CR 2000/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Thursday 16 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 jeudi 16 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,

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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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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,

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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,

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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,

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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. Nous commençons aujourd'hui le deuxième tour de plaidoiries dans l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique)* et je vais tout de suite donner la parole à l'agent de la République fédérale d'Allemagne, M. Westdickenberg.

Mr. WESTDICKENBERG:

I. OPENING REMARKS

Mr. President, distinguished Members of the Court,

1. This is the World Court. The eyes not only of our governments, of the scholars in academia are on these proceedings, but also of our citizens, of our public in general. However, Tuesday our United States friends somehow seemed to underestimate the authority of the Court, its eminent role in international law. They obviously tried

— an approach that relied on carrying the German arguments to the extreme so as to scare you, distinguished Judges, with a walk to the brink offering a glimpse into the abyss of legal extravagance;

— an approach that relied on exaggerations of German arguments as if we wanted to lead the Court onto the slippery slope of law-making as opposed to interpreting it;

— an approach that asserted facts and positions that did not correspond to what we had said.

2. Let me touch upon some of these *leitmotifs* that could be heard from the overture to the finale and which — to stay in this philharmonic vein — had too many *da capos* and wrong notes.

Their first movement: Germany would want you to rewrite the Vienna Convention. Far from it. Germany sees the Court as the "guardian of the Convention" and wants you to uphold it in letter and spirit. In Article 36, paragraph 1, the Convention states the obligations of States parties to inform foreign nationals about their individual right of consular assistance and all we want is to state that this obligation was violated by the United States. In Article 36, paragraph 2, the Convention states that all States parties to the Convention have to give the provisions of the Convention "full effect". All we are asking is to state that this obligation is rendered impossible by the procedural default rule in the United States and that the United States see to it that "full effect"

be given to the provisions of the Convention. Abiding by the provisions of the Convention is not a favour granted to foreign nationals or their sending States; it is a legal obligation stemming directly from the application of the Vienna Convention.

Their second movement: Germany would — by asking the United States to give full effect — meddle with US domestic legislation. Far from it. Germany has shown that it is the very principle of procedural default that in cases like this one systematically leads to the violations of the Vienna Convention. All Germany is asking you as the "guardian of the Convention" is to oblige the United States to provide effective review of and remedies for criminal convictions impaired by it. How the United States is fulfilling that obligation — an obligation, I hasten to say, stemming from the Vienna Convention, thus international law — we are neither venturing to prescribe nor asking the Court to do so. We want to stick to the principle which I underlined already in my introductory statement: we are dealing with international law in this Court — nothing more, but also nothing less! After all, it is the United States that signed the Vienna Convention and thus took on the obligation to abide by its provisions. Whatever changes are required to its domestic legal system is a matter of the signatory State. To remind it of that obligation through a decision of this Court is not meddling with domestic legislation, it is just in line with the Optional Protocol I to the Vienna Convention to deal with "disputes arising out of the interpretation or application of the convention". I wonder how one could compare the implementation of exactly that task with using: "the Optional Protocol as a vacuum cleaner" — an expression coined by Professor Meron. On the other hand, isn't the United States using a "mixer" to continue with this metaphor of household appliances: mixing things up that by their very nature are separate?

The US's third movement: Germany would misuse the Vienna Convention in its campaign to abolish the death penalty. Far from it. Yes, Germany advocates the abolition of the death penalty, but this is not our intention before this Court. What more could we do than stress — as I already did in my introductory statement on Monday — that "this case is not on the death penalty in general or its application in any particular country!" However, we are dealing with what this Court designated in its annals as the *"LaGrand Case"* and it just so happens that — sad and regrettable as it is — the death penalty and execution of the LaGrand brothers are inseparably

intertwined with the subject-matter of this case. Germany wants the Vienna Convention abided by in its very letter and spirit — just the opposite I would think from what any dictionary or law book would describe as "misuse".

Their fourth movement: Germany wants to lure the Court into a role where it would act as an appellate criminal court. Far from it. We want the Court to act in the very capacity foreseen by the Optional Protocol I — namely, to decide disputes arising out of the Vienna Convention, and not as an appellate Court.

Their fifth — and staying in line with this classical symphony **— and last movement: Germany would apply double standards: asking the United States to live up to standards Germany is not able or willing to abide by.** Far from it. As we will show Germany in its law and practice is in full compliance with the standards we expect from the United States. Let me unequivocally state: whatever the ruling of this Court may be, Germany will abide by its letter and spirit. And I invite the Court to take us at our word! Thus, for example, if there were a decision by a German court that were impaired by a violation of the Vienna Convention, naturally there is a remedy foreseen in German procedural law; we do not have to create it to fulfil obligations from the Vienna Convention: Section 337, paragraph 2, of the German Code of Criminal Procedure foresees a ground of appeal if a legal norm — including a norm of international law — is not applied at all or is incorrectly applied and if there is the possibility — no direct causation required — that the decision was impaired by this fact. A similar provision in US law would have made it possible for the LaGrand brothers to raise the violation of the Vienna Convention before US federal courts.

3. I would like to take up a line of argumentation that was put forward by Professor Trechsel on Tuesday, namely a systematic intention to oppose human rights to commitments made by States. He turned every single human right into a "fundamental right" which is simply restated in international conventions. This seems to me an "objectivist", if not simply a "natural law" concept of human rights which on face value sounds generous, but which in reality does not correspond to the reality of positive law. Human rights flow, in the first place, from international conventions voluntarily concluded between sovereign States. One therefore cannot create an artificial contrast between State obligations laid down in conventions and human rights.

4. Let me also address four points — only four exemplary ones for reasons of time — in the US pleading on Tuesday that clearly misrepresent German positions or assertions. I regret that I have to use your time on this, but for the record I did not want to let this stand without correction, lest I am accused of ceding these points.

First, Germany has not asked for absolute guarantees that mistaken violations of the Vienna Convention do not occur. We are not asking the impossible: we know that human errors occur and will occur again. However, we also thought that we had not to exclude the obvious. For those who are in need of explanation: we ask for assurances that the United States will redress the still prevailing situation of a consistent and widespread neglect of the Vienna Convention by United States law enforcement agencies — a situation acknowledged by the stepped-up US efforts to publicize those obligations under the Vienna Convention, a situation that, however, is not yet redressed as we have shown by the number of violations of the Vienna Convention exactly since those efforts were stepped up.

Second, Germany has not asked for an automatic nullification of impaired decisions — as Professor Trechsel implied Tuesday afternoon. It seems sufficient to refer to Professor Simma's pleading on Monday: all we ask for is the provision of effective review of and remedies for criminal convictions.

Third, Germany did not limit its demands on death penalty cases, but did emphasize these cases because of their irreversible nature.

Fourth, Germany did not ask the United States to do that what it simply cannot do due to its federal system. Let me ask you, Mr. President and distinguished Members of the Court: Do we learn here of a new principle of international law — namely, that a federal constitution lets a State opt out of its treaty obligations?

5. Mr. President, distinguished Members of the Court, I had almost forgotten to briefly take up two points which the Respondent brought up in documents submitted to us on 13 November respectively on 14 November 2000 and which do not serve the purpose they obviously are supposed to, namely to discredit German preparedness in general as far as consular assistance is concerned :

— First, the affidavit (document No. 1 of 13 November 2000), dated 2 November 2000, by Mr. Villareal, a former defence attorney of Mr. Michael Apelt, a German national sentenced to death together with his brother for murder in the State of Arizona. In the affidavit Mr. Villareal claims that the German Government was not interested in getting involved before all legal remedies were exhausted and that the financial assistance sought was refused by the German Government. Let me officially represent here — after having enquired with the responsible officer of the German Federal Foreign Office in Berlin — that, together, the German Federal Government and the Government of a German *Land* have so far in the course of the still ongoing appeal proceedings in the case *Apelt* disbursed more than DM 100,000 for projects assisting the Apelt brothers' defence, in particular concerning research for mitigating evidence in Germany on their youth.

— Secondly, as far as the letter (document No. 1 of 14 November 2000) of the German Consul to Mr. Richard Bozich, a former private investigator for Karl LaGrand, of 17 March 1993 is concerned, let it suffice to say that the Consul's question of in how far the German nationality "is crucial for the defence strategy" of Karl LaGrand is easily explained by the fact that Mr. Bozich was not the defence counsel responsible for defence strategy, but simply the investigator. In addition: at this moment nationality could only play a role in so far as a possible political intervention is concerned — against the background that in that case of the Apelt brothers the question of violation of Article 36 of the Vienna Convention was never raised; in so far as the question aims at a political intervention and does not express doubt about the necessity of assisting a German national.

6. Concluding my opening remarks in the second round, let me again state our main arguments which stay unchanged because Tuesday's pleading by the United States gives us no reason to change its main thrust — as ably as our friends on the side of the Respondent argued their case.

— We have come to you, Mr. President and distinguished Members of the Court, to obtain your decision clarifying important principles of international law arising out of the Vienna Convention and of the Statute and Rules of this Court, as far as the binding quality of your Orders on provisional measures is concerned.

— We have seen the LaGrand brothers deprived of their rights under Article 36 of the Vienna Convention because they were only informed about their rights on consular protection by the US authorities more than 16 years after their arrest and because they were deprived of the possibility of raising this violation of their right by the principle of procedural default. US authorities, whose acknowledged fault it was that the LaGrands were informed too late, turn this against them, saying that they could have only raised the matter earlier.

— Similarly, as far as the Order is concerned, United States authorities disregarded what the Court asked them to do, but rather preferred to continue on a path it had previously chosen — the execution, as if after more than 17 years after the arrest a stay of execution for days or months were impossible: as if the short time between Order and execution — the three hours referred to repeatedly on Tuesday — were an immutable law of physics and could not be extended: it was at the discretion of the Governor of Arizona to do so, but also other authorities at the federal level could have acted! International law — that means the Statute and Rules of this Court — and respect to this highest judicial organ of the United Nations, the International Court of Justice, demand that decisions of the Court are not rendered meaningless by actions of one party prior to that final decision.

— Even though the origins of this case trace back to the LaGrand brothers who were executed more than a year ago, we attach great significance to your ruling as far as German nationals in the United States, but also as far as citizens abroad from all countries party to the Vienna Convention are concerned. For the Vienna Convention on Consular Relations is an important pillar for the protection of foreigners abroad.

Germany, trusting in this Court, confidently awaits your decision, to which it attaches the greatest significance and by which it will abide faithfully.

Mr. President, distinguished Members of the Court, I thank you for your attention and ask you to call on Professor Bruno Simma to continue the German pleading. Thank you.

The PRESIDENT: Thank you very much, Mr. Westdickenberg. Je donne maintenant la parole au professeur Bruno Simma.

Mr. SIMMA: Merci, Monsieur le président. Thank you, Mr. President, for giving me the floor this morning.

II. JURISDICTION AND ADMISSIBILITY

1. Let me first address the issue of jurisdiction and admissibility. On Tuesday, counsel for the United States recalled, as Germany had already done on Monday, that the jurisdiction of this Court is always a limited one. There is also agreement between the parties that our case finds its jurisdictional basis solely in Article I of the Optional Protocol. This provision covers "[d]isputes arising out of the interpretation or application of [this very] Convention". Everything else — and here again we cannot but agree with the US Agent[1] — is outside the jurisdiction of the Court. What does undeniably remain, however, is a dispute concerning the correct understanding of the scope of this jurisdictional clause.

2. Contrary to the announcement made by the Agent of the United States, it was not only Professor Meron who dealt with questions of the competence of this Court. Rather, the issues of jurisdiction and admissibility went like a red thread throughout the whole US presentation and sometimes appeared at unexpected places, that is, among questions clearly belonging to the merits of our case. This fact and the rather light-handed manner in which statements with potentially far-reaching consequences were sometimes made does not facilitate our task this morning. Let me by way of example refer to Mr. Thessin's statement according to which the case "has been resolved by the United States apology and appropriate assurances of non-repetition, making the case in that sense moot". Mr. President, if one party has asked for certain remedies and the other party is only willing to concede, or has already offered, less, this is certainly a core question of the merits, and has nothing — I repeat, nothing — to do with "mootness" in the technical sense, or in any other possible sense.

3. The central allegation of Professor Meron was, as our Agent has already mentioned, that Germany used the "Optional Protocol [as a] giant vacuum cleaner which sweeps up every allegation of fact or law, whether or not it has anything to do with the interpretation or application

[1] CR 2000/28, para. 1.5.

of the Convention, however remote and however weak the evidence and its basis in law"[2]. Mr. President, this statement not only distorts our submissions but also reveals an understanding of the scope of the Optional Protocol's jurisdictional clause which is far too narrow and thus entirely untenable.

4. In this regard, Professor Meron's invitation to look at page 1209 of Professor Rosenne's *magnum opus*[3] was very helpful indeed. The leading case cited there on our issue is this Court's Judgment in the *Ambatielos* case in which we read:

> "The Court must determine . . . whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886. On the other hand, it is not necessary for that Government to show, for the present purposes, that an alleged treaty violation has an unassailable legal basis . . .
>
> [I]f it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty."

5. We submit — and I hope we have made this sufficiently clear, both in our Memorial and in our oral presentation — that the German reading of Article 36 of the Vienna Convention and the consequences arising out of its violations is based on "an arguable construction of the treaty" — to use the terms of the *Ambatielos* finding. Nothing more is required in order to answer the question of jurisdiction in the affirmative.

6. Further, we should keep sight of the fact that the jurisdictional clause on which we rely is not confined to "the interpretation or application of the Convention" but expressly refers to "disputes arising" about these matters. What this means is, that the Court is not limited to a quasi-"advisory" function concerning the understanding of the rules of the Vienna Convention but is called upon to decide contentious cases "*arising out* of the interpretation or application" of it. This is precisely what we have before us with regard to all the claims put forward by Germany. On the basis of the Optional Protocol, this Court cannot address mere abstract or hypothetical questions concerning the Vienna Convention, its competence presupposes a concrete dispute. In

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[2]CR 2000/28, para. 3.6.

[3]Shabtai Rosenne, *The Law and Practice of the International, 1920-1996* (3d. ed., Vol. III — Procedure).

our specific case, this dispute unfortunately involves the death penalty. We simply cannot avoid this topic in framing the issues for the decision of this Court. But, what is at the heart of our dispute is Article 36 of the Vienna Convention as such. The question of the implementation of this provision necessarily involves an assessment of laws and practices within the United States domestic legal system but only from the perspective of international legal requirements. The allegation that Germany attempts to turn this Court into an unauthorized overseer of US law and as a sort of court of criminal appeal implies a thorough — and of course deliberate — misunderstanding of Germany's submissions as well as of the scope of the Optional Protocol.

7. A topic on which my colleague, Professor Meron, laid special emphasis was the issue of diplomatic protection. Let me make it clear from the outset, Mr. President, that this issue enters the picture only through the intermediary of the Vienna Convention. What we request this Court to do is to find that Article 36 not only establishes rights and obligations between States but also gives rise to rights of individuals. If one was to follow this view, a dispute arising out of the interpretation of Article 36 necessarily encompasses a dispute about whether or not Germany is entitled to grant its nationals diplomatic protection. Hence, diplomatic protection does not stand alone, isolated, as Professor Meron wants you to believe, but is closely and insolubly linked to the dispute over the correct interpretation of the Convention. In other words, if, as Germany submits, Article 36 contains individual rights, Germany's right to diplomatic protection will be the necessary corollary. If, on the other hand, the US view were to prevail, the issue of diplomatic protection would inevitably evaporate. What this proves is that the controversy whether in our case, a right of Germany to diplomatic protection exists, clearly is a "dispute arising out of the interpretation of the Vienna Convention".

8. Counsel for the United States further argued that "the requirement of exhaustion of local remedies would bar further consideration of . . . claims [of diplomatic protection]". Professor Meron then questioned the German assertion that all remedies available to the LaGrands in the United States had been exhausted, because "remedies *are* available prior to conviction by jury and at the state level"[4]. Let me once again recall the undisputed facts of this case:

[4]CR 2000/28, para. 3.24.

US authorities failed to inform Karl and Walter LaGrand of their rights under the Consular Convention and they themselves were not aware of these rights well beyond the time when the jury trial and other (appellate) proceedings at the state level had been concluded. Mr. President, the essential element of the rule of exhaustion of local remedies was in our view correctly described by Belgian counsel in the *Barcelona Traction* case in the following words: *«[p]our pouvoir entrer en ligne de compte dans la vérification de la conduite de la personne lésée, les recours doivent lui avoir été effectivement* accessible». And the requirement of "accessibility" was then explained as follows:

> *«La première condition, à savoir* l'accessibilité *des recours envisagés ... est dictée par le bon sens. Comme l'indique la sagesse populaire, «à l'impossible nul n'est tenu». Un recours inaccessible doit donc être assimilé à un recours inexistant et on ne pourra opposer à l'action d'un État l'inaction de son ressortissant lorsque celle-ci est due à une force majeure,* a fortiori *lorsque l'impossibilité a été due à l'attitude des autorités de l'Etat défendeur.»*

And the statement goes on: *«L'accessibilité du recours, c'est la possibilité juridique et matérielle pour la victime d'y avoir recours.»*[5]

9. I submit, that this statement perfectly represents the generally recognized law on the matter; confirmed by the jurisprudence of this Court and its predecessor, by legal writing, and finally also by the new ILC draft Article 45 *(b)* on State Responsibility[6] which specifies the local remedies to be exhausted as "any available and effective local remedy . . .". Could any statement better match the particular circumstances of our present case in which it was precisely the conduct of the United States itself which prevented the LaGrands from raising the issue of consular notification at a sufficiently early stage of their criminal proceedings? Without spending more time on this obvious point, it is clear that in our case there existed no remedy that was open to the LaGrands and which they failed to employ, to paraphrase the holding of this Court in the *ELSI* case.[7] Amerasinghe sums up the situation as follows:

> "[A]vailability entailed not only that the remedy be accessible to the particular individual affected, if such remedy existed, but also that that remedy be available as a possible remedy in the specific context of the individual's case."[8]

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[5]Cited after C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge 1990), at p. 153.

[6]Text reproduced in United Nations doc. A/55/10 at p. l 36.

[7]Case concerning *Elettronica Sicula S.p.A (ELSI), I.C.J. Reports 1989*, p. 47.

[8]C. F. Amerasinghe, *op. cit*. p. 154.

As to Professor Meron's assertion that the LaGrands did not exhaust local remedies because they did not claim their right, a right about which they had not been informed, I find it disturbing, to put it mildly. It amounts to saying: you did not exhaust local remedies because you did not raise a point that you did not know about because the authority which is going to put you to death has not informed you in breach of international law — a remarkable statement.

III. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

1. Mr. President, let me now turn to the interpretation of Article 36 of the Vienna Convention. The Respondent has presented us with a restrictive and incorrect reading of Article 36 in this regard. Let me first, therefore, once again explain the system of consular assistance that is embodied in Article 36, paragraph 1. Second, I will argue that the rights under Article 36, paragraph 1, are individual and human rights. Third, I will address the violation of Article 36 by the application of rules of US domestic law which do not give full effect to the rights under Article 36, paragraph 1.

2. Counsel for the United States wants you to believe that Article 36 does not constitute a coherent and comprehensive régime. In the US view, Article 36 is a bag full of isolated rights with no apparent connection and no relevance whatsoever for criminal proceedings. Such a description does not only underestimate the drafters of the Convention, but also the result of their work. In reality, both the right to communication between consul and the foreign national and the right to consular assistance in criminal and other procedures are embodied in Article 36.

3. Article 36 sets up a coherent régime in which providing information to the detainee of his right to notification plays an essential role for the effectiveness of the whole provision. The rights do not only concern the consul or the sending State, but first and foremost the foreigner himself. First, Article 36, subparagraph 1 *(a)*, does not only regard the communication and access of consular officers to nationals, but operates also vice versa. The order of these two sentences is certainly less important than the substance of the rights embodied in that subparagraph. Second, Article 36, subparagraph 1 *(b)*, does not only cover arrests, but also mentions, in words of one syllable, the trial following an arrest. On Tuesday, Professor Trechsel argued that applying Article 36, subparagraph 1 *(b)*, to the detention and trial of foreign nationals would amount to a

«traitement préférentiel» of an arrestee as compared to a suspect at liberty[9]. But this turns the purpose of this subparagraph on its head. Is the situation of a person at liberty really inferior to that of an arrestee? While a person who is detained is unable to receive outside support without the help of State officials, a person at liberty is in a position to freely prepare for his defence and to contact whomever he pleases. Third, Article 36, subparagraph 1 *(c)*, explicitly covers arrangements of legal representation. Counsel for the United States has argued that legal representation of any standard would conform to the meaning and purpose of this subparagraph[10]. Such a view not only disregards the "appropriateness" of the legal representation which is expressly prescribed by Article 5, subparagraph (i), of the Vienna Convention on Consular Relations. It would also allow any State to circumvent that provision by appointing a convenient lawyer — convenient to the State, not to the individual. I am convinced that Ms Brown, an eminent practitioner of the Vienna Convention as she is, would certainly not accept such a proposition if advanced by Germany as against a US citizen. Again, the extremely narrow reading suggested by the Respondent deprives the rights embodied in Article 36 of most of their practical meaning. Fourth, the US argument disregards the structure of Article 36. On the one hand, Article 36 provides for the right of the detainee to information about his rights. On the other, it contains the right of the consulate to assist its nationals. For the effective exercise of his right to communication at all times, informing the foreigner about his rights is absolutely essential. Only if he is informed can he request notification and, in the future, benefit from freedom of communication with and access to the consulate. Only if seen in that systematic correlation do the rights embodied in Article 36 become meaningful and effective, as is expressly required in Article 36, paragraph 2.

4. Both Professor Trechsel and Ms Brown claimed that the German argument on Article 36 providing individual rights was contradicted by the right of a State to refuse communication with its nationals. But this argument confuses the right of the individual towards the receiving State with the right of a national towards his own State. Whereas the first point is a matter of

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[9]CR 2000/29, para. 6.47.

[10]CR 2000/28, para. 4.25.

international law, the latter is left to domestic law. For instance, according to German law German nationals do have a right to receive assistance from their consulate.

5. Let me now turn to Professor Trechsel's attack against the human rights dimension of Article 36. As a preliminary point let me say that I am familiar with — not to say, sick and tired of — arguments like that of the alleged "inflation of human rights" not only on the basis of my academic work but due to my ten years of practical experience as a member of the United Nations Committee on Economic, Social and Cultural Rights — a category of human rights which is generally thought of, countered or opposed by that very argument. Putting forward such an argument is usually the first step of disqualifying unwanted candidates for human rights status by proceeding from what I would call a "fundamentalist" — or western fundamentalist — conception of such rights. On a more personal note, I find it sad to listen to an eminent human rights lawyer from a region of the world where the death penalty has been abolished and where the situation in which the brothers LaGrand found themselves trapped, cannot occur, attempting to deconstruct the legal view of a human rights court in another region of the world where the situation is extremely virulent. I will be very frank: I consider this is an attempt by our distinguished opponents to appease the conscience of this Court by suggesting that one can very well reject the view of the Inter-American Court as to the human rights dimensions of Article 36, without the risk of being opposed to human rights in general. I have nothing against human rights: some of my best friends, the European Convention rights, are human rights.

6. Returning to Professor Trechsel's "fundamentalist" philosophy of human rights, the very abstractness, even aloofness, of such a purely naturalist conception of such rights deprives them of their most important feature, namely that of belonging to real people in everyday situations. In this sense, a closer look at contemporary human rights law will reveal many instances in which human rights refer to groups in need of particular protection such as migrant workers, the elderly, women, children, or human beings in developing countries. Does Professor Trechsel really want to suggest that these rights are not "human rights" in the proper sense of the term? If United Nations efforts in human rights law-making had been based on such a concept, they would have gone nowhere.

7. Regarding rights of foreigners, a famous saying has it that every human being is a foreigner, almost everywhere — except, of course, in his own country. For instance, almost all of

us in this courtroom, and, with one exception, all of the judges on the bench, are foreigners here, enjoying the hospitality of the Netherlands. And again, that absolutist view reveals itself as a fundamentally flawed and unrealistic conception. Germany therefore proposes that we look at the law in force, in particular at the text of Article 36, to find out whether it gives rise to individual human rights or rights of States. By the way, the distinction between "inter-State" relations and human rights does not correspond to the current stage of international law and international human rights law. Rather, human rights today are embodied in inter-State conventions and they are part and parcel of contemporary international relations.

8. As we have demonstrated both in our written and oral pleadings, a state-of-the-art interpretation clearly shows that Article 36 does contain individual rights. Indeed, as the *travaux* reveal, it was the intention of the drafters not to impose consular assistance on the foreigner but to make consular support dependent on the individual's willingness to be supported — which, in turn, means that it is his rights which are at stake, and, at least primarily, not those of the State involved. Thus, at several instances counsel for the United States' choice of words shows that they, also, were not capable of speaking of the rights under Article 36 without referring to the rights of individual foreign nationals. For instance, Ms Brown herself spoke of "the right referred to in paragraph 1, . . . the right of the consular officer and the foreign national to communicate with and have access to each other . . ." and of "the right of the foreign national to have his consular official notified of his detention and to have his communication forwarded"[11]. This very impossibility of speaking on Article 36 without speaking about the rights of foreigners is convincing testimony to the proposition that it does embody such rights — at least if one sticks to the text of the Convention instead of following a flawed and abstract concept of what individual and human rights should look like. In an analogy to the famous Humpty Dumpty, does the United States have the right to define "rights" differently from the rest of the world?

9. The "human rights" dimension of Article 36 was far from being alien to the drafters of the Convention, some 40 years ago. As we have shown in our Memorial, the *travaux* are replete with references to the connection between human rights and the right to consular notification. To cite

[11]CR 2000/28, para. 4.26.

only one example, in the words of the Greek delegate to the Conference, Mr. Spyridakis, the 1963 Vienna Conference "was also following the present-day trend of promoting and protecting human rights, for which future generations would be grateful"[12]. Let me mention at this point that, through a happy coincidence I would say, the German and the United States legal teams found themselves put up in the same hotel, and this gave me the opportunity this morning over breakfast to discuss with Ms Brown the interpretation of the meaning of the word "academician" which she had used in her presentation, because I was going to make a little remark about that, for instance calling Mr. Spyridakis as far as I know not having been a mere academician. But Ms Brown clarified the meaning of the term "academician" in such a charming and disarming way that I am going to desist from these remarks, maybe with one little exception a little later.

10. To return to my argument about human rights, this dimension of Article 36 is not some kind of claim "made up" by Germany but the expression of a development already taken into account by the negotiators of the Vienna Convention. Germany does not share the dismissive attitude towards both the United Nations General Assembly and the Inter-American Court of Human Rights expressed by counsel for the Respondent. It is of course correct — and Germany has never suggested otherwise — that the United Nations Declaration on the rights of aliens of 1985 does not expressly mention the right embodied in Article 36, subparagraph 1 *(b)*. But, regarding the widespread ratification and application of the Consular Convention, it seems obvious to me that, by referring to the right to communication "at any time", that is, also when a foreigner is arrested or detained, the General Assembly referred to the whole panoply of rights embodied in Article 36, and not only to subparagraph 1 *(a)*. There was simply no need to restate all of these rights in detail, because they were already recognized in the Vienna Convention of 22 years ago. Nevertheless, the United Nations Declaration does clarify that we are here in the presence of a human right of foreigners, and of course we share the view of this Court expressed in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that General Assembly resolutions "can . . . provide evidence important for establishing the existence of a rule or the

[12] *United Nations Conference on Consular Relations, Official Records*, Vol. I, United Nations doc. A/Conf.25/16, p. 339 (para. 13).

emergence of an *opinio juris*"[13]. This is especially true of a solemn General Assembly declaration like ours, adopted by consensus.

11. As I have already implied, it is strange that Professor Trechsel has invoked the jurisprudence of the European Court in a case dealing with the observance of individual rights in the United States. This deference to the regional European Court stands in marked contrast to his outright rejection of the Advisory Opinion of the Inter-American Court of Human Rights. A close analysis of the entire barrage of Strasbourg judgments fired at this Court by Professor Trechsel would show that none of these judgments is anything like as relevant to the problem before you, Mr. President, as is the Advisory Opinion of the Inter-American Court. But for understandable reasons, this Opinion is not supported by the United States. Such a selective approach to human rights seems particularly misplaced before this Court, whose jurisdiction is truly worldwide. I will not repeat the extensive citations that we put forward from the Opinion of the Inter-American Court. We are confident that this Court will have a more balanced view on the impact of the jurisprudence of regional human rights courts on this case than that displayed by our Respondent. Needless to say, the most truly universal human rights body, the United Nations Human Rights Commission, in its recent resolution on the question of the death penalty, has urged

> "all States that still maintain the death penalty . . . to observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention"[14].

12. The character of the safeguards contained in Article 36, paragraph 1, also sheds light on the meaning of Article 36, paragraph 2, in so far as this provision requires internal laws and regulations to conform with the rights under paragraph 1. No human rights lawyer worthy of that name would accept the proposition that effectiveness of human rights provisions can be achieved without remedies for their violation. Only then can the individual benefit from his rights instead of being at the mercy of State authorities.

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[13] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, I.C.J. Reports 1996,* p. 254 (para. 79). See also ICTY, *Prosecutor* v. *Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T (1998), reprinted in: 38 *International Legal Materials* (1999), p. 317, at p. 351 (para. 160). For an extensive [?]

[14] United Nations doc. E/CN.4/RES/2000/65, para. 3.

13. As we explained at length on Monday, the impact of paragraph 2 of Article 36 on our case is twofold: first, it clarifies that domestic law falls well within the ambit of and is subject to the rights under paragraph 1. Second, it makes clear that the rights under paragraph 1 must be effectively implemented by domestic law. It is understandable that Mr. Mathias tries to counter Germany's argument on the proviso by referring to the first part of Article 36. But notwithstanding the fact that paragraph 2 begins with the relevance of national law, the yardstick for domestic law in this regard is to be the effectiveness of the international law embodied in Article 36, that is the rights accorded to foreigners. In Germany's understanding, this clearly implies that there needs to be a means by which the injury to the defendant caused by the violations of his rights can be remedied at the domestic level. Otherwise, consular information simply does not amount to an effective right as required by Article 36, paragraph 1, but remains subject to the whims of the receiving State.

14. This has nothing to do with the United States argument that Article 36 does not deal specifically with "defences in criminal cases". But the provision unequivocally deal with the rights of foreigners to consular access and information and the effective implementation of these rights by domestic law. These rights are the domestic criteria, not any list of matters of domestic law covered by the provision. In a quite — this is what remains of my intention Ms Brown — unacademic remark about the *travaux*, that is, one unaccompanied by any references, counsel for the United States spoke of "the considerable unease that the delegates felt about the fact that the changes that were being informed referred to individuals and their rights". Unlike US counsel, I do not pretend to be able to read the minds of the delegates of 40 years ago; I just can't.

15. The other day, counsel for the United States argued that none of the rights under Article 36, paragraph 1, were violated by the application of the rule of procedural default. Such a statement simply glosses over the fact that without a remedy in case of its violation, a right to information is meaningless and not effective, contrary to the express requirement contained in the proviso in paragraph 2. In the view of the United States, paragraph 2 would add nothing to paragraph 1. But at this point, it simply remains for me to state that the Applicant and the Respondent continue to disagree deeply and sharply on this point.

16. On Tuesday, Ms Brown suggested that practitioners view Article 36 in a different way. Emphasis was put on the impossibility of perfect compliance with Article 36. Following that pattern, would counsel also argue that speed-limits on interstate highways in the United States, on the German autobahn — there indeed exists speed-limits on the German autobahn — or on British motorways are of little judicial relevance just because every day thousands of drivers risk their lives speeding? Did the Respondent really want us to believe that Article 36 was some sort of, maybe newly conceived, soft law of little relevance for the detainee? Let me be clear on this point: the Vienna Convention has been accepted by the vast majority of States around the world, and is a solid part of existing international law. Statistics of compliance and the content and substance of an obligation are two different matters. Nothing that Germany has advanced here requires more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government.

17. Mr. President, I would now like to ask you to call on Mr. Kaul to explain State practice regarding the implementation of Article 36, in particular German practice. Merci Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à M. Kaul.

Mr. KAUL: Merci, Monsieur le président.

IV. STATE PRACTICE WITH REGARD TO ARTICLE 36 OF THE VIENNA CONVENTION

1. Mr. President, Germany will now once more show why State practice cannot support nor justify the conduct of the United States in the case of the LaGrand brothers and that State practice cannot support the underlying restrictive and incorrect interpretation of Article 36 of the Vienna Convention by the Respondent.

In passing, let me mention that my remarks on State practice do not come from an academician but from a practitioner of consular law who has done consular work in the German embassies in Oslo, Tel Aviv and also Washington.

2. With regard to State practice, Ms Brown on Tuesday ventured to put before this Court a quite far-reaching and categoric statement. She said "the prevailing practice of the over 165 countries now party to the Vienna Consular Convention overwhelmingly supports our position". This is obviously a further but very accentuated repetition of the ancillary argument contained in the Counter-Memorial that "State practice including Germany's own practice conflicts with Germany's claim"[15]. Ms Brown also found it appropriate to state — incorrectly — that "Germany yesterday did not contest" the US view and that "Germany seems prepared to concede on this point".

3. Needless to say this is simply wrong. But before showing once more that arguments on State practice cannot support or justify the US position in this case, let me make a general remark: this is not a seminar concerning State practice on the Vienna Convention on Consular Relations. We absolutely must retain our focus on the fundamental facts and legal principles decisive for the concrete case of the LaGrand brothers before this Court. This case concerns the unresolved dispute between the United States and Germany arising out of the application of the Vienna Convention, this in a case in which the Respondent once again chose to deliberately ignore a sustained and grave violation of the right to consular assistance before putting two German nationals to death. As in the case of Mr. Breard, the LaGrand brothers, Mr. Faulder and Mr. Flores, executed just a week ago, State practice by the Respondent seems *de facto* to: "violate Article 36, ignore the violation in the criminal proceedings, refuse to impact the violation for the imposition of the death penalty, execute and apologize as usual".

The concrete question before the Court is whether such a practice is indeed in accordance with the Vienna Convention, whether such a practice is in line with the specific obligation to give full effect to the rights accorded under Article 36, and whether "the prevailing practice of the over 165 countries now party to the Vienna Consular Convention really overwhelmingly supports" such an approach.

4. In light of the one-sided and misleading US arguments on State practice, we were, at first, tempted to react by saying: *"si tacuisses philosophus mansisses"*. But given these arguments

[15]Counter-Memorial, footnote, paras. 91-94.

Mr. President, Germany finds it necessary to bring some order into this mish-mash of argumentation in which chalk is equated to cheese, — in which State practice is reduced to the notion of consular practice, — in which no appropriate differentiation is made between minor and grave cases, between consular practice, judicial and legislative practice of States, — in which this practice is presented in a one-sided and selective way and — in which — most importantly — the Respondent again generously ignores the fact that there is simply no State practice with regard to the question, the decisive question, at hand, namely whether imposition of the death penalty impaired by a serious violation of the right to consular assistance should be open to some kind of review or not.

We are of course aware that the Order of this Court of 9 October 1998 in the case of Mr. Breard and the Advisory Opinion of the Inter-American Court of Human Rights deal specifically with these issues, and that they are the only specific sources of jurisprudence available from international courts to date.

5. Mr. President, the United States is in general correct that in their consular practice, in the proper and narrower sense of the word, most States seem to follow the practice of investigating, apologizing, if appropriate, and undertaking to improve future compliance, when allegations of violations of Article 36 occur between governments. Germany also noted on Tuesday that most violations of Article 36 happen in minor cases. Germany, on its part, does not question that in the majority of such cases the practice of investigating and apologizing may continue to be appropriate.

6. But, Mr. President, does this justify in the concrete case of the LaGrand brothers before this Court the assertion, stunning assertion indeed, that "prevailing practice of the over 165 countries party to the Vienna Convention overwhelmingly supports" the US position? Germany suggests that here we have to be more precise. In our view, this US assertion would only be correct if the answer to the following two precise questions were to be clearly in the affirmative:

— First, does State practice, including the judicial and legislative practice of States, support the US view that violations of the Vienna Convention are irrelevant for national criminal proceedings? That convictions impaired by such a violation cannot be open to some kind of review with regard to the impact of such violations?

— Second, and more specifically: does State practice support the US view that violations of the Vienna Convention are irrelevant with regard to the imposition and execution of the death penalty? That imposition of the death penalty impaired by a violation of the right to consular assistance is not and cannot be open to some kind of review?

Needless to say, Mr. President, the answer to both these questions is from our side a very clear "No".

7. First: With regard to existing judicial practice relating to the failure to inform a foreign national about his right to consular assistance, such practice is rare and largely inconclusive. For example, an Australian case, the *Abbrederis* case, only deals with the admission of evidence, not with the lack of consular notification during the whole trial[16]. In an Italian case, the *Yater* case, the Court denied a reversal of a criminal judgment due to a violation of Article 36. However, in that case the defendant had an attorney of his own choice and not a court-appointed lawyer; and of course the case did not concern the pronouncement of the death penalty[17]. On the other hand, two British Crown Court cases suggest that a violation of Article 36 may indeed lead to the reversal of a judgment based on evidence impaired by the violation[18]. The United States Ninth Circuit Court, considering provisions of US administrative procedure similar to Article 36, decided that a violation of those provisions in certain cases requires a retrial, but it appears that US domestic courts are currently of the opinion that criminal procedure is not affected[19].

8. On Tuesday, Professor Trechsel has put together a remarkable array of international jurisprudence. Nevertheless, he has drawn a rather incomplete, if not wholly misleading, picture of comparative law of criminal procedure. Instead of looking at this or that instance where Article 36 has been expressly mentioned in legal writings, rather, he should have looked, on the one hand, at the law of the procedural codes and what it says about eventual claims of a violation of Article 36, and, on the other hand, to the concrete application of Article 36 in criminal justice systems.

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[16] 36 *Australian Law Reports* 110, at 123.

[17] 77 *ILR* 541.

[18] *R.* v. *Van Axeland Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich., Reported in *Legal Action* 12 Sept. 1991; *R.* v. *Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHR Sich. Reported in *Legal Action* 23 Dec. 1990.

[19] Cf. *United States* v. *Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980); *United States* v. *Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) and *United States* v. *Lombera-Camorlinga*, Counter-Memorial, Ann. 9.

9. Contrary to what the Court has been told on Tuesday, most municipal systems provide for remedies for breaches of Article 36 in their law of criminal procedure. It may be true that these remedies have not been created for the sole purpose of remedying breaches of the Consular Convention. But nobody has ever demanded such an extraordinary remedy. Rather, it is perfectly sufficient if relief can somehow be granted through the ordinary ways of appeal. Also, the point is of course not that ultimately an appeal may fail due to the circumstances in the case.

The crucial point, however, is simply that appellants must not be automatically precluded from raising this point on appeal only because the point was not argued at first instance. And this feature is indeed unique to the United States. Other countries have either directly incorporated Article 36 in their code of criminal procedure[20] — for example Spain and the Czech Republic — or recognize the provision as one that is at least in principle subject to appellate review.

10. With regard to German practice, counsel for the US sought again to convey the impression that Germany itself would not be able to deliver what it asks of the US in submission No. 4. Let me therefore use German law as an illustration of the fact that domestic law of criminal procedure does indeed allow for review of judgments which are, to cite submission No. 4, "impaired" by a violation of Article 36.

11. First, as far as the remedy of reversal of judgment is concerned, the German Constitutional Court, in its *Pakelli* decision on the European Convention on Human Rights, has left open the question whether the international legal principle of *restitutio in integrum* may lead to the reversal of German judgments. In fact Germany has introduced a provision in July 1998 providing for such a possible reversal if the European Court of Human Rights has declared that there was a violation of the European Convention on Human Rights. In the same decision, the German Constitutional Court clarified, however, that if required by international law to do so, German courts could reverse a judgment just like any other public act. Thus, the US contention that German law does not contain any possibility to reverse judgments if required by international law is, once again, simply wrong.

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[20]Cf. § 70 of the Czech Code of Criminal Procedure; Art. 520 (2) *(d)* of the Spanish Code of Criminal Procedure.

12. As to the German law of criminal procedure, an error of law which is not remedied during the trial can be put forward by appeal in three ways: *Berufung*, *Revision* and *Wiederaufnahme*. In murder cases the remedy would be *Revision* to the Federal Court of Justice. *Revision* is an appeal on questions of law only. In passing, let me mention that German courts were not yet confronted with the necessity to decide in a concrete *Revision* case about a violation of Article 36. But the doctrine is clear: To be successful, this appeal must fulfil three criteria.

(i) There must be a breach of "the law" according to Article 337 of the German Code of Criminal Procedure. In this sense law is also international customary law and international treaties as the Vienna Convention, this without any need for further implementing legislation[21].

(ii) The judgment must be based on the breach of the law. This requirement is analogous to the requirement of prejudice applied by US courts. However, there is an important difference: according to German case-law causation need not be proven! The Federal Court of Justice has constantly held that it is sufficient to show that it *cannot be excluded* that the decision of the court might have been different if the law had been applied properly. If you carefully look at our submission No. 4, you will notice that it asks only for the review of judgments "impaired by" the violation of Article 36.

(iii) The defendant must not have lost his right to an appeal.

13. German law, as interpreted by the courts, does not know provisions similar to the rule of procedural default. The German approach is different. Only specific points of appeal can be barred. First, the defendant may lose his right to put forward an error of law during appellate proceedings if he is defended by counsel and does not formally object to an order of the court during the course of the proceedings (Article 238, paragraph 2, of the German Code of Civil Procedure (StPO)). But this is not relevant to the present situation. Second, the defendant may be deemed to have waived the right to raise a particular point of appeal if the defendant's counsel does not contradict the admissibility of statements that were illegally obtained during the pre-trial phase.

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[21] Cf. Kleinknecht/Meyer-Goßner, StPO, 44th ed., § 337, MN 2; Karlsruher Kommentar zur Strafprozeßordnung, 3rd ed., § 337, MN 8.

However, a waiver is *not* possible if the judge was under an obligation to inform the defendant of his rights, including the right under Article 36.

14. Whereas counsel for the US asserted that German doctrine was silent on this point the contrary is true. All German commentaries on criminal procedure emphasize the obligation under Article 36 (VCCR)[22]. To quote from the so-called Karlsruhe Commentary invoked by Professor Trechsel: "Upon arrest of a foreigner, the consulate of his country of origin is to be notified without delay if he so requests after mandatory information of this right."[23]

15. German practice is consistent with these requirements of the Code of Criminal Procedure. No. 135 of the pertinent German Guidelines *(Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten — RiVASt)* are very clear on this matter. Detainees are, as a matter of routine, provided with a form — it is here — that informs them of their rights under Article 36. This form actually has been translated into 21 languages. To assist the judge in his duties, German authorities have devised this form that contains all relevant steps to be taken during the first hearing of the defendant. A special section is reserved for the detention of foreigners and the judge issuing a warrant of arrest must use it. The judge has to check several boxes, including whether he has informed the defendant of his rights under Article 36 and whether the detainee demands that the consulate of his home country be contacted or not. This form cannot, of course, exclude all human error. But it does demonstrate that Article 36 is relevant in criminal proceedings and that it is observed in the day-to-day work of German judges and law enforcement officers.

16. In conclusion, it is fair to say that while a violation of Article 36 of the Convention would of course not "always and automatically lead to the nullity of the decision", which Professor Trechsel foisted on us, there are definitely ways to challenge the decision of a court in a trial where the defendant had not been informed of his rights under Article 36 of the Convention. Most importantly, the defendant is not precluded from raising this point on appeal simply because

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[22]Cf. Kleinknecht/Meyer-Goßner, *Strafprozeßordnung*, 44th. ed., § 114b, MN 4 and 9; *Karlsruher Kommentar zur Strafprozeßordnung*, 3rd. ed., § 114b, MN 10; Löwe/Rosenberg, *Strafprozeßordnung*, 31st. ed., § 114).

[23]*Karlsruher Kommentar zur Strafprozeßordnung*, 3rd. ed., § 114b, MN 10.

he did not argue the point at first instance. Thus, German law is perfectly able to meet the requirements of Article 36 set out by Germany in its submission No. 4.

17. Mr. President, with regard to the question whether State practice supports the US view that violations of the Vienna Convention are irrelevant with regard to the imposition and execution of the death penalty, the answer is even more obvious. If you look at State practice worldwide, there is, to our knowledge, currently no other State in the world asserting that, even in death penalty cases, violations of the right to consular assistance are irrelevant. There is no other State applying the rule of "procedural default" or a similar rule in such a persistent and rigorous manner. There is no other State which *de facto* denies to this Court to even discuss the question of, first, whether imposition and execution of the death penalty after violation of the right to consular assistance is a proper application of the Vienna Convention and second, whether imposition of the death penalty impaired by a violation of the right to consular assistance should be open to some kind of judicial review or not.

18. What this means in the reality of today is the following: in the death penalty cases which are unfortunately so frequent in the United States, we may in all likelihood continue to see the pattern of "violate Article 36, ignore the violation in criminal proceedings, refuse to review the impact of the violation on the imposition of the death penalty, continue to apply the rule of procedural default, execute, apologize as usual".

This, indeed, is in our view a fundamental, a quintessential, challenge concerning the correct application and interpretation of the Vienna Convention around the world. As the Respondent has explicitly recognized, the right to consular assistance is, indeed, of crucial importance, not only for four million US citizens abroad but also for all foreign nationals in the United States, including German citizens.

This is why Germany seeks a clarifying judgment on our four submissions from you, the Members of the principal judicial organ of the United Nations.

19. Mr. President, I would now kindly ask you to call upon Professor Simma who will summarize our position on the remedies that Germany seeks. Thank you for your attention.

Le PRESIDENT : Je vous remercie beaucoup, et je redonne la parole au professeur Bruno Simma.

M. WESTDICKENBERG : Monsieur le président, nous avons encore besoin d'à peu près une heure pour notre plaidoirie et je vous laisse décider si, peut-être, c'est déjà maintenant le moment pour le *coffee break* ou si l'on va continuer avec le professeur Simma.

Le PRESIDENT : Je vous remercie. Je pense que nous pouvons encore entendre le professeur Simma et nous ferons la pause-café après son exposé.

Mr. SIMMA: Thank you, Mr. President, I consider this as a compliment: to be tolerable before the coffee break!

V. SAFEGUARDS AGAINST REPETITION

1. Let me turn to the Respondent's view on the topic of assurances and guarantees and, more specifically, to our submission No. 4.

2. First of all I would like to emphasize once again that in Germany's view these issues are under the jurisdiction of the Court. The Optional Protocol speaks of "disputes arising out of the interpretation or application", and what is before you in the present case is a dispute about breaches of the Vienna Convention; Germany claims entitlements arising out of these breaches and demands that the US make good the moral damage done and return to integral performance. This is a matter of State responsibility; and thus, the questions of State responsibility put forward by Germany are clearly within the ambit of the Optional Protocol.

3. The US view, according to which the responsibility aspects of our case are a matter of customary law and therefore not covered by the Protocol, would lead to absurd results. Clauses or optional protocols on dispute settlement appended to treaties could not fulfil their function because situations of breach could not be handled adequately, or not at all. What to me seems to be the case here is that what pops up is once again a milder version of the idea that the Vienna Convention régime is self-contained, that is, the only remedies available in case of breach would have to be found in the Convention itself. But of course the Vienna Convention does not contain any remedies designed to counter breaches of this kind! Let me also in this regard also remind you of

Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, according to which a treaty has to be interpreted in the light of the relevant rules of international law, around the treaty as it were, and State responsibility is around every treaty.

4. Turning more specifically to the assurance requested in Germany's submission No. 4, counsel for the United States tried to create the impression that the International Law Commission had formulated its respective draft Article 30 with great hesitation and that it went far beyond existing law[24]. What we find in fact, however, is that the ILC proposal met with general acceptance. Not a single State opposed its inclusion in the draft on State Responsibility. There was not one word of criticism in the comments of the United States on the draft Articles adopted at first reading in 1996. The same is true for the US contribution to the Sixth Committee debate of a few days ago. Of course, I would not be surprised if we were to find something resembling Tuesday's pleadings in the United States written comments to be submitted by the beginning of next year, but that should then be seen in a certain context.

5. On the other hand, there were quite a few States reacting favourably to the ILC proposal. For instance, according to Italy, *«[q]uant aux assurances et aux garanties de non répétition du comportement illicite, bien qu'elles ne soient pas toujours nécessaires, elles se configurent comme indispensable en de nombreuses hypothèses»*[25]. As to the German comment on the 1996 draft Article[26], to which US counsel drew our attention, let us look at its text:

> "Some doubt exists, . . . as to whether the injured State has, under customary international law, the right to 'guarantees of non-repetition' . . . To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate."

Well, I do not have any problems with this view. Some doubts might exist about its anchoring in customary law — our debate shows this — and assurances are certainly not due in all and every case. I will come back to that in a moment.

6. As to the gist of the debate in the ILC, it was decidedly positive. Let me quote from the Commission's report on its last session:

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[24]CR 2000/29, paras. 5.18 *et seq.*

[25]Statement of 25 Oct. 2000, manuscript, p. 4.

[26]United Nations doc. A/CN.4/488, p. 103.

> "There was support for including a provision on the duty to provide assurances and guarantees of non-repetition in the draft because there were cases in which there was a real danger of a pattern of repetition and countries could not simply apologize each time."[27]

Thus, the wording of the Committee's report to the General Assembly. In this context, by the way, repeated breaches of Article 36 were expressly mentioned as examples, in the ILC debates. To continue with another quotation from the ILC report:

> "The view was . . . expressed that assurances and guarantees of non-repetition were needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent."[28]

7. In his remarks concluding the ILC debate, Special Rapporteur James Crawford stated:

> "different views had been expressed on the retention of that subparagraph [that is, the subparagraph of the provision on cessation, which now combines cessation and our guarantees]; however, it was clear from the debate that most members of the Commission favoured its retention. . . . no government had proposed the deletion of [the respective article] . . . Replying to comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples; on the other hand they were common in diplomatic practice . . . [T]he draft articles operated primarily in the area of relations between States, although it was the courts that might eventually have to apply them if the problem could not be resolved diplomatically. [This is precisely our situation here.] It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches."[29]

8. The report of the Drafting Committee of last August expresses itself in the same vein:

> "Several members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances. They should be required especially in circumstances where there was apprehension of repetition."

Such assurances "were appropriate only if the repetition of the wrongful act was likely to occur". Even though the Drafting Committee was fully aware that in the past such guarantees had involved far-reaching demands, it took the view "that guarantees could not be dropped from the articles simply because some demands had been excessive"[30].

9. To sum up the sense of the ILC debate, it saw a firm place for our assurances and guarantees of non-repetition in the codification project. There is no way of denying this,

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[27] United Nations doc. A/55/10, para. 87.

[28] *Ibid*., para. 90.

[29] *Ibid*. para. 110.

[30] United Nations doc. A/CN.4/SR.2662, pp. 6 *et seq.*

Mr. President, because contrary to US counsel, I was there! And you can believe me that I was wide awake during the debate on draft Article 30.

10. Counsel for the United States drew attention to a remark made in the Commission according to which, "the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached"[31]. But of course, this remark referred to the distinction underlying the Commission's work on State responsibility between so-called primary and secondary rules, i.e., it referred to the theory according to which the breach of a primary rule, for instance a rule of the Vienna Convention on Relations, gives rise to new, secondary rules, and in that sense only, to obligations over and above Article 36 of such a breach. That is all there is to that statement.

11. I would also emphasize that the assurances and guarantees of non-repetition envisaged in the draft were never understood to be as absolute as counsel for the United States tried to depict them and thereby lead them *ad absurdum*, a point to which our Agent drew attention already in his introductory statement. It is clear that nobody can be held to perform the impossible. This was so clear to the Commission that it did not consider it necessary to mention this in the draft. The same is true for Germany and for the formulation of our submission No. 4. It might be, I admit, that the term "guarantees" used by the Commission is not very fortunate, considering the misunderstandings to which it appears to have led, but the Commission uses the terms "assurances" versus "guarantees" simply to design by the second-term remedies that go beyond mere words and involve certain preventive actions: thus the report of the Drafting Committee. These actions must, according to the draft Article, be appropriate, and "appropriate" in my view means adequate and effective. In our context what this implies is that the domestic measures to be undertaken by the United States, measures taken according to their choice — I emphasize this — must be capable of resolving the absurd Catch-22 situation that we have repeatedly described.

12. Mr. President, on Monday, I explained that safeguards against repetition are appropriate in the present case under both of the two different headings corresponding to their position in the two readings of the draft Articles of the ILC: first, as a means of reparation, second, and at present,

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[31] United Nations doc. A/55/10, para. 87.

as a corollary of cessation in cases of serious danger of repetition. Mr. President, under neither of these two *sedes materiae* a showing of injury and causation beyond what Germany has already done is required. Germany has suffered moral damage through the repeated neglect of its rights under the Vienna Convention by the actions of the United States, and the causation of this damage is beyond question. If you regard safeguards against repetition as a corollary of cessation in cases where an illegal act is repeated over and over again, as is the case here, neither prejudice nor causation need to be shown.

13. Mr. Mathias quoted from the Court's Judgment in the *Haya de la Torre* case, where it was held that the Court was not in a position to state how Colombia should terminate the asylum granted to this Peruvian politician, and the Court said that it was "unable to give any practical advice as to the various courses which might be followed with a view towards terminating the asylum, since, by doing so, it would depart from its judicial function"[32]. But, Mr. President, in its submission No. 4, Germany makes precisely such a distinction between what it requests the Court to do, namely to pronounce the obligation of the United States to provide Germany with an assurance of non-repetition and to ensure in law and practice the effective exercise of the Article 36 rights, and what is to be left entirely to the United States, namely the practical side of things (to use the term of the *Haya de la Torre* Judgment), the choice of means to make these assurances stick, if I may use this American expression.

14. Mr. President, to restate a point in this connection, the Agent for the United States suggested on Tuesday morning that the Court ought to determine that the actual dispute between the Parties "has been resolved by the United States apology and appropriate assurances of non-repetition"[33]. But, Mr. President, this is simply not the case. Germany does not consider the so-called "assurances" offered by the Respondent as adequate. And therefore, it remains for the Court to decide what would constitute an appropriate remedy for the injury done to Germany and its two nationals.

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[32]CR 2000/29, para. 5.26.

[33]CR 2000/28, para. 1.17.

15. Before I leave the field of State responsibility, let me clarify that nowhere in my statement on Monday did I mock, or express contempt, as was said by US counsel, for the forms of satisfaction other than assurances and guarantees[34].

16. Mr. President, one continuous objection of the Respondent against our submission No. 4 has been that in this submission Germany is demanding something from the United States which it is unable to deliver itself. Mr. Kaul has already, and I think very convincingly, refuted this criticism but let me come to the end of my statement by stating very plainly and simply that, if submission No. 4 were put forward against Germany, Germany would be in a position to comply with it.

This completes my statement. Let me finish on a personal note. I think that both my experiences within the United Nations — my participation in the work of the International Law Commission, and my being before this Court — have a decidedly rejuvenating effect on me. I feel like a student again: in the International Law Commission, I feel like in a high-powered seminar; and before this Court, I feel like in a State exam. Thank you very much for your attention.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur. Maintenant, la Cour va suspendre pour dix minutes.

L'audience est suspendue de 11 h 35 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à M. Donovan.

Mr. DONOVAN:

VI. CAUSATION

1. Mr. President, distinguished Members of the Court, I would like to return briefly to the procedural course of the LaGrands' case in order to respond to three of Attorney-General Napolitano's points: first, that German consular officials would not have acted to assist the LaGrands; second, that the mitigation evidence of which the violation deprived the LaGrands

[34] CR 2000/29, para. 5.22.

would have been merely cumulative of evidence already presented; and, third, that the Federal Court of Appeals satisfied itself that the evidence would have made no difference.

2. I would like to make two preliminary points first, however. First, the United States suggested on Tuesday that, the day before, Germany had condemned the US judicial system and made "newly manufactured" charges of racial discrimination. That is decidedly not the case. Germany pointed to several problems with the administration of the death penalty in the United States that have been identified by respected academics and organizations as mainstream as the American Bar Association. While people may differ about the scope and impact of those problems, and how to balance efforts to combat them with efforts toward other legitimate societal objectives, it is hard to deny that those problems exist. And because they exist, they form part of the factual circumstances in which the impact of the Vienna Convention violations here must be assessed.

3. Second, to be clear, the ground for the international responsibility in this case is provided by the breach of Article 36 of the Vienna Convention committed by the United States. But this breach of the law was not only prejudicial to the legal interests of Germany itself but also had fatal consequences for the LaGrand brothers. The argument on causation deals with this second aspect which, even if not essential in legal terms for the creation of US international responsibility, leads to an aggregation of its breach. Germany made this point on Monday when it observed that the United States had contended in its counter-statement of the facts that consular notification would have made no difference, but drew no legal consequences from that point. Except for the United States objection to one of the, as the United States would have it, five elements of Germany's first submission, that point remains unrebutted.

4. To proceed in response to the Attorney-General, I would like to address first her suggestion that Germany would not have acted even had the brothers contacted the consulate. To the contrary, we know that once the issue of citizenship was clarified, the brothers asked for help, and Germany provided it. That is the best evidence in the record before the Court about what would have happened in 1982.

5. Second, the Attorney-General argued that the evidence of which Germany claims the brothers were deprived was actually presented at the aggravation-mitigation hearing. In support of

that argument, she pointed to the testimony of an expert at the sentencing hearing and a passage in the presentence report.

6. Now it is necessary in order to assess the impact of the violation, to get into the nitty-gritty of the trial, that is unfortunately the case and I therefore invite the Court to review the materials in the record, but I will review them briefly here. The first expert to testify at the hearing was called on behalf of Walter LaGrand. On cross-examination, which takes up less than three pages of the transcript of that hearing, the prosecutor established, first, that the expert had met with Walter LaGrand for no more than an hour, approximately a year before the hearing; second, that the purpose of even that meeting was to establish Walter LaGrand's "mental state at or around the time of the incident", not to discuss mitigating factors that might have been relevant to sentencing; and third, that the only other preparation that the expert had done was to review presentence reports. No wonder the prosecutor saw so little need to cross-examine.

7. The second expert was called on behalf of Karl. He is the fellow that the Attorney-General quoted. He testified that he had spent an hour-and-a-half with Karl, and that the principal focus of his testimony was his opinion, based on the tape of Karl's confession, that Karl was telling the truth when he expressed remorse immediately after the arrest. In so far as he addressed social history, the superficial nature of his analysis, which the Attorney-General quoted, speaks for itself. The prosecutor obviously thought the same, because he spent even less time with Karl's expert than he had with Walter's — six questions, to be precise, taking up less than a page of transcript.

8. The only other witness to testify was Patricia LaGrand, Karl and Walter LaGrands' sister. While she surely testified to a difficult childhood, she just as surely could not make up for the absence of detailed information about the LaGrands' early childhood or, needless to say, the inadequacies of the experts' testimony.

9. Finally, the presentence reports, to be sure, include a brief, general statement about the unfortunate circumstances of the LaGrands' upbringing. But a few references in a presentence report cannot substitute for a case in mitigation.

10. We know that the information eventually secured from Germany provided concrete and extensive evidence of serious abuse and neglect during infancy and early childhood. To consider

the effect that evidence might have had, I again invite the Court to review the declaration of the mitigation expert included in the Annexes. She describes in detail the standard of care in capital cases, the minimal content of a social history as the start of a case in mitigation, and the use to which the history must be put. Specifically she explains:

> "Only with properly and independently gathered data can mental health professionals assess:
>
> (1) the presence and effect of medical, psychiatric and developmental disorders; and
>
> (2) the role of critical social, emotional and other factors, including pivotal life experiences, and their effect o[n] the individual's mental state and behaviour at critical points relevant to the charges and subsequent legal proceedings."

In other words, a minimally competent mitigation case must not only identify the relevant social, psychological, and developmental factors but it has to demonstrate a cause of connection between those factors and the charges at issue.

11. Judged by that standard, the aggravation-mitigation case put on at the sentencing hearing here can only be described as woeful. When one compares the sentencing hearing transcript to the expert's affidavit, one can appreciate the poor quality. But that conclusion draws additional support from other evidence before this Court: first, by the affidavit from Karl's lawyer admitting his own deficiencies, to which Germany has previously made reference; second, by the affidavit from an Arizona criminal lawyer expressing the view that the performance of Walter's lawyer "fell below the minimum standard of a defence counsel at a capital sentencing"; again specifically referring to the sentencing hearing and third, by the affidavit from Walter's *habeas* counsel, an experienced capital defender, who expressed the view that "[h]ad their trial counsel presented a complete case for mitigation, the LaGrands likely would not have been sentenced to death"[35].

12. Finally, I would like to address the Attorney-General's suggestion that in its 1998 opinion the Federal Court of Appeals somehow "peeked behind the veil" to assure itself that, even though the LaGrands had not been able to present the missing mitigation evidence at their sentencing, no miscarriage of justice had been done[36]. Now it's unclear from the transcript that I've reviewed exactly what point the Attorney-General wished to make, so I want to make sure that there is no

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[35]Anns. MG 46, at pp. 1013-17; MG 50, at p. 1113; MG 52, at p. 1216.

[36]Ann. MG 10, at p. 483 (citing *Sawyer* v. *Whitley*, 505 U.S. 333 (1992)).

confusion. As the Ninth Circuit's opinion reflects, the Court understood itself to be expressly barred by prevailing Supreme Court authority from considering what impact the mitigation evidence might have had. Instead, it restricted itself solely to the presence of aggravating circumstances that would make the LaGrands "death eligible". Now of course, the LaGrands did not claim that the missing mitigation evidence was relevant to the aggravating circumstances which had been found which made them "death eligible", and therefore the Court held that the mitigation evidence was irrelevant to its enquiry as restricted by prevailing authority. Thus, the LaGrands were in fact deprived by this evidence at trial — what the US Supreme Court has called the "main event"[37] — and neither the Ninth Circuit nor any other court in the United States ever considered the effect that the missing mitigation evidence would have had on the LaGrands' sentencing.

13. And there lies the basic factual question and there lies the place at which Germany runs into the evidentiary obstacles that I identified on Monday. As one of the pillars of the individualized sentencing required by the US Constitution, a defendant may introduce at the sentencing hearing any mitigation evidence he or she may think relevant, and the sentencing judge or jury has complete discretion to weigh that mitigation evidence against the aggravating factors that make the defendant "death eligible".

14. Needless to say, that is a supremely subjective judgment, and at this point in time it would be virtually impossible to reconstruct the mental processes by which it might have been made. In these circumstances — the fact judgment arises — how does a judicial system deal with that fact? Well, one comparison that might be made is by the most widely used standard of review in US proceedings, which is that if a trial error is made, if a right is violated, the defendant is entitled to relief unless the court can conclude that the violation was a harmless error. The United States objected on Tuesday to Germany's suggestion that the Court should presume causation, but it did not — because it could not — contest Germany's argument that this Court has the authority to assess the evidence in the light of the specific and concrete facts of the case, that the Court has the authority to determine how it will determine facts, and that the Court has the authority to make appropriate rulings in light of the evidentiary prejudice caused Germany by

[37] *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

United States actions. That authority should include the authority to deem contested facts established, or to shift the burden of proof on the basis of the showing that Germany has already made, if those rulings were necessary. That authority is the necessary prerogative of any fact-finder. As I said on Monday, however, no such evidentiary rulings are necessary.

15. To the extent that the precise causation issue here is amenable to proof, Germany has demonstrated that the Vienna Convention violations led to the LaGrands' sentences of death. At the very minimum, Germany has shown that the acknowledged violations deprived the LaGrands of mitigating evidence that would have been highly relevant to their sentencing and that could have caused the judge to impose a life sentence rather than death. The Trostler case from the Arizona Supreme Court, to which I referred on Monday, demonstrates that exactly the kind of mitigation evidence that was lost here can have that impact. No rule of evidence or principle of international law requires Germany to demonstrate anything more.

At this point, Mr. President, I would request that you call upon Professor Dupuy.

The PRESIDENT: Thank you, Mr. Donovan. Je passe la parole maintenant au professeur Pierre-Marie Dupuy.

M. DUPUY :

VII. LA MECONNAISSANCE PAR LES ETATS-UNIS DE L'ORDONNANCE DU 3 MARS 1999

1. Monsieur le président, il m'appartient de répondre aux arguments développés devant vous par les Etats-Unis à propos des mesures conservatoires et de la troisième conclusion de l'Allemagne. Je le ferai assez brièvement car les Etats-Unis ont, pour l'essentiel, repris, lors de leur plaidoirie de mardi dernier, les arguments qu'ils avaient déjà développés dans leur contre-mémoire. Il l'on fait, toutefois, non sans opérer certaines concessions dont on appréciera la portée (I). Se concentrant sur l'ordonnance du 3 mars 1999 pour mieux éviter un débat de fond sur la nature juridique des mesures conservatoires, à défaut de plaider le droit, ils ont voulu se concentrer sur les faits. Ils ont ainsi entendu démontrer que les Etats-Unis n'auraient pas pu agir autrement que ce qu'ils ont fait après avoir reçu l'ordonnance de la Cour (II); et ceci, parce que la requête de l'Allemagne en indication de mesures conservatoires aurait été trop tardive (III). Enfin,

les Etats-Unis se sont efforcés de dissocier aussi complètement que possible leur méconnaissance de l'ordonnance de la Cour d'avec le fond de la demande allemande elle-même (IV). Je reprendrai brièvement ces points.

I

2. *S'agissant du droit*, je ne vais pas réitérer le cœur de mon propos de lundi dernier sur la nature juridique des mesures comme sur celles des obligations qu'elles créent, mesures comme décisions de procédure, distinctes des jugements, engendrant des obligations de diligence à la charge de leurs destinataires, obligations dont le contenu et la plus ou moins grande rigidité dépendront, en chaque cas, des circonstances de l'espèce.

Constatons cependant deux choses dans la position avancée par les Etats-Unis mardi : d'abord, un repli stratégique, ensuite, une contradiction.

Le repli vient du fait que, selon eux, il ne servirait à rien pour les besoins de l'espèce que la Cour se prononce sur le droit des mesures conservatoires, puisqu'en l'occurrence, celles indiquées le 3 mars 1999 étaient manifestement facultatives.

Les Etats-Unis usent alors à nouveau de leur arme décidément favorite, à savoir l'argument linguistique du *"Should/Ought"*, comme on pourrait l'appeler.

Laissez donc, Madame et Messieurs les juges, planer l'ambiguïté sur ce que vous faites lorsque vous ordonner des mesures conservatoires. Jouez de la demi-teinte ou du clair-obscur et vous satisferez, au moins, les Etats-Unis.

3. Pourtant, et c'est ce qui gêne les Etats-Unis, vous avez déjà très clairement manifesté, en bien des occasions que j'ai d'ailleurs rappelées, votre désir de dissiper les équivoques sur la nature décisoire des ordonnances et, partant, sur leurs effets juridiques. Vous l'avez, le plus récemment fait dans votre ordonnance du 1er juillet 2000 en l'affaire *Congo c. Ouganda*. Et, vous l'avez fait dans les termes limpides que j'ai moi-même rappelés lundi dernier. D'où la contradiction américaine que j'annonçais.

Comment peut-on, en effet, conjointement affirmer, comme l'ont fait pourtant fait les Etats-Unis avant hier, d'une part : *"indications of provisional measures by the Court do not give*

rise to binding legal obligations"[38] et, d'autre part, consentir que lorsque la Cour emploie un langage différent, *a "language of understood mandatory character"*[39], comme elle le fit récemment dans l'affaire précitée, c'est qu'elle entend prendre une ordonnance ayant valeur obligatoire.

Allons, Messieurs ! Il faut savoir ! La Cour peut-elle ou ne peut-elle pas prendre des mesures conservatoires à portée obligatoire ? C'est l'un ou c'est l'autre.

Eh bien, nous répond-on de l'autre côté de la barre, tout est affaire de langage ! Selon les cas, disent les Etats—Unis, suivant que la Cour en restera au *"Should"* et au *"Ought"*, ou bien qu'elle se résoudra à employer la langue de l'autorité, c'est-à-dire … le français, les Parties sauront ce qu'elle a voulu dire !

Mais, en définitive, concluent les Etats-Unis, soudain conscients que concession rime ici avec contradiction, les mesures conservatoires *"stand as a clear statement of the Court's expectations and desires"*. Attentes et désirs ! Cela sonne comme le titre d'un bien mauvais roman !

4. Quant à nous, Monsieur le président, Madame et Messieurs, l'Allemagne vous indique par ma voix, que, pour elle, «vos désirs sont des ordres» ! Et qu'il n'y a pas trente-six façons de comprendre le sens, la logique et l'utilité des mesures conservatoires que vous indiquez. Qu'une juridiction ne peut pas, à la fois, se réunir, délibérer, ordonner, même s'il est dit que, par là, elle «indique», sans attendre, en droit, que les parties défèrent à son ordonnance. Qu'il ne saurait y avoir de demi-mesure ni d'hésitation. Et qu'il n'est qu'à se pencher sur la logique judiciaire, inhérente au cours du procès international, comme le soulignait sir Gerald Fitzmaurice, étayée par votre jurisprudence pour conclure que de telles ordonnances sont, toujours, et pas une fois sur deux, ou trois, ou six, de véritables décisions.

Décisions de procédure, elles sont toujours obligatoires, quoique provisoires et ancillaires par rapport au jugement; mais la rigidité des obligations qu'elles engendrent dépendra notamment de l'intensité de l'urgence comme de la balance des intérêts en présence. En l'occurrence, c'était littéralement une question de vie ou de mort, et il n'y avait d'autre issue possible que d'obtempérer, c'est-à-dire, très simplement, de surseoir à exécuter.

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[38] Intervention de M. Matheson, CR 2000/29, par. 7.1.p. 44.

[39] *Ibid.*, par. 7.6, p. 3.

II

5. C'est là, précisément — et c'est mon second point — que l'on en vient aux faits. Les faits, nous disent les Etats-Unis, ne nous ont pas permis de faire autre chose que ce que nous avons fait : nous avons réveillé le conseiller juridique du département d'Etat (ce qui, il faut le croire, n'est pas rien) et nous avons transmis l'ordonnance à qui de droit, non sans que, pour ce qui concerne la Cour suprême, le *Solicitor General* ait rappelé que cette ordonnance n'avait aucun effet. Et s'il en est ainsi, c'est parce que l'Allemagne, nous disent les Etats-Unis, et aussi la Cour, ayant statué sans même nous entendre, nous avaient mis dans une telle situation.

Alors, puisque les Etats-Unis nous invitent à en venir aux faits, nous allons à présent les examiner. Et nous le ferons pour répondre à deux séries de questions précises. La première est la suivante : est-ce que les Etats-Unis pouvaient faire, oui ou non, autre chose que ce qu'ils ont fait après avoir reçu votre ordonnance, et ceci, à trois niveaux, celui de l'Etat d'Arizona, celui de l'organe judiciaire fédéral, c'est-à-dire la Cour suprême, et celui de l'exécutif fédéral ?

Dans ces trois cas, la réponse est positive : au niveau de l'Etat fédéré, c'est-à-dire de l'Arizona, comme l'a d'ailleurs admis Mme Napolitano, le gouverneur ne peut agir, à ce stade, en suspension d'une exécution que s'il est sollicité de le faire par le *Clemency Board*. Mais, précisément, dans ce cas, le défendeur s'est, si j'ose dire, empressé, de ne pas vous rappeler que telle était la situation. Le gouverneur était ainsi sollicité par le *Clemency Board* !

Au niveau fédéral, pour ce qui concerne la Cour suprême, elle aurait encore très bien pu agir, dans le cadre des procédures d'urgence pendantes devant elle, pour ordonner la suspension d'exécution. Et la preuve qu'elle avait le temps matériel de le faire a été apportée, en l'occurrence, par elle-même. Elle a en effet pris un jugement dans le laps de temps précédant l'exécution de Walter LaGrand. Simplement, elle l'a pris dans l'autre sens, celui de l'autorisation de faire pénétrer Walter LaGrand dans la chambre à gaz.

Quant à l'exécutif fédéral, il aurait pu, tenant compte notamment de la levée de bouclier qu'avait soulevée l'affaire *Breard* de la part des différents secteurs de l'opinion, y compris les plus avertis, il aurait pu soit demander à la Cour suprême d'ordonner la suspension, soit agir lui-même auprès de l'autorité locale; mais il s'est contenté de la répétition, mot pour mot, par la voix du *Solicitor General*, de l'idée selon laquelle votre ordonnance n'avait aucun effet obligatoire.

Deuxième série de questions pratiques : les Etats-Unis prétendent qu'ils auraient pu agir autrement s'ils avaient disposé de plus de temps. Ils oublient seulement un détail, c'est que, un an auparavant, placés dans les mêmes conditions que dans l'affaire *LaGrand*, mais avec, à l'époque, beaucoup plus de temps, ils ont pourtant agi exactement de la même manière à l'égard d'Angel Francisco Breard qu'ils le feront ensuite à l'égard de Walter LaGrand.

Allons, décidément, la chanson a raison, qui nous dit «le temps ne fait rien à l'affaire»; d'autant qu'en l'occurrence, le raisonnement du défendeur est une fois de plus circulaire, puisque, précisément, ce que lui demandait la Cour, c'était de lui en accorder, du temps. Et ce temps, les Etats-Unis pouvaient, juridiquement et matériellement, le lui accorder.

6. Cependant, Monsieur le président, Madame et Messieurs les juges, vous n'êtes nullement obligés de me croire. N'étant moi-même qu'un modeste *"academician"* dont Mme Catherine Brown vous a tant manifesté le peu de crédit qu'ils méritaient, je ne vais pas procéder exactement à un appel à témoin, mais tout simplement vous prier, Monsieur le président, de bien vouloir redonner la parole à un autre conseil de l'Allemagne sur les deux séries de questions que je viens d'évoquer, car lui est bel et bien un praticien, qui plus est, un praticien américain : c'est M. Donovan

Après quoi, si vous le permettez, je reprendrai brièvement la parole pour conclure cette plaidoirie relative à l'effet des mesures conservatoires et leur violation par le défendeur. Je vous demande par conséquent, Monsieur le président, de bien vouloir redonner, pour une brève intervention, la parole à M. Donovan.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. And now I give the floor to Mr. Donovan.

Mr. DONOVAN:

III

7. Mr. President, distinguished Members of the Court, as Professor Dupuy has suggested, I will like to address the United States' argument that even though Arizona chose to proceed with the execution of Walter LaGrand in the face of this Court's Order, the United States complied with that

Order because it took all steps "at its disposal" to ensure that he was not executed. I respectfully refer the Court to the citations in the written version of my submissions, but I will suggest that the United States is wrong both as a matter of international law, which matters here, and US domestic law, which does not.

8. First, and most clearly, the Attorney-General explained to us on Tuesday, that Arizona law permits the Governor to grant clemency or commutation or a reprieve if the Clemency Board so recommends[40]. As the Attorney-General also explained here, precisely because of Germany's intervention to this Court, the Clemency Board did recommended a reprieve.

9. The United States has assured the Court that it followed the Court's specific direction that it convey this Court's Order of Provisional Measures to the Governor, and there is no suggestion that Arizona officials did not know of the Court's Order once it was delivered. As the Attorney-General has explained, at that time, the Governor was fully empowered even under Arizona law to grant a reprieve, but she chose not to. Indeed, as the Attorney-General has already explained, the Governor chose not to even before this Court had ruled. She announced the day before, that she would not grant commutation or a reprieve, would not grant clemency, and she made that announcement, again as the Attorney-General has explained to this Court, in part in reliance on the advice of the United States, that any Order this Court might issue would not be binding.

10. As the United States acknowledges in paragraphs 3 and 6 of its Counter-Memorial, it is internationally responsible "for the actions of Arizona". Thus, the Governor's refusal to suspend the execution is alone dispositive of the United States argument that it took all measures at its disposal. The Governor could have stopped the execution, she chose not to.

11. In any event, the United States federal authorities had ample additional means at their disposal to comply with the Order. The federal judicial authority of the United States, of course, also engages its international responsibility. On the day of this Court's ruling, both Germany and Walter LaGrand filed applications in the United States Supreme Court seeking, respectively, an injunction against and a stay of the execution. Walter's filing raised the Vienna Convention claim,

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[40] Ariz. Const., Art. 5, Sec. 5; Ariz. Rev. Stat., Sec. 31-402.

Germany's filing relied directly on the ICJ Order. Both applications were denied[41]. In rejecting Germany's application, the court expressed some doubts about its jurisdiction over the filing. As the Attorney-General mentioned, the filing was made under a very infrequently used provision of the United States Constitution authorizing original bills of complaint to that court. But even if there were question about the court's jurisdiction over Germany's application there can be no question about its jurisdiction to provide relief on Walter's application, that is on a *habeas* petition. pending in that court[42]. While the Supreme Court's opinion in Germany's application cites the tardiness of the plea as one of the bases for declining to grant relief, there can be no question from that decision that the Supreme Court indeed had time to decide; and that is also clear from the dissenting opinion in the parallel Order denying relief on Walter LaGrand's application. So the Supreme Court, also the federal judicial authority, had time to make a decision whether or not it would comply with this Court's Order.

12. Indeed, there was yet another proceeding involving Walter LaGrand in which the Supreme Court took action on the day of the execution. On that day, the Ninth Circuit, the intermediate federal court of appeals covering Arizona, entered an injunction against the execution on the ground that execution by lethal gas was cruel and unusual punishment, and therefore unconstitutional. The state immediately filed a petition for a writ of *certiorari* to the United States Supreme Court, asking that that injunction be vacated. The Supreme Court, on the day of the execution, granted the writ, summarily reversed the Ninth Circuit's judgment, and vacated the injunction. That permitted the execution to go forward by virtue of the third order issued by the United States Supreme Court on 3 March 1999 in cases involving Walter LaGrand[43].

13. There were similar proceedings, as it happens, on the day of Karl LaGrand's execution. On that day, the Ninth Circuit also entered an injunction against the execution on the ground that lethal gas was unconstitutional and enjoined the execution. Arizona on that day filed an application

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[41] Ann. 30 *(Federal Republic of Germany* v. *United States*, 526 US 111 (1999)), 32 *(LaGrand* v. *Arizona,* 526 US 1001 (1999)).

[42] 28 U.S.C. § 2254 (authorizing federal court to entertain habeas petition from person in custody pursuant to state judgment "on the ground that he is in custody in violation of the Constitution or law or treaties of the United States"); see also *Missouri* v. *Jenkins*, 495 US 33, 57 (1990) (federal court may enjoin municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *Asakura* v. *Seattle*, 265 US 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French* v. *Hay*, 89 US (22 Wall.) 250 (1874) (federal court may enjoin enforcement of state judgment entered in violation of federal law).

[43] Ann. 31 (*Stewart* v. *LaGrand*, 526 US 115 (1999)).

to lift the injunction, which the Supreme Court granted. Karl LaGrand's lawyers then filed a motion for clarification of the order, and the Supreme Court denied that application. Only then did Arizona officials go forward with the execution[44].

14. These kinds of pre-execution applications are a regular feature of US death penalty litigation, and US federal courts are well-accustomed to them. Whether one agrees or disagrees with the federal courts' death penalty rulings in the United States, there can be no question that the Supreme Court takes very seriously its obligations to decide cases, in this area as in others. The justices are always available for emergency applications. In the specific case of death penalty litigation, when an execution is scheduled, the Clerk of the United States Supreme Court stays in close contact both with the clerk of the lower court from which a case might be coming and with state officials responsible for the execution. As will not come as a surprise, state officials generally wait for the ruling of the Supreme Court before proceeding with an execution as to which there might be a request for relief pending. I would respectfully suggest to this Court that it would demean both the dignity and the diligence of the United States Supreme Court to suggest that, in a case where human life was at stake, that court would not do whatever was necessary to properly decide the case before it.

15. The executive branch also had means "at its disposal" to comply with the Court's Order. The President has very broad authority to facilitate the resolution of international disputes[45], and he could have exercised that authority, according to at least one scholar, by use of an executive order[46]. Now, the United States will no doubt suggest that several hours was not sufficient in order to actually issue an executive order: but one suspects that if the federal executive had firmly indicated its intention to issue such an order to responsible officials of the State of Arizona, they might have suspended the execution to allow the federal executive to take the appropriate steps.

16. In any event, it is also clear that the federal executive can sue in federal court against the state or state officials in order to enforce a federal obligation. The United States itself confirmed

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[44]Ann. 31, at p. 674; see *LaGrand* v. *Stewart*, 173 F.3d 1144 (24 Feb. 1999), stay vacated by *Stewart* v. *LaGrand*, 525 US 1173 (24 Feb. 1999).

[45]*Dames & Moore* v. *Regan*, 453 US 654 (1981).

[46]See Carlos Manuel Vásquez, "Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures", 92 *AJIL* 683 (1998).

that in the *Breard* case when it advised the Supreme Court in its filings there that the United States had authority "to sue in order to enforce compliance with the Vienna Convention"[47]. In this case, for example, the United States attorney in the district of Arizona could have gone to a federal judge in the district of Arizona on an emergency application and asked that judge to suspend the execution in order to comply with the International Court of Justice's Order. Federal courts generally give deference to the executive's interpretation of international obligations and, particularly given the emergency circumstances that would have existed at that point, it is likely that a federal court would have adhered to the United States request.

17. Having said all this, it may be worthwhile to pause to recall that none of it matters. It is a fundamental principle of international law that, as a former President of this Court has said, a State

> "cannot evade [its international] responsibility by alleging that its constitutional powers of control over [its political subdivisions] are insufficient for it to enforce compliance with its international obligations"[48].

Surely when the Court called upon the United States to employ all means at its disposal to ensure that Walter LaGrand was not executed, it did not intend to incorporate into that Order any particular limitations on US federal authority within the US constitutional system. Not only would that kind of interpretation fly in the face of a most basic principle of international law, but it would also require this Court to determine complex questions of US constitutional law simply to determine whether its Order had been complied with. Surely, the Court could not have so intended.

18. Finally, the United States suggests that the timing of the Court's Order did not give it sufficient time to deliberate. Of course, a court order is generally not understood as an invitation to a party to deliberate; it is generally understood that the order itself represents the judgment as to the necessity of action given the prevailing circumstances. But in any event, there is no reason to believe that further deliberation would have led to a different result. The United States has itself drawn a comparison to the Paraguay case, in which, in the United States view, Paraguay acted with sufficient despatch to allow all actors to make appropriate decisions. But we know what happened in the Paraguay case: the United States federal executive advised both the Governor of Virginia

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[47]"Brief of the United States as *Amicus Curiae*", p. 15, No. 3, *Breard* v. *Greene*, 523 US 371 (1998).

[48]Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law* (Max Sørenson, Ed., 1968), pp. 531, 557.

and the United States Supreme Court that indications of provisional measures by this Court were not binding. There, as here, the United States Supreme Court and the Governor of Arizona adhered to that recommendation and declined to give effect to that Order.

19. Mr. President, distinguished Members of the Court, the United States is a nation of laws, committed to the rule of law. The United States did not fail to comply with this Court's indication of provisional measures because it did not have time to comply. It did not comply with this Court's indication of provisional measures because, as it has stated here in these proceedings, it did not regard that indication as law. This case provides the Court an opportunity to establish that it was.

20. I would request the Court to call again upon Professor Dupuy.

The PRESIDENT: Thank you very much. Je donne maintenant la parole au professeur Pierre-Marie Dupuy.

M. DUPUY : Je vous remercie, Monsieur le président. Je serai très bref. J'ai simplement un dernier point encore à relever qui concerne le désir des Etats-Unis d'éliminer toute relation entre la violation des mesures conservatoires et le fond de l'affaire.

IV

21. Le conseil des Etats-Unis a clairement indiqué devant vous mardi dernier que, selon eux, *"The Court can dispose of the merits of this case without any need to resolve this issue"*.[49] *"This issue"*, c'est la question de la responsabilité américaine pour non-application des mesures conservatoires.

L'invitation faite à la Cour consiste à lui demander de ne pas se prononcer sur la conclusion n° 3 de l'Allemagne, et, ceci, parce qu'en définitive, elle n'aurait rien à voir avec le fond. Le fond, c'est, pour les Etats-Unis, la requête en réparation par satisfaction demandée par l'Allemagne. La question des mesures conservatoires, c'est autre chose, un incident de procédure, un accident de parcours, une anicroche, pour ne pas dire une peccadille, pas davantage. Alors, ici, je serai bref, d'autant plus qu'il serait malséant de se répéter.

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[49] *Ibid.*, p. 52.

Je me contenterai de rappeler que les Etats-Unis ont méconnu une obligation juridique, posée par l'acte juridique qu'était votre ordonnance. Or, en l'occurrence, compte tenu des données de l'espèce, c'est-à-dire de l'extrême urgence, de l'objet vital de l'enjeu, et de la balance des intérêts en présence, les Etats-Unis étaient tenus de suspendre l'exécution. Ils ne l'ont pas fait. Ils engagent leur responsabilité. Et ils l'engagent sur une base nouvelle par rapport à l'accusation principale qui leur est adressée par l'Allemagne, laquelle réside, comme vous le savez, dans la violation de l'article 36 de la convention de Vienne.

22. Mais, nouvelle, cette responsabilité pour violation de l'ordonnance du 3 mars 1999, même si elle peut être examinée comme telle, reste cependant corrélée, dans les faits, avec la responsabilité principale des Etats-Unis. Et elle a aussi des conséquences juridiques au fond. Elle lui reste liée parce qu'elle rend impossible la seule réparation satisfaisante, qui n'était pas la satisfaction, mais qui aurait pu être la *restitutio in integrum* si Walter LaGrand avait été laissé en vie le temps nécessaire à la formation de votre propre jugement. Lequel n'aurait pas réformé les décisions judiciaires internes américaines; ceci, vous ne le pouvez ni ne le devez; mais votre jugement qui aurait constaté, dans l'ordre juridique international, l'existence d'un corps d'obligations, en l'occurrence méconnues par les Etats-Unis, ce qui les obligeait à «répondre», en droit international, de leur fait illicite international, c'est-à-dire à être internationalement responsables. Que cette responsabilité dans l'ordre international se traduise, ensuite, par des conséquences dans l'ordre interne, il n'y a là rien que de très usuel, et l'on n'a même pas attendu l'avènement des droits de l'homme, qui ne datent pourtant plus d'aujourd'hui, pour connaître de telles situations.

23. Les Etats-Unis sont responsables, en soi, parce qu'ils n'ont pas déféré à l'obligation provisoire que vous leur faisiez dans l'urgence. Mais ils sont, du même coup, également responsables, au fond, d'une aggravation des conséquences du préjudice qu'ils avaient infligé à l'Allemagne du fait de la violation de l'article 36 de la convention de Vienne de 1963. Or, il paraît d'un bon usage du sens commun que de dire qu'à dommage aggravé correspond une responsabilité elle-même aggravée.

24. L'Allemagne, en fait de réparation, vous demande une satisfaction. Mais elle le fait tout en sachant qu'il n'y a rien de plus insatisfaisant que la satisfaction ! Du moins lorsqu'il s'agit de payer par là le *pretium doloris*, que l'on pourrait traduire, en l'occurrence, par le prix du sang !

C'est pour cela, pour cela aussi, que la simple satisfaction de droit commun, si j'ose dire, celle qui réside dans des excuses, ne suffit pas, même si les excuses américaines s'étendaient, ce qu'elles ne font de toute façon pas, à l'ensemble des violations de l'article 36.

L'aggravation du préjudice causé par la méconnaissance de l'ordonnance, en rendant le dommage allemand irréparable, c'est-à-dire imparfaitement réparable, suppose une satisfaction renforcée.

Si j'avais le cœur à en rire, ce qui n'est pas le cas, je dirais, que la satisfaction renforcée, compte tenu du caractère tragiquement répétitif des agissements américains à propos des condamnés à mort sans bénéfice de l'assistance consulaire, c'est celle que l'on impose à des enfants lorsqu'on leur demande de reconnaître leur faute, certes, mais aussi «de s'engager à ne pas recommencer». Je crains cependant, Monsieur le président, Madame et Messieurs les juges, que sans votre décision et, cette fois, votre décision de jugement, les Etats-Unis n'aient pas spontanément la sagesse que l'on prête habituellement aux enfants…

J'en ai ici terminé, du moins avec les points essentiels qui me paraissaient devoir être relevés dans la plaidoirie des Etats-Unis sur les mesures conservatoires et je vous demande, Monsieur le président, de bien vouloir donner à présent la parole à M. Westdickenberg, agent de la République fédérale d'Allemagne, pour qu'il conclue ce second et dernier tour de nos plaidoiries.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Je donne maintenant la parole à M. Westdickenberg, agent de la République fédérale d'Allemagne.

Mr. WESTDICKENBERG :

VIII

Mr. President, distinguished Members of the Court, after the presentation of Professor Dupuy we come to the end of the German pleading in this case.

Before reading out Germany's submissions let me add two remarks:

— First, my colleagues and myself, representing together the Federal Republic of Germany in this case, are oblivious neither of the fact that at the root of this case there were two men who were executed for crimes they committed, nor of the suffering of the victims and those left behind.

— Second, the oral proceedings of this Court so far have confirmed the hope I expressed in my introductory statement: Germany and the United States can litigate in a manner reflecting the good and close relations as friends and allied partners.

SUBMISSIONS OF GERMANY

The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligations to comply with the Order on Provisional Measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.

Thank you, Mr. President and distinguished Members of the Court, this ends the pleading for the German side.

Le PRESIDENT : Je vous remercie, Monsieur Westdickenberg. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la République fédérale d'Allemagne. Ceci met un terme à notre séance d'aujourd'hui. La Cour se réunira à nouveau demain à 14 heures pour entendre le second tour de plaidoiries des Etats-Unis d'Amérique. La séance est levée.

L'audience est levée à 12 h 45.