CR 2000/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Tuesday 14 November 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany* v. *United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le mardi 14 novembre 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	President	Guillaume
	Vice-President	Shi
	Judges	Oda
		Bedjaoui
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
	Registrar	Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Oda
Bedjaoui
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal, juges

M. Couvreur, greffier

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

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The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Le Gouvernement de la République fédérale d'Allemagne est representé par :

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M. Donald Francis Donovan, du cabinet Debevoise & Plimpton, New York,

M. Hans-Peter Kaul, chef de la division du droit international public du ministère fédéral des affaires étrangères,

M. Daniel Khan, de l'Université de Munich,

M. Andreas Paulus, de l'Université de Munich,

comme conseils;

M. Eberhard Desch, du ministère fédéral de la justice,

M. S. Johannes Trommer, de l'ambassade de la République fédérale d'Allemagne aux Pays-Bas,

M. Andreas Götze, du ministère fédéral des affaires étrangères,

comme conseillers;

Mme Fiona Sneddon,

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Le Gouvernement des Etats Unis d'Amérique est representé par :

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comme agent;

Mme Catherine W. Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis d'Amérique,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

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M. Stefan Trechsel, professeur de droit pénal et de procédure pénale à la faculté de droit de l'Université de Zurich,

comme conseils et avocats;

M. Shabtai Rosenne, membre du barreau israélien, membre honoraire de l'*American Society of International Law*, membre de l'Institut de droit international,

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M. Robert J. Erickson, chef principal adjoint à la section des recours de la division du droit pénal du département de la justice des Etats-Unis d'Amérique,

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Mme Jessica R. Holmes, attachée au cabinet du conseiller aux affaires juridiques à l'ambassade des Etats-Unis aux Pays-Bas,

comme conseils.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte, et je donne immédiatement la parole à M. James Thessin, Acting Legal Adviser, United States Department of State.

Mr. THESSIN:

1.1. Thank you, Mr. President. Members of this Court. Learned friends of the Federal Republic of Germany. Ladies and Gentlemen.

1.2. I am honoured to appear as the Agent of the United States. My colleagues and I are here to assist this Court to understand the facts and legal principles that underlie a dispute between the United States and Germany.

1.3. Because this dispute came before this Court in the most gripping of circumstances, when an individual faced imminent execution for murder, it is easy to stray from the central issues of the case before us. But as international lawyers and jurists, we must retain our focus on the fundamental facts and legal principles.

1.4. Allow me to summarize what this case is about and what it is not about. My colleagues will follow with greater detail. With your permission, Mr. President, counsel will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel.

The issues of the case

1.5. This case is about the interpretation and application of the Vienna Convention on Consular Relations and nothing else. While it bears the name *LaGrand Case (Germany* v. *United States of America)*, the case concerns only the dispute between the United States and Germany arising out of the application of the Vienna Convention on Consular Relations. Everything else in the German claims and submissions is outside the jurisdiction of the Court under the Optional Protocol.

1.6. The United States and Germany agree with respect to two central matters in the case. First, we agree that the Consular Convention required the competent authorities to inform Walter and Karl LaGrand without delay that each had a right to have those authorities notify German consular officials of his arrest. And second, we agree that the competent authorities did not inform either of the LaGrands of this right.

1.7. Germany and the United States disagree, on the other hand, on what obligation the United States bears for this breach. The United States believes that this breach has been properly remedied by the appropriate satisfaction it has already given[1].

1.8. First, the United States has acknowledged that its authorities did not inform Walter and Karl LaGrand of their right to consular notification as required by Article 36, paragraph 1 *(b)*, of the Consular Convention. We made this acknowledgment even though the failure was based upon a good faith mistake arising in complex circumstances and in our view created no prejudice.

1.9. Second, the Department of State, on behalf of the United States, has extended its sincere apologies and deep regrets to the Government of Germany for the breach of the United States obligation under Article 36, paragraph 1 *(b)*, in the cases of Karl and Walter LaGrand. I have no hesitation, Mr. President, reiterating that apology here again before this Court.

1.10. Third, the Department has assured Germany that the United States recognizes that compliance with consular notification requirements must be improved and that it is engaged in a comprehensive effort to this end.

1.11. We have the highest interest in improving compliance with the Consular Convention. US nationals travel to every corner of the world. Without a properly functioning international system of consular notification, our consular officials abroad cannot fully perform their functions. Accordingly, our commitment to improve our performance in this area is genuine and continuing.

1.12. To improve our effort, the United States invited Germany in the Note of 18 February 2000 to tell us promptly of any case in which Germany believed that a failure of consular notification may have occurred. Germany did not respond to that Note, but on 26 October it did file with this Court a list of cases it apparently believes involved failures to provide consular notification. Last-minute allegations without opportunity for the United States to review cannot fairly support a conclusion that the United States flagrantly disregards Article 36. In light of the late date on which the Court admitted the new documents, the Court should attach no evidentiary weight to their admission.

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[1]1.8. These steps are described in detail in the first two Documentary Exhibits to the United States Counter-Memorial: the Note of 18 Feb. 2000 from the Department of State to the Embassy of the Federal Republic of Germany (Exhibit 2), and the Report of Investigation, dated 17 Feb. 2000, that was attached to the Note (Exhibit 1).

1.13. Mr. President, this dispute with Germany should have been resolved when the United States took these several steps. As the Court will hear today, this resolution is consistent with the Consular Convention. This resolution is consistent with State practice; and this resolution is consistent with the law of State responsibility. No further reparation by the United States is necessary or appropriate in the circumstances of this case.

1.14. Germany has not done more for its breaches when Germany failed to notify US nationals in a timely way of their consular rights, nor has the United States asked Germany to do more in those cases.

1.15. Germany, on the other hand, has a much more expansive view on what remedy the United States owes for its failure to notify the LaGrands. Germany asks that the Court determine that the executions were wrongful, when Germany does not show that the lack of notification undermined in this case the fairness of these two trials or the full consideration of mitigating factors. Germany asks for guarantees of non-repetition, when Germany itself has less than a perfect record. Germany asks for special rules for death penalty cases, even though the Vienna Convention makes no such distinction.

1.16. In effect, Germany asks this Court to create additional obligations to which the Parties have not agreed. Neither the interests of Germany, nor the interests of the United States, nor the interests of the international community as a whole, are served if this Court accepts Germany's invitation to distort the requirements of the Consular Convention and exaggerate the remedies for its violation.

1.17. We believe a way forward exists for the Court: to determine that the actual dispute between the Parties — the violation of an obligation owed Germany to inform the LaGrands of their right to consular notification — has been resolved by the United States apology and appropriate assurances of non-repetition, making the case in that sense moot. Germany's other claims are speculative and derivative and do not stand on their own.

Issues not before the Court

1.18. This proceeding does not require the Court to address several other matters that Germany spent substantial time discussing yesterday.

1.19. *Criminal systems of States*. As the Court itself has wisely stated, the function of this Court is to resolve international legal disputes between States and "not to act as a court of criminal appeal"[2]. Instead, the Court's role focuses on the interpretation and application of international conventions. Thus, we must not allow Germany to lead us into examining again the competency of counsel, analysing newly manufactured allegations of racial discrimination, and restructuring the United States criminal system.

1.20. The Consular Convention cannot properly be read to dictate to a State how its domestic judicial system is to be structured. Germany, in effect, has invited this Court to create a new international legal obligation, one that would necessarily intrude deeply into the domestic criminal justice system of any State that imposes punishment for any crime, whenever a violation of consular notification occurs. Mr. President, Members of this Court, the German position would involve this Court in legislation, not interpretation, and would require this Court far to exceed its proper judicial role.

1.21. Although we oppose Germany's efforts to expand this case, this is not because we fear such an enquiry. In fact, with the single exception of the violation of the duty to inform the LaGrands, the United States has acted in full accordance with state, federal and international law at all stages of the proceedings, before Arizona courts, before federal courts and before this Court. At the sentencing hearing, advocates for the LaGrands brought forward mitigating facts from their earliest childhood days in Germany. The LaGrands were treated in every manner as if they had been United States citizens, which many officials, and even at least one of the LaGrand brothers, thought was the case. Germany's impact at best on this case would have been cumulative of this exhaustive process. As Judge Oda stated,

> "if consular contact had occurred at the time of Mr. Walter LaGrand's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different"[3].

1.22. Despite Germany's harsh condemnation of the United States legal system in its Memorial and in its oral presentations, and before any need existed to sustain its questionable

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[2]Order of 3 March 1999, *LaGrand Case (Germany* v. *United States)*, para. 25.

[3]*LaGrand Case (Germany* v. *United States of America),* Order of 3 March 1999, declaration of Judge Oda, para. 4.

claims in this Court, the highest authorities of Germany, President Herzog and the Minister of Justice, who surely speak for Germany in the most authoritative way, have paid tribute to the fairness of the procedures involved in the LaGrand case. President Herzog specifically wrote, in the translation provided by Germany: "In no way do I doubt the legitimacy of the conviction nor the fairness of the procedures before the courts of the State of Arizona and the federal courts." The Minister of Justice wrote to similar effect:

> "[N]or are there any doubts about the fact that the proceedings were conducted under the Rule of Law — ultimately leading to the imposition of the death penalty with final and binding effect — before the courts of the State of Arizona and before the Federal Courts."

The LaGrands — to cite the Minister of Justice — committed "dreadful crimes" marked with "particular brutality".

1.23. *Good faith*. Nor is the good faith of the United States properly in doubt. The Report of Investigation (at Exhibit 1) describes in considerable detail the circumstances surrounding the arrest of the LaGrand brothers, including the confusion that existed with respect to their nationalities, and explains the manner in which the violation of the duty to inform took place. In a country of immigrants where most residents trace their roots to other countries, in a country without national identity cards, the United States goes to great lengths to avoid divisions between citizens and non-citizens. Distinguishing citizens from non-citizens is therefore often difficult. The United States delegation, for example, has advocates born in Germany, Poland and Switzerland and another whose ancestors immigrated from Germany; only one of us is not a citizen. The implication that Arizona authorities negligently or deliberately violated the duty to inform the LaGrand brothers is insupportable.

1.24. The US efforts to address the violation in this case to the best of its ability, however, were seriously complicated by the late date at which Germany raised the issue. German Foreign Minister Fischer first raised the possibility of a failure of consular notification with Secretary Albright on 22 February 1999, only two days before the scheduled execution of Karl LaGrand, leaving insufficient time for an investigation of the matter prior to the execution. Similarly, the Application and Request for Provisional Measures before this Court were filed the evening before the scheduled execution of Walter LaGrand. I ask the Court to consider that the

untimely diplomatic contact concerning the failure of consular notification and the untimely filing of the Application in this Court are both directly attributable to the Government of Germany.

1.25. *Capital Punishment.* Although many here have grave reservations about capital punishment, this case is not, as the opinion of the Court[4] and the German Memorial agree[5], a case about capital punishment. International law permits capital punishment when it is duly prescribed for commission of the most serious crimes and carried out by a State in accordance with due process of the law and stringent procedural safeguards, as is the case in the United States. The International Covenant on Civil and Political Rights specifically recognizes this. Some 70 States currently retain and use the death penalty for the most serious crimes. The constituent states of the United States that have chosen to retain the option of capital punishment for the most serious crimes have done so by open and democratic means.

1.26. Most importantly, the Vienna Convention on Consular Relations makes no reference to capital punishment. No reference exists to capital punishment in its extensive preparatory work. No reference exists to capital punishment in the academic writing on the Convention prior to the case Paraguay brought in this Court in 1998. Nor do the provisions of the Convention make any distinction between cases of capital punishment and other criminal cases involving other sentences. Any interpretation of this Convention by this Court in this case, accordingly, should be equally applicable to non-capital cases as well. I have no doubt that the Court will recall that its jurisdiction is limited to the interpretation and application of the Vienna Convention on Consular Relations and does not extend to far-reaching initiatives to litigate the death penalty under the guise of a violation of this Convention.

1.27. Mr. President, Members of this Court, let me introduce the counsel for the United States and summarize briefly the remaining presentations today.

Order of presentation

1.28. Mr. President, I will ask you first to call upon the Honourable Janet Napolitano, the Attorney-General of the State of Arizona, its highest law enforcement official, who is elected by

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[4]Order of 3 March 1999, *LaGrand Case (Germany* v. *United States)*, para. 25.

[5]Memorial, paras. 1.08-1.09.

the people of Arizona. Attorney-General Napolitano will present the significant facts in this case and discuss the speculative and implausible character of the prejudice alleged by Germany.

1.29. We will then ask the Court to hear from Theodor Meron, Charles L. Denison Professor of Law at New York University, currently serving as Counsellor on International Law at the Department of State. Professor Meron will address the competence of the Court in this case.

1.30. Following Professor Meron, we will ask the Court to hear from Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs in the Department of State and Deputy Agent in this proceeding. Ms Brown will address the extensive efforts made by the United States to prevent recurrence of this breach and will analyse the consular notification provisions of the Vienna Convention.

1.31. We will then ask the Court to hear from Mr. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs in the Department of State and Deputy Agent in this case, who will address the relief sought by Germany.

1.32. Following Mr. Mathias, we will ask the Court to hear from Professor Stefan Trechsel of the University of Zurich and long-time member and former President of the European Commission on Human Rights. Professor Trechsel will discuss the nature of the right of the foreign national to be informed of his or her right to notification of a consular official. He will focus on three questions: first, can this right be considered as belonging to the category of human rights; second, regardless of how one defines the right to such consular information, is it a right of defence that is part of the right to a fair trial; and third, if it were such a right (which he will conclude that it is not), what consequences derive and do not derive from breaching this right.

1.33. Following Professor Trechsel, the Court shall hear from Professor Michael Matheson of the Johns Hopkins School of Advanced International Studies, who will address the Court's Order indicating provisional measures in this case and the US response to that Order.

1.34. I thank the Court for its attention. Mr. President, I ask you to call upon Attorney-General Napolitano.

The PRESIDENT: Thank you very much Mr. Thessin. I will now give the floor to the Honourable Janet Napolitano, Attorney-General of the State of Arizona.

Ms NAPOLITANO:

2.1. Mr. President, Members of the Court, it is an honour for me to appear before you today. I am mindful of the fact that it is unprecedented for the United States to invite an official of a state of the United States to assist in representing it before this Court. I deeply appreciate this opportunity, and hope that my comments today will help you in understanding the issues raised by this case.

2.2. I am here today in part because the State of Arizona bore direct responsibility for bringing the LaGrand brothers to justice for the crime of first degree murder and for carrying out the sentence imposed upon them. I am also here today because, while international law attributes to the United States international responsibility for a breach of Article 36 of the Vienna Convention, the breach in this case arose because officials in the State of Arizona did not inform the LaGrand brothers of the right of consular notification once it was known they were German nationals. Thus the US Department of State thought it appropriate, and I agreed, that I should undertake to explain to the Court the essential facts of this case. My plan is first to explain the facts relating to the breach of Article 36, then to review for the Court the criminal proceedings and to finally address the absence of prejudice.

2.3. Let me first, however, say a few words about the context in which this case arose. The Court is aware, that the United States has a federal form of government. A defining characteristic of our federalism that is not always well understood is that our federal government was constituted by individual states joining together and vesting powers — but only specified and limited powers — in the federal government. The states retained to themselves, and to the people, all other powers. One consequence of this is that a state such as Arizona has an autonomous criminal justice system in which the federal government has virtually no role. Thus the murder that the LaGrand brothers committed was prosecuted by Arizona authorities, without any federal government involvement. It was a crime against the people of Arizona, and the LaGrands were charged with murder under the laws of Arizona. The President of the United States, although the Chief Executive Officer of the United States, had no authority to bring the LaGrand brothers to trial for the murder, and had no authority over the administration of the sentence imposed upon them. Only the federal

courts of the United States, as overseers of federal constitutional rights in the United States, had any authority to affect the outcome of the LaGrands' case.

2.4. Within the United States each state also has its own governmental structure, which can be quite different from that of another state. Arizona has 15 counties and a decentralized criminal justice system. In addition to the Arizona Attorney-General, who is a statewide elected official, there exists for each county, a county attorney who is elected by the people of that county. Each county attorney has primary prosecutorial jurisdiction in murder cases. The county attorney is responsible for bringing a defendant to trial and for the sentencing proceeding if the defendant is found guilty. It generally is only after an appeal is filed that my office becomes responsible for a murder case. Consistent with this arrangement, the LaGrands were prosecuted by the County Prosecutor of the Pima County Attorney's Office. My office handled the case on appeal, but the County Prosecutor again represented the State of Arizona in the final clemency hearing. The Governor of Arizona, as the Chief Executive Officer of the State of Arizona, had the responsibility to see to it that the sentences were faithfully carried out. She could commute the sentences through the pardon process, but only if she received a recommendation to do so from the Arizona Board of Executive Clemency.

2.5. It may also be helpful to the Court to know something about the geography and demography of Arizona. Arizona is slightly smaller than Poland, and has roughly the same population as Finland or Denmark. It is bordered on the south by Mexico. The LaGrands were arrested in Tucson, which is about an hour's drive north of Mexico. The site of the bank robbery and murder was a short distance further north and west. Los Angeles, California, where the German consular post responsible for Arizona is located, is about 488 miles from Tucson. Arizona has a very diverse population, including a large number of Hispanics, American Indians, African-Americans, and Asian-Americans as well as Caucasians. This diverse population results in part from our location in the American Southwest and our proximity to Mexico, and from the presence of several military bases in Arizona. Many United States servicemen have started families in other countries, and have been subsequently transferred into Arizona. Their wives or husbands or children are often foreign born, but their children in particular, normally are citizens of the United States. (It was therefore unusual that the LaGrands were not United States citizens,

first, because they were born out of wedlock to United States citizen fathers, and second, because they were adopted by a United States citizen who failed to complete the necessary naturalization procedures.) Because of Arizona's diversity, our law enforcement personnel deal frequently with persons born abroad who are the American citizen children of United States servicemen. Because of concerns about discrimination and equal treatment under the law, and based on the experience of dealing with this diverse population, our law enforcement personnel have learned that they can easily offend American citizens such as these by questioning their nationality.

The facts relevant to the breach of Article 36 (1) *(b)* and to Germany's last-minute intervention in this case are not as Germany has represented them

2.6. With those preliminary remarks, I would like to turn now to the facts relating to the failure of notification in this case. After Germany instituted these proceedings, my office assisted the United States Department of State in investigating the consular notification issue. The results of that investigation are set forth in a lengthy report provided to you and provided to the German Government by the United States in February of this year — it is Exhibit 1 to the Counter-Memorial. Prior to that investigation, there was considerable confusion about the LaGrands' nationality and what was known about it between January 1982, when the LaGrands were arrested, and in June 1992, when the LaGrands established contact with German consular officials in Los Angeles.

2.7. Our investigation showed that the arresting officers thought that Karl and Walter LaGrand were US citizens based on Karl and Walter's representations. The arrest procedures of Pima County included completing an arrest sheet, which required information about the citizenship of the arrested person. The options on the sheet were to check a box indicating US citizenship or to fill in a blank line with the name of the arrestee's country of nationality if not a US citizen. This is Exhibit 1 to the German Memorial. This sheet is filled out with information provided by the arrested person. The arrest sheet for Karl shows clearly — but erroneously — that he was a US citizen. The arrest sheet for Walter does not have the box for US citizen checked, but neither was the line for nationality if not a US citizen filled out. From this, the report concluded that neither brother identified himself as a German national to the arresting officials, and that Karl affirmatively said he was a US citizen. Moreover, at the time of the crime, both brothers wore their

hair in an African-American style and spoke without a hint of a German accent[6]. They looked like Americans, they talked like Americans, their entire demeanour was American.

2.8. We also learned that at least some of the arresting officials knew that the LaGrands' fathers were US servicemen, which simply reinforced their understanding that the LaGrands were US citizens, even though they knew that the brothers had been born in Germany. They would have made this assumption in part based on their experience with the US military population in Arizona. I have since learned that this was a very common misunderstanding about US citizenship law, and that even the US citizen parents of adopted foreign-born children mistakenly think that their adopted children automatically become citizens. In fact, after the brothers were adopted by Masie LaGrand, he apparently thought that his adopted sons were American citizens, because he clearly identified both Walter and Karl as US citizens to the United States Army when he arranged for their travel to Germany in 1974. This is strong evidence that the LaGrands themselves thought that they were or might be US citizens at the time of their arrest. They certainly did nothing to suggest to the arresting officers that a further enquiry into nationality was warranted.

2.9. Our investigation also showed that the LaGrands were initially detained in the Pima County jail, and that those jail officials also apparently thought that the LaGrands were Americans. This is understandable, since they would have had the same information as the arresting officials.

2.10. Our investigation further disclosed, however, that after the LaGrands were transferred from the county jail to an Arizona state prison, state prison officials apparently learned that they were not in fact Americans. We could not determine exactly what they knew, how they knew it, or when they knew it, given the lapse of time. But an official of the state prison wrote to the US Immigration and Naturalization Service in mid-1983 advising the Service that it was possible that the LaGrands were illegal aliens. By late 1984, the prison's records clearly showed that the LaGrands were German. So, the report inferred that the Immigration Service confirmed to the prison that the LaGrands were German. Clearly, the LaGrands should have been asked whether they wanted a German consular official notified of their detention once that information was confirmed. Arizona regrets that proper information was not given to the LaGrands at that time.

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[6]Exhibit 1 to the United States Counter-Memorial submitted to this Court on 27 March 2000, p. 3.

2.11. Thus far I have focused on the arresting and detaining authorities because in the United States they have been considered to be the competent authorities for purposes of Article 36. It is important to know, however, that other people who were not regarded as competent authorities knew, or had access to information showing, that the LaGrands were in fact German nationals.

2.12. After the LaGrands were convicted, the court's sentencing process provided for preparation of what we call a "presentence report". A presentence report is prepared by a court employee after conviction has occurred to assist the court in sentencing. It contains social history and other information relevant to sentencing, as well as information about the crime. I refer the Court to Exhibit 6 to the United States Counter-Memorial, as well as to Annex 2 of the German Memorial. The court employees responsible for drafting the LaGrands' presentence report knew that the LaGrands were German and reflected that information in the report. Those employees, however, had no responsibility for the arrest or detention of the LaGrands and were not acting as lawyers or as sworn peace officers charged with the detention of prisoners. The United States has never considered such officials to be competent authorities responsible for consular notification under the Vienna Convention. Moreover, the arresting and detaining authorities would not have been given the presentence report, and thus would not have known that the presentence report — unlike the arrest sheet — identified the LaGrands as German nationals.

2.13. Importantly, given Germany's protestations that somehow the presentence reports were unavailable, the presentence reports about Karl and Walter were provided not only to the judge, but also to the prosecutor and to the LaGrands' defence counsel. You can see that the defence lawyers had it by looking at Annex MG 5 to the German Memorial, which shows that, during the sentencing hearing held on 12 December 1984, the judge specifically asked the attorneys if they had received copies, and both attorneys replied in the affirmative[7]. Thus it is clear that the prosecutor and the two defence lawyers at least had access to information that the LaGrands were German.

2.14. Walter's own defence lawyer confirmed to us that he knew that Walter was a German national. In contrast, Karl's attorney assumed, as had the Arizona officials who arrested the

[7] Ann. MG 5, p. 419.

LaGrands, that the LaGrands were American citizens. Karl's defence lawyer knew that Karl had been born in Germany, but also knew the LaGrands' fathers were American servicemen and was himself a US military dependant. In any event, both defence lawyers knew that the brothers had lived in Germany for a few early years.

2.15. I understand that Germany contends that it was misled about when Arizona officials knew that the LaGrands were German. It has alleged that it learned only at the clemency hearing for Karl LaGrand on 23 February 1999, that the LaGrands' German nationality was known to Arizona from the beginning. While the LaGrands themselves bear some responsibility for causing confusion, the fact is that their nationality was known to the state and to the defence counsel and to the judge prior to sentencing. Germany has confused the question of when Arizona arresting and detaining authorities knew with the question when the LaGrands' lawyers and the prosecutor knew.

2.16. Germany tried to emphasize that it only learned of the extent of the alleged breach at the clemency hearing when the prosecutor for the Pima County Attorney's Office, the office that originally charged and prosecuted the LaGrands, said that it was well known before the LaGrands were tried that they were German. If the Court listens carefully to the context of the prosecutor's remarks, the Court will see that he was responding to assertions made at the hearing that, if consular notification had occurred, German consular officials could have obtained mitigation evidence from Germany that could have resulted in the LaGrands receiving a sentence of life imprisonment. The prosecutor's point was that the LaGrands' own defence counsel were fully aware that the LaGrands had been born and lived the first few years of their lives in Germany. The LaGrands' own defence counsel could have sought mitigation evidence from Germany regardless of any consular assistance. Arizona's failure to inform the LaGrands that they could request consular assistance thus in no way precluded their obtaining evidence from Germany to present as part of their defence, as indeed they did.

2.17. The availability of the presentence report to the defence lawyers also demonstrates that the LaGrands could have raised the breach of Article 36 as a defence in the LaGrands' criminal proceedings, if they had thought this was an important legal issue. More importantly, however, it shows that there is no justification for Germany's own delay in raising the consular notification issue since it admits, as it must, that it also knew of the LaGrands' situation by 1992, seven years

before it instituted these proceedings. If it had been seriously interested in understanding what information was considered in sentencing the LaGrands, Germany could have received the presentence reports at any time after 1992 simply by asking the LaGrands' lawyers for them, or asking the State of Arizona or asking the United States Department of State. Germany's reference yesterday that the presentence report was under seal is misleading. The Court can see from page 1009 of the German Memorial that the presentence reports had become public at least by March 1993, when Karl LaGrand filed them in the federal district court as part of his effort to have his conviction and sentence overturned[8]. If Germany had been reasonably diligent, it would not have been surprised by the remarks at the clemency hearing by the County Prosecutor, who was absolutely correct in advising that the failure to inform the LaGrands about the possibility of consular notification was in no way an obstacle to their presenting evidence from Germany at their mitigation hearing. Any implication that Germany could not have had access to the presentence report prior to the date of the clemency hearing is simply wrong.

2.18. I would also like to assure the Court that considerable steps have been taken by Arizona since 1992 regarding consular notification. Even before this case came to the forefront, the Governor of Arizona and my predecessor in office had taken numerous steps to ensure that all competent officials in Arizona understand and comply with the consular obligations of the United States. In doing so, we have worked closely with the United States Department of State to ensure that our guidance is consistent with the requirements of both the Vienna Convention and the many bilateral treaties to which the United States is a party.

2.19. All Arizona county attorneys, who are responsible for prosecutions, have been reminded in writing of these requirements as have all heads of the various police agencies in Arizona. Local police departments, which are responsible for arrests, have adopted orders on consular notification. The Arizona Department of Corrections, which is responsible for post-conviction detentions and some pretrial detentions, now has guidance on consular notification and has compiled and distributed to all corrections facilities a list of consular offices in the United States in or nearest to Arizona. This of course includes the German consulate in Los Angeles,

[8] Ann. MG 46.

California, which serves Arizona. Our Department of Corrections has adopted procedures that require that the citizenship of all detained inmates be determined and that information about consular assistance be given to all foreign-born inmates, even though some may be United States citizens. My predecessor in office wrote to the Chief Justice of the Arizona Supreme Court to seek a change in the rules of the courts of Arizona that will also help ensure compliance. We have conducted and will conduct numerous training sessions, which are supplemented by training sessions conducted by the United States Department of State officials in various Arizona locations and by wide distribution within Arizona of the Department of State's written guidance on consular notification. I can state unequivocally that the State of Arizona is fully committed to this effort and has been since long before the present case was filed.

The LaGrands received all of the due process protections necessary to ensure that they received a fair trial

2.20. I would now like to turn to the actual criminal proceedings and to Germany's two claims related to those proceedings. The first is that, because the LaGrands were not informed that they could request consular notification, there should have been a subsequent opportunity to alter the outcome of their criminal proceedings. The second is the claim that, if the LaGrands had been informed of their right to consular notification on a timely basis, the outcome of the proceedings would in fact have been different. I submit to the Court that neither of these propositions is correct.

2.21. The LaGrands were tried, as I have said, by the State of Arizona under the laws of Arizona. The LaGrands were afforded the full set of procedural and substantive safeguards pertaining to criminal trials regarding capital punishment in the State of Arizona. These include the protections of what Americans call the "Bill of Rights", which consists of the first ten Amendments to the Constitution of the United States and which in the criminal context establish rights afforded to all individuals in the United States, whether they are citizens or not. The time available to me today is insufficient to review all of the safeguards that applied, but I would like to review those that were especially relevant to the trial of Walter and Karl LaGrand.

2.22. First, the LaGrands were guaranteed the right to be tried before a fair and impartial tribunal under the Fifth and Fourteenth Amendments to the United States Constitution[9]. There is no dispute in this case that both the jury and the judge were fair and impartial.

2.23. Second, under Arizona and federal law, the LaGrands were guaranteed that they would not be discriminated against because of their race, ethnicity, gender, or national origin[10]. There is no evidence and no allegation whatsoever that the LaGrands were discriminated against. They certainly were not discriminated against because they were German nationals.

2.24. Third, the LaGrands were entitled under the Fifth Amendment to the United States Constitution to remain silent and not to give any statement to police or other officials. These rights were fully respected[11].

2.25. Fourth, under the Sixth Amendment to the United States Constitution, the LaGrands were also entitled to be informed of the charges against them; to have a public trial by a jury; and to have adequate time and opportunity to prepare their defence and to consult with legal counsel[12]. Again all of these rights were accorded the LaGrands.

2.26. The Sixth Amendment also guarantees the right to counsel. Yesterday, Germany emphasized that, if the LaGrands had received notice of right to consular notification, Germany would have assisted them in obtaining better counsel, and this could have changed the result. This contention does not withstand analysis. The question whether the LaGrands' lawyers provided adequate representation was one that the LaGrands were entitled to raise in the course of appealing their convictions. Walter chose not to raise the claim in his initial appeals, although Karl did. The courts of Arizona and of the United States both concluded that the LaGrands' right to effective legal representation had not been violated[13]. Germany has somewhat grudgingly conceded this in Walter's case, and has apparently accepted that Walter's attorney could not be faulted. Germany

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[9] *Delaware* v. *Van Arsdall*, 475 US 673 (1986).

[10] *Craig* v. *Boren*, 429 US 190 (1976); *Loving* v. *Virginia*, 388 US 1 (1967); *Bolling* v. *Sharpe*, and 347 US 497 (1954); *Korematsu* v. *United States*, 323 US 214 (1944); *Yick Wo* v. *Hopkins*, 118 US 356 (1886).

[11] *Tague* v. *Louisiana*, 444 US 469 (1980); *North Carolina* v. *Butler*, 441 US 369 (1979); *Miranda* v. *Arizona*, 384 US 436 (1966); *US* v. *Garibay*, 143 F.3d 534 (9th Cir. 1998).

[12] *County of Riverside* v. *McLaughlin*, 500 US 44 (1991); *Jones* v. *Barnes*, 463 US 745 (1983); *Duncan* v. *Louisiana*, 391 US 145 (1968); *Gideon* v. *Wainwright*, 372 US 335 (1963); *Glasser* v. *United States*, 315 US 60 (1942).

[13] Ann. MG 4 and MG 10.

has, however, disparaged the work of Karl's attorney. The Arizona Supreme Court thoroughly reviewed all aspects of Karl's ineffective assistance of counsel claim and correctly rejected it. The Supreme Court was mindful that Karl was tried together with Walter and Walter's attorney conducted thorough and aggressive cross-examination of the witnesses. The Court found that the decision not to pursue an insanity defence was reasonable given that it would have opened Karl's juvenile court record to scrutiny. Karl's counsel argued impulsivity, the only other suggested defence, in his closing remarks and during sentencing. Thus, the Court could not identify any prejudice to Karl by virtue of his counsel's decisions[14].

2.27. Accordingly, Germany is on very thin ground here. It insists that it is not seeking to make this Court a court of criminal appeal, yet, clearly, it would have this Court believe that Karl LaGrand's defence lawyer was somehow incompetent and that a different lawyer might have achieved a different result. Only hindsight and wishful thinking sustain Germany's assertion that inadequate counsel led to Karl being sentenced to death. The clearest proof of this, of course, is that Walter also was sentenced to death notwithstanding the efforts of his lawyer, whom Germany has not criticized in a similar way.

2.28. Returning to the rights accorded to the LaGrands as criminal defendants, they had a right to the assistance of investigators and experts, if they could show a particularized need for such assistance[15]. In addition, if the LaGrands had not understood English, they would have been entitled to be assisted by an interpreter[16]. No interpreter was needed, however. As the Court can hear for itself on the videotapes, the LaGrands spoke perfect English.

2.29. Finally, because the prosecutor sought the death penalty, the LaGrands were entitled to additional protections designed to guard against the possibility that capital punishment might be imposed capriciously, arbitrarily, or disproportionately. For example, automatic appellate review of the conviction as well as the sentence was required[17]. Consistent with this requirement, the

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[14]Ann. MG 4, pp. 306, 307.

[15]*Ake* v. *Oklahoma*, 470 US 68 (1985); *State* v. *Dickens*, 926 P.2d 468 (1996); A.R.S., paras. 13-4013 *(a)*.

[16]*State* v. *Hansen*, 705 P.2d 466 (Ct. App. 1985).

[17]*State* v. *Brewer*, 826 P.2d 783 (1992).

LaGrands' convictions and sentences were reviewed on appeal by the Arizona Supreme Court, which was one of only many courts that reviewed the fairness of the trial.

2.30. The LaGrands also were entitled to seek executive clemency, including commutation of their sentences[18]. The LaGrands exercised this right, and Germany has provided the Court with copies of the official videotapes made of the clemency proceedings. Those tapes show an intense review of all of the factors that led to the original sentence: the gravity of the crime, the devastating impact it had on the surviving victim, the LaGrands' difficult childhood, and their remorse. Ultimately, the clemency board decided that a sentencing judge's balancing of these factors should be left undisturbed, and that the sentences should not be commuted.

2.31. If any of the fundamental rights I have enumerated — or if any other fundamental rights guaranteed to the LaGrands — had been violated, the judicial remedies available to the LaGrands could have led to a new trial or sentencing hearing. In fact, numerous courts reviewed their convictions and sentences at their behest over a 15-year period and concluded that the convictions and sentences should not be disturbed. The LaGrands first had an appeal as of right to the Arizona Supreme Court, which is made up of five justices, all of whom come from different backgrounds. The opinions that resulted from that appeal are before this Court as exhibits to Germany's Memorial[19]. The opinions show that the brothers raised many issues. The State Supreme Court independently examined, for example, the admissibility of the statements made by Karl. It examined the instructions given to the jury, it examined whether it was appropriate to excuse from the jury someone opposed to capital punishment. It examined whether imposition of capital punishment was consistent with applicable legal requirements. It examined whether Karl had adequate legal counsel: and it examined a number of other technical issues.

2.32. The Arizona Supreme Court on direct appeal did not examine whether the failure to inform the LaGrands that they could request consular assistance was relevant to the trial, because neither brother raised the issue. The Supreme Court examined all the mitigating evidence Germany insists was omitted, including the LaGrands' difficult upbringing. In fact, the Arizona Supreme Court decision specifically found that the trial court judge also considered mitigating evidence, as

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[18] *Gregg* v. *Georgia*, 428 US 153 (1976); *State* v. *Richmond*, 560 P.2d 41 (1976).

[19] Anns. MG 3 and MG 4, both 30 Jan. 1987.

pointed out in the opinion where the court states and I quote: "[t]he trial judge found three mitigating factors: defendants' ages (Walter was 19 and Karl was 18 at the time of the killing), their prior home lives, and their remorse"[20]. The Supreme Court noted that the trial judge did not find these mitigating factors sufficient to outweigh the aggravating circumstances. The Supreme Court then went on to also independently find that the mitigating factors were not sufficient to warrant leniency. The court stated: "In addition to noting defendants' relatively young ages, we have reviewed histories of their upbringing . . ."[21] Thus the very evidence that Germany claims it would have provided to the Court, was in fact actually presented to the court. The Supreme Court nonetheless concluded, "these mitigating factors do not outweigh the existing aggravating circumstances and thus do not warrant leniency"[22]. The aggravating circumstances to which the court referred were the especially cruel, heinous and depraved nature of the LaGrands' conduct, the fact that the brothers had a prior felony conviction involving a violent offence, and that the murder was committed for pecuniary gain. Remember, this was a bank robbery during which the LaGrands stabbed a 63-year old bank manager 24 times with a letter opener until he died. They also stabbed a bank teller multiple times, though she lived to testify against them. No additional evidence that Germany would have provided would have changed these facts or the nature of the mitigation that the court considered.

2.33. The LaGrands asked the United States Supreme Court to review the Arizona Supreme Court's decision. This was a discretionary appeal, and the Supreme Court declined to take the case[23]. Such a decision by our United States Supreme Court generally indicates that it has concluded, based on the defendants' request for review, that no substantial federal issue warranting its review was presented.

2.34. Having thus exhausted their direct appeals, the LaGrands were entitled to seek post-appellate relief by collaterally attacking the validity of their convictions and sentences in both the state and the federal courts. They first initiated such proceedings in the state courts. In 1989

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[20]Ann. MG 3, pp. 293, 299, 300.

[21]Ann. MG 3, pp. 293, 301.

[22]Ann. MG 3, pp. 293, 301.

[23]Ann. MG 7, 5 Oct. 1987.

the Arizona lower court denied post-conviction relief, and in 1990, the Arizona Supreme Court affirmed that decision. In June 1991, the United States Supreme Court again declined to review those decisions. In this proceeding, which was the first request for collateral review in the Arizona state courts, the LaGrands raised a number of issues, but they again did not raise the issue of consular notification.

2.35. The LaGrands next exercised their right to seek *habeas corpus* review of the legality of their detention by the federal courts. This process allows them to raise directly in a federal trial court any claims they had of violations of the United States Constitution or other provisions of federal law. They began this process in March 1993 by seeking review in the United States District Court for the District of Arizona[24]. It was in the District Court that the LaGrands, for the first time, sought to raise a claim relating to the failure of consular notification. That court issued two decisions on different aspects of the state court proceedings[25]; the 24 January opinion deals with the consular notification issue. The court noted that the issue could be raised only if the LaGrands could show cause for the default and prejudice. Otherwise, review was precluded by the failure of the LaGrands to raise the issue in the prior state court proceedings.

2.36. Germany has been critical of the procedural default rule. This is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal *habeas corpus* proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.

2.37. The federal court found that the LaGrands had failed to meet this requirement of showing an objective external factor that prevented them from raising the issue earlier, and therefore it was not necessary to reach the question of prejudice[26]. While the court did not discuss this issue at length, I would offer the observation that defence counsel are generally expected to

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[24]Ann. MG 46.

[25]Anns. MG 8 and 9, 24 Jan. 1995 and 16 Feb. 1995.

[26]Ann. MG 8, pp. 456 and 458.

know the rights that are relevant to the defence of their clients. I would also note that nothing impeded the LaGrands' defence lawyers from seeking assistance from the German Government, or other sources in Germany, if they had thought that doing so would be useful, or from exploring whether there was any obligation to inform Germany of the arrests.

2.38. The decisions of the United States District Court were reviewed by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit consolidated the appeals and issued its decision on 16 January 1998[27]. It found no merit to the LaGrands' claims. It looked closely at the question whether the LaGrands should be permitted at this late stage to raise the consular notification issue. The court noted that the claim was procedurally defaulted for lack of a showing of cause and prejudice. Nevertheless, the court stated that, "[l]acking cause and prejudice, we may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of one who is actually innocent"[28]. I invite this Court to read the Ninth Circuit's discussion of this issue, which is on page 483 of Volume II of Germany's Memorial.

2.39. As the Ninth Circuit's opinion indicates, the procedural default rule is not so rigid or so absolute that it would allow for a miscarriage of justice. As is so often the case, to reach its conclusion, the court looked at the underlying arguments that the LaGrands were presenting. One could say that the court peeked behind the veil and decided that there was not enough behind the veil to warrant opening it all the way. It is clear from the Ninth Circuit's discussion that the court was aware that the LaGrands came from a mixed marriage and a troubled childhood. The court held, however, that even given that mitigation evidence, the crime the LaGrands committed and the way they committed it made them eligible for the death penalty. Thus there was no miscarriage of justice. The United States Supreme Court again declined to review this decision in December 1998[29].

2.40. Thus the United States Supreme Court's December 1998 decision was the final step in three separate proceedings that provided the LaGrands a full and fair opportunity to challenge their convictions and sentences. The first, of course, was the direct appeal from the state trial court to

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[27] Ann. MG 10.

[28] Ann. MG 10, p. 483.

[29] Ann. MG 11.

the state Supreme Court and then to the US Supreme Court. The second was the collateral review of the state conviction by the Arizona state courts, and the third was the collateral review of the state conviction by the federal courts. Thus, over the course of 15 years, this matter went through these three separate intense reviews and the case was decided against the LaGrands in all three proceedings.

2.41. When all is said and done, the LaGrands' case was reviewed by a total of 15 different independent judges or justices on four different courts beyond the state trial court. When that process was completed, however, the State of Arizona still could not implement the sentence until specifically authorized by the Arizona Supreme Court. On 15 January 1999, the Supreme Court of Arizona issued warrants for carrying out the sentence of death originally imposed on Walter and Karl LaGrand in December 1984. It set Karl's execution for 24 February 1999 and Walter's for 3 March 1999. The warrant for Walter's execution is before the court as Annex MG 13. The warrants allow Arizona to set the time for the executions. In each case, if the execution had not occurred within 24 hours of the time set, the warrants would have expired, and a considerable period of time would have elapsed before a new date could be obtained from the Arizona Supreme Court.

2.42. The issuance of the warrant precipitated a number of events. At the political level, in early February, German government officials appealed to President Clinton, to Secretary of State Albright, and to the Governor of Arizona, asking to have the death sentences commuted to life imprisonment on humanitarian grounds. At that time, the German Government did not ask that the sentences be commuted because of consular notification issues. In fact, the letters made clear that Germany agreed that the LaGrands had received a fair trial. The LaGrands also returned again to the Arizona state courts, on 2 February 1999, and to the federal courts for relief. In the state court they sought to raise a number of issues, including the notification claim.

2.43. On the legal front, one of the aspects of our judicial system, which is criticized by some and praised by others, is that even after the 15 years of extensive appeals that I have described it was still possible for the LaGrands to seek a last-minute relief from the state and federal courts, and they did so. In a decision issued 23 February 1999, the state court ruled in Karl's case that the

consular notification claim was procedurally defaulted[30]. The federal appeals court issued another decision on 24 February, in which it also said that the consular notification claim was defaulted[31]. Various issues were then raised with the US Supreme Court, which finally permitted Karl LaGrand's execution to occur that evening[32].

2.44. A similar sequence of events occurred at the last minute in Walter's case. In addition, on the very day scheduled for Walter's execution — 3 March — Germany attempted to file suit against the United States in the United States Supreme Court to block the execution, based on the Provisional Measures Order of this Court. Such a suit is one of a very limited number of kinds of cases that can be filed originally in the Supreme Court without first having been filed in the lower courts. They are extraordinarily rare, and the Court does not accept them readily in part because its primary function is to review questions of law, not to make findings of fact which may require time-consuming fact-finding proceedings. For reasons explained by the Supreme Court in the opinion before you as Annex MG 32, the Court declined to permit the suit to be filed given its last-minute nature. None of the state or federal courts that considered the LaGrands' claims in February and March 1999 found a legal basis to stay the executions.

2.45. Independent of any legal bar, the LaGrands also had the opportunity to seek the stay of their execution or commutation of their sentence through the clemency process established by the State of Arizona. As I have previously noted, the Court can observe that process by watching the videotapes submitted by Germany. On 23 February 1999, the Arizona Board of Executive Clemency met to consider a commutation of sentence for Karl LaGrand. On that same day, at the conclusion of the hearing, and by a majority vote, the Board did not recommend a commutation for Karl LaGrand. This meant that the Governor of Arizona had no option to grant clemency.

2.46. On 2 March 1990, the Arizona Board of Executive Clemency met to consider the case of Walter LaGrand. The Board again recommended against a commutation of sentence. Towards the end of the clemency hearing, however, word of Germany's Application and Request for Provisional Measures reached the Board. In these rushed circumstances, it recommended to the

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[30]Ann. MG 24.

[31]Ann. MG 21.

[32]Ann. MG 23.

Governor a 60-day reprieve. Notwithstanding this recommendation, the Governor decided that the execution should go forward. Her statement about her decision is before you as Annex MG 33. The Court will note that the Governor's statement is dated 2 March, although Walter's execution was set for and occurred on 3 March. This is because the Board recommendation was made on 2 March and, in the interest of justice and to bring certainty to both the victims and to the defendant, she issued her decision in a timely fashion rather than wait until the last minute.

2.47. The decision whether to grant a reprieve or clemency is a very personal one, and I would not purport to describe the Governor's thinking on this issue beyond referring to her statement. I would note, however, that the Board's failure to recommend clemency indicated that it believed that the sentence should not be disturbed. In addition, the people of Arizona had given the LaGrand brothers a fair trial, three separate appellate processes, and an enormous amount of due process. During that time, the victims of their brutal murder had waited patiently. The Governor knew that the victims and the prosecutor continued to support the sentence of capital punishment, and she was required by law to consider the victims' views[33]. She had no reason to think that the failure to inform the LaGrand brothers that they could request consular assistance was in any way relevant to the outcome of these long proceedings. She knew that the LaGrands had presented evidence of their troubled childhoods, including their brief years in Germany, to the original sentencing judge. She knew that the LaGrands had been given all of the rights that an American citizen would have been given. And she was aware of the United States Department of State's interpretation of the Provisional Measures Order, which Professor Matheson will address later. It is fair to say, then, understanding that there was no legal impediment to the execution and that the Clemency Board had recommended against commutation, she concluded that the equities weighed in favour of proceeding.

Germany's claim that the outcome would have been different if the LaGrands had been informed of the right to have German consular officials notified of their detention is speculative and demonstrably unfounded

2.48. I would like now to turn in more detail to Germany's claim that, if the LaGrands had been informed in 1982, 1983, or 1984 that they could have German consular officials notified of

[33] Arizona Revised Statutes, paras. 13-4401 *et seq.*

their arrest and detention, the outcome of their sentencing proceeding would have been different. I respectfully submit that, in fact, the outcome would have been the same, for any number of reasons.

2.49. First, it is clear that the LaGrands were not strangers in Arizona unfamiliar with the language or culture of their surroundings or with the Arizona legal system. They were well-established in Arizona and in the United States. Their family ties were all in the United States. Their mother, their sister (who testified on their behalf), their girlfriends, and their friends, were all in the United States. They understood the American system of justice. They spoke English with the fluency of native-born Americans. They looked like Americans. Their demeanour was American. It is inconceivable that they were disadvantaged in any way as they went through the criminal justice process by the fact that they were German nationals. Indeed, as I have already noted, one of the brothers even identified himself as a United States citizen at the time of his arrest, and neither identified himself as German although given the opportunity to do so. It appears that the LaGrands themselves thought that they might have acquired United States citizenship as a result of having been adopted by a United States serviceman.

2.50. Second, there is every reason to think that the LaGrands would not have requested consular notification if they had been informed that they could do so. By 1982, the LaGrands had had virtually no contact with the German Government for 15 years. They had never been documented as German nationals after being included in their mother's German passport in 1967. They had made one trip back to Germany after 1967, for about six months, but that was done on US military travel orders, and they lived in United States military housing while there. All indications are that they lived in Germany as Americans and did not even retain an ability to speak German. Contrary to the suggestion made yesterday that both LaGrands availed themselves of consular assistance, Walter LaGrand refused consular visits from a German consular officer on at least two occasions.

2.51. Finally, even if the LaGrands had requested consular assistance prior to their sentencing hearing, Germany has not shown that it would have provided any significant assistance that would have affected the outcome. When German consular officials learned in 1992, that the LaGrands were imprisoned in Arizona, they themselves were uncertain whether the LaGrands were German or American and apparently refrained from providing consular services until the LaGrands'

German nationality could be confirmed. It is interesting to note that, like the officials of the Arizona state prison, the German Government wrote to the US Immigration and Naturalization Service to confirm whether the LaGrands were American or German. Even after the German Government was approached by Karl LaGrand's attorney, the German Government did not understand the legal significance of their German nationality. In a letter dated 17 March 1993, which we submitted to this Court this morning as part of our supplemental submissions, the German Government stated that it "would be interested in knowing . . . why their German citizenship is crucial to your defence". This letter is Tab 5 of the Supplemental Submissions. The process of confirming the LaGrands' nationality took the German officials six months. It is, therefore, highly probable that the process of confirming the LaGrands' nationality would not have been completed in time for any consular assistance to have been provided prior to sentencing.

2.52. In an attempt to show the level of consular services provided to its nationals who were arrested abroad, Germany filed with this Court Germany's Consular Instructions from 1975. Nowhere do these instructions state that Germany will take any significant steps on behalf of a defendant who is already represented by counsel, as the LaGrands were. At best, the instructions indicate that Germany might have loaned money to the LaGrands for purposes of their defence, but even this is not clear. Moreover, a piece of paper containing written instructions does not constitute evidence that those instructions were followed or how they were followed by the Los Angeles Consulate General in 1982, 1983 or1984.

2.53. In a further attempt to show their level of consular services, Germany has called the Court's attention to the case of two other German brothers who are on death row in Arizona. The Apelt brothers were arrested in January 1989, and by March 1989, German officials had made contact with the Apelt brothers, well before their trial, which occurred one year later. German consular officials had an opportunity to assist the Apelts prior to their trial. Yesterday, Germany suggested that it would have hired better lawyers for the LaGrands had it known earlier of their situation. In contrast to this speculative hindsight, Germany, when given the opportunity, did nothing and allowed the Apelts to be defended by lawyers provided by the state of Arizona. One of those lawyers has provided a declaration which is before the Court as Tab 6 of the Supplemental Submissions. He advised us that German consular officials did not assist the defence lawyers in

preparation of the Apelts' defence. Rather, the consular officials asked only to be kept informed of the course of the proceedings. These facts, too, refute Germany's claim. If minimal services were provided to two German nationals facing capital punishment in 1989, there is even less reason to think that significant assistance would have been provided in 1982 to 1984; and the imposition of capital punishment in the Apelt cases further undermines Germany's suggestion that consular notification would have changed the outcome in the earlier LaGrand cases.

2.54. It is fanciful to think that the evidence of an unhappy childhood in Germany, that Germany has claimed would have resulted in the LaGrands' receiving a life sentence, would have had any effect. That evidence relates to just the first three to five years of the LaGrands' lives. It is true that the evidence shows that those years were troubled. It is also true that under the laws of Arizona evidence of a troubled childhood is the kind of evidence that can be offered as mitigation in a criminal proceeding. In this case, however, there was also ample evidence available to the defence that the LaGrands had lived equally, if not more, troubled lives in the United States. They had, in fact, lived the majority of their lives in the United States by the time of their trial, and it is unlikely that any defence lawyer would have considered it necessary to reach back to their brief lives in Germany to find more evidence of a troubled childhood than was already available.

2.55. This is particularly true because the available evidence included substantially the same kind of evidence about the LaGrands' childhood in Germany as Germany has proffered. At the sentencing hearing, psychologists who testified for the LaGrands noted that their childhood was difficult even in Germany, where they came from an interracial marriage and had been placed in a foster home. One of the psychiatrists who testified at the Aggravation-Mitigation hearing specifically told the trial court:

> "Germany isn't exactly like France or Italy or Spain. They're colour conscious, and they — they don't look very kindly at interracial marriages, and this affects the marriage and affects the children, interpersonal relationships of the children with the German kids in Germany and would affect adversely on the LaGrand children."[34]

The presentence report notes that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or lack of education"[35]. An

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[34]Ann. MG 5, p. 355.

[35]Ann. MG 1.

additional portion of the presentence report submitted by the United States also states clearly that the LaGrands had been placed in a convent in Germany by their mother because their mother could not care for them[36]. In sentencing the LaGrands, the trial judge took this into account. Every appellate court that discussed this issue noted that information about the LaGrands' troubled childhood, including the facts that they were in foster care in Germany and potentially discriminated against in Germany because they were multiracial, was available at the time of their trial and their sentencing. Thus, the evidence proffered by Germany is, at best, cumulative to that which was available in the United States and to the information that was in fact known to the sentencing judge.

2.56. Moreover, that evidence would simply have been weighed, as I have stated, along with other mitigating evidence, against the evidence offered by the County Prosecutor in support of its request for capital punishment. I do not wish to burden this Court again with a detailed account of the circumstances of the murder committed by the LaGrand brothers. You will find that evidence recounted in the court opinions before you. You may also obtain a flavour of the evidence offered at trial by watching the videotapes of the clemency hearing that Germany has submitted to this Court. Those tapes show that a critical witness against the LaGrands was a young woman who, at the age of 20, had seen her 63 year-old colleague brutally murdered and who had almost been murdered herself. Even in 1999 — 17 years later — this woman's terror and distress were palpable. Given the horrific circumstances of the crime the LaGrands had committed, and the eyewitness testimony of this young woman, the decision to impose capital punishment would not have been changed by the kind of mitigation evidence that Germany has proffered.

2.57. Before closing, I would like, as a prosecutor, to make a few general observations. Although I am not an expert in international law, I do bear responsibility for enforcement of the criminal laws enacted by a freely-elected legislature in a representative democracy. As we consider the issues of this case, which is not about capital punishment, but about the relationship between the criminal justice system of a country and the obligation of consular notification, it is important to remember that a horrible murder was committed simply because two men were

[36]Exhibit 6 to United States Counter-Memorial.

frustrated when they tried to rob a bank, and to remember the stake society has in protecting itself from violent crime and in making sure that perpetrators of violent crime are brought to justice. Whether or not the LaGrands were told they could contact German consular officials bears no necessary relationship to the fundamental questions of whether they had adequate assistance of counsel, understood the proceedings against them, and received a fair trial. With hindsight, it is always possible to think of something more that might have been done. But in this case, there should be no doubt that the LaGrands received a fair trial with all appropriate procedural and substantive protection, and that they received all of the protection that an American citizen would have received. It is fanciful to think that the outcome of the proceedings would have been different if the LaGrands had been informed promptly that they could have German consular officials notified of their detention. Certainly this Court should find no reason to conclude that the United States is deficient in applying a rule of procedural default to a claim raised so long after the trial and so remote from the question of guilt or sentencing.

2.58. Mr. President, Members of the Court, this concludes my presentation. I thank you for this opportunity to address you here today. I hope that I have been of some guidance in understanding the facts surrounding this case. I now invite you to hear from Professor Meron.

Le PRESIDENT : Je vous remercie. May I ask Professor Meron if he wishes to take the floor now, or if you prefer your exposé to be cut into two parts.

Mr. MERON: Mr. President, I shall be delighted to take a break right now.

The PRESIDENT: I shall defer to your wish.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise, and I now give the floor to Professor Theodor Meron.

Mr. MERON: Mr. President, distinguished Court,

3.1. I have the pleasure and the honour to address the Court this morning. My task is to discuss the jurisdiction of the Court which, as the Application instituting these proceedings itself

clearly states, rests exclusively on the Optional Protocol to the Consular Convention. This jurisdiction is limited to disputes arising out of the interpretation or application of this Convention and nothing else.

3.2. May I start on a personal note. For me, this case is about a breach of State-to-State obligations and has nothing to do with human rights or with due process. It is for these reasons that, as a human rights scholar, I feel comfortable — perfectly comfortable — in arguing this case this morning for my government.

3.3. Allow me first to describe how I shall proceed. I will discuss the nature of the dispute and the obligation of Germany to demonstrate that its claims and submissions involve the interpretation or application of the Consular Convention. I will next demonstrate that Germany, and only Germany, has the burden of establishing that its claims are well founded in fact and law. I will then argue that the Optional Protocol does not confer on the Court jurisdiction over the exercise of diplomatic protection and that, even if the Court has jurisdiction based on diplomatic protection or on individual rights, in the present case such claims are inadmissible for failure to exhaust local remedies. I will then explain the role of LaGrands' lawyers and emphasize that it does not excuse non-exhaustion of local remedies and that international law regards a defendant and his or her lawyer as one entity for purposes of local remedies. Finally, I will show that Germany is invoking against the United States standards which it does not follow in its own national practice and explain why this should have an adverse impact on the question whether this Court should consider the German claims and on the merits of those claims.

The jurisdiction of the Court is limited by the terms of the Optional Protocol and the Consular Convention

3.4. The German Memorial recognizes "the prima facie nature of findings on jurisdiction and admissibility within a procedure on Provisional Measures"[37]. While not contesting the Court's jurisdiction under the Optional Protocol to enter a judgment regarding breach of the duty of notification, the Counter-Memorial reserves the right of the United States to challenge the jurisdiction and admissibility of the remaining claims of Germany[38]. The position with regard to

[37]Memorial of the Federal Republic of Germany, paras. 3.12, 3.78.

[38]Counter-Memorial of the United States of America, para. 48.

the competence of the Court over such claims is thus wide open. As Professor Rosenne wrote, "the Court can deal with questions of jurisdiction in the course of determining the merits"[39]. The distinguished counsel for Germany, Mr. Khan, referred yesterday to a statement by Professor Rosenne concerning time-limits on objections to jurisdiction. I refer the Court to page 843 of Rosenne's book where he makes it clear, in a passage which Mr. Khan did not cite, that those limits concern exclusively cases where the object is to prevent any further pleading on the merits of the case, and thus to terminate the proceedings. This was not the position here, of course. Rosenne continues, "Other matters relating to jurisdiction or the ability of the Court to continue with the proceedings up to the decision on the merits may be raised by either of the parties as the pleadings progress."[40]

3.5. Let me start by confirming that we continue to uphold the points already made in the Counter-Memorial.

3.6. Germany claims that "the entirety of the claims" put forward in its Memorial is both within the jurisdiction of the Court under the Protocol and admissible[41]. The United States disagrees. The Optional Protocol, Mr. President, is not a giant vacuum cleaner which sweeps up every allegation of fact or of law, whether or not it has anything to do with the interpretation or application of the Consular Convention, or however remote or however weak the evidence and its basis in law.

3.7. We submit that it is the function of this Court to assess every claim and every submission by Germany as to its being logically and inherently situated within the provisions of the Optional Protocol and the Consular Convention. As the Court itself stated in the *Fisheries Jurisdiction* case, it is for the Court itself "to determine on an objective basis the [real] dispute"[42] that has been submitted to it. I refer the Court also to page 1209 in Professor Rosenne's book.

3.8. Aware of the speculative nature of its claims, Germany has tried to shift the burden of proof to the United States. Following on the Memorial, the distinguished counsel for Germany,

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[39]2 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* , p. 531 (3rd. ed. 1997).

[40]Rosenne, *supra* Note 3, p. 843.

[41]Memorial of the Federal Republic of Germany, para. 1.11.

[42]*Fisheries Jurisdiction* (*Spain* v. *Canada*), *I.C.J. Reports 1999*, para. 30.

Mr. Donovan, argued yesterday that the Court should "presume causation". With all due respect, such an attempt stands international law on its head. Germany wants the United States to show that the breach did not cause prejudice to the LaGrands. But surely international law teaches that the burden to prove prejudice and any other element of a claim rests on the Applicant before this Court.

3.9. The principle *actori incumbit probatio* is well established in the jurisprudence of this Court. As the Court stated in the *Nicaragua* case *(Jurisdiction and Admissibility)*, "it is the litigant seeking to establish a fact who bears the burden of proving it"[43]. The Court "cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular" point of view[44].

The Optional Protocol does not confer on the Court jurisdiction over exercise of diplomatic protection

3.10. It is unclear what Germany means by "diplomatic protection" in the present case and what the consequences of its invocation are in this context. With respect, there is nothing between this case and espousal of economic claims in *Mavrommatis*.

3.11. Germany argues that the Optional Protocol confers upon the Court jurisdiction over the right of Germany to exercise diplomatic protection over the LaGrands[45]. The United States fully maintains the view already expressed that the customary law of diplomatic protection is not within the Court's jurisdiction under that Protocol[46].

3.12. Counsel for Germany and its revised submissions fashion a special rule for cases of a breach of the duty of notification in cases which involve capital punishment. There is no authority, however, Mr. President, for introducing the concept of punishment, even less a distinction between different punishments in the Consular Convention. If Germany wishes to have the Convention amended, so that special provisions for capital punishment are made, it should proceed differently to attain that end.

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[43]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *USA) I.C.J. Reports 1984*, p. 437, para. 101.

[44]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992*, p. 399.

[45]Memorial of the Federal Republic of Germany, pp. 31, 33, para. 3.22.

[46]Counter-Memorial of the United States of America, p. 60, para. 74.

3.13. The duty of notification is, of course, not limited to capital cases and pertains to all cases involving arrest and detention, including immigration cases. Suppose that in some cases of breach, a State presents to this Court a diplomatic protection claim asking for compensation for a national, who, it alleges, lost a week's pay because he was detained without being informed of the right to have his consul notified. The new cases presented to the Court by Germany also involve typically rather trivial situations. Acceptance of the German argument would require the Court to adjudicate all such claims, present and future.

3.14. The Memorial itself recognizes that the right of Germany to exercise diplomatic protection is founded on international, i.e., on customary law[47]. I refer the Court to Professor John Dugard's first report to the ILC on Diplomatic Protection which explains the customary nature of this topic[48].

3.15. Diplomatic protection, Mr. President, under customary law is outside the jurisdiction parameters created by the Optional Protocol.

The *Nicaragua* Judgment establishes a clear separation between jurisdiction over treaty and jurisdiction over custom

3.16. The Court's Judgment in the *Nicaragua* case provides a clear authority, I submit, for separation between jurisdiction over treaties and jurisdiction over customary law. Already in its Judgment of 1984, the Court stated

> "the fact that [certain] principles . . . have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions"[49].

Even if a treaty norm and a customary norm were to have exactly the same content, each would have — and I quote the Court again — its "separate applicability"[50]. In a pronouncement, which I believe is authoritative for the present case, the Court, in its 1986 Judgment on the Merits, stated:

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[47]Memorial of the Federal Republic of Germany pp. 114-116, paras. 4.87-4.90 (Sept. 16, 1999).

[48]*UNGAOR*, Int'l Law Comm., 52d Sess., United Nations Doc. A/CN.4/506, at p. 1, para. 36 (2000).

[49]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 424, para. 73.

[50]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 175.

"two rules of the same content are subject to separate treatment as regards organs competent to verify their implementation depending on whether they are customary rules or treaty rules"[51].

3.17. Acting on this distinction between treaty and custom and invoking the United States multilateral treaty reservation, the Court in the *Nicaragua* case, refused to apply certain multilateral treaties, but did apply customary law based on the acceptance by the parties of the compulsory jurisdiction of the Court under the more general grant of jurisdiction through Article 36, paragraph 2, of its Statute. That general grant of jurisdiction, we all remember, is not valid for the present case. In the *LaGrand* case which involves Article 36, paragraph 1, of the Statute, the Court has jurisdiction only over one particular treaty, the Consular Convention. It lacks jurisdiction over customary law of diplomatic protection. The principle governing the present case is thus exactly the same as that governing the scope of the Court's jurisdiction in *Nicaragua*, but the components are reversed. The United States is simply asking this Court to apply here the same principle that it applied against the United States in the *Nicaragua* case.

3.18. The learned counsel for Germany will be quick to point out that in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States, invoking among others the Optional Protocols to the Vienna Diplomatic and Consular Conventions, itself made claims "in its own right and in the exercise of the right of diplomatic protection"[52]. Any resemblance between these two cases, however, is superficial and any such reliance would be totally out of context. In the *Hostages* case, in contrast to the present case, there was an inextricable link, a Gordian knot if you will, between the claims and the roles of the United States as the victim State, and the continuing breaches of the Diplomatic and Consular Conventions with regard to their most fundamental aspects: inviolability of diplomatic and consular premises and the illegal detention and mistreatment of the person of diplomats and consuls.

3.19. Only two of the hostages were private individuals. The rest were diplomats and consuls. Although the very fact of these two persons being held hostage on the Embassy grounds resulted in their coming under the umbrella of the diplomatic conventions, the Court itself chose to

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[51] *Id.*, at pp. 95-96, para. 178.

[52] Case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 6, para. 8 *(c)*.

cite in reference to these two individuals the protection of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran[53], thus recognizing the distinction between private individuals (under the Treaty of Amity) and official persons (under the diplomatic conventions). Moreover, the *dispositif* — and this is what counts here — the *dispositif* of the Judgment makes no mention of diplomatic protection. Clearly departing from the language of the United States submissions, the Court referred only to the direct injury caused to the United States: "decides that Iran is under an obligation to make reparation to the Government of the United States for the injury caused to the latter"[54].

3.20. It follows from all of this that the Court's jurisdiction under the Optional Protocol to the Consular Convention does not extend to any question of diplomatic, let me stress, diplomatic protection.

The LaGrands have failed to exhaust local remedies

3.21. Should the Court, nevertheless, decide that it has jurisdiction over the diplomatic protection of the LaGrands or on the basis of a breach of any individual right, the requirement of exhaustion of local remedies would bar further consideration of such claims. As Professor Rosenne observes, the Court can deal with pleas in bar in whatever manner it finds appropriate[55].

3.22. In his statement yesterday, the distinguished Co-Agent of Germany, Professor Simma, conceded that claims with regard to diplomatic protection, or to individual rights, are subject to the requirement of exhaustion of local remedies. So did the Memorial[56]. Germany asserts, however, that all remedies available to the LaGrands "within the judicial system" of the United States have been exhausted[57]. We shall show that this assertion is not accurate.

3.23. Germany gives the requirement of exhaustion of local remedies a novel reading, one which would radically depart from the rich practice and jurisprudence of international law on local

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[53]*Id.*, at p. 26, para. 50.

[54]*Id.*, at p. 45, para. 95 (5).

[55]*Supra*, Note 3, at 840 (1997).

[56]Memorial of the Federal Republic of Germany, p. 184, para. 5.16.

[57]*Id.*, paras. 5.17, 3.23.

remedies. It complains that "[t]he United States law does not provide an effective remedy for the breach of the requirement of notification in the case that the omission of consular notification is discovered after a defendant has been convicted in a jury trial"[58].

3.24. By these very statements, I submit, Germany concedes that remedies *are* available prior to conviction by jury and at the state level. The specific breach claimed by Germany is the breach of the duty to inform. This breach, Mr. President, could easily have been remedied at the trial stage, if raised in a timely fashion. The judge would have enabled consular notification to be given and consular assistance could have been provided for the entire continuation of the proceedings.

3.25. But — I regret to say — Germany would have the Court rewrite American law, as well as international law, by insisting that certain remedies, if unexhausted at the level specified by national law, must be available additionally at a different level, in different courts. But surely this matter is entirely up to the sovereign State to decide.

3.26. Germany argues that the United States is in breach of international law by not providing additional — I emphasize the word "additional" — recourse at the federal level. There is, of course, no entitlement in international law, to a second-level, *habeas* type, review of claims that were not raised in state courts. Rules pertaining to procedural default do not violate any international obligations of the United States. They are a reflection of the United States federal system which discourages unnecessary federal involvement in matters retained by the states. And Article 36, paragraph 2, deals with quite different matters, such as prison visitations, etc., as my colleagues will further explain.

3.27. Even if an obligation to provide for remedies for the breach through the system of criminal justice existed, it would be entirely within the classical tradition of international law to accept that a State may require exhaustion of remedies before a particular court or type or level of courts and within a particular procedural framework. The whole meaning of exhaustion of local remedies is that the defendant State is given an opportunity to redress a breach within its domestic legal system, by allowing resort to courts, institutions, or officials, as determined by the national

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[58] *Id.*, at p. 75, para. 4.25.

law and in compliance with such specific limitations as timing and procedures to be followed, in order to avert a breach of international law. These propositions, Mr. President, are self-evident.

3.28. The requirement of exhaustion in international law encompasses procedural default and the timely raising of claims. When a person fails, for example, to sue in national courts before a statute of limitations has expired, the claim is both procedurally barred in national courts and inadmissible in international tribunals for failure to exhaust local remedies.

3.29. In the *Ambatielos* arbitration[59], to which I draw the Court's attention, the person whose cause Greece espoused and brought before the arbitration, had failed to call before the trial court a witness essential for the success of his action. Such evidence could not be introduced in the Court of Appeal. The arbitral commission ruled that the failure amounted to "non-exhaustion of the local remedy available . . . [in the trial court]" and that the case was therefore inadmissible.

3.30. The *Ambatielos* case, I submit, is instructive for the present case, where the breach could have been challenged in a timely fashion — but was not challenged — at the state level. The fact that in such circumstances the challenge could not be made at the federal level violates no rule of international law. Nor does it cure this non-exhaustion of local remedies, which is fatal to the admissibility of the claim before this Court.

3.31. Should the German Government consider, however, that the *Ambatielos* approach is harsh, we recall that *Ambatielos* was confirmed and followed, with full citation and attribution, by the European Court of Human Rights in the case of *Cardot* v. *France*. In finding Cardot's application inadmissible for non-exhaustion, the Court stated that exhaustion of local remedies requires

> "that the complaints intended to be made subsequently at Strasbourg should have been made to those same [domestic] courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law"[60].

3.32. The case of Cardot is not the sole example of this approach by the European Court of Human Rights. In *Barbera, Messegué and Jabarodo* v. *Spain*, for example, the convicted persons argued that the last-minute substitution of one judge with another whom they considered biased,

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[59] *Ambatielos* claim *(Greece* v. *U.K.)* (1956), 12 *UNRIAA* 120.

[60] *Cardot* v. *France*, 200 Eur. Ct. H.R. para. 34 (1991).

violated their right to a fair trial. They had not protested the change at the trial level, however, and the Court found the claim on that particular issue to be inadmissible[61].

3.33. The fact is that most countries — I emphasize most countries — have varieties of rules parallelling in some respects the United States rules of procedural default. International tribunals have upheld such rules and found the cases inadmissible for non-exhaustion of local remedies.

The failure of attorneys to raise the breach at the appropriate stage and time of the proceedings does not excuse non-exhaustion of local remedies

3.34. In trying to explain away the fact that the LaGrands did not raise the breach as required by the law of the United States and thus to excuse non-exhaustion of local remedies, Germany argues that they were unaware of the Convention's provisions[62].

3.35. In most cases, however, Mr. President, the law is complicated and the role of challenging breaches is carried out by attorneys, as Germany itself recognizes[63]. The rule of exhaustion of local remedies, one of the cardinal rules of international law, would lose any viability should defendants not be bound by the acts of their attorneys. The law has always assumed that a defendant and his or her lawyer appear as one single entity in terms of legal positions.

3.36. Germany itself recognizes that it was the duty of the attorneys to discover and to challenge the breach[64]. It blames Karl LaGrand's attorney, who could and should have raised the breach and considers him inadequate for his tasks. It did not question the competence of Walter LaGrand's attorney, although it was Walter LaGrand who was the subject of the provisional measures indicated by the Court in its Order of 3 March 1999.

3.37. Even if consular notification were, in exceptional cases, relevant to the administration of justice, it would be the duty of attorneys to raise the matter at an appropriate stage and in a timely fashion. In the LaGrand case, the defence counsel were free at all times to ask Germany for assistance.

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[61] *Barbera, Messegué and Jabarodo* v. *Spain*, 146 Eur. Ct. H.R. Series A, para. 59 (1988).

[62] Memorial of the Federal Republic of Germany, p. 12, paras 2.07, 4.05, 4.81.

[63] *Id.*, at p. 85, paras 4.41, 4.42.

[64] *Id.*

3.38. We do not claim, Mr. President, that court-appointed lawyers are always the best. But the conclusions of the United States courts that Karl LaGrand's lawyer provided a constitutionally sufficient level of representation should not be, I submit, second-guessed. Those conclusions merit deference.

3.39. Given the independence of the bar in the United States as in many other countries and the fact that, in the United States, lawyers for the defence and the prosecutors are adversaries rather than partners, the state of Arizona could not ask to be privy to the defence strategy of the lawyers for the LaGrands. It could not tell them what challenges to raise, nor even enquire why certain arguments were or were not made.

3.40. A judgment of the European Court of Human Rights in the case of *Kamasinski* v. *Austria* directly supports the position of the United States. An American citizen convicted in Austria for criminal offences raised a plea of nullity for inadequate representation by counsel[65]. The Supreme Court of Austria rejected that plea on the ground that it was the duty of the regional court to appoint a defence lawyer, but not to supervise his activities[66]. Emphasizing the principle of the independence of the legal profession, the European Court considered that "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes"[67].

3.41. The Court refused to distinguish between the acts of the defendant and his counsel, insisting that "Kamasinski must be identified with the counsel who acted on his behalf, and he cannot therefore attribute to the respondent State any liability for his counsel's decisions"[68]. The court reached its decisions despite the court's recognition that Kamasinski, as someone who was not a long term-resident of Austria, was unfamiliar with Austria's legal system. In contrast to Kamasinski, the LaGrands could not claim any lack of familiarity with the United States system.

3.42. The European Commission of Human Rights has also held that the advice of lawyers that a further remedy would be useless does not constitute a "special circumstance" "absolv[ing] the applicant from exhausting that remedy"[69]. It followed this view even where similar advice was

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[65] *Kamasinski* v. *Austria*, 168 Eur. Ct. H.R. Series A, para. 35 (1989).

[66] *Id.*, at para. 37.

[67] *Id.*, at para. 65.

[68] *Id.*, at para. 91.

[69] *Simon Herold* v. *Austria*, Application No. 4340/69 (1971), 38 Collection of Decisions 33.

given to the applicant by both his counsel and the judge[70]. In another case, the Commission held that advice given by lawyers "did not dispense with or modify" the need to comply with the requirements of exhaustion[71]. I refer the Court to Amerasinghe's summary of the law, which I would like to include in the transcript[72].

Germany is invoking against the United States standards which it does not follow in its own practice

3.43. Admissibility is not just a technical question of international law. In certain circumstances, it raises fundamental questions of fairness and equity and requires special judicial prudence. I submit that the present case belongs to this category.

3.44. Despite its harsh condemnation of the United States rule of procedural default, Germany insists on the benefit of similar rules, when it appears as a defendant. In application *I.H.* v. *Federal Republic of Germany* concerning a conviction of an applicant by a German regional court, a conviction confirmed on appeal by a German federal court, the Federal Constitutional Court found the constitutional complaint inadmissible because "it had not been complained of within the time-limit provided for in the Federal Constitutional Court Act"[73]. The European Commission on Human Rights decided that "in these circumstances [the applicant] cannot be considered as having exhausted the remedies available to him under German law". There is little difference, if any, between the approach of the United States courts and that followed by the German (Federal) Constitutional Court in this case.

3.45. Even in cases of denial — outright denial — of court-appointed counsel to an indigent defendant — in this case a Turkish national — for a complicated appeal hearing, Germany has opposed the quashing of convictions, arguing, in drastic contrast to its position in the LaGrand case, that there was no prejudice to the defendant[74]. Not surprisingly, the European Court of

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[70] *Id.*

[71] *X* v. *Belgium*, Application No. 1488/62 (1963), 13 Collection of Decisions 96.

[72] C. F. Amerasinghe, Local Remedies in International Law 213 (1990):

> "Mere doubts as to the existence or effectiveness of a remedy do not exempt the individual from exercising a remedy, nor does bad advice given by counsel or his opinion or the personal opinion of the individual as to the probability of success of a remedy or as to expediency and tactics in handling his case."

[73] *I.H.* v. *Federal Republic of Germany* (unpublished), (12 Feb. 1990).

[74] *Pakelli* v. *Germany*, 64 Eur. Ct., para. 40 (1983).

Human Rights, invoking "the interests of justice"[75], found Germany in breach of Article 6 (3) *(c)* of the European Convention, a provision comparable to Article 14 (3) *(d)* of the International Covenant on Civil and Political Rights, to which Germany is also a party. Significantly, the European Court recognized that under the Convention it was not "empowered" to support annulment of the judgment of the Federal Court[76].

3.46. Thus, Mr. President, throughout the present proceedings, Germany attempts to have a different standard applied to the United States than that which it follows in its own national practice. Germany has not shown that its system of criminal justice requires annulment of criminal convictions where there has been a breach of the duty to provide consular notification. Even yesterday, it did not argue that in its national practice it reviews or annuls convictions on the sole ground of such breach. Cases cited in the United States Counter-Memorial demonstrate that where United States citizens in Germany who had not been given consular notifications were sentenced to imprisonment, Germany, while apologizing to the United States, did not even mention the possibility of quashing the convictions[77]. There are additional cases of Americans detained in Germany who have not been notified of the right to have their consul informed of their detention. I draw the attention of the Court to the supplemental declaration we filed yesterday, by Elizabeth Swop. In no case, anything more than an apology was offered to the United States. I conclude that in its own practice Germany does not follow what it asserts in the *LaGrand* case as the correct interpretation of the Consular Convention, i.e., that the breach of duty of notification has consequences in the national criminal procedures and requires the quashing of the convictions and sentences made in the absence of notification.

3.47. What are the implications, Mr. President, for the readiness of the Court to consider the German claims of the fact that Germany does not accept as binding for itself certain norms that it has invoked as categorically binding for the United States? The United States is asking this Court to consider whether Germany should not be precluded from raising, against the United States, alleged rules that it itself does not follow. But this matter presents not only a question of

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[75] *Id.*

[76] *Id.*, at para. 45.

[77] Counter-Memorial of the United States of America, p. 64, paras. 78, 79, Exhibits 8-11.

preclusion. It indicates that the interpretation of the Consular Convention which is asserted by Germany has not become a part of international law binding on the United States.

3.48. The United States is not invoking here a claim of *tu quoque*. It wishes, rather, to raise two other arguments. First, basic principles of administration of justice and equality of the parties require that both litigants in these proceedings be accountable to the same rules of international law. It would be against such principles of international law to apply against the United States alleged rules that Germany appears not to accept for itself.

3.49. The second argument relates to the status of the alleged rules as international law. The rules alleged by Germany are at best uncertain. In areas of uncertainty of the law, the fact that the other party itself resorts to a contested practice has the effect of diluting the status of the alleged rules of international law[78].

3.50. The German national practice has the effect of rendering inappropriate the German invitation to this Court to adopt its asserted interpretation of the Consular Convention. Thus, the German assertions involve not only a question of fairness to the defendant State but also a challenge to the principles of administration of justice to which this Court has always been committed.

3.51. Moreover, since the German domestic practice as well as the US domestic practice reflect, as we shall demonstrate, the general practice of States parties to the Convention, there has been a general rejection by States of the interpretation of the Consular Convention that Germany is asserting against the United States in the present case.

3.52. Were the German interpretation of the Consular Convention accepted, all States parties would currently be in breach, weakening any incentives to a better implementation of the Convention.

3.53. As the applicant State, it was the duty of Germany to establish the correctness of its asserted interpretation of the Consular Convention. This Germany has clearly failed to do.

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[78]Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 40 (1989).

Conclusions

3.54. In concluding, I draw the attention of the Court to its statement in the *Northern Cameroons* case that

> "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore.
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> . . . . . .
>
> That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case."[79]

I take the liberty, Mr. President, of suggesting that in the present case which rests on an interpretation of the Consular Convention which neither Germany nor any party to the Consular Convention accepts and follows in its own national practice, it may be appropriate for the Court, as a court of justice, to exercise its judicial discretion to entertain the case.

3.55. This, Mr. President, concludes my presentation. I thank you for your patience, distinguished Court, and would appreciate it if you, Mr. President, would call now on Ms Catherine Brown.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to Ms Catherine Brown.

Ms BROWN:

4.1. Mr. President, distinguished Members of the Court, it is an honour for me to appear before you again today. My focus will be the United States response to the breach in this case and the question whether the Vienna Convention on Consular Relations requires any different response. I will in particular address whether the Convention requires States party to provide remedies in their criminal justice systems to foreign nationals who have not been informed, in accordance with Article 36 of the Convention, that they could request consular notification. Germany has constructed a fanciful theory in an effort to persuade the Court to answer this question "yes". The United States submits that the answer in fact is indisputably "no", and that the Court would

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[79]Case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, pp. 29-30.

seriously distort the framework in which consular relations are conducted were it to conclude otherwise. I propose today first to discuss briefly the actions that the United States has taken in response to the breach in this case and the overall question of United States compliance with Article 36. I will then address the requirements of the Vienna Convention and show that it provides no basis for requiring the remedy in municipal law that Germany seeks to have imposed on the United States.

The United States has investigated the alleged breach; apologized to Germany; and undertaken a significant broad effort to improve its compliance with the requirements of Article 36

4.2. Mr. President, it is well known that the United States regards the Vienna Convention as a Convention that establishes State-to-State rights and obligations, not individual rights that inhere in the individual and that must be justiciable in the criminal justice system. This conception of the Convention underlies our view that breaches of Article 36 of the Convention need not be remedied in the criminal justice process. We believe that Germany held the same view until it recently decided that it would be useful to reinterpret the Convention for purposes of cases involving capital punishment. Accordingly, both the United States and Germany historically have followed the practice of investigating alleged violations of Article 36, apologizing if appropriate, and undertaking to improve future compliance. Neither country has provided for remedies in its criminal justice system for such violations, which are common in both countries. In some recent cases involving foreign nationals in the United States sentenced to capital punishment, we have also taken the additional step of asking the relevant authorities to consider the fact of the violation as a relevant but not dispositive factor weighing in favour of a possible grant of clemency. This is consistent with our view that the remedies are political, not judicial.

4.3. Our response to the breach of Article 36 in this case followed this pattern insofar as possible, given that Germany raised the consular notification issue with the United States only two days before Karl LaGrand's scheduled execution, in the letter from Foreign Minister Fischer that is before the Court as Exhibit MG 18. Germany's previous communications had sought clemency solely on the basis of opposition to the death penalty[80].

[80]MG 14, 15, and 16.

4.4. Consistent with the prior practice of the United States and Germany, once we had confirmed that a breach had actually occurred — which was not until many months later — we expressed the regrets and extended the official apologies of the United States to Germany, and we advised Germany in detail of the steps being taken in the United States to prevent future recurrences. We also provided Germany with a report of our investigation, and we offered to answer any questions Germany might have about it. That was done by the diplomatic note that is Exhibit 2 to the Counter-Memorial.

4.5. In our diplomatic note, we assured Germany of the seriousness with which the United States regards consular notification and we fully accepted the need to improve observance of the requirements of Article 36. The efforts the United States is taking to improve compliance are recounted both in the note that is Exhibit 2 and in Exhibit 3 to the Counter-Memorial, but they have continued since those exhibits were prepared. Secretary of State Albright has fully and personally supported these efforts from the beginning, as has Attorney-General Janet Reno of the United States. The centrepieces of the effort have been our 1998 brochure and pocket card, which have been made available to the Court. As of today, we estimate that we have distributed over 60,000 copies of the brochure, and over 400,000 copies of the pocket card to federal, state, and local law enforcement and judicial officials throughout the United States.

4.6. We are also conducting training programmes throughout the United States, some in co-operation with consular officials of other countries, such as Mexico, that have taken a genuine interest in helping us improve observance. We are reaching out to all levels of government. While we have traditionally, as you heard from Attorney-General Napolitano, regarded arresting and detaining officials as the competent authorities for purposes of Article 36, we are also including judicial officials in our outreach effort, and are asking them to confirm that consular notification requirements have been observed with respect to foreign nationals who appear before them. We specifically called this initiative, which is a change in our prior practice, to Germany's attention, because it directly addresses the confusion that arose in the case of Karl and Walter LaGrand. Most recently, Secretary of State Albright has personally decided to establish in the Department of State a permanent office to focus on US and foreign compliance with consular notification and access requirements.

4.7. We were frankly disappointed yesterday to hear Germany disparage these efforts, as if they were not genuine or were not having an impact. It went to great lengths to characterize them as so ineffective that the Court should take the extraordinary step of ordering the United States to create remedies in its criminal justice system in death penalty cases. Leaving aside that the Vienna Convention provides no support for such a remedy — to which we will return later — Germany's characterization distorts reality. First, it is important for the Court to know that the United States has consistently sought to comply with Article 36 since it first became a party to the Vienna Convention in December 1969. Moreover, we had little reason to think that foreign governments were dissatisfied with our efforts until the 1990s. Germany certainly did not undertake to advise us of any serious concerns on its part — just as it did not raise the LaGrands' case with us between 1992 and 1999. Thus, our current effort is one that started relatively recently.

4.8. Second, the programme thus far has been far more successful than Germany allows. Indeed, Germany has affirmatively mischaracterized what is happening in the United States today. For example, its belated supplemental submission to the Court included a letter from California that Germany cited as evidence that California does not think that it has to comply with Article 36. We have in turn submitted a letter from California stating explicitly that it fully accepts the obligations of Article 36. What was missing from Germany's story was the fact that it was precisely in order to improve its compliance that California recently decided to incorporate the requirements of Article 36 into its state law. As I will explain later, we do not believe that the Convention requires such incorporation, and indeed relatively few parties to the Convention have chosen this approach. But we would think that Germany would welcome such an effort rather than criticize it. We certainly see no justification for misrepresenting the innocuous and clearly correct statement of a California official that the California statute was not in effect recently and therefore could not be violated until recently. I could describe similar positive efforts throughout the United States, and Attorney-General Napolitano this morning described efforts taken by the state of Arizona, including efforts to bring its judicial officials into the process, again directly responsive to the confusion that arose in the case of Karl and Walter LaGrand. Every day my office receives requests from law enforcement entities throughout the United States for our brochure and pocket

card so that they can do what is required. Moreover, we have been told explicitly by foreign consular officials that they are receiving notification more often as a result of our efforts.

4.9. The list of cases of alleged violations discussed yesterday by Mr. Simma does not diminish our confidence that our programme is being felt. The list is little different from a list the United States might prepare about Germany or any number of countries, as shown by the supplemental declaration we have submitted from Elizabeth Swope, the Secretary of State's Senior Co-ordinator for Consular Notification. Germany fails to recognize that consular notification never works perfectly, in Germany, in the United States, or elsewhere, and that consular officers routinely learn of their nationals in detention through a variety of means and at a variety of times in relation to the criminal process. To the extent that the list shows that German consular officers learned of cases through family members, direct contacts of foreign nationals, or in other ways, it is simply illustrative of the realities of consular practice. The same variation in methods of notification is evident in at least one of the cases of non-compliance by Germany identified by Ms Swope's declaration, and is amply documented in our state practice survey, which is Exhibit 8 to our Counter-Memorial.

4.10. More importantly, Germany utterly fails to recognize what is involved in ensuring compliance. The United States is a country covering roughly 9.2 million square kilometres, as compared to Germany's roughly 350,000 square kilometres. Our population of 270 million compares to Germany's of less than 83 million. As you have heard this morning, we have a unique federal structure. In fact, arresting and detaining authority in the Untied States is decentralized not only between the federal government and the states, but also within the federal government and within the states. By one estimate, there are over 700,000 law enforcement officials in the United States and they are working in over 18,000 different jurisdictions.

4.11. This is not to excuse, but to explain. The United States has embarked on what we see as a long-term, permanent effort to address the question of compliance with Article 36. We do not need any additional requirement of compliance with Article 36, because we fully understand and our states fully understand that it has the force of law in the United States and can be implemented directly. The problem instead is one of reaching a highly diverse and enormous number of relevant officials in a large number of law enforcement jurisdictions through long-term, persistent training

programmes. Germany's criticism of the programme ignores these factors and frankly suggests a *naïveté* about the United States, surprising from a country that has purported here to make definitive representations about the American judicial system, and a country that has its own compliance problems in a much smaller and much less complex environment.

4.12. In any event, it is wrong to belittle the United States position that Article 36 breaches are appropriately addressed through a process of investigating, apologizing, and undertaking a genuine good-faith effort to do better in the future. In her authoritative commentary on the Vienna Convention on Diplomatic Relations, Eileen Denza has observed that the Diplomatic Convention has been remarkably successful in winning support and observance. One reason, in her view,

> "is that reciprocity forms a constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State. Its own representatives abroad are in some sense always hostages."[81]

The same can be said of the Vienna Convention on Consular Relations. States party know that the rules of conduct they urge upon others are ones that they must be prepared to live by themselves. Conversely, they know that the way in which they treat States party under the Convention may significantly affect the way they are treated. In this context, the response of the United States is anything but meaningless. It is a clear, public, and concerted message directed from the highest levels of the United States Department of State and the United States Department of Justice to the States party to the Convention, designed to assure them that we are indeed serious about Article 36, and that we fully expect to be held to the same standards domestically as we seek to hold them to with respect to American citizens abroad. We will continue our efforts regardless of the outcome of this case, and regardless of whether countries like Germany lose interest because their real focus is on capital punishment, not consular notification. By the same token, we can legitimately look askance at Germany's belated effort to establish a special rule for consular notification in cases of capital punishment, given that such a rule would have no reciprocal impact on Germany's own criminal justice system.

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[81] E. Denza, *Diplomatic Law*, 2nd. ed., 1998, p. 2.

The Vienna Convention does not require any different response

4.13. Mr. President, I would like to turn now to the question whether the United States response to the breach in this case has been inadequate under the Vienna Convention. Contrary to Germany's suggestions, the answer does not lie in deciding whether the Vienna Convention benefits individuals. The performance of consular functions inherently benefits individuals. Moreover, it is clear that Article 36, by recognizing the right of consular officials to communicate with and to assist their nationals, provides a benefit to those nationals. Nor does the answer turn on whether Article 36 recognizes the rights of individuals — it plainly does, by its terms. But that does not tell us much about the nature of those rights, or about the remedies required under the Vienna Convention for breaches of Article 36. The relevant question is whether the obligation to inform a foreign national that he can request consular notification must be integrated into a receiving State's criminal process and treated as so fundamental to that process that the possibility of undoing the process must exist if this obligation is not observed. The answer to this question, again, is clearly, no. This is not to say that informing an individual cannot in some cases lead to the provision of consular assistance that might be useful in a criminal defence. But this possibility is not a sufficient basis on which to conclude that the Convention makes consular notification integral to the criminal justice process or requires States parties to establish remedies in their criminal justice systems for a failure to inform a foreign national that he may request consular notification.

The text of the Convention does not support Germany's position

4.14. In some sense our enquiry could begin and end with the text of the Convention. Let me note a number of significant omissions that speak directly to Germany's claim. The Convention's title, of course, tells us simply that the Convention's subject is consular relations between States. It makes no reference to criminal matters, nor to individuals, and it in no way suggests that the Convention purports to address the internal criminal justice systems of States party, or questions of individual rights in the criminal process.

4.15. The same is true of the Preamble to the Convention, which expressly says that the Convention is addressed to consular relations and the development of friendly relations among nations. The Preamble's one reference to rights that might be thought to benefit individuals in a

judicial context — privileges and immunities — is immediately qualified by a statement that such privileges and immunities are intended not to benefit individuals but States. Germany has argued that this qualification pertains only to the privileges and immunities granted to consular officers by the Convention, and not necessarily to Article 36. But even if we were to accept this as true, it does not change the fact that the Preamble tells us that the Convention is fundamentally intended to regulate consular relations between States and to benefit States, not individuals.

4.16. Again, this is not to say that Article 36 does not benefit individuals: clearly it does. But it is titled "communication and contact with nationals of the sending State". It is in a section titled "facilities, privileges and immunities relating to a consular post", and it is in a chapter titled "facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post". These headings, again, are consistent with the fundamental focus of the Convention, which is the right of States, not individuals. And, again, nothing in them suggests that we are reading a provision that in any way addresses the substantive or procedural criminal laws of the member States.

4.17. Yesterday, our German friends spent considerable time walking the Court through the actual text and structure of Article 36. As someone who practices consular law on a daily basis, I must confess to having been quite interested in the reading given to this Article by three academicians. There is quite a difference in perspective, and frankly I have no hesitation in suggesting to the Court that the academicians turned Article 36 on its head. An afterthought provision took on exaggerated importance, and the essence of Article 36 was pretty well obscured.

4.18. Germany glossed quickly over the fact that paragraph 1 of Article 36 begins with the important words "With a view to facilitating the exercise of consular functions relating to nationals of the sending State". These words introduce all three of the following subparagraphs, and of course they give no support to the notion that the rights and obligations enumerated in paragraph 1 are intended to ensure that nationals of the sending State have any particular rights or treatment in the context of a criminal prosecution.

4.19. The academicians also failed to appreciate the significance of the first subparagraph of Article 36 , paragraph 1, which states a general principle — "consular officers shall be free to communicate with nationals of the sending State and to have access to them" — and its reciprocal

principle. It is this freedom of communication that is the most important right articulated in Article 36, because communication is essential to the sending State's ability to perform its consular functions. Subparagraph (1) *(a)* states a general principle that is entirely sufficient whenever the freedom of movement of the consular officer and the foreign national is unconstrained. Does it recognize a right of individual communication? Yes. But does it suggest that that right is independent of the right of the sending State? No. In fact, it was precisely because the right of the individual flows from the right of the sending State that the negotiators ordered the two sentences as they did, reversing the original order proposed by the ILC. And does Article 36, paragraph 1 *(a)*, relate the right of the individual to a criminal proceeding? Again the answer is no. And this omission is significant because, as Professor Trechsel will elaborate, there are many contexts in which criminal proceedings can take place while the foreign national remains at liberty.

4.20. Now, finally, we get to Article 36, subparagraph 1 *(b)*. It deals with the particular situation that arises when a foreign national is detained. It is addressing the special problems of consular communication that arise when a foreign national is in detention. Because he is detained he and the consular officer cannot exercise the fundamental rights stated in subparagraph 1 *(a)* unless they get some help. It is for this reason that we have the special provisions in subparagraph 1 *(b)* about informing consular officers of detentions and forwarding communications.

4.21. Of course, notification of the detention under the Vienna Convention is required only if requested by the foreign national, and as we can see from the negotiating history, it is because of this limitation introduced as a modification to the ILC draft, that we also find in the final sentence of subparagraph (1) *(b)* the requirement that the authorities of the receiving State inform the detained foreign national of his rights to have this consular official notified and his communications forwarded. Germany yesterday advanced the suggestion that this final sentence — the one that the United States failed to observe — is the most important provision in Article 36. And from this it attempted to argue that therefore necessarily every other provision in Article 36 was violated. In fact, this final sentence was included in the text only at the last minute out of a concern that the foreign national might not know that he could request consular communication. But then again, he might. He might well be aware of the possibility, or his family

might be aware of it, or he might be contacted by a diligent consular officer, regardless of being informed. Indeed it is not unusual for consular officers to learn of their nationals in detention through these alternative methods. The final sentence of Article 36, subparagraph 1 *(b)*, is, in essence, a prophylactic measure. It is not enshrined as an individual right of the individual to be informed. It is not: "The person concerned shall have a right to be informed." It is simply that the competent authorities "shall inform the person without delay of his rights". I suggest that this choice of words is not insignificant. That is, the sentence expresses an obligation that the receiving State undertakes to the sending State; it is the sending State that has the right to have its national informed.

4.22. Our German friends' most significant error, however, lies in their assumption that the rights established by Article 36 are designed to be integral to the criminal process. They seem to rest this argument on the requirement that notification must occur without delay. I would note that they mischaracterized our position with respect to the meaning of "without delay", but that is not directly relevant to our point. Our point is that Article 36 is about consular communications and it is not related to the criminal process. For example, subparagraph *(b)* does not provide that the detained foreign national must be informed of his rights before any investigatory statement is taken, or before any particular step in the criminal process. It does not link informing the consular officer to any step in the process, such as the initiation of an investigation, the filing of charges, or the commencement of trial. It is simply operative in cases of detention, and its rules apply regardless of the reasons for the detention and regardless of when detention occurs in relation to the criminal process.

4.23. Only subparagraph 1 *(c)* of Article 36 touches directly on the question of legal proceedings, by providing that consular officers shall be entitled to arrange legal representation for a detained foreign national. By the same token, however, once the foreign national has legal representation, the purpose of this provision has been met.

4.24. There remains paragraph 2 of Article 36. Our Germany friends glossed over the fact that it is focused exclusively on the rights referred to in paragraph 1: first, the right of reciprocal consular communication and access; second, in the special circumstances of detentions, the right of the foreign national to have his consular official notified and to have his communications

forwarded; and third, also in cases of detention, the right of consular officers to visit, converse, and correspond with their nationals and to arrange for their legal representation. It is self-evident that the laws and regulations relevant to the exercise of these rights are laws relating to communication and access, such things as the use of communications devices; how often can you send a letter? Can you use the telephone? Are you entitled to visit in person your own embassy? Are there curfews in place? Are there visiting hours in place? Or are there security procedures in place? If so, they may not be so restrictive as to defeat the purposes of the Convention. But a rule relating to the defences that a foreign national can raise in a criminal proceeding is utterly unrelated to any of the rights enumerated in paragraph 1. Germany's suggestion that paragraph 2 of Article 36 prohibits application of rules of procedural default to claims relating to breaches of Article 36 , subparagraph 1 *(b)*, is far afield from the text, which would have to be substantially rewritten to get to Germany's result.

4.25. Accordingly, there is no basis for Germany's contention that the United States violated paragraph 2, or any provision in paragraph 1 other than the prophylactic obligation to inform the LaGrands that they could communicate with their consular officials if they wished. Germany has cited not a single factual instance or provision of law that interfered with or prevented any communication between the LaGrands and German consular officials. It has not identified a single failure to provide access. Nor has it identified any instance in which the LaGrands attempted to arrange legal representation for the LaGrands, much less an instance in which its ability to do so was obstructed.

4.26. I would like to make one further observation about the text, again focusing on a significant omission. Nothing in the Convention requires States parties to incorporate the Convention into their laws, or to provide remedies as part of their systems. This is in contrast, for example, with the International Covenant on Civil and Political Rights, which in Article 2, imposes express requirements for the adoption of necessary legislative measures and which requires States parties to ensure effective remedies. Clearly, when States have wished through international conventions to require changes in municipal law, they have found clear words to do so.

State practice under the Vienna Convention on Consular Relations also does not support Germany's suggestion that States party must provide remedies in their criminal justice systems for breaches of Article 36

4.27. Mr. President, it hardly seems necessary to turn to State practice. Yet I cannot help but mention that the prevailing practice of the over 165 States party to the Vienna Consular Convention overwhelmingly supports our position. Germany attempted to dismiss State practice yesterday for understandable reasons. It suggested that State practice is scarce, when in fact it is voluminous albeit not readily accessed by an academician. It also suggested that it is irrelevant either because violations occur in minor cases — which is an unsupported proposition — or because there is no practice in death penalty cases, a point that neglects the fact that the Vienna Convention does not address the nature of the sentence or even link consular notification to the criminal process. How it squares its approach with the Vienna Convention on the Law of Treaties — which it enthusiastically embraced yesterday — is unclear. In fact, the lack of support for Germany's position in its own practice or that of other States is of special significance, and not just because the Vienna Convention on the Law of Treaties attaches great weight to subsequent practice. I say this because the Vienna Consular Convention is not just another treaty. Rather, with the Vienna Convention on Diplomatic Relations, it has become the basic framework that defines the way in which the vast majority of the nations of this world conduct their diplomatic and consular conversation. I use the word "conversation" deliberately, to emphasize how much these Conventions have become part of the day-to-day argumentation and communication that occurs between governments as they dispute their various rights and obligations. Those of us who work in foreign ministries discuss these conventions internally and with other foreign ministries on a continual daily basis, and through this conversation and the day-to-day practical application of the Vienna Convention, Article 36 has indeed been infused with meaning.

4.28. The Court will find a detailed account of State practice under the Convention at Exhibit 8 to our Counter-Memorial, as I have already mentioned. Since Germany seems prepared to concede on this point, I will just note a few of the most salient points, several of which I have mentioned already.

4.29. First, compliance with consular notification is rarely perfect, and second, it is frequently discussed. Most significantly, there is no evidence that in this discussion States grant

remedies in their criminal justice process for failures of notification. The significance of this cannot be overstated, given the frequency of the failures. Yet it surely reflects the view that Article 36 does not require that violations be remedied in the criminal justice process. Two clear examples are before the Court as Exhibits 10 and 11 to the Counter-Memorial. They are Notes from Germany to the United States apologizing and undertaking to do better, but in no way suggesting that the sentence imposed on the American in question should be set aside because of the failure of notification.

4.30. In recent years, of course, defence lawyers in the United States have attempted to persuade our courts to create remedies in our criminal justice system. We have not supported those efforts for all of the reasons that we are advancing before this Court. In addition, we cannot say that the obligation to request consular notification implicates issues of fundamental fairness that are not independently addressed by the considerable safeguards accorded to all defendants under the criminal laws of the United States.

4.31. A final consideration for us has been that it would be very difficult to craft suitable remedies that could be administered appropriately by criminal courts. On the one hand, a *per se* rule of returning to the *status quo ante* would surely lead to absurd results, particularly in cases like this, where the defendants were nominally Germans but were for all practical purposes Americans. On the other hand, a rule providing for remedies on a showing of prejudice would necessarily draw issues of State-to-State treaty violations into criminal defence litigation in a highly problematic way. For example, a defendant inevitably will insist that he would have requested that his consular representatives be notified if only he had been asked. He will persuade a consular officer, if he can, to submit an affidavit on his behalf that invariably will say that the officer — or his predecessor many years previously or some months previously — would have done any number of things that would have made a critical difference. How can we explore the veracity of these assertions? To do it fully and fairly, the prosecutor would need access to inviolable consular archives to determine the policies and resources that would have governed the consular officer's response. The prosecutor would also require a waiver of the consular officer's immunity from testimony, so that he could cross-examine the officer about his government's true commitment to consular assistance. In this case, for example, we have clear evidence that Germany did not react

promptly when it learned of the LaGrands; that it provided no assistance to one of the Apelt's trial lawyers; and that it does not pay for lawyers for German nationals, but instead allows them to be represented by lawyers funded by US federal or state governments — to mention only a few potentially embarrassing facts. I would hope the Court would agree that, while a State party might choose to create such a process, the Vienna Convention does not require it to do so.

The negotiating history of the Vienna Convention on Consular Relations also does not support Germany's suggestion that States party must provide remedies in their criminal justice systems for breaches of Article 36

4.32. Mr. President, I have perhaps ten more minutes. I do not know if you wish to break at the customary time.

The PRESIDENT: If it is no more than ten minutes, let us go on.

Ms BROWN: Thank you. I will try to condense this.

4.33. I wanted to offer just a few observations about the negotiating history, which I cannot adequately summarize today. I would ask the Court to pay particular attention to our discussion of it in the Counter-Memorial.

4.34. I would like to focus on just a few points relating to the three major changes between the ILC draft and the final draft that are relevant to this case. One is the reversal of the two sentences in subparagraph 1 *(a)*, to which I have already alluded; the other is the change from the requirement in the ILC draft that all cases of detention be notified to the provision that notification only occur at the detained national's request, and the third is the change in paragraph 2 from the ILC's "must not nullify" proviso to the proviso that was finally adopted.

4.35. The debates that led to these changes clearly show that the formulation in Article 36, subparagraph 1 *(b)*, with its reference to informing the individual of his "rights" under that paragraph, was not adopted out of any desire to create or recognize individual rights that would be justiciable in municipal criminal justice systems. Rather, it is absolutely clear from the *travaux* that this was done to balance the State's right to protect its nationals with the individual's privacy interests and to minimize the burden on States.

4.36. During this discussion, I think it particularly significant that a delegate pointed out that the burden concerns raised by the original proposal could be addressed by countries waiving their rights to notification. The very fact that a delegate conceived of the concept of waiver clearly reflects an assumption that the rights of States were at issue, and indeed there should be no dispute that even today a sending State could advise a receiving State that the receiving State need not inform the sending State's nationals of the right of consular communication — for example, if the sending State determined that it was unwilling or unable to respond to requests for consular assistance.

4.37. The discussion that led to the revision of subparagraph 1 *(b)* also revealed the considerable unease that the delegates felt about the fact that the changes that were being introduced referred to individuals and their rights. It was for this reason, because of this discomfort, and to reinforce the character of the Convention as one relating to the rights of States, that the order of the two sentences that I have alluded to previously was reversed.

4.38. Finally, there is nothing in the *travaux* that supports the view that Article 36 was intended to have implications for the rights of individuals with respect to the substantive or procedural criminal laws of the member States other than those relating to communication, prison visits and rules of the kind I described earlier. Germany's remarks on this point yesterday are again far afield. It is not a question of the primacy of international law over municipal law. Clearly the proviso in subparagraph 2 would override a municipal law that provided that consular officers could not visit their nationals in detention, to take an extreme example. That is not the question. The question is whether Article 2 reaches the kinds of rules of criminal law and procedure that are relevant to the defence or to when claims must be made in criminal cases — rules that have nothing to do with the ability of consular officers to communicate with or to assist their nationals. I have previously explained why it is evident from the text that it does not. In the *travaux* it is clear from the ILC commentary, with its express references to rules relating to visiting nationals in prison, that the answer is no. Similarly, the delegates' discussion of paragraph 2 in no way suggests that they expected paragraph 2, even with the amended proviso, to have implications for the validity of the criminal process. Germany's suggestion that the proviso of paragraph 2 requires remedies in the

criminal process is a fanciful invention that simply is not supported by the *travaux*, just as it is not supported by the text or by State practice.

4.39. Mr. President, in closing I would just like to offer a note of caution about the position taken by Germany in this case. Germany's goal plainly is to make Article 36 a tool of its current policy objective, which is expressly to seek elimination of capital punishment and, understandably, to protect its nationals from such punishment whenever possible. We have no problem with that goal, but we have considerable objection to Germany's method. Whatever Germany's official views about capital punishment, they provide no basis for effectively rewriting the text of the one nearly universal convention that provides the basic framework for the conduct of consular relations throughout the world. The States party to the Convention did not ratify it in the expectation that it would have the implications for their criminal justice systems that Germany seeks to have this Court impose on the United States.

4.40. I urge the Court to listen carefully to the conversation occurring every day in virtually every country of the world about issues of consular notification and access to which I have alluded. And I request that it reject Germany's invitation to drastically alter that conversation and the fundamental expectations of the 165 States party to the Vienna Convention on Consular Relations whose interests will inevitably be affected by the decision of this Court.

4.41. Mr. President, that concludes my presentation and I thank you for your patience. After lunch I would invite the Court to hear from my colleague, Mr. Mathias.

Le PRESIDENT : Je vous remercie beaucoup. La séance est levée. La Cour reprendra ses travaux cet après-midi à 15 heures.

L'audience est levée à 13 h 15.
