the *Frontier Dispute,* and the *Land and Maritime Boundary Between Nigeria and Cameroon,* indicate the Court's "tendency to recognize the hu-

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merits stage is sufficiently excessive to generate a sense of injustice in the minds of some litigants." *Id.*

246. *See id.* at 680.

247. *See* Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough,* (visited Feb. 12, 2001) <http://www.amnesty.org/ailib/aipub/1998/SUM/5102798.htm>; Allyson Collins, Senior Researcher Human Rights Watch, *Letter to Governor of Arizona regarding Karl and Walter LaGrand,* dated 23 February 1999 (last modified Jan. 2001) <http://www.hrw.org/hrw/press/1999/mar/exeltr.htm>.

248. *See Paraguay,* 1998 I.C.J. at 257; *LaGrand,* 1999 I.C.J. at 15.

249. *See* Application of the Genocide Convention, 1993 I.C.J. at 19. The Court based its jurisdiction on the Convention and, therefore, "confine[d] 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." *Id.*

man realities behind disputes [between] states."[250] While the Court's developing jurisprudence in this area should be applauded, the failure of states to abide by the Court's orders when individual rights are directly in issue is troublesome. The Court's inability to deal with the recent *Legality of the Use of Force* cases, despite allegations of substantial loss of life, demonstrates that the most obvious limitation upon the Court is the constraint of jurisdiction. This limitation operates to ensure that the Court is not the most appropriate avenue for developing consistent jurisprudence on provisional measures applications involving human rights.

To enable the ICJ to be more responsive to the claims of individuals under international law, commentators advocate enlarging the Court's jurisdiction to accommodate applications from individuals or international organizations. Mark W. Janis has pointed to the European human rights system, which provides individuals with a right of individual petition, to support his argument that opening up the ICJ's jurisdiction is perhaps the only method of ensuring the ICJ's effective utilization. [251] While it is unlikely that such reform will take place in the near future, there are other international fora established with the specific aim of protecting human rights that allow urgent applications to be heard. When considering communications received under the Optional Protocol to the ICCPR, Rule 86 of the Rules of Procedure of the Human Rights Committee permits the UN Committee to inform states subject to the individual communication procedure "of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."[252] Rule 86 has been described as "an immensely valuable tool, which . . . could prove a formidable weapon in the task of deterring a State Party from taking further punitive measures, once an author has already lodged a communication and is thus in a particularly vulnerable position."[253] The Human Rights Committee has used its Rule 86 power to request stays of execution in death penalty cases from Caribbean state parties to the Optional Protocol such as Trinidad and Tobago. The procedure suffers, however, from the defect that it is not binding upon state parties.[254] Thus, while some states have granted stays when requested by the Committee,[255] other states have failed to comply with such

250. Higgins, *supra* note 137, at 103.

251. *See* Mark W. Janis, *Individuals and the International Court*, *in* THE INTERNATIONAL COURT OF JUSTICE—ITS FUTURE ROLE AFTER FIFTY YEARS 205, 209 (A.S. Muller, et al. eds., 1997). Janis refers to the Court of Justice of the European Communities and the European Court of Human Rights. *Id.*

252. Rules of Procedure of the Human Rights Committee, Rule 86, U.N. Doc. CCPR/C/3/Rev.3 (1994).

253. P.R. GHANDHI, THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION—LAW AND PRACTICE 57-58 (1998).

254. *See id.* at 57.

255. *See Pratt and Morgan v. Jamaica*, Communication No. 210/1996 and 225/1987 (1989), *cited in Report of the Human Rights Committee*, U.N. GAOR Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 222, U.N. Doc. No. A/44/40 (1989).

requests and carried out death sentences on those who have filed communications alleging a violation of their human rights.[256] A more chilling development in this regard has been Trinidad and Tobago's denunciation and re-accession to the Optional Protocol with a reservation that removed the ability of the Human Rights Committee to consider communications relating to death row inmates.[257] In November 1999, the Human Rights Committee found this reservation to be incompatible with the object and purpose of the Optional Protocol, and thus decided that a communication concerning a death row prisoner from Trinidad and Tobago was admissible.[258] Trinidad and Tobago have responded to this decision by again denouncing the Optional Protocol, thus removing the ability of the Human Rights Committee to hear any individual complaint from that country.[259]

Requests for provisional measures may also be made in the Inter-American and European human rights systems. In a provision that closely mirrors Article 41 of the Statute of the International Court of Justice and the criteria articulated by the ICJ, the American Convention on Human Rights provides that:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.[260]

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256. *See Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. 1, ¶ 411, U.N. Doc. A/49/40 (1994).

257. Trinidad and Tobago re-acceded to the Optional Protocol but with a reservation, which provided (in part) that:

> Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith.

Declarations and Reservations, as of 8 August 2000, to the Optional Protocol to the International Covenant on Civil and Political Rights, <http://www.unhchr.ch/html/ menu3/b/treaty 6_asp.htm>.

258. *See Decision of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 67th Sess., Annex, ¶ 7, U.N. Doc. No. CCPR/C/67/D/845/1999 (1999).

259. *See* Notice to Denounce the Optional Protocol to the International Covenant on Civil and Political Rights, Minister of Foreign Affairs, Trinidad and Tobago, Mar. 27, 2000, *noted in Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 55th Sess., Supp. No. 40, vol. 1, U.N. Doc. A/55/40 (2000).

260. American Convention on Human Rights, Nov. 22, 1969, art. 63(2), 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

The President of the Court is also authorized to call upon states to adopt emergency provisional measures when the Court is not in session.[261] The Commission has requested that the Court adopt provisional measures in cases where human life has been under threat.[262] In contrast to the Inter-American system, there is no formal article in the European Convention on Human Rights and Fundamental Freedoms that enables the European Court on Human Rights to adopt provisional measures. The Rules of Procedure, however, have incorporated such a provision.[263] As these rules are not included in the European Convention, they are merely procedural and therefore not binding on the parties.[264] The feature that distinguishes provisional measures applied by all three human rights institutions from Article 41 of the Statute of the ICJ is that they are designed to prevent irreparable damage to the rights of persons rather than of states. Thus they offer a more direct and effective method of dealing with the irreparable prejudice that an individual may suffer without relying on diplomatic protection or a finding that the rights of a state are also affected. These procedures, however, were not available to Breard or LaGrand because the United States is not subject to the jurisdiction of the Human Rights Committee pursuant to the Optional Protocol or the Inter-American Court of Human Rights.

V. CONCLUSION

It is unfortunate that the outcome of the orders in the *Vienna Convention Cases*, which generated a great deal of public attention, was not more constructive. The orders have nonetheless had some positive effects on the jurisprudence of the Court. In the context of the *Vienna Convention Cases,* scholars have stated that,

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261. *See* Rules of Procedure of the Inter-American Court of Human Rights, art. 25(4) (entered into force Jan. 1, 1997), Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. C.H.R. 163, OEA/ser. L./V./I.4, doc. rev. 7 (2000).

262. *See* Order of the Inter-American Court of Human Rights August 8, 1990, Provisional Measures Requested by Inter-American Commission on Human Rights Regarding Peru (Bustios-Rojas Case) (last visited Mar. 19, 2001) <http://www1.umn.edu/humanrts/iachr/b112a.htm>. *See also* Thomas Buergenthal, *Interim Measures in the Inter-American Court of Human Rights, in* INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS, *supra*, note 247, at 69, 69.

263. Rule 39(1) provides:

> The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

European Court of Human Rights, Rules of Court (entered into force Nov. 1, 1998) (visited March 6, 2001) <http://www.echr.coe.int>.

264. *See* Cruz Varas v. Sweden, App. No. 15576/89, 14 Eur. Ct. H.R. (ser. A) at 34-35 (1991).

> [w]here the rights of States and those of individuals are inseparable, it would be unwise for the Court to remain inflexible by seeking to address only the rights of States. This would prove unworkable in practice. International human rights law . . . provides the essential link in international law between the State and the individual, the ultimate bottom line in any legal order.[265]

The orders in these two cases demonstrate that the ICJ can respond to human rights under imminent threat, particularly when the most important right, the right to life, is at issue. The efficacy of the Court's ability to protect individual human life can, however, be questioned in light of the execution of both LaGrand and Breard despite the ICJ's orders to the contrary. While delay in implementing an interim protection order may not always result in a state's inability to obtain a remedy under international law, the failure to fulfill an order is irreversible where human life is at stake. Despite the limitations of invoking Article 41 for this purpose, the applications by Paraguay and Germany demonstrate that states are turning to the ICJ to protect human rights, particularly where the Court can assume jurisdiction on the basis of a jurisdictional clause in a treaty. This is, perhaps, not a surprising trend considering many states are not subject to the individual complaint procedures of the international and regional human rights institutions. It can thus be expected that use of Article 41 to protect human rights under threat of irreparable harm will continue in the future.

It is true that as provisional measures orders are prepared under considerable time pressure, "the text of such Orders should not be put under the magnifying glass on the assumption that every word has been weighed with the scholarly care which you might employ if you were writing a paper."[266] The extreme time constraints under which the Court prepared its orders in the *Vienna Convention Cases* certainly adds weight to this comment. If the Court is to retain a credible role in protecting human rights through the implementation of Article 41, however, it needs to clarify the purposes and requirements for a grant of provisional measures in the context of threats to persons rather than to a state. From the Court's jurisprudence it appears that a state may utilize diplomatic protection to protect the lives of its nationals, and that protection may be afforded where the rights of a state are also under threat or where internationally protected rights are involved. The *Vienna Convention Cases* are unusual in that the Court ordered Breard's and LaGrand's lives be temporarily spared without an explicit binding treaty provision protecting their right to life. The two orders leave unanswered whether the Court will discuss the suitability of a stay of execution and new trial as remedies for a breach of Article 36 of the Vienna Convention on the merits of Germany's case.

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265. Addo, *Vienna Convention on Consular Relations, supra* note 125, at 680.
266. Thirlway, *supra* note 147, at 6.

Only future cases will determine whether the Court will expand its rulings in this area. For instance, is it possible for a state to invoke Article 41 to protect human rights where the violation of an *erga omnes* obligation is alleged? Will the Court be able to demonstrate the link between the alleged breach and the threat to the rights of a state party for the purposes of Article 41 in such a case? Additionally, the possibility that states may attempt to utilize Article 41 remains where other human rights, apart from the right to life, are endangered. Such an expansion will depend on whether the Court can assume jurisdiction, and whether a state can demonstrate irreparable prejudice and urgency. Without an amendment to Article 41, these questions remain for future determination by the Court itself. Judge Oda's concern that the Court should not depart from its principal function as a court designed to settle inter-state disputes must be weighed against scholarly comment that the ICJ would be unwise to ignore the link between the rights of states and those of individuals. At present it would appear that the current limitations in implementing the Court's orders combined with the problems in enforcing international human rights law, tell against the use of the provisional measures procedure in the ICJ as a practical method of protecting human life.

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