INTERNATIONAL COURT OF JUSTICE

LAGRAND CASE

(Germany v. United States of America)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

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Part One
Introduction

1.01 In lodging the present Application, the Federal Republic of Germany asks the International Court of Justice to decide upon a dispute arising under the 1963 Vienna Convention on Consular Relations. It is Germany's claim that by failing to inform Karl and Walter LaGrand, two German nationals, arrested in 1982 on suspicion of capital crimes in Arizona, of their right to consular access, even though the competent authorities were aware of their German nationality from the outset, the United States violated the obligations flowing from Article 36 (1) of the Vienna Convention on Consular Relations. This breach of international law had tragic consequences: Had the German consulate been duly informed, its officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, in obtaining competent counsel and in collecting mitigating evidence. Thus, the case of the LaGrands would have been thoroughly investigated, and essential mitigating evidence, mainly located in Germany, would have been presented at the decisive steps of the criminal proceedings. In fact, however, Karl and Walter LaGrand were poorly represented, none of this evidence was produced, and the brothers were sentenced to death. There are compelling reasons to believe that the LaGrands would have escaped the death penalty if the evidence mentioned had been introduced in time.

1.02 However, eight years later, in 1992, when German consular officers were finally made aware of the nationality of the LaGrands and had the opportunity to come to their help, all legal avenues available before the Arizona courts had already been exhausted. According to the domestic law of the United States, the LaGrands were now barred from raising the violation of their right to consular access and from introducing the essential mitigating evidence obtained in the meantime with the assistance of the German Government. There was no effective mechanism available to them anymore to remedy this situation. Thus, the United States also put itself in breach of Article 36 (2) of the Vienna Convention.

1.03 After having learned that two German nationals, Karl and Walter LaGrand, had been sentenced to death, the Federal Republic of Germany, in addition to consular assistance, pursued a variety of activities in order to minimise the consequences of the United States' breaches of the Vienna Convention. In doing so, Germany chose at first the avenue of energetic moral and political appeals because it did not want its steps to negatively affect the legal efforts to save the LaGrands from execution. In particular, Germany was determined to avoid any impression of interfering in pending judicial proceedings. However, after an Arizona State attorney disclosed at the last minute, on 23 February 1999, the shocking fact that the state authorities had known all along, since 1982, that Karl and Walter LaGrand were German, and after Karl LaGrand was executed just one day later, despite most urgent appeals from its highest representatives, Germany decided to bring the case before the International Court.

1.04 Most regrettably, the United States showed itself unimpressed by the Provisional Measures indicated unanimously by this Court and proceeded also to execute Walter LaGrand, thus causing irreparable harm to the rights claimed by Germany.[1] As a consequence, Germany has to modify its original Submissions.

1.05 In pursuing its Application, Germany has limited the remedies it seeks from the Court to what it considers absolutely necessary to ensure that in the future German nationals in the United States will be provided with adequate and timely consular assistance, so that a case as utterly deplorable as that of Karl and Walter LaGrand will not repeat itself.

1.06 Unfortunately, breaches of the right to consular access appear to be rather common in the United States, as evidenced by the fact that the present Application has been preceded by that of Paraguay in the Case of Angel Francisco Breard only last year. The parallels between the two cases are striking, but there also exist important differences: In the instance of the two German nationals, the efforts of the United States Federal Government to have the competent state Governor suspend the executions were even weaker - if they deserve to be called "efforts" at all.

> On the other hand, the parallelism mentioned makes it possible for Germany to deal with several legal arguments developed by the United States before this Court in the Hearings on Provisional Measures in the *Breard* Case, particularly with regard to jurisdiction, already at this stage. Germany hopes that, thereby, its own Case will be able to proceed to the stage of the merits as speedily as possible.

1.07 The questions at issue in the present Case are of an importance which transcends by far the particular litigation at stake. The United States is one of the countries most strongly committed to the protection of the rights and interests of its citizens abroad. In the words of the President of this Court in the *Breard* Case:

> > "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[2]
>
> Germany has nothing to add to this. Hence, it is convinced that it is in the interest of both parties to allow this Court to pronounce itself on the substantive legal issues raised in the present Application as quickly and comprehensively as possible.

1.08 Germany wants to emphasise that its Application is not directed against capital punishment, neither in general nor in regard to the way the death penalty is applied in any particular country. This, however, must not be mistaken to mean that Germany does not take a clear and strong stance on the issue of capital punishment:

> The death penalty was abolished in the Federal Republic of Germany in 1949 by Article 102 of the Basic Law. Since then, the Federal Government has been especially committed to the world-wide outlawing and abolition of capital punishment. This policy is a reflection of the clear stance by the parliament and the German people, the majority of whom has opposed the death penalty for many years. With its decision of 17 June 1998, the German *Bundestag* unanimously supported the Federal Government's endeavours to bring about the universal abolition of the death penalty.[3]

1.09 To state it once again: The Case brought before this Court does not concern the entitlement of the federal states within the United States to resort to the death penalty - however deplorable Germany may find the increasing resort to this inhuman method of punishment in a country with which it otherwise shares such a strong commitment to human rights, based on the inherent dignity of the human person. Neither does Germany intend, or has ever intended, to use the International Court of Justice as a court of criminal appeal. In its Order of 3 March 1999 in the present Case, by which it indicated Provisional Measures *proprio motu*, this Court emphasised that its function is

> "to resolve international legal disputes between States *inter alia* when they arise out of the interpretation or application of international conventions."[4]

> This is precisely what Germany requests the Court to do.

1.10 Analogously, whenever the following Memorial refers to, explains and analyses certain features of the domestic law of the United States, this is done exclusively for the purpose of elucidating issues raised at the level of international law. Thus, the description of the rule of "procedural default" applied in the U.S. law of criminal procedure[5] is necessary in order to demonstrate the failure of the law of the United States to comply with its obligation under Article 36 (2) of the Vienna Convention on Consular Relations, according to which national law

> "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

1.11 The present Memorial is divided into seven Parts:

> The Introduction (Part One) is followed by a Statement of Facts on the treatment of Karl and Walter LaGrand by the United States criminal justice system, leading to their execution in February/March 1999 (Part Two).

Part Three deals with the issues of the jurisdiction of the Court and the admissibility of Germany's Case. It arrives at the conclusion that the Optional Protocol to the Vienna Convention on Consular Relations provides a basis of jurisdiction which covers the entirety of the claims put forward by Germany, and further, that there exist no circumstances which could make these claims inadmissible.

Part Four sets out in detail the violations of international law committed by the United States which injured Germany in its own rights as well as in those of the LaGrands as its nationals, *i.e.*, the breach of both Article 36, paragraph 1, and Article 36, paragraph 2, of the Vienna Convention on Consular Relations, as well as the non-observance of the Order on Provisional Measures pronounced by this Court on 3 March 1999 by the execution of Walter LaGrand on the same day.

Subsequently, Parts Five and Six of the Memorial establish that these violations of international law entail the international responsibility of the United States vis-à-vis Germany and give rise to the legal consequences attached to such internationally wrongful acts. Part Six then elaborates the remedies requested by Germany: Satisfaction by way of a pronouncement of the wrongfulness of the actions and omissions of the United States which had fatal consequences for the brothers LaGrand, and assurances and guarantees of non-repetition to prevent further violations of Germany's rights and those of its nationals. Thus, Germany wants to repeat that it has limited its requests to those remedies which it considers as the minimum requirements, but also as absolutely necessary, to ensure that German nationals in the United States will have access to adequate consular assistance in the future, as prescribed by the Vienna Convention.

Part Seven contains the Conclusions and Submissions put forward by Germany.

Two companion Volumes contain the materials annexed to the Memorial.

Part Two
Statement of Facts

2.01 The following Statement of Facts is, to the best of the knowledge and belief of the Government of the Federal Republic of Germany, accurate and complete. It presents the facts which are considered to be of relevance for the decision of the Court on the claims submitted by Germany in the present case.

In the afternoon of 7 January 1982, Karl and Walter LaGrand were arrested by Arizona law enforcement authorities on suspicion of several crimes committed in the morning of the same day at the Valley National Bank in Marana, Arizona, among them the murder of the bank

> manager. At the time of the alleged crime, Karl was 18 and Walter 19 years of age.
>
> According to the arrest information sheet concerning Karl LaGrand, he was born in Germany.[6] So-called "presentence reports" demonstrate the knowledge on the part of the Arizona authorities of the German citizenship of both Walter and Karl LaGrand. Reports of 22 and 23 April 1982 dealing with an earlier incident, and reports of 2 April 1984 dealing with the crimes committed in Marana each contain the information "Citizen of Germany - resident alien"[7]. Nevertheless, the Arizona authorities did not inform the brothers about their rights under the Vienna Convention on Consular Relations, nor did they notify the German Consulate of their arrest and detention. Neither were the brothers themselves aware of these rights.

2.02 The brothers were detained and put to trial before a jury at the Superior Court of Pima County, Arizona. On 17 February 1984, the brothers were convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping.[8] The brothers were represented by counsel appointed by the Court because they could not afford legal counsel of their own choice.

2.03 The brothers' attorneys failed to raise the violation of the Vienna Convention or to contact the German consulate on their own initiative. Neither did they raise or investigate mitigating circumstances linked to the upbringing of the brothers in Germany under extremely difficult social conditions. On 14 December 1984, both brothers were sentenced to death for first degree murder and to concurrent jail sentences for the other charges.[9]

> Thus, the German nationals were detained, tried and sentenced to death without being advised of their right to consular assistance, as guaranteed to them by Article 36 (1) (b), of the 1963 Vienna Convention on Consular Relations. Neither the authorities of the State of Arizona nor the brothers nor their attorneys informed the German Consulate General in Los Angeles or any other German representative about their arrest, detention, and sentencing. Nor did the State of Arizona inform the brothers or their attorneys on the LaGrands' rights under the Vienna Convention.

2.04 On 30 January 1987, the Supreme Court of Arizona rejected both Walter and Karl LaGrand's appeals by 3 to 2 votes.[10] The lack of consular advice was again not raised by the attorney of the LaGrands or anybody else. However, as far as the quality of Karl LaGrand's representation was concerned, the Arizona Supreme Court concluded that, although Karl's Attorney at that time, David Gerson

> > "kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial."[11]

2.05 On 5 October 1987, the United States Supreme Court denied *certiorari*, that is, it denied to hear the case and confirmed the judgments. The late Justices Marshall and Brennan dissented because they held that the death penalty was a violation of the Eighth and Fourteenth Amendment of the United States Constitution, which prohibit the infliction of "cruel and unusual punishments".[12] Once again, the omission of consular advice was neither raised nor decided upon. Several other extraordinary remedies at the State level remained unsuccessful. In none of these, the issue of consular notification was raised.

2.06 It was only in June 1992, after all legal avenues at the state level had been exhausted, that German consular officers were made aware of the case by the LaGrand brothers. The detainees themselves had learnt of their rights through two other German inmates, and not through the Arizona authorities. Immediately, the German authorities investigated the nationality of the brothers. These investigations by the competent German authorities led to the result that the brothers did indeed possess German nationality.[13] On 8 December 1992, an official of the Consulate General of Germany in Los Angeles visited the brothers in prison to find out what further steps were to be taken to assist them in their legal efforts. In the following, Germany helped the brothers' attorneys to investigate the brothers' childhood in Germany, both by financial and logistical support, and to raise this issue and the omission of consular advice in Court proceedings.

2.07 On 24 January and 16 February 1995, the Federal U.S. District Court for the District of Arizona rejected the so-called *habeas corpus* claims of the brothers in four separate orders.[14] In these proceedings, the attorneys raised for the first time the lack of consular advice and the violation of Art. 36 of the Vienna Convention on Consular Relations. The attorneys also raised the inadequate performance of earlier counsel, especially in the case of Karl LaGrand, and other shortcomings in the proceedings. The court rejected the assertion of this and other claims on the basis of the doctrine of procedural default. Applying this doctrine, the Court decided that, because Karl and Walter LaGrand had not asserted their rights under the Vienna Convention in the previous legal proceedings at the state level, they could not assert them anymore in the federal *habeas corpus* proceedings.

> The doctrine of procedural default was held to bar such relief even though it became obvious in the proceedings that Karl and Walter LaGrand were unaware of their rights under the Vienna Convention at the time of the earlier proceedings. Further, it became also obvious that the brothers were unaware of their rights precisely because the authorities failed to comply with their obligations under the Convention to inform them of those rights without delay.

2.08 Karl and Walter LaGrand's following appeals to the intermediate (federal) appellate court and the U.S. Supreme Court were the last means of legal recourse in the United States available to them as of right. On 16 January 1998, the (federal) Court of Appeals of the 9th Circuit rejected the brothers' appeals against the judgment of the District Court, confirming, *inter alia*, that the claim

of violation of the Vienna Convention was "procedurally defaulted".[15] On 2 November 1998, the U.S. Supreme Court denied *certiorari* against this decision without stating any reasons.[16] At that stage, the brothers LaGrand were finally informed of their right to consular access.[17]

2.09 On 12 January 1999, the Arizona Supreme Court decided that Karl LaGrand was to be executed on 24 February 1999; on 15 January 1999, the Court decided that the execution of Walter LaGrand was to take place on 3 March 1999.[18] The German Consulate learned of these dates on 19 January 1999.

2.10 During the following days and weeks, Germany decided to pursue several avenues in order to prevent the execution of the brothers. Firstly, the highest German authorities raised the issue in direct diplomatic communications to the United States and Arizona authorities. Secondly, Germany supported the attorneys in their attempts to resort to any remaining domestic legal means. German officials also participated in the clemency hearings before the Arizona Board of Executive Clemency.

2.11 More specifically, as to the activities of the Government of the Federal Republic of Germany, it used every diplomatic means at its disposal in order to prevent the carrying out of the death sentences. Numerous interventions were made. Both the President[19] and the Chancellor of the Federal Republic of Germany appealed to the President of the United States, the latter also to the Governor of Arizona.[20] Foreign Minister Fischer[21] and Minister of Justice Däubler-Gmelin[22] raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. Démarches were undertaken by the German Ambassador to the United States. A further démarche followed on behalf of the European Union. Both the German Ambassador and the German Consul-General in Los Angeles explained the German position to the Board of Executive Clemency of the State of Arizona on the days prior to the execution of the brothers. In his second letter to United States Secretary of State Albright dated 22 February 1999, the German Foreign Minister, Joschka Fischer, raised the issue of a violation of the Vienna Convention - to no avail.[23] A detailed Memorandum of the German Government was enclosed in that letter.

2.12 It was only on 23 February 1999 that the authorities of the State of Arizona did reveal that they had, since 1982, had knowledge of the German nationality of Karl and Walter LaGrand. Until that day, Germany had assumed that the Arizona authorities had not been aware of the German nationality of the detainees. However, during the proceedings before the Arizona Board of Executive Clemency on 23 February 1999, State Attorney Peasley admitted that the authorities of the State of Arizona had been aware all along, since 1982, that Karl and Walter LaGrand were German: Reacting to an earlier statement made by a German attorney who had hinted that the Arizona authorities might possibly not have been aware of the German nationality of the brothers at the time they were arrested, Mr. Peasley said:

> "We didn't know, you're told, until ten years after the offence and eight years after, eight years after the conviction, nobody knew that Karl LaGrand was a German citizen. You may recall that being said to you this morning. On the presentence report in this very case which this Board also has, up at the top of that report it says `Citizen of Germany', `Resident Alien'. Any suggestion that it was not clear, not clear then, is simply untrue."[24]

Further research undertaken in the course of the preparation of the present Memorial confirmed the accuracy of this admission. It was thus in full knowledge of the German nationality of the detainees that the authorities of the State of Arizona, for more than ten years, held, tried and convicted Karl and Walter LaGrand without informing them of their rights under Article 36 of the Vienna Convention.

Such failure to effect the required notification precluded Germany from protecting its nationals' rights and interests in the United States as provided by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the state courts.

2.13 On 24 February 1999 (amended 26 February 1999), the 9th Circuit Court rejected a second *habeas corpus* claim of Karl LaGrand which was based, among other arguments, on the omission of consular notification.[25] The Court held that the latter claim was procedurally defaulted. On the same day, the 9th Circuit Court decided that execution by lethal gas was unconstitutional, and ordered a stay of execution.[26] The U.S. Supreme Court, however, vacated the stay of execution without giving reasons for its decision.[27]

On 23 February 1999, the Arizona Board of Executive Clemency, by 3 votes to 1, rejected the appeals for clemency in the case of Karl LaGrand despite interventions by the German Ambassador to the United States, Mr. Jürgen Chrobog, and other high-ranking German representatives.

Karl LaGrand was permitted to choose lethal injection instead of gas and did so. In the evening of 24 February 1999, Karl LaGrand was executed.

2.14 On 23 February 1999, the Arizona Superior Court in Pima County rejected Walter LaGrand's second petition of post-conviction relief of 16 February 1999 as procedurally defaulted.[28] His attorney had *inter alia* raised the lack of consular advice.[29] On 1 March 1999, Walter LaGrand confirmed his choice to die in the gas chamber instead of by lethal injection. On the evening of 2 March 1999, after all domestic remedies had been exhausted, Germany brought an Application before the International Court of Justice and requested Provisional Measures against the execution of Walter LaGrand. On the same day, Foreign Minister Fischer addressed a third letter to Secretary of State Albright referring to Art. 36 of the Vienna Convention and the German Application to the International Court of Justice and requesting her to urge

Governor Hull to suspend Walter LaGrand's execution.[30] On 3 March 1999, the International Court of Justice granted the request *proprio motu*. The dispositif of the Court's Order was worded as follows:

> "(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."[31]

2.15 On the same day, not only Walter LaGrand but also Germany applied to the U.S. Supreme Court for a stay of execution.[32] In a letter of 3 March 1999 to the Supreme Court, Seth P. Waxman, the U.S. Solicitor General, argued for the U.S. Federal Government that

> "it is our position that the Vienna Convention does not furnish a basis for this Court to grant a stay of execution."[33]

Concerning the Order of the Court, he was of the opinion that

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief ... ."[34]

The U.S. Supreme Court denied the motion of Walter LaGrand (Justices Stevens and Breyer dissenting).[35] Furthermore, on appeal by the State of Arizona, the Supreme Court reversed a stay of execution ordered by the 9th Circuit Court, holding that Walter LaGrand had waived any claim that execution by gas chamber violated the Constitution (Justice Stevens dissenting).[36] Further, the Supreme Court denied the motion brought by Germany and declined to exercise its original jurisdiction in the case.[37] Two Justices dissented, two other Justices based their decision on the position of the U.S. Government.

2.16 Already on 2 March 1999, the Governor of Arizona, Ms. Jane Dee Hull, had rejected a move for a stay of execution in spite of a respective recommendation of the Arizona Board of Executive Clemency. Her statement read, *inter alia*:

> "[I]n the interest of justice and with the victims in mind, I have decided to allow this execution to go forward as scheduled."[38]

Apart from communicating the Order of the International Court of Justice to the Governor of Arizona, the United States Federal Government did not undertake any other measure to halt the execution of Walter LaGrand and implement the Order of the Court.

Walter LaGrand was executed on the evening of 3 March 1999 local time in Phoenix, Arizona, by lethal gas.

Part Three
Jurisdiction and admissibility

I. The subject-matter of the present dispute

3.01 The proceedings instituted by Germany in the present case raise questions of the interpretation and application of the Vienna Convention on Consular Relations and of the legal consequences arising from the non-observance on the part of the United States of certain of its provisions vis-à-vis Germany and two of its nationals. It was strictly within the framework of these proceedings and in order to preserve its rights under the Convention that Germany asked the Court to indicate Provisional Measures. These measures were granted by the Court in its Order of 3 March 1999.[39] Since the Provisional Measures were disregarded by the Respondent's competent authorities, Germany was forced to include the consequences of the non-observance of the Order within the scope of the present proceedings.

3.02 Germany will demonstrate that all these issues are covered by one and the same jurisdictional basis, namely Art. I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963 (henceforth referred to as the "Optional Protocol").[40] With regard to the non-observance of the Order of 3 March 1999, Germany will, in an auxiliary and subsidiary manner, also invoke the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case.

3.03 Although in this initial phase of the proceedings Germany is under no obligation whatsoever to anticipate any challenges to the jurisdiction of the Court or the admissibility of the case which the Respondent may eventually put forward, Germany will deal with the issues of jurisdiction and admissibility already at this stage in order to provide a solid basis for proceeding to the merits of the present Case as speedily as possible. Thus, if the Respondent were able to concur with the legal views developed in the following, lengthy proceedings on Preliminary Objections could be avoided.

3.04 The questions arising in the present Case are of an importance which transcends the individual litigation at stake. The United States is one of the countries most strongly committed to the protection of the rights and interests of its citizens abroad. Hence, Germany is convinced that it is in the interest of both parties to allow this Court to pronounce itself on the substantive legal issues raised in the present application as quickly and comprehensively as possible. Crucial questions, many of them not yet decided by international judicial bodies, could be clarified, thus strengthening the rule of law in international relations and thereby serving not least the many United States citizens

> "scattered about the world - as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that `international law is founded upon mutuality and reciprocity' ... The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation."[41]

In her letter to the Governor of Virginia in the case of the Paraguayan national Angel Breard requesting a temporary stay of the execution of Mr. Breard, U.S. Secretary of State Albright took the same position, stating that

> "[A]s Secretary of State ... I have a responsibility to bear in mind the safety of Americans overseas."[42]

3.05 The paramount interest of the United States in the observance of the rules of the Vienna Convention was also underlined by President Schwebel in his Declaration appended to the Order of this Court of 9 April 1998 in the *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. USA* [henceforth referred to as the *Breard* Case]):[43]

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[44]

II. The legal bond establishing the jurisdiction of the Court in the present Case

3.06 Germany and the United States are both members of the United Nations, and thus *ipso facto* parties to the Statute of the International Court of Justice (henceforth referred to as "the Statute") which forms an integral part of the Charter of the United Nations (Art. 92, 93 [1]) of the Charter). In this capacity, both States are entitled to make use of the machinery provided by the principal judicial organ of the United Nations (Art. 92 of the Charter) without any further prerequisites *ratione personae* (Art. 35 [1] of the Statute).

3.07 In the present Case, the jurisdiction of the Court is based upon Art. 36 (1) of the Statute and Art. I of the Optional Protocol. Art. 36 (1) of the Statute provides that the jurisdiction of the Court encompasses "all matters specially

provided for in the Charter of the United Nations or in treaties and conventions in force." The Optional Protocol is a treaty within the meaning of this provision. The use in Art. 36 (1) of the Statute of the expression "in force" does not limit the scope of this provision to treaties concluded prior to the entry into force of the Statute itself, but rather refers to the date of the institution of the respective proceedings. This interpretation is supported by the settled practice of the Court as well as by the unanimous opinion in doctrine and has never been seriously challenged.[45]

3.08 The Vienna Convention on Consular Relations of 24 April 1963[46] and the accompanying Optional Protocol have been ratified by both the United States of America and the Federal Republic of Germany. Neither country has declared any reservations. In accordance with its Art. VIII (1), the Optional Protocol entered into force on 19 March 1967. It became binding upon the United States on 24 December 1969 and upon Germany on 7 October 1971, respectively.[47] It is thus on that latter day that the legal bond establishing the jurisdiction of the Court between the two States was created. This legal relationship has remained unchanged ever since.

3.09 In accordance with Art. 102 (1) of the United Nations Charter and Art. 4 (1) (c) of the regulations implementing this provision,[48] the Vienna Convention and the Optional Protocol were registered *ex officio* with the Secretariat of the United Nations on 8 June 1967 (Registration No. 8640).

III. The scope of the Court's jurisdiction under Article I of the Optional Protocol

3.10 Art. I of the Optional Protocol on which Germany bases the Court's jurisdiction in the present Case is worded as follows:

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

Germany fully agrees with the view expressed in the United States' Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (henceforth referred to as the *Hostages* Case) that the Court's jurisdiction under Art. I of the Optional Protocol is "clear, simple, and unanswerable".[49] It was in this very case that the United States addressed and rebutted - in a thoroughly convincing manner - several possible arguments against the Court's jurisdiction under the Optional Protocol. This legal reasoning is as valid today as it was almost 20 years ago, particularly as regards the question whether or not the rules laid down in Art. II and III of the Optional Protocol[50] have any impact on the compromissory clause contained in Art. I and the interpretation of the terms "dispute" and "interpretation or application" used in this provision.

3.11 In its Judgment of 24 May 1980 in the *Hostages* Case, the Court fully accepted the arguments put forward by the United States, the then applicant. Although Germany sees no need to reiterate this argumentation at length, it takes the opportunity to recall the opinion shared by the United States and the Court on the relevant issues:

> In its Memorial of 12 January 1980, the United States took the view that
>
> > "Articles II and III do not require a two-month waiting period prior to resort to the Court under Article I"[51]
>
> and maintained
>
> > "that proceedings in this Court may be unilaterally instituted under Article I of the Optional Protocol *at any time* after a dispute of the appropriate character has arisen."[52]
>
> The United States arrived at this conclusion after a careful analysis of the wording, the purpose, the historical context and the legislative history of the Optional Protocol. Its view was finally confirmed by the Court itself in the following words:
>
> > "The terms of Articles II and III ..., when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question."[53]
>
> Germany cannot but fully support this understanding of a provision, which was quite aptly characterised by the United States as "truly a model compromissory clause"[54] .

3.12 In the light of such authoritative and unequivocal pronouncements on the part not only of the International Court of Justice but also of the United States Government, Germany is convinced that a somewhat ambiguous observation on the point at issue made by the Agent of the United States in his oral argument in the *Breard* Case[55] was a mere policy statement rather than an indication of a shift in the firm and sound legal position taken by our Adversary on earlier occasions. Such a shift would find no support whatsoever in jurisprudence or in doctrine.

> While Germany is fully aware of the *prima facie* nature of findings on jurisdiction and admissibility within a procedure on Provisional Measures, it might still be permitted to point out that the Court itself addressed the recent doubts raised on this point by the Agent of the United States. The Court simply recalled - and thus confirmed - its

previous Judgment in the *Hostages* Case.[56] Germany thus considers that both parties to the present dispute concur with each other in the approval of the Court's authoritative statement to the effect that the two months' period referred to in Art. II and III would only come into play when

> "recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal."[57]

Obviously, these conditions are not met in the present Case.

Therefore, by bringing the present case before the International Court of Justice on 2 March 1999, Germany has simply exercised its right under the Optional Protocol to institute proceedings unilaterally

> "at any time after a dispute of the appropriate character has arisen"

- to once more follow the wording used by the United States in its written argument in the *Hostages* Case.[58]

IV. Preconditions of the jurisdiction of the International Court of Justice under Article I of the Optional Protocol

3.13 The reference by the United States in its Pleadings in the *Hostages* Case to "a dispute of the appropriate character" points at two preconditions of the Court's jurisdiction under Art. I of the Optional Protocol, namely

a) the existence of a "dispute" and

b) the condition that this dispute must be "arising out of the interpretation or application of the (Vienna) Convention" on Consular Relations.

1. The existence of a "dispute"

a) The meaning of the term "dispute"

3.14 The concept of "dispute" is fundamental for the contentious jurisdiction of the Court. It was already in 1924 in the *Mavrommatis Case* that the Permanent Court coined the classical definition of the term "dispute" frequently used in clauses establishing the jurisdiction of the Court:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[59]

Subject only to minor adjustments,[60] this definition has been constantly applied by both the Permanent Court and its successor, the International Court of Justice. It was recently confirmed in the Judgment of 11 June

1998 on Preliminary Objections in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*,[61] where the Court recalled that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties,[62] and that, in order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other.[63] The Court went on to say:

> "Whether there exists an international dispute is a matter for objective determination."[64]

3.15 Thus, as the Court already clarified in its Advisory Opinion on the *Interpretation of Peace Treaties* of 30 March 1950,

> "[t]he mere denial of the existence of a dispute does not prove its non-existence. ... [In] a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations ... the Court must conclude that international disputes have arisen."[65]

As the United States correctly argued at that occasion, every other position would lead to a result which

> "could only operate to further the purposes of a State not prepared to live according to the law and carry out its responsibilities as a member of the community of nations."[66]

3.16 Furthermore, the Court has made very clear that a party cannot prevent an affirmative answer as to the existence of a dispute by simply not advancing any arguments in favour of its position, whether that party does not participate in the proceedings at all or, although doing so, does not openly admit the existence of a legal or factual controversy with its adversary:

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty."[67]

3.17 The application of the thus-described set of criteria for the determination of the existence of a dispute prevents the frustration of a commitment to arbitrate or judicially settle in cases where one party is reluctant to admit the existence of a dispute and, by doing so, challenges the jurisdiction of the Court in general. It was precisely the application of these criteria which was vigorously propounded by, and finally worked in favour of, the United States

in the *Hostages* Case; a case in which the same jurisdictional basis on which Germany is relying today was invoked by the then applicant.

3.18 Moreover, the position taken by the Court in this respect is so sound and, with regard to the proceedings *in absentia* foreseen in Art. 53 of the Statute, almost self-evident that, notwithstanding frequent discussions about its scope in concrete cases, it has never been challenged in principle. However, due to the position taken by the United States recently in the Hearing on the Request for the Indication of Provisional Measures in the *Breard* Case, where, in a very similar, if not virtually identical, legal context, Counsel for the United States argued that

> "there is no dispute here about either the interpretation or the application of the Convention",[68]

Germany considers it advisable to underline once again the validity of the principles regarding the existence of a dispute.

3.19 Hence, on the basis of the criteria described, there can be no doubt that there does exist "a disagreement on a point of law or fact, a conflict of legal views or interests" and thus a "dispute" within the meaning of Art. I of the Optional Protocol between Germany and the United States on all substantive issues raised by the Applicant in the present proceedings.

b) The individual issues in dispute between the parties

3.20 Subject to a more comprehensive presentation during the discussion on the merits of the case,[69] the points in dispute between the two parties may be enumerated and briefly described as follows:

(1) There exists a "dispute" about the interpretation and application of Article 36 (1) of the Vienna Convention

3.21 Germany contends that in the case of Karl and Walter LaGrand the United States failed to meet its legal obligation under Art. 36 (1) (b), last sentence, of the Convention, to inform the two inmates "without delay" about their right to contact the competent consular post, *i.e.*, the German Consulate General in Los Angeles. Indeed, Karl LaGrand was only given the respective advice on 21 December 1998, that is almost 17 years after his arrest in January 1982.[70]

This obvious failure to comply with a key provision of the Convention had far-reaching consequences:

a) Since Karl and Walter LaGrand were ignorant of the possibilities open to them under the Convention, they were prevented from invoking their rights enshrined in Art. 36 (1) (a) 2nd sentence and Art. 36 (1) (b) 1st and 2nd sentence, including, in particular, their right to communicate with the German Consulate.

b) Germany itself was deprived of its rights embodied in Art. 36 (1) (a), 1st sentence, and Art. 36 (1) (c) - provisions specifying and concretising the consular functions laid down and recognised in Art. 5 (a), (e) and (i) of the Convention -, namely to establish contact and communicate with their nationals in prison, and in particular its right to arrange for adequate legal representation of the two inmates.

As will be demonstrated later,[71] the ultimate execution of the LaGrand brothers was causally linked to the above-described breaches of the Vienna Convention by the United States.

3.22 Germany thus claims that the United States violated the rights of the Applicant in a twofold way: First, the conduct of the United States impeded Germany from exercising its protective functions spelled out in the said provisions and thus directly violated a treaty-based right of Germany, and second, Germany was injured in the person of its two nationals Karl and Walter LaGrand, whose illegal treatment - with fatal results - it now raises by way of diplomatic protection. With regard to this latter aspect, it is to be pointed out that both Karl and Walter LaGrand had exhausted all local remedies at their disposal before the present case was brought before the International Court of Justice.

3.23 It is significant that until now the Respondent has not put forward any legal arguments in order to justify its failure to comply with the Vienna Convention on Consular Relations in the present case. Even if in the course of the present proceedings the United States were to arrive at the conclusion that the breach which it committed was so manifest that no justification whatsoever were even arguable - a highly unlikely eventuality -, this admission could not defeat the Court's jurisdiction on the ground of alleged non-existence of a "dispute".

As the then Counsel for the United States in the *Hostages* Case, Mr. Schwebel rightly pointed out, such an argumentation would simply be "specious", because

> "[t]he sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty. It would be anomalous to hold that the Court has jurisdiction where there is an arguable claim that a treaty has been violated, but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court, or in the terms of the Optional Protocols. Indeed, any such rule would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction."[72]

This view - which was implicitly followed by the Court[73] - has Germany's full support in the present proceedings.

3.24 Moreover, there do exist several open questions between the Parties, with regard to both matters of law and of fact. These unresolved questions underline the existence of a dispute and deserve clarification within the present proceedings.

3.25 (1) It remains unclear whether or not the United States will argue that at the time of the arrest of the LaGrand brothers, the United States authorities were not aware of the German nationality of Karl and Walter LaGrand and that its conduct was therefore not in breach of Art. 36 (1) (b) of the Convention. Germany, on its part, is convinced - and will show - that the authorities in the United States did know the German nationality of the LaGrand brothers. Thus, on this point we may be faced with a "disagreement on a ... fact" within the meaning of the *Mavrommatis* jurisprudence.

3.26 In the very unlikely case that Germany does not succeed in establishing to the satisfaction of the Court positive knowledge *ab initio* on the part of the responsible officials of the United States of the German nationality of Karl and Walter LaGrand at the time of their arrest, Germany will - in a purely subsidiary and auxiliary manner - argue that the United States nevertheless breached Art. 36 of the Convention because its officials failed to meet the standard of due diligence required under the circumstances: If the Arizona authorities had applied that standard, they would have detected that the brothers LaGrand were - or, at least, could possibly be - German nationals. It would then be for the Court to decide whether or not, and to what extent, Art. 36 of the Convention puts a State under an obligation to apply due diligence in order to establish the nationality of its prisoners, at least in cases in which there exist clear indications that such persons might be foreign nationals. Germany is convinced that, due to the special circumstances of the *LaGrand* Case, the United States was indeed under an obligation to that effect - a legal view which is obviously not shared by its adversary. Thus this question also gives rise to a "dispute" within the established meaning of the term.

3.27 (2) Moreover, Germany holds that Art. 36 (1) of the Convention not only confers rights on Germany itself but grants individual rights to its two nationals Karl and Walter LaGrand as well: rights that are now to be taken up by the State of origin at the international level in the exercise of diplomatic protection. The United States, on the contrary, seems to be of the view that the provision in question does not grant any individual rights at all. Hence, there also exists a dispute on this point.

3.28 (3) Finally, it would be artificial and unsustainable to draw a fine distinction between a dispute about the application and interpretation of Art. 36 (1) itself and a dispute on the question of what remedies are owed for an eventual breach of the obligations embodied in this provision. This latter question - regarding which views undoubtedly differ sharply between the parties - can only be dealt with adequately after a breach of the Vienna Convention on Consular Relations has been ascertained.

3.29 In sum, the present case gives rise to various questions related to Art. 36 (1) of the Convention. Hence, in accordance with the meaning attributed to that

term by the established jurisprudence of this Court, other authorities and the unanimous opinion of publicists, there does exist a "dispute" between the Parties on these questions.

(2) There exists a "dispute" about the application and interpretation of Article 36 (2) of the Convention

3.30 Germany holds that the doctrine of procedural default embodied in the municipal law of the United States, as it was applied in the proceedings against Karl and Walter LaGrand, is in violation of Art. 36 (2) of the Convention,[74] which provides that

> "the laws and regulations of the receiving State ... must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

Not only did federal courts of the United States consistently and mechanically apply this doctrine in the present Case - with fatal consequences for the brothers LaGrand to be described later -,[75] but officials of the United States executive branch, too, expressed the view that the application of this doctrine would not infringe upon Art. 36 (2) of the Convention.[76] There can be no doubt, therefore, that there exists a dispute between the parties on the question of whether or not the application of certain doctrines or principles of United States domestic law was compatible with Art. 36 (2) of the Convention in the present Case.

(3) There exists a dispute about the legal effect of the Court's Order on Provisional Measures of 3 March 1999 and the consequences arising therefrom

3.31 The German position with regard to the legal effects arising from Orders on Provisional Measures in general and the Court's Order of 3 March 1999 in particular found its expression in a Press Release issued by the German Ministry of Foreign Affairs on 4 March 1999, the day after the execution of Karl LaGrand:

> "The International Court of Justice (ICJ) has rendered a decision binding under international law."[77]

More specifically, on the day before, Germany had argued before the U.S. Supreme Court with regard to the Order of the International Court of Justice of 3 March 1999:

> "The actions required by the ICJ Ruling are binding upon the United States ... pursuant to Article 94 (1) of the United Nations Charter, a treaty of the United States".[78]

The German Government reiterated this view in very clear terms several weeks later in its reply to a respective interpellation from the German Parliament:

> "The ICJ has not only made a pronouncement of a recommendatory character but rendered a mandatory decision. On 3 March 1999, that is, still before the execution of Walter LaGrand on 4 March 1999, it granted the request of the [German] Federal Government for the indication of Provisional Measures in full, and called on the United States, in a decision taken in accordance with Article 41 of the ICJ Statute in connection with Article 75 of the Rules of Court, as follows:
>
> `The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings ...'.
>
> As is well known, the United States did not comply with this legally binding decision of the ICJ."[79]

3.32 The opinion expressed in these statements reflects a legal position to which Germany has adhered firmly and consistently. It has also done so on earlier occasions before this Court. For instance, in his oral argument in the *Fisheries Jurisdiction* Case, Agent for Germany pleaded that certain acts of the Government of Iceland were "illegal", *inter alia,* because

> "these acts intentionally disregard the Court's Order of 17 August 1972, confirmed by Order of 12 July 1973, according to which the Republic of Iceland should refrain from taking any measures against German fishing vessels engaged in fishing activities in the waters around Iceland outside the 12-mile fishery limit during the pendency of the proceedings before the Court."[80]

From this, Germany drew the conclusion - as it will do in the present Case - that, in principle, and subject to a careful analysis of each specific Order, the breach of an Order of the Court brings into operation the ordinary principles of State responsibility as expressed, for example, by the Permanent Court of Justice in 1927 in the *Chorzów Factory* Case[81] and further elaborated since by this Court and other institutions, in particular the International Law Commission.

3.33 Germany therefore maintains - subject to a more detailed presentation below - that

a) an Order of the Court falls within the scope of Art. 94 of the Charter and is thus binding on the addressees, and

b) consequently, a breach of an Order of this Court brings into operation the principles of State responsibility.

3.34 Unfortunately, in view of the conduct of the United States vis-à-vis the Court's Order of 3 March 1999 as well as on previous occasions, the Respondent appears to hold quite a different view regarding the Orders on Provisional Measures of this Court in general, and the specific Order at issue in particular.

3.35 At one occasion, the divergence of views on this point has become manifest even in the present context: In the proceedings initiated by Germany before the U.S. Supreme Court to enforce and give effect to the Court's Order of 3 March 1999, the United States Solicitor General took the view that

> "an Order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."[82]

In sharp contrast to this, Germany, in its complaint initiating the proceedings before the Supreme Court, had argued that

> "The ICJ Ruling will be violated if the United States does not ensure that a national of Germany, Walter LaGrand ... is not executed ...".[83]

3.36 To further illuminate the existence of a dispute on this point, it is to be recalled that the Governor of Arizona, Jane D. Hull, chose to simply disregard the Court's Order without even considering the possibility that any legal effects might arise from this ruling of the principal judicial organ of the United Nations. Possibly, in doing so, the Arizona Governor let herself be inspired by the views expressed by the Department of State in its *amicus curiae* brief to the Supreme Court in the *Breard* Case, in which it asserted:

> "The better reasoned position is that such an order is not binding."[84]

In the same case, in her letter to the Governor of Virginia of 13 April 1998, Secretary of State Albright characterised the Order of the Court of 9 April 1998 - containing a text virtually identical to that of 3 March 1999 - as "non-binding".[85]

3.37 Neither did the United States Federal Government take any steps to enforce the ruling of the International Court of Justice in the *LaGrand* Case. This was openly admitted by Mr. Foley at a Press Conference of the US State Department on 3 March 1999:

> "Question: Does the State Department take a position, other than simply transmitting the documents?
>
> Mr. Foley: No, we have not. We simply transmitted the documents."[86]

3.38 In sum, there does exist a fundamental dispute between the parties on the question whether and to what extent binding effect can be attributed to the Orders of the Court on Provisional Measures.

(4) There exists a "dispute" with regard to the remedies owed for the violation on the part of the United States of its international legal obligations

3.39 There also exists a dispute between the parties with regard to the remedies owed for the violation of both the aforementioned provisions of the Vienna Convention on Consular Relations and the Court's Order of 3 March 1999.

3.40 Whereas Germany holds that the ordinary principles of State responsibility must apply in the present case, the United States seems to be of the opinion that the consequences arising from a violation of these international legal obligations are very limited, if such consequences do exist at all.[87]

3.41 If one takes the view - as the United States apparently does - that Orders of the International Court of Justice indicating Provisional Measures do not create legal obligations, it is only consistent to further hold that disregard for these Orders cannot entail responsibility.[88] This view, however, is not shared by Germany.

3.42 With regard to the violations of the Convention itself, the United States has not offered Germany any remedy for its wrongful conduct. In light of its conduct in the *Breard* Case, it does not seem that the United States is willing to accept that a breach of the legal obligations at stake in the present case obliges it to any reaction. Germany, on its part, maintains that in principle the whole range of remedies available under the international law of State responsibility also applies to the particular violations which occurred in the *LaGrand* Case.[89]

2. The existence of a dispute "arising out of the interpretation or application of the [Vienna] Convention" on Consular Relations

a) Introductory remarks

3.43 By using the formula "arising out of the interpretation or application", Art. I of the Optional Protocol employs a rather classical wording: Not only had this formula already been used in many similar jurisdictional clauses, it also follows *verbatim* the text of a model clause adopted by the Institut de Droit International in 1956.[90] Commenting on the (envisaged) jurisdictional clause, the initiator and rapporteur of the respective Commission of the Institut, the late Professor Guggenheim, could thus rightly state:

> "Cette formule - qui couvre toute la gamme des différends juridiques possibles au sujet d'une Convention ou d'une Résolution - étant devenue d'un usage généralisé dans les clauses des actes prévoyant la juridiction de la Cour, il n'y a aucune raison d'en faire abstraction dans la clause modèle."[91]

In attributing such a wide scope to the formula ("toute la gamme des différends juridiques possibles"), Professor Guggenheim relied on the authority of the Permanent Court of International Justice, which had advocated a broad understanding of the term "application" in two judgments delivered in 1925 and 1927 respectively.[92] In the *Chorzów Factory* Case, confirming the formula developed in the *Mavrommatis* Case,[93] and after expressly rejecting a strictly literal meaning of the word "application" in a jurisdictional clause virtually identical with the one embodied in the Optional Protocol, the Court stated in its Judgment of 26 July 1927 that

> "`[A]pplication' is a wider, more elastic and less rigid term than `execution', but also that `execution ... is a form of application'."[94]

Giving special emphasis to the intentions of the parties, and thus confirming the basic rule that the very purpose of interpretation is to ascertain such intention from a text[95] - a rule which has now found its expression in Article 31 (1) of the Vienna Convention on the Law of Treaties - , the Court further argued:

> "For the interpretation of [the jurisdictional clause], account must be taken ... also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision."[96]

3.44 In order to clarify such intention in the present case, Germany does not have to rely on remote, ambivalent and contradictory sources. Rather, these intentions find their unequivocal expression in the text of the Optional Protocol itself, whose Preamble provides:

> "The States Parties to the present Protocol and to the Vienna Convention on Consular Relations ...
>
> Expressing their wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice ..." (emphasis added).

The relevance of the preamble for the purpose of interpreting the legal instrument of which it is an integral part - in particular with regard to the ascertainment of the intentions of the parties that led to the conclusion of the treaty - is generally accepted.[97] Thus, in order to determine the legal purport of the operative provisions of a treaty, the preamble plays an important role both as a tool of systematic ("context" within the meaning of Article 31 [2] of the Vienna Convention on the Law of Treaties) as well as of teleological interpretation (Article 31 [1] of the Vienna Convention).

3.45 The wording of the Preamble to the Optional Protocol illuminates the comprehensive scope of disputes that the parties intended to bring within the jurisdiction of the Court. In this respect the Preamble confirms the text of Art. I of the Optional Protocol itself. A careful reading of the Memorial of the United States in the *Hostages Case* has led Germany to conclude that this assessment is shared by the Respondent in the present proceedings.[98]

b) The dispute concerning Article 36 (1) and Article 36 (2) of the Convention

3.46 (1) Germany claims, first, that the United States violated the Vienna Convention by failing to provide its nationals, Karl and Walter LaGrand, with the notice required by Art. 36 (1) (b), last sentence, of the Convention, according to which

> "[t]he said authorities [*i.e.*, those of the receiving State] shall inform the person concerned without delay of its rights under this sub-paragraph".

3.47 By violating this provision in the case of the LaGrand brothers, the authorities of the United States prevented Germany from exercising its rights under Art.36 (1) (a) and (c) of the Convention, namely its freedom

> "to communicate with nationals of the sending State and to have access to them" (Art. 36 [1] [a] Vienna Convention)

and the various rights conferred upon the sending State *vis-à-vis* its nationals in prison, custody or detention as provided for in Art. 36 (1) (b) of the Convention, including the right

> "to visit, ... to converse and correspond with him and to arrange for his legal representation."

3.48 Additionally, by not providing the required notice to the two detainees, the United States violated Art. 36 (1) (a), 2nd sentence, of the Convention, where it is stated that

> "[n]ationals of the sending State have the same freedom with respect to communication with and access to consular officers of the sending State."

Germany raises this point as a matter of diplomatic protection on behalf of Walter and Karl LaGrand.

It is beyond reasonable doubt that all these issues are questions relating to the interpretation and application of the Vienna Convention and thus fall within the scope of Art. I of the Optional Protocol.

3.49 (2) Germany's second claim relates to the question of whether or not the laws and regulations of the United States available to implement the provisions

laid down in Art. 36 (1) of the Convention are sufficient in view of Art. 36 (2) of the Convention, according to which such laws and regulations

> "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

Germany claims that, by applying the rule of procedural default in a mechanical manner to the case of the LaGrands, the United States has violated Art. 36 (2) of the Vienna Convention by preventing the effective exercise of the right to consular assistance after the jury trial and the sentencing phase have been concluded. This issue is clearly a dispute on the interpretation and application of the Vienna Convention and, as such, falls within the scope of Art. I of the Optional Protocol.

3.50 Germany therefore submits that, since both claims arise out of the interpretation and application of the Convention, the Court has jurisdiction to hear them.

c) Remedies owed for the violation of the Vienna Convention falling within the scope of Article I of the Optional Protocol

3.51 In the *Breard* Case the United States argued that the question of the remedies pursued by Paraguay did not lead to a dispute "about the interpretation or application of the Vienna Convention because "the Vienna Convention does not provide for such an extraordinary form of relief."[99]

However, this allegation was rejected by the Court in its Order of 9 April 1998 which held that

> "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Article 5 and 36 thereof; and ... this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963."[100]

By this statement the Court referred to its established jurisprudence according to which

> "[d]ifferences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[101]

3.52 Moreover, less than two months before the oral hearings in the *Breard* Case, the Court had rejected a similar objection with regard to its jurisdiction raised by the United Kingdom and the United States in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie.* There, the parties differed, *inter alia*, on the question of whether or not the incident at Lockerbie was governed by the Montreal Convention, the only legal instrument providing a

jurisdictional basis for the Court to decide on the merits of the case. The Court held:

> "A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court."[102]

3.53 Thus, the Court's unequivocal position may be summarised as follows:

> (a) a dispute whether or not the violation of a provision of the Vienna Convention gives rise to a certain remedy is a dispute concerning "the application and interpretation" of the aforesaid Convention, and thus falls within the scope of Art. I of the Optional Protocol and,
>
> (b) in more general terms, a jurisdictional clause providing for the jurisdiction of this Court in disputes concerning the "interpretation and application" of a specific "legal régime" covers the question whether or not this very legal régime is applicable or not in a given case.[103]

3.54 If these criteria are applied to the present dispute over the remedies owed for a breach of certain provisions of the Vienna Convention, there can be no doubt that this question falls within the scope of Art. I of the Optional Protocol. Even if the United States were to take the view that the Vienna Convention constituted a sort of "self-contained régime" - an assertion which Germany contests -, the answer would be the same because the subject-matter of the question is a dispute regarding the interpretation and application of the Vienna Convention within the meaning which the established jurisprudence of this Court has attributed to this and other virtually identical jurisdictional clauses.

d) The dispute concerning the conduct of the United States vis-à-vis the Court's Order of 3 March 1999

3.55 Germany brought the present Case before the International Court in order to have its rights under the Vienna Convention enforced. The Court issued its Order of 3 March 1999 precisely in order to preserve those rights pending its decision on the merits. The Court stated that it would

> "not order interim measures in the absence of `irreparable prejudice ... to rights which are the subject of dispute ...'"[104]

and that

> "the execution of Walter LaGrand ... would cause irreparable harm to the rights claimed by Germany in this particular case".[105]

It is certainly true - as Paraguay put it in the *Breard* Case - that

> "[t]he Order therefore constituted the Court's provisional `interpretation and application' of the Convention."[106]

3.56 With due regard to the wording of Article I of the Optional Protocol in conjunction with the intentions of the parties as expressed in its Preamble, there can be no reasonable doubt that the dispute between the parties on the question of whether the United States were obliged to comply and did comply with the Order, is therefore a dispute

> "*arising out of* the interpretation or application of the Convention" (emphasis added),

and thus a dispute falling within the jurisdiction of the Court as established in Article I of the Optional Protocol. It is to be stressed once again that

> "[t]he primacy of the text, especially in international law, is the cardinal rule for any interpretation."[107]

Thus, with due regard to the ordinary meaning of the text of the Optional Protocol, including its Preamble, and the aims and purposes attributed to this legal instrument by the parties themselves, Germany holds that the dispute relating to the non-compliance of the United States with the Court's Order of 3 March 1999 is covered by the jurisdictional clause in Article I of the Optional Protocol.

3.57 Questions relating to the non-compliance with a decision of the Court under Article 41 para. 1 of the Statute, *e.g.* Provisional Measures, are an integral component of the entire original dispute between the parties. This was already confirmed by the Permanent Court of International Justice in its Order of 5 December 1939 where the Court stated

> "*the parties to a case* must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend *the dispute*."[108]

3.58 The same line of reasoning - although developed in a much more detailed and explicit manner - was followed in the Judgments of the International Court of Justice in the *Fisheries Jurisdiction* Cases (1972-1974) brought by the United Kingdom and the Federal Republic of Germany against Iceland.

There, Germany expressly included in its submissions certain post-application actions by Iceland - *e.g.* the forcible interference with German-registered fishing vessels by Icelandic coastal patrol boats - which had taken place after the Court had issued Orders on Provisional Measures calling upon Iceland to refrain from actions to aggravate or

extend the dispute over fishing rights in waters surrounding the island.[109]

In its Judgment of 25 July 1974 on the merits of the case, the Court held that it had jurisdiction to consider this claim since

> "[t]he matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961 [the instrument conferring jurisdiction]."[110]

Earlier in the same Judgment, and in a wider context, the Court had already explained the reasons for the rather broad scope it was willing to attribute to its jurisdiction in this case.[111] It started by saying that

> "[t]he present dispute was occasioned by Iceland's unilateral extension of its fisheries jurisdiction. However, it would be too narrow an interpretation of the compromissory clause to conclude that the Court's jurisdiction is limited to [this question]."[112]

And the Court went on to explain that

> "[f]urthermore, the dispute before the Court must be considered in all its aspects. ... Consequently, the suggested restriction on the Court's competence not only cannot be read into the terms of the compromissory clause, but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties."[113]

These principles can and should be applied, *mutatis mutandis*, to the present Case. Indeed, the similarities in the *Fisheries* Cases and in the present Case with regard both to the legal as well as to the factual setting are striking:

3.59 In the present Case the dispute was, in the Court's own words, "occasioned" by the United States' failure to comply with certain provisions of the Vienna Convention. However, in order to consider the dispute "in all its aspects", it would "be too narrow an interpretation of the compromissory clause to conclude that the Court's jurisdiction is limited to"[114] this question. The submission relating to the non-compliance on the part of the United States with the Court's Order of 3 March 1999 "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application." Restrictions on the Court's competence with regard to this question "not only cannot be read into the terms of the

compromissory clause", that is, in the present Case, Article I of the Optional Protocol, "but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties."[115] Indeed, the taking into account of the conduct of the United States vis-à-vis the Court's Order of 3 March 1999 is certainly an essential element in the settlement of the present dispute by judicial means, and thus in the administration of justice within the meaning attributed to this expression in the *Fisheries* Case.

3.60 Finally, Germany holds that the Court has jurisdiction over the dispute with respect to the Order also by virtue of its inherent jurisdiction. As the International Court of Justice has explained in the *Nuclear Tests* Cases

> "[s]uch inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[116]

The Court described the purpose and scope of its authority - emanating directly from its status as a court of justice - as follows:

> "[T]he Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the `inherent limitations on the exercise of the judicial function' of the Court, and to `maintain its judicial character (*Northern Cameroon, Judgment, I.C.J. Reports 1963,* at p. 29)'."[117]

The question of whether or not an Order of the Court on Provisional Measures - issued in a specific case pending before the Court - has been violated or not by one of the parties, undoubtedly falls within the scope of the inherent jurisdiction of the Court thus described.

3. Conclusion

3.61 In sum, there exists a "dispute", within the meaning given to this term by uniform jurisprudence and scholarly opinion, with regard to all issues raised in the present proceedings. This dispute arises out of the interpretation and application of the Vienna Convention on Consular Relations and thus falls within the scope of Art. I of the Optional Protocol. It is therefore respectfully submitted that the Court is competent to hear all claims brought by the Federal Republic of Germany.

V. The admissibility of the claims brought by Germany

3.62 A comprehensive analysis of the applicable legal instruments, of the relevant caselaw and the pertinent writings of publicists has indicated nothing

that could give rise to any doubts with regard to the admissibility of the present application. Therefore, Germany holds that the application which it lodged on 2 March 1999 as well as each and every claim comprised therein is admissible. No developments since then have rendered the application inadmissible in whole or in part.

> Although the burden to prove the contrary falls fully within the responsibility of the Respondent in the present case, Germany - for the reasons set out at the very beginning of this part of its Memorial - avails itself of the opportunity to briefly address the issues of the timing of its application as well as the argument of mootness.[118] Furthermore, in the context of admissibility, Germany will deal with the question of the nationality of Karl and Walter LaGrand which might be regarded as having a direct impact on the *ius standi* of Germany before this Court.[119]

1. The timing of the German application

3.63 Considering certain reproaches regarding Germany's timing of its application,[120] the Court's attention is drawn to the fact that the applicable treaty provisions do not provide for any specific time-limit or moment in time at which an application is to be brought before the Court.

3.64 Germany is fully aware that - even in the absence of any such provision -

> "delay on the part of a claimant State may render an application inadmissible",

as this Court has stated in its Judgment of 26 June 1992 in the case concerning *Certain Phosphate Lands in Nauru*.[121] At the same occasion, the Court went on to specify:

> "[I]nternational law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[122]

The subject-matter of the *Nauru* Case was the question of the rehabilitation of phosphate land worked out before 1 July 1967 by Australia. The acts allegedly constituting a breach of an international obligation had been completed before, and did not extend beyond, that day. A claim as to rehabilitation was raised by the Nauruan Government on 31 January 1968 and rebutted by the Australian Government on 4 February 1969. As the Court pointed out, it was on this latter day at the latest that

> "Nauru was officially informed ... of the position of Australia on the subject of rehabilitation of the phosphate land".[123]

Thus, it was at this very moment that the opposing claims with regard both to the facts and to the law governing the dispute were ultimately formulated and made known to the parties. From this date, it took Nauru more than 20 years to resolve to bring the dispute to the International Court. But this circumstance did not prevent the Court from holding that

> "Nauru's Application was not rendered inadmissible by passage of time".[124]

Considering such recent jurisprudence of the Court, it seems to be beyond reasonable doubt that "passage of time" cannot constitute a bar to the admissibility of the claims raised by Germany in the present case.

3.65 This is even more obvious if one takes into account the differences between the legal and factual situations involved in the two cases:

First of all, it was only seven days before it brought the dispute to the Court that Germany had become aware of all the relevant facts underlying its claim.[125] These seven days were not only needed for the preparation of the Application but were equally used for intensive diplomatic and political activities at all levels.

Second, Germany only became aware of the imprisonment and the death sentence against its two nationals at the end of the year 1992, by mere coincidence and in particular without any active assistance by the United States.[126] Germany immediately engaged in a variety of activities at the diplomatic and consular level in order to help to minimise the consequences which had arisen from the United States' breach of obligations under the Vienna Convention on Consular Relations. In so doing, Germany, until 23 February 1999, the date on which it became apparent that the Arizona authorities had been fully aware of the German nationality of Karl and Walter LaGrand from the beginning, chose to pursue the avenue of moral and political appeals rather than a strictly legal approach. These appeals were carried out assiduously, as described in Part Two of the present Memorial (Statement of Facts).

Germany decided in favour of this alternative because it did not want its steps to negatively affect the efforts to save the LaGrand brothers from execution. Thus, several motions with the aim of reversing the death sentences pronounced against the brothers were pending before U.S. courts. Germany was determined to avoid any impression that it was interfering in these proceedings.

Germany had full confidence that U.S. courts would ultimately rectify the obvious violations of international law involved. Besides, Karl LaGrand was the first German citizen sentenced to death and actually executed in the United States since the creation of the Federal Republic of Germany. The first and only experience Germany had hitherto had in

this regard was the case of Jens Soering[127] in the 1980's, in which a death sentence could finally be avoided. It was only after the shocking revelation on 23 February 1999 by State Attorney Peasley that the authorities of the State of Arizona had been aware since 1982 that Karl and Walter LaGrand were German nationals, that Germany felt compelled to change its course and decided to bring the case before the International Court of Justice.

3.66 Under these circumstances, the timing of the German application cannot raise any doubts as to admissibility. Neither did it lead to a trial by ambush. On the contrary, respect towards both this Court and the Respondent commands that a State take the step towards settlement by the principal judicial organ of the United Nations only after having carefully weighed all alternatives and having duly considered the legal and factual problems of the case as well as the political implications to which such an Application may give rise.

Germany thus chose to bring this case to the Court only after having

a) become aware of all relevant facts,

b) thoroughly examined the pertinent law in order to ensure a sound legal argumentation,

c) considered and exhausted the appropriate alternatives, and finally

d) carefully weighed the political implications of such a step.

3.67 Furthermore, an essential part of the German claim relates to the question of the consequences arising from the breach of the Court's Order of 3 March 1999 indicating Provisional Measures, a question to which considerations as to "passage of time" obviously cannot apply.

3.68 Third, Germany would like to draw the attention of the Court to a statement in its Judgment of 11 June 1998 on Preliminary Objections in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*. There, a Nigerian submission to the effect that Cameroon's application had not been brought before the Court in "due time" and that this circumstance was to be seen as a violation of the principle of good faith, was rebutted by the Court in the following words:

> "The Court observes that the principle of good faith is a well-established principle of international law. ...
>
> The Court furthermore notes that although the principle of good faith is `one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist' (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). There is no specific obligation in international

> law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause.
>
> Moreover:
>
> A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)
>
> Thus, Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions."[128]

The same holds true - *mutatis mutandis* - in the present Case: Since the applicable jurisdictional basis, Art. I of the Optional Protocol, does not provide for any temporal limitations or restrictions of any other kind, the principle of good faith in itself can in no way limit Germany's discretion in this respect.

3.69 Finally, it is to be repeated once again that Germany has been active at all political and diplomatic levels imaginable before bringing the present dispute before the International Court of Justice - a step taken after due and careful deliberation. Germany drew attention to this circumstance in its argument before the U. S. Supreme Court in the immediate aftermath of this Court's Order of 3 March 1999 and just hours before Walter LaGrand was executed:

> "As this Court will appreciate, it is not a small step for a sovereign state and close ally of the United States to bring proceedings against the United States ... in the ICJ ... ."[129]

2. The German application has not become moot due to subsequent developments

3.70 On several occasions in the past, the Court has found that certain events subsequent to the filing of an application may

> "`render an application without object' and `therefore the Court is not called upon to give a decision thereon'".[130]

In the present Case, the only line of reasoning fitting into this pattern would be the assumption that the execution of Walter LaGrand could

have deprived the present application of its object. From the viewpoint of domestic criminal procedure it is certainly true that

> "if the condemned man's sentence is executed, the matter is terminated and becomes, in the Anglo-Saxon parlance, `moot'. The *international* incorrectness of the situation, however, is not mooted."[131]

Holding otherwise would wholly misinterpret the object and purpose of the present Application. The present Case - to emphasise this once again - deals with a specific and ongoing dispute on the application and interpretation of the Vienna Convention on Consular Relations, on the remedies available to Germany for violations of certain of its provisions, and on the legal consequences arising from the non-observance of the Court's Order of 3 March 1999. It is obvious that none of these issues have lost their relevance following the execution of Walter LaGrand.[132]

3.71 A comparison with the *Nuclear Tests* Case affirms this finding. In this case, the Australian Government had requested the Court to adjudge and declare that

> "the carrying out of *further* atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law."[133]

When France later unilaterally entered into a binding commitment to cease further atmospheric nuclear testing, it was indeed arguable that the Australian claim thereby lost its object.

3.72 One of Germany's claims in the present Case is for the Court to adjudge and declare that

> "the United States should provide Germany a guarantee of the non-repetition of the illegal acts."[134]

Since such a guarantee - binding under international law - has not yet been given, there still exists a difference between Germany's submissions in its Application and in the present Memorial on the one hand and the factual and legal reality on the other, even considering developments subsequent to the filing of the application. The same is true for all other claims which Germany has asked the Court to decide upon. Germany is convinced that the question of "mootness" as a bar to the admissibility of a case could - if at all - only come into play after subsequent developments have led to a complete congruity between the Applicant's claims and the reality, both in law and in fact. This, however, is obviously not the case.

3. The nationality of Karl and Walter LaGrand

3.73 Immediately after the German Consulate General in Los Angeles had learned about the imprisonment of Walter and Karl LaGrand, that is, in June 1992, it engaged in a careful and comprehensive inquiry into the nationality status of the two brothers. In collaboration with the competent administrative bodies in the Federal Republic of Germany the following facts with regard to their nationality were established:

> Walter Bernhard and Karlheinz LaGrand were born on 26 January 1962 in Dillingen/Germany, and on 10 October 1963 in Augsburg/Germany respectively, as sons out-of-wedlock of Emma Magdalena Gebel, a German national.[135] At the time of birth of the two brothers the pertinent provision of the German law on nationality - the *Reichs- und Staatsangehörigkeitsgesetz* of 1913 - provided in its § 4 (1), first sentence:
>
> > "Upon birth, the child of a German [father] born in wedlock acquires the nationality of the father, a child of a German [mother] born out of wedlock acquires the nationality of the mother."[136]
>
> It was by virtue of this provision that Karl and Walter LaGrand became German nationals by origin. This was certified on 15 March 1993 through the issuance of "certificates of citizenship" for both brothers by the competent authority, in this case, the *Landrat des Wetteraukreises in Friedberg*.[137] Just for the sake of completeness it might be added that acquisition of nationality by virtue of the *ius sanguinis* principle - as expressed in § 4 (1) RuStAG[138] - is a social fact which constitutes a genuine connection/link between an individual and the country of origin within the meaning that this term has been given in the jurisprudence of this Court.[139] As Judge Rezek rightly put it:
>
> > "Sur le plan des relations internationales, il est également certain que l'attribution de nationalité *jure sanguini*s, ayant pour base la nationalité parentale, n'a pas fait l'objet de contestations manifestes ... ."[140]
>
> Consequently, it has never been contested that a nationality based on this principle provides the State which has granted it a title to the exercise of diplomatic protection and to the institution of international judicial proceedings.

3.74 The German nationality of the two brothers was not affected by any subsequent events, *i.e.* in particular neither by their moving to the United States nor by their adoption by Mr. Masie LaGrand. According to the applicable rules of the German law on nationality, neither of these circumstances lead to the loss of German nationality. Thus, Karl and Walter LaGrand never lost their German nationality; they were German nationals from their birth until their death.

3.75 These facts appear to be undisputed between the parties. As Germany discovered in the course of the preparation of the present Memorial, several government agencies within the United States were aware of the German nationality of Karl and Walter LaGrand right from the moment of the imprisonment of the two brothers.[141] Even before, upon their entry into the United States they were both provided with Alien Registration Cards.[142] Further, the Immigration & Naturalization Service of the US-Department of Justice treated them as (deportable) aliens, in concrete terms, as German citizens.[143] That Karl and Walter LaGrand never acquired the nationality of the United States is equally undisputed between the parties.[144]

3.76 Hence, since Karl and Walter LaGrand were German nationals all their life, and since they never acquired any other nationality, Germany is entitled to bring this Case before the International Court of Justice, and the claims which it raises here are admissible.

VI. Conclusion

3.77 For the reasons given in the present Chapter, Germany respectfully requests the Court to declare that it has jurisdiction to hear this case and that each and every claim Germany has raised is admissible.

3.78 Germany is aware that findings on questions of jurisdiction and admissibility within the framework of a procedure on Provisional Measures are of a merely *prima facie* nature and do not prejudge the question of the Court's jurisdiction to rule on the merits. However, with all due respect, it might be permitted to recall that both in its Order concerning the request for the indication of Provisional Measures in the *Breard* Case as well as in the respective Order in the *LaGrand* Case, the Court has not expressed the slightest doubt about its jurisdiction and the admissibility of the various claims. This is remarkable in so far as in the former case the United States had raised certain objections to the Court's jurisdiction. These objections were, however, categorically rejected by the Court in their entirety.[145]

Part Four
Obligations breached by the United States

4.01 Germany will now turn to an analysis of the obligations which were breached by the United States. As Germany will elaborate in necessary detail, by not informing the LaGrand brothers of their right to have the U.S. authorities notify the German consulate of their arrest and detention, and by thus not providing the consulate with access to them, and by ultimately executing them, the United States has violated the following obligations embodied in Art. 36 of the Vienna Convention on Consular Relations:

> (1) First of all, the obligation to inform a national of the sending state without delay of his or her right to inform the consular post of his home State of his arrest or detention (Art. 36 [1] [b]); but also, as a consequence

> (2) the obligation to grant the consulate of the sending State the freedom of communication with its nationals detained by the receiving State, including its right to visit, and, *vice versa*, the obligation to grant the nationals of the sending State the freedom to communicate with and have access to the consulate of the sending State (Art. 36 [1] [a] and [c]).

4.02 In addition, by upholding laws that prevent a defendant from raising the said violations of Art. 36 (1) of the Vienna Convention before its domestic courts and by not providing for any effective mechanism to remedy the violation of the correlative rights, the United States has committed a breach of its obligation

> (3) to enable full effect to be given to the purposes for which the rights embodied in Art. 36 (1) are accorded (Art. 36 [2] of the Vienna Convention on Consular Relations).

4.03 Further, by its failure to allow German nationals the exercise of the rights accruing to them as aliens under Art. 36 of the Vienna Convention, the United States has also breached

> (4) the minimum rights of aliens in foreign States, giving rise to the law of diplomatic protection.

4.04 Finally, by not observing the Order on Provisional Measures pronounced by the Court on 3 March 1999 "to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision" of the International Court of Justice on the matter,[146] the United States has not abided by

> (5) its obligation under Art. 94 of the Charter of the United Nations and Art. 41 of the Statute of the International Court of Justice "to comply with the decision of the International Court of Justice in any case to which it is a party" and its corresponding duty not to render impossible the judicial task of the Court.

In the following, Germany will set out these violations in detail.

I. Breaches of Article 36 of the Vienna Convention on Consular Relations

4.05 As the United States itself has explained before this Court in the *Hostages* case:

> "The right of consular officers in peacetime to communicate freely with co-nationals has been described as implicit in the consular office, even in the absence of treaties ... . As Article 5 of the [Vienna] Convention makes plain, a principal function of

> the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations ... ."[147]

Germany fully shares this assessment of the importance of the rights and obligations enshrined in Art. 36 of the Vienna Convention. Unfortunately, in the present Case, the United States itself has not acted according to this statement and has not ensured that Art. 36 of the Vienna Convention was complied with properly. By not advising the LaGrand brothers of their right under Art. 36 (1) (b) of the Convention to inform the German consulate, by thereby preventing Germany from exercising its rights to access to and communication with its nationals guaranteed by Art. 36 (1) (a) and (c), and by upholding internal laws which do not enable full effect to be given to the rights provided for by Art. 36 (1), the United States has breached its obligations under Art. 36 of the Vienna Convention.

1. Omission of advice to German nationals on their right to consular access in violation of Article 36 (1) (b) of the Convention

4.06 There cannot be any doubt whatsoever that the United States has violated Art. 36 (1) (b) of the Vienna Convention by not informing the German consulate of the arrest and detention of the LaGrand brothers "without delay" in 1982. Thus, it was only in mid-1992 that the German Consulate General in Los Angeles became aware of the fact that the two German nationals sentenced to death were being held in prison.

4.07 According to Art. 36 (1) (b) of the Vienna Convention on Consular Relations,

> "[i]f he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph".

Accordingly, once a national of the sending State is arrested and detained, a two-step-procedure must follow: First, the arrested and detained person has to be advised of his or her right to inform the sending State's consulate of the arrest. Second, if he or she then wishes to address a communication concerning his or her arrest or detention to

the consulate, the authorities of the receiving State must forward this communication to the consulate of the sending State in the consular district concerned.

4.08 The purpose of this provision is clear: the arrested or detained foreigner shall have access to the consular facilities of his or her home State at any time. As Professor Luke Lee has observed:

> "Essential to the fulfilment of a consul's protective functions are his right to be informed immediately of a detention of nationals of the sending State, to visit them in prison, and to assist them in legal and other matters."[148]

In no way was this provision an innovation made by the Vienna Convention. It only confirmed a long-standing practice established by bilateral treaties on consular relations to the same effect.

4.09 The right to notification of one's consulate has even been considered part of customary international law.[149] For instance, when Californian officials denied the Mexican consulate the right to communication with a Mexican national detained in the State of California, the United States Department of State advised the local authorities that

> "[e]ven in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world ... ."[150]

Subsequent to the intervention of the Federal authorities, California allowed the Mexican consul to visit the detainee.

4.10 Following the adoption of the 1963 Vienna Convention, it was the United States in particular which insisted - and rightly so - on strict compliance with the provisions of the Convention, even by countries which had not yet ratified it. For instance, in a case which arose before the ratification of the Vienna Convention by Syria, Syria detained United States citizens without informing the U.S. consulate. In an instruction to its consul to Syria, the U.S. Department observed that

> "[t]he right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations. The recognition of these rights is prompted in part by considerations of reciprocity. ... The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." [151]

4.11 There is one important difference between the rules usually to be found in bilateral treaties on consular relations and the Vienna Convention. Whereas the bilateral treaties either provide for automatic notification of the consulate or make the information of the consulate dependent on the demand of the detainee, and thereby also of his or her knowledge of his or her rights, the Vienna Convention has devised an elaborate mechanism to ensure that, on the one hand, the detainee is informed of his or her rights but, on the other hand, that it is for him or her to decide whether he or she wants the consulate to be contacted or not. Thus, notification of the consulate without or against the will of the person concerned is excluded. We will turn later to the consequences of this provision of the Vienna Convention for the question of whether Art. 36 (1) (b) embodies an individual right.

4.12 In the present Case, the violation of Art. 36 (1) (b) is as obvious as it could possibly be:

> The LaGrands were arrested on 7 January 1982, on the very day the robbery at the Valley National Bank in Marana (Arizona) had taken place, at about 3 p.m local time. In spite of the fact that on the arrest form of Karl LaGrand the place of birth of the detainee was indicated as "Ausberg, Germany" (apparently referring to the German city of Augsburg) nobody considered it necessary to inform the brothers of their right to contact the German consulate. Neither did the authorities inform the consulate on their part, although they were - as State Attorney Peasley had to admit during the clemency hearing concerning Karl LaGrand on 23 February 1999 - perfectly aware of the German nationality of the arrested brothers. The ensuing "delay" of ten years during which Germany did not know of the arrest and of the criminal proceedings is totally unacceptable - especially in view of the insufficient remedies provided in United States law for violations of the Vienna Convention (on which later). On top of this, it was not the United States but rather the LaGrand brothers themselves who ultimately established contact with the German consulate in order to receive consular assistance. The United States has to date not even apologised for such blatant disregard of its obligations under Art. 36 (1) (c) of the Vienna Convention.

4.13 Unfortunately, this case appears to be anything but singular. As an American observer has noted on the practice of the United States in the matter: "[N]otification is seldom provided at the state or local level."[152] In the recent past, again, several German nationals have been arrested and detained in the United States without receiving information about their right to consular assistance "without delay". For the period of 1998 and 1999 alone, at least eight respective cases of violations of the Vienna Convention on Consular Relations involving German nationals have been brought to the attention of the German authorities.[153] A number of other cases are presently under investigation and there might be further instances in which Germany does not yet know of failures to render the consular advice required by the Vienna Convention. As this Court was informed in the *Breard* Case,[154] several other countries share the German experience.[155] Since that case, at least one foreign

national has been executed in spite of the breach of the notification requirements of the Vienna Convention and despite vigorous protests of the home country concerned.[156] In 1997, against the background of this factual situation in the United States, the Inter-American Court of Human Rights was requested to render an advisory opinion on the *Application of the Death Penalty in Violation of the Vienna Convention on Consular Relations and International Human Rights Guarantees*.[157]

4.14 The wording of Art. 36 (1) (b) is crystal clear. The issue of whether Art. 36 provides not only a right appertaining to Germany but also an individual right for its nationals will be taken up later. But already at this point it is important to state that this issue is not decisive for the existence of a breach of an international obligation committed by the United States as against the Federal Republic of Germany. Art. 36 (1) (b) is a treaty obligation of the United States towards Germany, and Germany has the right to see it respected vis-à-vis its nationals, whether they happen to live in or just visit the United States.

2. Resulting breaches of Articles 36 (1) (a) and (c) of the Convention

4.15 In addition to the breach of Art. 36 (1) (b) of the Vienna Convention, the United States has also violated Art. 36 (1) (a) and (c) of the Vienna Convention, because it failed to enable the LaGrand brothers to have access to the German consulate. The two respective subparagraphs of Art. 36 (1) read:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) ...;
>
> (c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. ... ."

4.16 If the notification required by Art. 36 (1) (b) does not take place, and the detainee is not informed of his or her right to consular access, a foreign consulate might, possibly for a long time, remain unaware of the fact that a national of the sending State is held in custody in the receiving State. Consequently, consular access cannot be provided and the exercise of the rights accorded by Art. 36 (1) (a) and (c) Vienna Convention will be frustrated. Hence, in our specific Case, by not fulfilling its obligation to inform the

German consulate according to Art. 36 (1) (b), the United States also violated the right to consular access provided for in Art. 36 (1) (a) and (c). This violation continued until Germany became aware of the German nationality of the LaGrand brothers and was allowed to provide consular services, that is, in 1992.

3. Breach of Article 36 (2) of the Vienna Convention through application of the municipal law doctrine of procedural default

4.17 Under Art. 36 (2) of the Vienna Convention, the United States is under an obligation to ensure that its municipal

> "laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The United States is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury, and by applying these rules to the case of the brothers LaGrand.

a) Interpretation of Article 36 (2) of the Vienna Convention

4.18 In view of the importance of the communication between a consulate and the nationals of the sending State, the principal purpose of Art. 36 of the Vienna Convention is to ensure that States Parties are able to render consular assistance to nationals detained and charged with offences under the jurisdiction of other States Parties. Thus, the requirement of notification set up in Art. 36 (1) (b) constitutes the cornerstone of the system of protection of foreign nationals designed by the 1963 Convention. In order to give "full effect" to this provision, States Parties must not only inform persons detained "without delay" of their right to inform their consulate of their arrest and detention, but also must react to the non-observance of this obligation by their authorities so as to ensure that "full effect" be given to the observance of the Vienna Convention. If non-observance of the obligation to notify were not followed by a reversal of judgments thus infected by a lack of consular advice, the omission of notification would not only go unheeded, but would - particularly in an adversarial system of criminal justice, like that of the United States - even constitute a kind of "advantage" for the law-enforcement authorities of the receiving State which would then not have to deal with the foreign consulate and with a detainee well-informed of his or her rights.

4.19 This contextual interpretation is confirmed by the *travaux préparatoires* of the Vienna Convention. According to Art. 32 of the Vienna Convention on the Law of Treaties,[158] which expresses customary international law on the matter,[159] the drafting history constitutes a subsidiary but nonetheless important means of interpretation. A review of the drafting history of Art. 36 (2) illuminates the breadth of the obligation which that provision imposes on States Parties. It confirms that the purpose of this provision is to ensure that

municipal law meets certain minimum requirements for the effective domestic implementation of the obligations enshrined in the Convention.

4.20 The paragraph as originally proposed by the International Law Commission provided as follows:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify* these rights."[160]

4.21 Obviously, a provision thus phrased would have been much weaker than the current version. However, in the ensuing discussion, several members of the Commission expressed the opinion that domestic law must be in accordance with the individual rights enshrined in the future Convention:

> In the opinion of Mr. Georges Scelle,
>
> > "Inasmuch as the status of aliens was governed by law, and was not merely a de facto status, and as, in case of conflict, international law prevailed over municipal law, any local law that hampered the consul in his exercise of the essential function of protecting his fellow citizen's human rights in the receiving State would be superseded by the rules of international law as embodied in the Commissions's code. Indeed, he would go so far as to say that a consul could provoke an international debate on the validity of the local law which conflicted with a principle of international customary or treaty law."[161]

4.22 It was only at the 1963 Conference that the present version was proposed. The article now read:

> "[T]he said laws and regulations must enable *full effect* to be given to the *purposes* for which the rights accorded under this article are intended."[162]
>
> This wording, which then found its way into the final text of the Convention, changed the ILC proposal in two respects: First, the term "full effect" is much stronger than the term "not nullify", making it clear that the treaty provisions giving rise to the rights under consideration here must not only be somehow kept in existence (not nullified), but rather be implemented completely and effectively. Second, the reference to the "purposes" of the Convention means that the full effect to be given to the Convention not only relates to the rights accorded but also extends to the actual *purpose* which these rights are to serve. In other words, what is required is not merely that particular provisions of national law must not violate the Convention. Rather, the municipal law as a whole of the State party must give full

effect to the Convention, thus allowing the actual exercise of the rights provided for in the Convention.

4.23 In the plenary of the 1963 Conference, an attempt by the Union of the Socialist Soviet Republics to restore the weaker version originally proposed by the ILC was rejected.[163] As the delegate of the United Kingdom said in defence of the new text:

> "[I]t was most important that the substance of the rights and obligations specified in paragraph 1 should be preserved, which they would not be if the Soviet Union amendment were adopted."[164]

Hence, what this demonstrates is that the Conference was fully aware of the impact of the difference between the wording proposed by the ILC and that ultimately adopted in Vienna. By deciding in favour of the stronger version, the Conference rejected the attempt to water down the obligations to be enshrined in the Convention.

Interestingly, in the hearing on Provisional Measures in the *Breard* Case in 1998, it was the Soviet proposal defeated at the 1963 Conference, and not the wording of the Convention as finally adopted, which the United States referred to in arguing that Art. 36 does not require a minimum standard for domestic law.[165]

4.24 To sum up this point, in the words of Shank and Quigley, the drafting history of the Vienna Convention supports the argument "that Article 36 prevails over domestic procedure".[166] Accordingly, if the domestic law of a State party to the Convention does not provide for the enforcement of the obligation of notification, it will not meet the requirement to give full effect to the rights contained in Art. 36 of the Convention.

b) The insufficiency of United States law

4.25 United States law does not provide an effective remedy for the violation of the requirement of notification and the resulting violation of Art. 36 (1) (a) - (c) of the Convention in the case that the omission of consular notification is discovered after a defendant has been convicted in a jury trial. In any case, a violation of Art. 36 cannot be remedied in the same way as a violation of rights of the accused stemming from federal constitutional law. It may be true in principle that, as the Solicitor General emphasised before the U.S. Supreme Court in the *Breard* case,

> "the procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid `laws and regulations' of the United States with which any claim of a failure of consular notification must comply."[167]

However, there exists a particular rule in U.S. law which in the view of Germany is in conflict with the requirement of Art. 36 (2) of the

Vienna Convention according to which national law must give full effect to the rights accorded in Art. 36 (1) of the Vienna Convention.

(1) The rule of procedural default in U.S. domestic law

4.26 In the present context it is not necessary to give a complete presentation on the content and function of the rule of procedural default to be applied in federal *habeas corpus* proceedings in U.S. law.[168] To the extent that this rule does not affect international legal matters, it is of no concern to the present proceedings. However, in the LaGrand Case, the rule of procedural default has been applied in a way which is of utmost relevance here because it deprived the brothers of the possibility to raise the violations of their right to consular notification in U.S. criminal proceedings. In order to demonstrate the failure by the United States to comply with its commitments under the Vienna Convention, it is necessary to briefly discuss the system of appellate jurisdiction in the United States in its relationship with the treaty rights involved.

4.27 In principle, U.S. federal courts possess the so-called *habeas jurisdiction* when a prisoner alleges that his or her detention violates treaties concluded by the United States. 28 U.S.C. § 2254 (a) provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

In the present as well as in other criminal cases, however, U.S. courts have denied all appeals based on violations of the Vienna Convention by either denying actual prejudice - i.e., arguing that the lack of consular notification had no effect on the criminal proceedings - or by applying the doctrine of so-called procedural default.

4.28 The rule of *procedural default* is closely connected with the division of labour between federal and state jurisdiction in the United States. The United States is a federal State which knows a relatively strict separation between the federal government and the state governments, including the respective judicial branches. Criminal jurisdiction belongs to the States except in cases provided for in the Constitution.[169] As the U.S. Supreme Court has explained in *Picard v. Connor*, the doctrine of procedural default consists in the requirement of exhaustion of remedies at the State level before a *habeas corpus* motion can be filed with federal Courts:

> "It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."[170]

And further:

> "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. ... We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts."[171]

4.29 There is only one exception to this exclusion of challenges not raised before State courts: The showing of both *cause* for and *prejudice* resulting from the default:

> "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[172]

Cause requires the prisoner to show

> "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[173]

For *prejudice*, the habeas petitioner must show

> "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[174]

4.30 The standard for this exception is very high, however. Its aim is limited to preventing a "miscarriage of justice".[175] Accordingly, the claimant has not only to prove that he or she could not have raised the matter before, but also that the conviction is wrong precisely because of this failure. Neither is incompetence of the defence lawyer recognised as a ground for admitting a challenge to a conviction, if the ground was not already raised in State proceedings:

> "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. ... [T]he exhaustion doctrine ... generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."[176]

In most cases, fault of the attorney alone is not sufficient for demonstrating cause and prejudice:

> "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective ... we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[177]

However, the standard for "constitutional ineffectiveness", as established in *Strickland v. Washington*, is quite high:

> "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[178]

4.31 Concerning death penalty cases, the harshest criticism of this jurisprudence comes from within the Supreme Court itself: In the words of the late Justice Blackmun:

> "In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors - even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court ... ."[179]

This reasoning equally applies to claims based on the Vienna Convention as a treaty constituting "the supreme law of the land", a rank equal to federal laws.[180]

4.32 To the best of Germany's knowledge, no federal court has ever recognised that the failure of counsel to raise the violation of Art. 36 of the Vienna Convention in State proceedings would amount to ineffective counselling pursuant to the *Strickland* criteria. In any case, the ineffectiveness of counsel does not dispense with the requirement to show prejudice. A failure to invoke the lack of consular notification in the original trial will not be sufficient to claim cause and prejudice due to ineffective counselling. Therefore, the *habeas corpus* claim will remain unsuccessful.

4.33 Only in the exceptional case where a violation of a constitutional right has led to the conviction of an innocent person, the showing of cause for the procedural default can be dispensed with.[181] To meet this standard of "miscarriage of justice" in death penalty cases, the petitioner must at least show "innocence of the death sentence", that is, that the death penalty was wrongly imposed. In this instance,

> "to show `actual innocence', one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[182]

> However, that showing may not include additional mitigating evidence not considered during the trial phase.[183] In principle, claims not based on established federal constitutional law cannot be relied on in *habeas* proceedings. Exceptions in the case of the enunciation of new "watershed legal rules" are recognised only rarely.[184] A violation of a treaty will usually not be equated with the violation of constitutional rights.[185] Thus, to the best of Germany's knowledge, none of the Courts involved did even raise the possibility of applying the "actual innocence" jurisprudence to violations of the Vienna Convention, neither in the case of the LaGrands nor in other cases concerning the Vienna Convention.[186]

4.34 The *Antiterrorism and Effective Death Penalty Act* of 1996 ("AEDPA")[187] has made it even more difficult to challenge a state conviction. A *habeas* petitioner alleging to be held in violation of treaty law will not even be granted an evidentiary hearing to establish prejudice.[188] Thus, in the *Breard* case, the Supreme Court only referred to the first phrase of Art. 36 (2) of the Vienna Convention - apparently disregarding the second phrase - and applied the domestic rules of procedural default and the AEDPA to justify its refusal to deal substantively with Breard's claim of a violation of Art. 36 of the Vienna Convention.[189]

4.35 In addition, in order to obtain a certificate of appealability against a (federal) District Court judgment, "a substantial showing of the denial of a constitutional right" is required.[190] Since U.S. courts have ruled that violations of treaty rights cannot be equated to violations of constitutional rights, the rejection of claims arising out of a violation of the requirement of notification contained in Art. 36 of the Vienna Convention in a Federal District Court is not appealable to higher federal courts.

> > "[R]ights under a treaty and rights under a federal statute are not the equivalent of constitutional rights. ... Even if the Vienna Convention on Consular Relations could be said to create individual rights ..., it certainly does not create constitutional rights."[191]
>
> Therefore, even when a claim of violation of the Vienna Convention is validly raised in state proceedings, it cannot reach the federal Court of Appeal, but will be decided in the lowest federal Court, the District Court. By this token, a violation of Art. 36 (2) of the Vienna Convention is reviewed less thoroughly than a violation of a provision of the domestic constitution.

(2) The application of the doctrine of procedural default in the case of the LaGrand brothers and similar cases regarding Article 36 (2) of the Vienna Convention

4.36 The jurisprudence just described made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German

consulate in Los Angeles in 1992. On 16 January 1998, the United States Court of Appeals of the 9th Circuit decided that the claim of violation of the Vienna Convention was procedurally defaulted, even though the violation itself was not in dispute:

> "It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the Treaty. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted."[192]

4.37 The Circuit Court expressly rejected the argument that the LaGrands had been blocked from obtaining evidence on their abusive childhood in Germany, by pointing to the jurisprudence of the U.S. Supreme Court[193] according to which this claim to

> "actual innocence of the death penalty must focus on eligibility for the death penalty, and not on additional mitigation".[194]

> Since this was not the case, the brothers' claim of violation of Art. 36 of the Vienna Convention on Consular Relations was procedurally defaulted, and their claim was dismissed. The substantive argument to the effect that additional mitigation might have prevented the pronouncement of the death penalty was not discussed. The United States Supreme Court denied *certiorari*, that is, it denied to hear the case.[195]

4.38 Shortly before his execution, on 24 February 1999 (amended 26 February 1999), the 9th Circuit Court rejected a second *habeas corpus* claim of Karl LaGrand which was based, among other arguments, on the lack of consular notification.[196] The Court held the latter claim to be procedurally defaulted. The other decisions in the case were based on different grounds not related to rights under the Vienna Convention.

4.39 The application of the procedural default rule in the LaGrand case in no way constitutes an exception but rather confirms the rule of the non-enforcement of the Vienna Convention by U.S. courts. Thus, in the case of *Faulder v. Johnson*, the 5th Circuit Court denied that the violation of the requirement of notification contained in the Vienna Convention led to actual prejudice:

> "While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained."[197]

4.40 In our specific context, the decision of the 4th Circuit Court of Appeals in the case *Murphy v. Netherland* is especially revealing: On the one hand, the judgment asserts that a violation of the Vienna Convention does not amount to "a substantial showing of the denial of a constitutional right" which the AEDPA requires in order to allow appeals against district court judgments.[198]

On the other hand, the 4th Circuit Court of Appeals held that the claim of violation of the Vienna Convention was defaulted because Murphy had not raised the issue in the state court and could not show cause for his default.

> "The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonably diligent investigation by his [the defendant's] attorney."[199]

4.41 Thus, the discovery of the omission of consular notification constitutes an important test for the quality of an attorney. At the same time, such lack of notification is precisely one of the reasons why a foreign accused will not receive an adequate defence. Without an adequate defence, however, the accused will not be able to raise the omission of notification.

4.42 In the case of the LaGrand brothers, none of their several counsel engaged in the various proceedings raised the lack of consular notification before 1992. This circumstance alone provides evidence for the insufficient quality of their defence. In the following, the mitigating circumstances relating to the childhood of the LaGrand brothers in Germany could not be raised in the jury phase or later until, at last, the brothers themselves became aware of their rights and received consular assistance. At that stage, however, their claims were procedurally defaulted.[200] If they had had better defence counsel from the outset and thus been able to raise the issue of their German nationality at an earlier stage, the invocation of mitigating circumstances based on their difficult childhood in Germany could have saved them from the death penalty.[201] *Mutatis mutandis*, the situation is similar to that described by the California Supreme Court relating to the right to counsel: "The defendant who does not ask for counsel is the very defendant who most needs counsel."[202] A remark made by Shank and Quigley about the case of Angelo Breard is equally pertinent in the case of the LaGrand brothers: Just as Breard, the LaGrand brothers were

> "not aware of [their] right to be notified of the right of consular access during [their] trial and appeal but became aware of it only when attorneys representing [them] at the *habeas corpus* stage discovered [Arizona]'s error and explained article 36 to [them]. [They] thus [were] unaware that [their] right was violated until the time had passed by which, according to the Supreme Court, [the LaGrands were] required to make [their] claim. And [their] lack of awareness was not through any fault of [their] own, but precisely because [Arizona] authorities had failed to inform [them]."[203]

4.43 Hence, through the application of the rules of procedural default and the requirement to show actual prejudice, an effective raising of the claim of lack of notification is made impossible. No effective remedy for violations of the right to consular notification exists.

4.44 As far as the showing of prejudice is concerned, the very fact that the right to consular access was not invoked during the jury trial demonstrates the

lack of adequate defence due to the omission of the necessary notification. Therefore, U.S. law does not effectively protect the rights to consular access enjoyed by a detained person. As Judge Butzner put it in his concurring opinion in *Breard v. Pruett*: "Collateral review [e.g. *Habeas corpus* review] is too limited to afford an adequate remedy."[204]

4.45 Academic scholars have expressed similar views regarding the effect of violations of the Vienna Convention in U.S. law in administrative cases:

> "[F]ederal courts have determined that a violation of INS [Immigration and Naturalization Service] Regulations with respect to consular access [that is, administrative regulations implementing the undertakings of the US under Art. 36] will invalidate challenged proceedings only if the defendant can show prejudice. The courts have made this determination despite the fact that no such requirement is set forth in the Vienna Convention."[205]

As Shank and Quigley put it:

> "That standard [demanding the showing of prejudice] would seem too strict to comply with Article 36, which specifies that the right of consular access is an absolute right. Nothing in the text of Article 36 suggests that relief for a foreign detainee should depend on whether he can show prejudice. Moreover, requiring a showing of prejudice would often defeat the right."[206]

And elsewhere:

> "A domestic court may not, consistent with the obligations assumed by a State under the Vienna Convention, erect a requirement that some specific detriment be found."[207]

4.46 In conclusion, Germany entirely shares the following assessment of U.S. practice by Keith Highet:

> "The purposes of consular access rights are quite obviously to protect the criminal defendant nationals. To cut off the right of appeal on the basis of failure to raise the question of lack of consular access under the Convention in state court, when notification of such consular access was the duty of the arresting (receiving) State and was not in fact performed, is as absurd as Catch-22 but not in the least amusing. It is in fact the precise *opposite* of the performance of the duty to `enable full effect to be given to the purposes for which the rights accorded under this article are intended.'"[208]

(3) Impossibility of suits by foreign governments

4.47 Foreign governments do not possess a right of action to enforce their rights resulting from Art. 36 of the Vienna Convention on Consular Relations before U.S. courts. U.S. courts, invoking a lack of standing or applying the Eleventh Amendment of the Constitution, which bars

> "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State",

have consistently denied foreign States and/or their diplomatic or consular representatives a remedy against violations of the Vienna Convention.[209]

(4) Conclusion

4.48 As a result, the domestic law of the U.S. does not

> "enable full effect to be given to the purposes for which the rights accorded under this article [Art. 36 VC] are intended."[210]

In fact, in the context of criminal proceedings, U.S. law grants the Vienna Convention no effect at all after the sentencing phase of the original trial, even if the matter was not raised before state courts due to the lack of knowledge of the foreign nationality of the defendant or of the existence of the right to consular notification. As the present Case demonstrates, the doctrine of procedural default was applied in a persistent and rigorous manner throughout each trial. The judicial authorities in question were fully aware that the brothers LaGrand did not know about their rights at the earlier proceedings precisely because U.S. authorities had failed to comply with their obligations under the Vienna Convention to inform them of these rights "without delay".

4.49 Let us not be misunderstood: What is at issue here is not this or that provision of the domestic law of the United States or certain decisions of U.S. domestic courts. As Keith Highet puts it:

> "What is not at stake is the actual correctness of the determinations made by the U.S. courts - and in particular the Supreme Court. What is at issue is the reaction of the other organs of the State concerned - the executive power of the United States - to those inadequate decisions. Moreover, what is not at issue is whether the Supreme Court correctly interpreted U.S. domestic federal appeals practice; it may well have done, but that practice must also be measured against the less subjective lens of international scrutiny, and for reasons of internal illogic alone should be found wanting."[211]

It is the view of Germany that United States domestic law fails this test. Since the rationale of Art. 36 is that notification will enable the consulate to provide a foreigner arrested or detained with adequate

remedies to put him or her on an equal footing with defendants possessing the nationality of the receiving State, the United States has violated Art. 36 (2) of the Vienna Convention by preventing the effective exercise of the right to consular assistance after the jury trial and the sentencing phase have been concluded.

c) The existence of "prejudice"

4.50 Even if one followed the view that the requirement of "prejudice" under domestic law - that is, an influence of the lack of consular notification on the result of the case - is in line with Art. 36 (2) of the Vienna Convention, U.S. law nevertheless fails to meet the standard of Art. 36 (2): Even if "prejudice" is shown, U.S. law does not allow for the raising of the treaty violation in federal courts if the violation was not raised before in state courts. Therefore, if a foreign national did not know of his or her right until after the end of the state proceedings, he or she cannot raise the matter later after he or she has discovered the fault of the authorities. This is particularly unacceptable in death penalty cases where execution of the final judgment is irreversible.

4.51 In any event, notwithstanding its view that "prejudice" must not be required by domestic law pursuant to Art. 36 (2) of the Vienna Convention, Germany will show in the following that "prejudice" indeed occurred - in the case of the LaGrand brothers, in particular, Germany will demonstrate that the lack of consular advice was decisive for the infliction and execution of the death penalty. If the LaGrands had been properly informed of their rights, they would have been advised and supported by the German consulate as required by the Vienna Convention. Under these circumstances, the brothers would not have been executed.

Walter and Karl LaGrand would have needed the assistance of German consular officers to help them in obtaining adequate legal representation and to help their lawyers in putting on the best possible defence from the time they were arrested for capital murder. Instead, the LaGrands were represented by court-appointed lawyers who made several grave errors exacerbated by the absence of German consular assistance, including in particular, the inadequate case for mitigation presented at sentencing.

(1) The burden of proof

4.52 The burden of proof for the impact of the violation of the Vienna Convention on the trial of the LaGrand brothers is to be borne by the United States. The United States executed the LaGrands before they had the chance to testify on the decisive effect on their trial of the omission of notification. Germany was thus deprived of vital testimonial evidence. In the case of Walter LaGrand, the execution was in flagrant violation of a binding Order of Provisional Measures from this Court.[212]

For this disregard of the Order of the Court, the United States alone is responsible. It is therefore the United States which has to bear all the consequences of such a violation of international law. In the words of Judge Shahabuddeen, citing E. Dumbauld,

> "[w]hen a refusal to furnish information or to carry out provisional measures is put on record, apparently a presumption arises which takes the place of direct evidence in the sense that it legitimates a conclusion derived from the fact in question by reasonable inference."[213]

> Therefore, Germany requests that, to the extent there are any disputed issues of material fact relating to Germany's claims as to which the LaGrands' testimony would have been relevant, the Court draw all necessary inferences in favour of Germany and consider such facts as proven.

(2) If properly informed of their rights, the LaGrands would have sought and received consular assistance

4.53 It is clear that had the LaGrands been properly accorded their rights and thus had been able to contact the German Consulate, German consular officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, retention of competent counsel, and collection of important mitigating evidence from family, friends and State agencies in Germany.[214] Germany would have reacted in 1982 with the same high level of commitment, diligence and care that it brought to bear in 1992, upon finally learning, from Karl LaGrand's new counsel, that the LaGrands were on Arizona's death row.[215]

4.54 It is also clear that Germany would have provided precisely the consular assistance the LaGrands needed most. Helping detained nationals to find legal counsel and to collect mitigating and other evidence from the sending state - a task for which consular assistance is truly invaluable - are fundamental consular activities.[216] Under the German Federal Law on Consular Assistance ("Konsulargesetz"), every German citizen being detained for criminal investigation or held prisoner needing legal and consular help in a foreign country is entitled to immediate consular and legal assistance provided for by the respective diplomatic or consular representation of Germany. In an unofficial translation, Articles 1 and 7 of the Law read:

> "Article 1. Consular officers (career consular officers or honorary consular officers) shall be required ... to give Germans and domestic juridical persons advice and assistance at their limited discretion [nach pflichtgemäßem Ermessen]." ...
>
> Article 7. Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their

> consular district and especially provide them with legal protection if so required by such persons."[217]

Paragraph 5 of the Law also provides for financial assistance if necessary.

In addition, a Circular Order ("Runderlaß") issued by the German Foreign Ministry[218] requests all German consular officers and other representatives to provide quick, appropriate and comprehensive support for arrested Germans. If a German consulate learns of the arrest of Germans, it is even required to contact them without a request on their part.[219] The German consular officers are also required to ask, *inter alia*, whether the arrested or detained persons wish to be provided with an attorney, and to provide them with information on their rights in the host country.[220] In case a detained person wishes to receive the assistance of an attorney, the consular officers are required to arrange for competent and reliable counsel. Otherwise, they must take care that such counsel is appointed by the court.[221]

4.55 To turn to our specific Case, upon finally learning of the LaGrands' situation in 1992, Germany came to their assistance in an effective manner, as it has done in the cases of three other Germans on death row in Arizona and Florida, respectively. Germany helped Walter LaGrand collect important mitigating evidence in Germany in 1993.[222] Unfortunately, as described earlier, U.S. procedural rules barred consideration of this new evidence. In comparable cases, too, Germany has supported the defence, for instance by paying for a psychiatric expert opinion and an investigation into unknown facts from the childhood of the accused (as in the case of Michael Apelt currently on death row in Arizona) or by financially supporting attorneys' additional fact-finding efforts not covered by State aid (as in the case of Dieter Riechmann currently under arrest in Florida). Further, German consular officers regularly help Germans to get in contact with capable attorneys or lawyers of their own choice.

4.56 Had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene at a time when vigorous assistance would have made a difference. Indeed, Germany's assistance in obtaining competent, experienced trial counsel and presenting a complete, persuasive mitigation case likely would have saved their lives, as these are two fundamental elements in a successful capital defence, one that avoids the death penalty. As four States argued as *amici curiae* to the Supreme Court of the United States in the *Breard* Case:

> "The United States is the only Western industrialized nation that still imposes the death penalty. Because of the severity of the potential punishment, a consul has a special interest in assisting a national who faces a capital charge."[223]

(3) The United States' violation of the Vienna Convention prevented essential mitigating evidence from being presented during sentencing

4.57 Germany's inability to render prompt consular assistance - a direct result of the United States' breach of its Vienna Convention obligations - proved fatal to the LaGrands because it impeded introduction of compelling evidence for mitigation during the sentencing phase of the LaGrands' trial. Germany's co-operation and assistance were necessary for this purpose as much of the available mitigating evidence was located in Germany, including both witnesses and documentary evidence about the profoundly miserable early childhood of the LaGrand children and the prejudice they and their mother probably faced because of Walter and Karl's biracial heritage. Had the United States properly notified the LaGrands of their Vienna Convention rights, Germany would have assisted their counsel in collecting this evidence *before the trial*, which was essential to the "preparation and presentation of the all-important sentencing-phase defense."[224]

(i) The role of mitigating evidence in U.S. death penalty litigation

4.58 In the United States, capital trials proceed in two stages. First, a trial on the merits is held to determine the defendant's guilt or innocence. If the defendant is found guilty, a sentencing hearing is held to decide the sentence to be applied.[225] Two constitutional principles inform the sentencing phase. First, under the Eighth Amendment, only individuals of sixteen years of age or older, sane, and guilty of aggravated murder as defined by statute in each state, can be executed.[226]

> Second, during the sentencing phase, defendants can present any evidence which may convince the judge to impose a sentence lighter than death.[227] The state must prove aggravating evidence beyond a reasonable doubt, whereas mitigating factors must only be proved beyond a preponderance of the evidence.[228] States cannot limit the consideration of the mitigating evidence, either judicially or by statute, in such a way as to exclude it from the sentencing process.[229] The judge must balance the evidence submitted, weighing the strength and quality of the aggravating factors against the mitigating ones, in order to ensure that the personal circumstances of each defendant are considered in determining the penalty.[230]

4.59 Consideration of mitigating evidence is a "constitutionally indispensable part" of capital litigation.[231] Individualised sentencing and background circumstances are critical in determining whether personal culpability should be mitigated in capital cases. The Eighth Amendment to the U.S. Constitution allows neither mandatory capital sentencing schemes nor completely discretionary sentencing schemes.[232] In order to avoid arbitrary or capricious imposition of the death sentence therefore, courts are required to evaluate any "compassionate or mitigating factors" which might reduce the individual's personal culpability.[233]

4.60 Given the gravity and irrevocability of the death penalty, the defence counsel is under a higher duty than in routine criminal trials to undertake extensive investigations into the defendant's background in order to identify and introduce all possible information which may mitigate the sentence.[234] Any

aspect of a defendant's character or history or any circumstances that might entail a sentence less than death must be considered.[235] These requirements ensure that sentencing authorities have adequate information before they impose the death penalty, while preserving the basic humanity and dignity of the defendant.[236]

> Counsel must, therefore, prepare and introduce at sentencing a complete social history presenting the defendant's childhood and family life, from information collected from family, friends, medical and school records, and other available sources.[237] The failure to present information about a traumatic childhood, mental history, school performance and other evaluations can result in irreparable prejudice to the defendant, as it did to the LaGrands.[238] Defence counsel's efforts to provide this information can mean the difference between life and death.[239]

(ii) The absence of critical mitigating evidence in the LaGrands' cases

4.61 Without the assistance of the German Consulate, the LaGrands' attorneys were unable to present their complete social and medical histories at sentencing. Although both lawyers presented an outline of the troubled childhood of Karl and Walter LaGrand, because Germany was not involved, none of the available documentary and possible testimonial evidence of their childhood circumstances was presented.

> At sentencing, each lawyer had one expert witness testify about his client's mental state and history; however, the doctors had met only briefly with each defendant and based their entire opinions on information provided by the defendants themselves in the absence of the records in Germany corroborating and detailing the LaGrands' early childhood of abuse and neglect.[240] Thus, these expert opinions were incomplete, inadequate and not sufficiently compelling.[241]
>
> > "An accurate social history [as presented to both the court and the experts] must be supported by independently gathered evidence from as many divergent sources as possible."[242]

4.62 Materials available at that time from state agencies in Germany indicate that the LaGrands suffered from serious physical and emotional neglect, malnutrition, illnesses and hospitalisations from infancy.[243] Criminal charges were brought against Walter and Karl's aunt for some of these incidents.[244] Walter was abandoned by his mother into his grandmother's care at birth. His grandmother was already caring for Walter's sister and his two cousins at this time, and was incapable of caring adequately for the four young children.[245] Consequently, Walter was frequently shuttled between his grandmother and state child care institutions at an early age, ultimately spending over 2½ years in state children's homes before his fifth birthday.[246] Because of such a history with his mother and siblings, Karl LaGrand was immediately placed into a children's home at birth, separated from his siblings for the first three years of

his life.[247] None of this information was discovered by the LaGrands' counsel or presented to the sentencing judge.

4.63 Germany's assistance was crucial in obtaining the records detailing this difficult childhood. When the Consulate was finally contacted, the German Government provided the funds to hire an attorney in Germany to investigate Walter LaGrand's background. This investigation resulted in the production to Walter LaGrand's counsel of many records detailing the trauma, neglect and abuse Walter and his siblings suffered during their early years.[248]

4.64 The documents located with the assistance of the German Government in 1993, while critical to establishing mitigating factors at sentencing, only scratch the surface of the evidence Germany could have assisted in uncovering for the LaGrands before trial. Witness testimony from family, friends, social workers and caretakers could have been sought, and possibly located, to supplement the documents detailing Walter and Karl's early years of abandonment, malnutrition, hospitalisation and foster care. It is undeniable that an effort to locate the potential witnesses would have been more promising in 1983, when the LaGrands were on trial for their lives. Had proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence.

4.65 There are compelling reasons to believe that the LaGrands' sentences would have been reduced had the evidence about their traumatic childhood, hospitalisations and racial isolation in Germany been presented. Evidence of dysfunctional family backgrounds and childhood neglect can be critical in the individualised sentencing process.[249] Arizona courts have held that a difficult family background that affects or impacts on a defendant, rendering his behaviour beyond his control, is a relevant mitigating circumstance.[250] In *State v. Trostle*, for example, the Supreme Court of Arizona reduced a death sentence to life imprisonment after evaluating evidence of early childhood abuse and neglect.[251] The court found that the long term damage of childhood abuse and the absence of a stabilising family were relevant mitigating factors because they impaired the defendant's ability to conform his conduct to the law. Indeed, any evidence of mental impairment or behaviour disorders may be relevant in mitigating capital punishment.[252]

4.66 Had the information from Germany been available during the LaGrands' trial, it would have been provided to the expert witnesses for evaluation of the probable consequences of such profound physical and emotional childhood suffering and its detrimental effect on the LaGrands behaviour as young adults.[253] This psychological evidence would have been important, *inter alia*, in supporting the argument made in post-conviction proceedings that Karl LaGrand had impulsive personality disorder, an important mitigating argument to prove that the murder was not premeditated.[254] The evidence regarding physical and emotional trauma as infants would also have led to additional medical and psychological opinions not offered at sentencing because the experts were unaware of the background. Of course, this evidence would also have been submitted directly to the court to corroborate the opinions of the

experts and the descriptions the defendants and their sister offered of their childhood.[255]

4.67 Finally, because of the nature of the crime for which the LaGrands were convicted - essentially a bungled bank robbery - theirs was a case where a proper case for mitigation is likely to influence the judge and result in a sentence less than death.[0] Whereas a serial killer or a criminal convicted of an especially heinous murder is not likely to receive leniency as a result of mitigating evidence regarding the effects of a traumatic childhood, the LaGrands' crime was of a different magnitude. Indeed, the police officer who had taken the confession of Karl LaGrand told the Federal Public Defender's office that the LaGrand case had

> "always disturbed him because, in all of his years of experience as a law enforcement officer, and in his experience investigating many violent crimes, he has never considered this particular crime to warrant the death penalty."[1]

In sum, the United States' violation of the Vienna Convention prevented the LaGrands' attorneys from accessing information that could have proved decisive in preventing their death sentences.

(4) The United States' violation of the Vienna Convention prevented Germany from obtaining effective trial counsel for its nationals.

4.68 The failure of the LaGrands' trial attorneys to present mitigating evidence from Germany at sentencing reveals another prejudice resulting from the United States' violation of the Vienna Convention: inadequate counsel. Had Germany been afforded its rights under the Vienna Convention, it would have assisted its nationals in obtaining effective, experienced counsel, either by providing funds or by persuading better counsel to take on these cases pro bono. Instead, the LaGrands were subjected to the inadequate legal representation of court-appointed lawyers *neither of whom had ever represented a client accused of capital murder*.

(i) The importance of competent, experienced counsel in U.S. death penalty litigation

4.69 Capital litigation in the United States is highly specialised and highly complex. Only competent counsel can navigate it successfully and avoid the death penalty for their clients.[2]

> "Every step - whether it be one of the countless pressure points before and during trial, such as plea bargaining, pretrial investigation, motion practice, jury selection, development and presentation of a guilt-phase defense, preparation and presentation of the all-important sentencing-phase defense, jury instructions, final argument, or any one of the umpteen instances when preservation of one of the defendant's various legal rights requires action; or whether it be one of the critical

> moments on appeal, when issues are identified, conceptualized, and melded into a coherent whole - presents opportunities for success (and conversely, for failure) that depend directly on the relative strength or weakness of the lawyer's performance."[3]

> Capital defence, therefore, requires an experienced advocate - one aware of the many Constitutional issues, able to activate safeguards, challenge inappropriate decision-making by judges, opposing counsel and legislators, and preserve all rights and claims for the lengthy appeals process that follows every death sentence.[4]

4.70 In the United States, indigent defendants, like the LaGrands, are most likely to have ineffective lawyers and thus are disproportionately likely to receive death sentences.[5] Indeed, poverty and inadequate counsel are, however unjustly, the two "key variables" determining whether capital punishment is sought, imposed and carried out.[6] Instead of receiving the protection and assistance of their country to obtain competent counsel, the defence of the LaGrands was in the hands of changing court-appointed attorneys in the Arizona criminal justice system, whose performance left much to be desired.[7] The disparity in the quality of such random representation has been the subject of heavy critique and loud calls for reform from scholars, practitioners and jurists alike.[8]

4.71 The need for effective counsel at the trial phase cannot be overemphasised. As Supreme Court Justice Blackmun explained in dissent from *McFarland v. Scott*:

> "[The American] system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing."[9]

4.72 For foreign nationals facing the death penalty, the Vienna Convention right to consular notification and assistance "without delay" is fundamental, because if the consulate cannot assist with obtaining adequate counsel at the "main event", its assistance is often moot. The LaGrand Case amply demonstrates the potentially lethal consequences of poor trial representation for capital defendants.

> "Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required"

by constitutional law.[10] In other words, Germany's intervention at any stage later than the trial phase would be unlikely to remedy the extreme prejudice created by the counsel appointed to represent the LaGrands, for two reasons. First,

> "[e]ven the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel."[11]

Second, the only remedies for constitutionally ineffective counsel in U.S. law are at the post-conviction stage, where the standard for constitutionally competent trial counsel is so absurdly low, that even had the LaGrands' lawyers been drunk, unconscious or physically absent from their trials (let alone ignorant of the law), they would not have received relief and an opportunity for a new, properly conducted trial.[12] These two constitutional legal doctrines, of restricted postconviction relief on the one hand, and of extreme standards for ineffective assistance on the other, form the "pernicious vicegrip" described by Supreme Court Justice Thurgood Marshall which traps capital defendants subjected to profoundly inadequate legal representation.[13]

(ii) The LaGrands' ineffective trial counsel

4.73 The record is replete with evidence of the ineffective advocacy of the LaGrands' attorneys. Their failure to seek or present mitigating evidence from Germany was discussed above. In addition, there was ample, additional mitigating evidence available here in the United States, which they also never endeavoured to find or present. In particular, the lawyers never attempted to contact Walter or Karl's mother, father, step-father. Nor did they do any investigation into Walter and Karl's many stays at foster homes and state children's agencies in the United States, although considerable, important documentary and testimonial evidence was readily available.

4.74 In 1999, the Federal Public Defender located both Walter's biological father, Tirso Molina Lopez, and his step-father, Masie LaGrand, and obtained affidavits from them.[14] Their testimony contained important information about Walter and Karl's mother, Emma Gebel, and her attitude toward her children. Mr. Molina described how Emma often seemed depressed, and drank during her pregnancy.[15]

> Mr. LaGrand provided extensive information about Emma and the boys. For instance, though Emma did tell Mr. LaGrand about Karl, she never told him until after their marriage that she had two older children as well.[16] Mr. LaGrand also said that when Karl was very young
>
> > "he appeared shaky, abnormal and seemed to suffer from some sort of involuntary shaking of his head."[17]

> Mr. LaGrand also stated that when the family returned from Germany, Mr. LaGrand sent Karl to live with his mother (Karl's step-grandmother) in Alabama for a year. Mr. LaGrand stated that he wanted Karl under his mother's care because he was very young, too young for school, and that he "noticed a positive change in Karl, an improved and better attitude" during the time he spent with his step-grandmother.[18] Finally, Mr. LaGrand described in detail the continuing emotional and physical neglect to which Emma Gebel subjected her two sons. She was "often verbally abusive" to the boys and "seemed completely unconcerned about the welfare of her two sons."[19] By contrast, she took relatively good care of and clearly favoured her daughter, Patricia.[20] Mr. LaGrand stated that he
>
> > "always believed that the constant verbal abuse from Patricia, Emma, and the glaring absence of love and concern from their mother was terribly harmful to the boys."[21]
>
> Similarly, upon being contacted by the Federal Public Defender's Office in March 1999, Walter's foster mother provided a declaration describing how Walter had been deprived of the love of a mother and father and how he had behaved like a normal teenager while living with her family.[22] Several social workers who had worked with Walter also offered to write declarations. They all stated that they would have done so in 1984, as well. Indeed, one of the social workers "appeared upset that he had not been contacted sooner."[23] Other available evidence, including records from the children's homes was collected in just several days by the Federal Public Defender and presented in Walter's third petition for state post-conviction relief.[24]

4.75 In 1993, Karl's *habeas* counsel tracked down considerable evidence from similar sources, including many psychological evaluations from the Youth Opportunity Unlimited and VisionQuest boys homes where Karl spent several years. This information, detailing the extent to which Karl's mental and emotional state had been disturbed and affected by his abusive, disruptive and unloving family, was submitted it with Karl's first *habeas* petition.[25] *Habeas* counsel also interviewed Karl's foster parents and his mother, who provided information about the physical abuse Karl and Walter's step father had inflicted on them.

> Significantly, Karl's *habeas* lawyer also provided this newly-obtained information to the expert who had testified for Karl at his sentencing hearing.[26] With the benefit of this newly-provided information, which would have been readily available prior to Karl's trial and sentencing, the expert came up with a dramatically different diagnosis, one that provided further mitigating evidence.[27]

4.76 The LaGrands' trial counsel never even looked for any of this critical, easily locatable evidence, which together with the information collected from Germany clearly showed not only the LaGrands' intolerable home life but, importantly also indicated that when the boys were away from their mother

and their miserable home life, they did better, did not act out and were well liked.[28] Of course, none of this evidence was presented to either expert testifying about Walter and Karl's mental and emotional profile, thereby seriously impeding, if not preventing entirely, these experts from providing any useful testimony at sentencing. Because background evidence of a traumatic childhood is considered mitigating to the extent it affects the defendant's behaviour as an adult, investigation into these areas and proper preparation of the expert witnesses was essential to establishing a credible, compelling case at sentencing.

4.77 Trial counsel's legal representation was fatally inadequate in other ways as well: Walter's lawyer failed to investigate adequately his innocence claims, for instance, by failing to discredit the only witness contradicting Walter and Karl's consistent accounts that Karl acted alone in committing the murder, and neglecting to hire an independent crime scene investigator to review the physical evidence. He also failed to investigate Karl's mental health background which would have supported a claim that Karl acted alone and impulsively, thereby rendering Walter completely ineligible for the death penalty.[29] Then upon appeal and post-conviction, Walter's lawyer failed to have his client consult with an independent counsel to investigate an ineffective assistance claim.[30]

> Karl's counsel was equally inadequate. The Arizona Supreme Court, while not finding his performance to be constitutionally ineffective, agreed that he was not a zealous advocate for his client, saying that he had kept an "exceedingly low profile."[31] Karl's lawyer failed to interview any witnesses; he did not hire an independent investigator; he only asked questions of 2 out of 18 witnesses who testified at trial. And, as discussed above, he put on virtually no case for mitigation at sentencing, having failed completely to investigate Karl's background and properly prepare his expert witness.[32] Indeed, Karl's trial lawyer subsequently acknowledged his inadequacies and stated that he should have done many things differently.[33]

4.78 All of these instances of incompetent lawyering resulted in death sentences for Karl and Walter LaGrand that could have been avoided if the United States had merely abided by its obligations under the Vienna Convention. For had Germany been promptly notified of the LaGrands' situation, it would have arranged for competent counsel to represent the brothers. Competent counsel would have investigated the cases thoroughly at the trial stage, as subsequent counsel finally did. And, it would have made all the difference.

> Germany wants to emphasise that it has not presented all this evidence in order to bring the United States justice system to trial in this forum. Rather, since the United States itself claims that "prejudice" needs to be shown, Germany wants to establish that "prejudice" indeed occurred as a consequence of the omission of consular advice to the LaGrand brothers.

4.79 United States domestic law, as applied to the case of the LaGrand brothers, has not met the requirements of Art. 36 (2) of the Vienna Convention: Although the brothers were undeniably prejudiced by the lack of consular assistance - and, ultimately, their death sentence was due to the breaches of Art. 36 (1) of the Convention by authority of the Respondent -, U.S. domestic law did not provide any remedy for these violations of the Convention. Thus, U.S. domestic law did not, to repeat once again the respective wording of Art. 36 (2),

> "enable full effect to be given to the purposes for which the rights accorded under this article are intended."

d) The particular responsibility of the sentencing State in death penalty cases

4.80 Given the gravity and irrevocability of the death penalty, the sentencing State is under a particular, higher duty to most carefully weigh and examine the negative impact and consequences of a violation of the rights granted by the Vienna Convention on Consular Relations to foreign nationals. This higher standard of responsibility must apply to the full and proper examination of all relevant aspects of the proceedings affected by the violation in question with regard to, in particular, the decisive phase of sentencing. Again, taking into account the gravity and irrevocability of the death penalty, the necessary careful scrutiny must address in particular the questions of:

> - if and to what extent the violation of the Vienna Convention prevented the defendant from seeking and obtaining consular assistance,
>
> - if and to what extent the violation prevented assistance by competent and effective counsel, experienced in death penalty litigation, and
>
> - if and to what extent the violation prevented essential mitigating evidence from being presented during sentencing.

4.81 Germany submits that in our concrete case U.S. authorities, instead of recognising and living up to this particular responsibility connected with the death penalty, unfortunately chose another, wholly inappropriate course of action: They chose to apply in a persistent and rigorous manner certain rules of U.S. domestic law, in particular the rule of "procedural default", whose effect was that no remedy was available to the LaGrand brothers. The authorities did so in full knowledge that Karl and Walter LaGrand had been unaware of their rights under the Vienna Convention at the time of the earlier proceedings, and that they had been unaware of their rights precisely because the Arizona authorities had failed to comply with their obligations under the Convention to inform them of those rights without delay.

> It was this deplorable attitude in disregard of the United States' obligations under the Vienna Convention, despite the obviousness of the violation committed and sustained over a long period, which

eventually barred any relief and led to the execution of Karl and Walter LaGrand.

e) Conclusion

4.82 For the reasons thus given, Germany submits that the United States has violated the notification requirement contained in Art. 36 (1) of the Vienna Convention on Consular Relations. If the United States had abided by this obligation and promptly notified Germany of the situation of the LaGrand brothers, Germany would have arranged for competent counsel to represent them and helped in the preparation of their defence. Thus, their case would have been thoroughly investigated at the trial stage of the criminal proceedings, and essential mitigating evidence mainly located in Germany would have been presented during the sentencing phase. There are compelling reasons to believe that the LaGrands' sentences would have been reduced had this evidence been introduced. Hence, the lack of consular advice was decisive for the infliction of the death penalty.

4.83 Further, the United States has violated Art. 36 (2) of the Vienna Convention because it has not provided any effective remedy against its violation of the notification requirement. Rather, certain rules of U.S. domestic law, in particular the rule of "procedural default", made it impossible for the LaGrand brothers to successfully raise this violation subsequent to their conviction in the Arizona courts - a circumstance which ultimately led to their execution.

4.84 The requirement of "prejudice" under domestic law is not in line with Art. 36 (2). But even if it were held otherwise, the law of the United States still does not meet the requirements of Art. 36 (2) because it does not provide effective remedies even in the face of such prejudice as in the case of the LaGrand brothers.

4.85 The United States did not prevent the execution of Karl and Walter LaGrand irrespective of German demands. By thus making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law.

II. Violations of the rights of aliens resulting from the breaches of the Vienna Convention

4.86 By not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 (1) (b) of the Vienna Convention on Consular Relations, the United States has not only violated its treaty obligations to Germany in the latter's own right, but also injured Germany *indirectly* through its failure to accord to German nationals in the United States the treatment to which they were entitled under international law.

1. The law of diplomatic protection

4.87 According to the rules of international law on diplomatic protection, Germany is also entitled to protect its nationals with respect to their right to be informed upon their arrest, without delay, of their rights under Art. 36 (1) (b) of the Vienna Convention, respectively to the consequences of the omission of such advice. As *Oppenheim's International Law* explains:

> "Although aliens fall under the territorial supremacy of the state they enter, they nevertheless remain - as is recognised in Art. 3.1(b) of the Vienna Convention on Diplomatic Relations 1961 - under the protection of their home state. This right of a state to protect its nationals abroad provides the means whereby it may enforce the duty of other states to treat aliens on their territory in accordance with certain legal rules and principles. The failure of a state to treat aliens on its territory in accordance with its international obligations will involve that state's international responsibility."[34]

4.88 This view is confirmed by United States practice and doctrine. Thus, the influential *Restatement of the Foreign Relations Law of the United States* provides in § 711:

> "A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates
>
> (a) ...;
>
> (b) a personal right that, under international law, a state is obligated to respect of individuals of foreign nationality; ...
>
> (c) ... ."[35]

4.89 These opinions are based on a longstanding jurisprudence both of the present Court and of its forerunner. In one of its earliest judgments, the Permanent Court of International Justice declared:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law."[36]

As the International Court of Justice explained in the *Barcelona Traction* Case:

> "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them."[37]

According to this jurisprudence, the rules on diplomatic protection rest on a double basis:

> "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach."[38]

4.90 Thus, all these pronouncements agree on two conditions for the exercise of diplomatic protection. First, the violation of an individual right provided by international law. Second, the existence of a bond of nationality between the State exercising its right to diplomatic protection and the individual whose rights were violated. As the Permanent Court has explained,

> "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".[39]

In the present Case, Germany has already established the existence of the bond of nationality between itself and the LaGrand brothers,[40] as well as the breach of Art. 36 (1) (b) of the Vienna Convention on Consular Relations by the United States. In the following, Germany will demonstrate that Art. 36 (1) (b) provides an individual right to German nationals. The breach of this right in the case of the LaGrand brothers entails the right of Germany to the exercise of diplomatic protection on behalf of its nationals.

2. The right to consular advice as an individual right of foreign nationals

4.91 Under international law, a State has a broad measure of discretion in its treatment of aliens. However, this discretion is not unlimited. It is, *inter alia* and above all, subject to the treaty obligations of the State concerned, such as the obligations under the Vienna Convention on Consular Relations.[41] As Germany will prove, the right to be informed upon arrest of the rights under Art. 36 (1) (b) of the Vienna Convention does not only reflect a right of the sending State (and home State of the individuals involved) towards the receiving State but also is an individual right of every national of a foreign State party to the Vienna Convention entering the territory of another State party. As will be set out, this interpretation does not only follow from the wording, the drafting history and subsequent general State practice concerning the Vienna Convention, but also corresponds to the bulk of U.S. practice and jurisprudence.

a) Interpretation of Article 36 (1) (b) of the Vienna Convention

4.92 According to the jurisprudence of the International Court of Justice, the most important means of interpretation of a treaty is the text of the treaty itself:

> "[I]n accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion."[42]

4.93 The wording of Art. 36 (1) (b) firmly supports the view that Art. 36 creates an individual right for nationals of the sending State. The last sentence of Art. 36 (1) (b) does not speak of obligations of the receiving State only, but also of "rights" of the person arrested or detained. By stating that it is for the arrested person to decide whether consular notification is to be provided - and not for the authorities of the receiving State or the consular post of the sending State - the Convention puts the foreign individual in the "driver's seat", as it were. This reading is confirmed by Art. 36 (1)(c) of the Convention, according to which the national arrested or detained in the receiving State may refuse any action on his or her behalf which may be taken by his or her consulate against his or her will. Finally, para. 2 of Art. 36 refers to the "rights referred to in paragraph 1", presupposing that it is individual rights Art. 36 (1) is dealing with.

4.94 When analysing the object and purpose of a treaty, recourse to the preamble of the instrument can help to identify the contracting parties' intentions in drafting the treaty.[43] In the Supreme Court proceedings in *Breard*,[44] the United States advanced the view that Preambular Paragraph 6 of the Vienna Convention stands in the way of a direct application of Art. 36 of the Convention in domestic proceedings. The Preambular Paragraph referred to states that, in the view of the States parties,

> "the purpose of such [i.e., consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States".

However, the U.S. argument is based on a misunderstanding of the relationship between Art. 36 of the Vienna Convention and the cited passage of the Preamble. The Vienna Convention outlines, among other things, the functions, privileges, and immunities of consuls. Paragraph 5 of the Preamble clarifies that these privileges and immunities do not grant individual rights to the individual consul, but rights to the sending state which the latter may waive at any time. Paragraph 5 speaks of "privileges" and "immunities" and of consular "functions". This language refers to specific articles of the Convention granting privileges and immunities to consular personnel (*e.g.*, Art. 29, 32, 33,

35, 40, 41, 49, 50, 52 concerning privileges, and Art. 43 concerning immunity) or spelling out consular functions. Whereas these Articles use terms such as "privilege" or "immunity", which are usually referred to as "the consular privileges and immunities",[45] Art. 36 of the Vienna Convention is neither concerned with a "privilege" nor with an "immunity". Therefore, Preambular Paragraph 6 does not refer to Art. 36 but rather to those provisions of the Convention that confer privileges and immunities on the consul, his or her family or staff, and on the premises of the consulate itself.

4.95 Furthermore, it is hard to imagine how an individual detained in a foreign State covered by Art. 36 could "abuse" his or her rights under that convention. Thus, Paragraph 6 of the Preamble of the 1963 Vienna Convention simply makes no sense if interpreted to apply to the rights of individuals. It makes perfect sense, however, if understood to relate to privileges and immunities *ex officio*. Therefore, the passage in the Preamble discussed here does not in any way limit the right granted to the individual foreign national.

4.96 A comparison with other treaties on diplomatic or consular relations reveals that the terms "privileges" and "immunities" usually refer to the rights that consuls/ diplomats possess *because of their function as the sending States' representatives*.[46] The Preamble of the Vienna Convention on Diplomatic Relations of 18 April 1961,[47] in a sense the forerunner of the Vienna Convention on Consular Relations, contains a similar phrase.[48] A resolution adopted by the Diplomatic Conference of 1961 on that matter accordingly focuses on the possibility of a waiver of immunities for civil claims.[49] Recalling paragraph 4 of the Preamble to the 1961 Vienna Convention on Diplomatic Relations (which is identical to the wording of Preambular Paragraph 6 of the 1963 Vienna Convention on Consular Relations), the resolution confirms that diplomatic immunity should not be used to shield consuls from the consequences of their wrongdoings or to frustrate civil claims brought against them in the courts of the receiving State. This supports the view that by excluding the exercise of individual rights in the Preambles of the 1961 and 1963 Vienna Conventions, States were aiming at preventing consular or diplomatic agents from taking personal profit from their status. However, this rationale does not apply to the object and purpose of Art. 36 (1)(b) of the 1963 Vienna Convention, because this Article does not deal with privileges granted *ex officio* at all but with rights of "ordinary" foreign nationals not exercising any official function. Paragraph 6 of the Preamble to the 1963 Vienna Convention therefore does not determine the object and purpose of Art. 36 of the Convention.

b) Travaux préparatoires of the Vienna Convention on Consular Relations

4.97 As already pointed out,[50] the *travaux préparatoires* may clarify the purpose of Art. 36 (1) (b) even further. We will first turn to the discussion of the issue of consular advice and notification in the International Law Commission, and, following that, to the proceedings of the 1963 Vienna Conference.

(1) Discussions within the ILC (1960-1961)

4.98 From the very beginning of the ILC's debate on what was to become the future Art. 36, Commission members were aware of the fact that by including such an article, they would codify an individual right. The ILC draft articles still foresaw an obligation of the receiving State to automatically notify the sending State's consular officer of the detention of its nationals. During the Vienna Conference, after some discussions, this obligation was amended to become an obligation of notification *upon request of the detainee*. Nevertheless, the debates within the ILC show that the Commission proceeded from the assumption that foreign nationals do possess an individual right to contact their consul.

> Art. 30A, as proposed by Special Rapporteur Sir Gerald Fitzmaurice, read:
>
> > "In order to facilitate the exercise of the consul's function of protecting the nationals of the sending State resident or present within his district.
> >
> > (a) A consul shall have complete freedom of communication with and access to such nationals, and correspondingly they shall have complete freedom of communication with the consul, and also (unless subject to lawful detention) of access to him.
> >
> > (b) The local authorities shall inform the consul of the sending State without delay when any national of that State is detained in custody within its district ... ."[51]
>
> As Mr. Milan Bartos observed in the deliberations of the International Law Commission, Art. 30 A "was intended to safeguard human rights ..."[52]. And further:
>
> > ,,A code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals."[53]
>
> Mr. George Scelle
>
> > "agreed with Mr. Bartos that the protection of individual and human rights was one of the consular functions."[54]
>
> And Mr. Douglas Edmonds (from the United States) observed:
>
> > "[T]he protection of human rights by consuls in respect of their nationals should be the primary consideration for the Commission."[55]

> Speaking at the 13th session in 1961, Mr. Edmonds called the right of a foreigner to communicate with the consulate of his or her home state "a very fundamental human right".[56]

4.99 Members of the ILC critical of a right of communication were opposed to such a right precisely because it involved a human right, which, in their view, had no place in a convention on consular relations. For Mr. Jaroslav Zourek, the right to communication went

> "beyond what seemed to him the proper province of consular law and had impinged upon such matters as human rights...".[57]

4.100 Taken together, these statements strongly indicate that the members of the ILC were well aware of the specific character of the proposed right of communication of nationals with the consulates of their home States as a full-fledged human right, as opposed to the privileges and immunities dealt with in the other parts of the Commission's draft. It was precisely this specific nature of what later was to become Art. 36 which guided their work.

(2) Discussions at the Vienna Conference on Consular Relations

4.101 At the Vienna Conference of 4 March to 22 April 1963, consensus on the future Art. 36 was reached only at the last minute. The reason for the division of opinions lay in the question of whether or not the provision ought to embody a duty of automatic notification (as proposed by the ILC) or of notification upon request. The view that the article contained a right pertaining to the individuals concerned remained unchallenged, however.

> For instance, the Spanish delegate to the Conference, Mr. Perez Hernandez, remarked that
>
> > "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country, established by the International Law Commission's draft, was one of the most sacred rights of foreign residents in a country."[58]
>
> The delegate of India, Mr. Das Gupta, emphasised that
>
> > "the right given to consulates implied a corresponding right for nationals."[59]
>
> This right was also asserted by the delegate of the Republic of Korea, Mr. Chin. According to him,
>
> > "the receiving State's obligation under [Art. 36] paragraph 1 (b) was extremely important, because it related to one of the fundamental and indispensable rights of the individual."[60]

> The Tunisian delegate, Mr. Bouziri, argued in favour of the final version of Art. 36 by pointing to the adequate safeguard of both individual freedom and the exercise of consular functions.[61]

4.102 Various States submitted amendments to the ILC draft criticising the proposed automatic notification of the receiving State upon detention of a foreign national. Instead, most of these States favoured such an obligation only upon request of the detained individual. This, of course, strengthened the "human rights element" in Art. 36 since the will of the person concerned was rendered more important. The obligation to inform the detainee of his options also gained additional weight.

4.103 What is relevant in our context is that during the 1963 Vienna Conference, the Respondent in the present case was one of the leading sponsors of a modification of the ILC draft away from automatic notification. Thus, the United States proposed an amendment to Art. 36 making the notification of an arrest to the consulate dependent upon the request of the foreign national concerned.[62] As the U.S. delegate, Mr. Blankinship, explained in the Second Committee,

> "[t]he object of the amendment was to protect the rights of the national concerned."[63]

In the plenary, he added:

> "In its present form [without the amendment] the draft of Art. 36 ... did not recognize the freedom of action of the detained persons ... ."[64]

According to the French delegate, Mr. de Menthon,

> "the amendment affirmed one of the fundamental rights of man - the right to express his will freely."[65]

Some States were opposed to this amendment. In their view, making notification dependent upon request would weaken the protection of the individual in Art. 36 who often would not know of his or her right to have the consulate notified of his or her arrest or detention. Thus, these delegations were also concerned with the rights of the individual derived from that provision. These concerns were justified to a large extent because, at the time, the article did not yet contain a clause requiring the local authorities to inform the detainee of his or her rights as finally provided in Art. 36.

4.104 A concern that the national might be ignorant of his or her right was expressed by several delegates. For instance, Mr. Dadzie from Ghana was of the opinion

> "that the (mentioned) amendment involved a risk: a national of the sending State ... might not know that his consulate should be notified, and might therefore fail to request notification."[66]

The Soviet delegate, Mr. Konzhukov, asked:

> "What guarantee was there that the person concerned had been informed of his right...?"[67]

4.105 Finally, a few days before the end of the 1963 Conference, several countries submitted a proposal to amend the ILC version of Art. 36, containing no obligation of automatic notification but rather providing for notification of the consulate only upon request of the detainee.[68] The United Kingdom submitted, again, an amendment to that proposal, requiring the local authorities to inform the detainee of his rights.[69] To justify this amendment, the delegate of the United Kingdom, Mr. Evans, stated that:

> "The language of the [first-mentioned proposal] was unacceptable as it stood, because it could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights. ... For those reasons, ... it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights ... ."[70]

The amendment of the United Kingdom was accepted by 65 votes to 2 (13 abstaining).

4.106 States opposing the version of Art. 36 thus adopted did so because they were of the opinion that a provision conveying a human right had no place in the Convention. Thus, the representative of Kuwait, Mr. Sayed Mohammed Hosni, remarked that, in his opinion,

> "the International Law Commission's text introduced a novelty to the convention by defining the rights of the nationals of the sending States and not, as stated in paragraph 1 of the commentary, the rights of consular officials. ... As representative of a country with many aliens on its territory, he fully believed in the rights of nationals of sending States and was against restricting them; but they were irrelevant to the convention under discussion."[71]

The Venezuelan delegate, Mr. Perez-Chiriboga, argued in favour of the deletion of the reference to individual rights, explaining that

> "the draft convention was not the appropriate instrument" [to codify rights and duties of nationals].[72]

> Due to strong opposition, Venezuela finally dropped its proposal to delete the paragraph.[73]

4.107 The statements thus reproduced demonstrate a remarkable consensus among the representatives of a great number of States from different regions of the world. Even States opposing the codification of rights of individual nationals in the Convention agreed that the proposed Article did precisely this - stipulate individual rights. But the overwhelming majority was of the opinion that international law had reached a stage where a codification of consular law could not proceed without a norm providing for individual rights of foreign nationals. In the words of the delegate of Greece, Mr. Spyridakis, by providing an individual right, the Conference

> "was also following the present-day trend of promoting and protecting human rights, for which future generations would be grateful."[74]

c) The UN Declaration on the human rights of aliens

4.108 Other international instruments support this view. Art. 10 of the United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live, which was adopted by UN General Assembly Resolution 40/144 on 13 December 1985,[75] also guarantees the freedom of communication for a foreign national with the consulate of his or her home State:

> "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."

> Thus, according to this Declaration, the right of access to the consulate of the home State, as well as the information on this right, is the right of any alien, that is of "any individual who is not a national of the State in which he or she is present" (Art. 1 of the Declaration). The Declaration stresses the close link between the rights of aliens to consular assistance and human rights.

4.109 This link also becomes apparent from the drafting history of the Declaration. During the *travaux préparatoires* in the ECOSOC and within a Working Group charged with the elaboration of what was to become GA Res. 40/144, various Governments referred to the close relationship between Art. 10 of the resolution and Art. 36 of the Vienna Convention on Consular Relations. For instance, the Japanese Government favoured the inclusion of the words "in accordance with the provisions of Art. 36 of the Vienna Convention on Consular Relations" in the text of Art. 10.[76] Similarly, the Norwegian Government pointed to the fact that (the final) Art. 10 of the Declaration and Art. 36 of the Vienna Convention contain the same right.[77]

4.110 General Assembly Resolution 40/144 is not legally binding upon States. But an analysis *lege artis* must not stop there. As this Court has noted in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character."[78]

Whereas the specific resolutions referred to in the Advisory Opinion had been adopted with a considerable number of negative votes and abstentions, our Declaration was adopted by consensus, without a single vote against or any abstention. Nevertheless, even in the case of the General Assembly resolutions concerning nuclear weapons, the Court did accord these resolutions considerable weight in interpreting the relevant law on the matter. As the International Criminal Tribunal for the Former Yugoslavia explained with regard to the United Nations Declaration on Torture of 9 December 1975,[79]

> "[i]t should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition."[80]

The use of the label "Declaration" is additional proof to the fact that the General Assembly considered the contents of Resolution 40/144 as particularly significant.

4.111 Second, irrespective of whether the Declaration as such is legally binding or not, it certainly constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the terms of Art. 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties, which is generally considered to be an expression of customary law on the matter.[81] Therefore, the declaration is important evidence of *opinio juris* and international practice on the character of Art. 36 (1) (b) of the 1963 Vienna Convention on Consular Relations as embodying an individual right of aliens on foreign territory.

d) Recognition of the individual right to consular advice by United States domestic law

4.112 The foregoing analysis is supported by United States jurisprudence and practice. In the process of obtaining the consent of the U.S. Senate to the ratification of the 1963 Vienna Convention, the Administration declared that the Convention was self-executing, that is, directly applicable in internal law

without the need for any implementing legislation. In the words of the Deputy Legal Adviser of the U.S. Department of State, Mr. J. Edward Lyerly, the treaty was

> "entirely self-executive [*sic*] and does not require any implementing or complementing legislation."[82]

4.113 Obviously, the international legal obligations of the United States do not depend on the question whether a treaty is self-executing pursuant to United States internal law or not.[83] In the United States Government brief to the Supreme Court in the *Breard* Case, the U.S. Solicitor General asserted that the Convention was self-executing but did not provide for an individual right:

> "The United States agrees that the Vienna Convention is self-executing, in the sense that it can be implemented by government officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting."[84]

But the self-executing character of the Convention as a whole, and that of the right provided in Art. 36 (1) (b), is strong evidence that U.S. law itself regards the right to consular advice as an individual right and not as a mere reflex of a duty incumbent on the United States Government.

4.114 In its brief to the Supreme Court, the U.S. Government cited one of the leading U.S. experts in the field, Professor Carlos Manuel Vázquez, to the effect that Art. 36 (1) (b) was not enforceable by individuals.[85] Indeed, Professor Vázquez was right in pointing out that the question of the self-executing character of a treaty and that of a right of action pursuant to a treaty provision are "analytically distinct".[86] However, the reference to Professor Vázquez' article by the U.S. Government is misleading, because in a footnote, Professor Vázquez then explains that

> "[t]he standing issue is closely related to the right-of-action issue."[87]

In an earlier article on the subject, Professor Vázquez had gone into further detail:

> "In treaty cases, therefore, an important factor in determining whether a private right of action should be `implied' under a treaty that does not expressly confer one is whether failure of the courts to afford the remedy would produce (or exacerbate) the international responsibility of the United States to the state of the individual's nationality. If it would, a private right of action to obtain that remedy under domestic law should be considered to be implicit in the treaty."[88]

As Germany will argue in detail later, [89] the violation of the right to information on consular access under Art. 36 (1)(b) of the Vienna Convention does indeed entail the international responsibility of the State concerned.

4.115 Professor Vázquez further argues that a right of action is not necessary if a self-executing provision is used as a defence, e.g. in a criminal case, or if national law provides for a right of action on its part, which is also the case in criminal proceedings:

> "Defendants relying on a treaty as a defense to a criminal prosecution (or claiming that the treaty governs the conditions of their confinement) do not need a `private right of action,' as they are not seeking to maintain an action."[90]

Thus, the arguments of Professor Vázquez support rather than contradict Germany's interpretation of Art. 36 (1) (b) of the 1963 Vienna Convention as establishing an individual right.

4.116 The U.S. Supreme Court itself has also clearly expressed the connection between the self-executing character of a provision and enforcement by courts:

> "The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." [91]

4.117 Notwithstanding the opinion of the Federal Government during the ratification process that the Vienna Convention was self-executing, the United States incorporated the obligation of consular notification at the request of the detained person in the Code of Federal Regulations, which is to be applied by federal offices and agencies but not by state and local authorities. § 50.5 (a) (1) of Title 28 of the Code reads:

> "In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney." [92]

Similar provisions can be found in the Immigration Regulations. Thus, Section 236.1 (e) of the Code of Federal Regulations provides that

> "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States."[93]

Thus, U.S. federal law provides for the very right to consular information whose existence as an individual right the U.S. government is denying in the present case. However, as explained above, the provisions in U.S. federal law cannot be of help to those detainees who are detained in State criminal proceedings which are not regulated by federal law.

4.118 Several U.S. courts have recognised that Art. 36 (1) (b) of the Vienna Convention provides for an individual right. This jurisprudence was established in cases dealing with federal agencies not subject to the law of the individual states. For instance, according to the U.S. 9th Circuit Court, the immigration regulations mentioned above were intended to implement U.S. obligations stemming from the Vienna Convention and therefore served the benefit of the individual alien. As the Court explained,

> "the regulation itself must serve a purpose of benefit to the alien. ... [T]he particular regulation involved here, 8 C.F.R. § 242.2(e) (1979), serves such a purpose. It was intended to insure compliance with this country's treaty obligations to promote assistance from their country of origin for aliens facing deportation proceedings in the United States."[94]

Only recently, in the case of *United States v. Lombera-Camorlinga*, the 9th Circuit Court unequivocally confirmed this jurisprudence. Because of the clarity and the quality of its reasoning, the decision deserves to be cited at length:

> "The government, however, reasons that the right violated by the customs officers belonged not to the appellant, as an individually affected foreign national, but rather to the Mexican Consulate. Based on this reasoning, the government contends that the appellant lacks standing to complain of the violation. We disagree.
>
> While one of the purposes of Article 36 is to `facilitat[e] the exercise of consular functions relating to nationals of the sending State,' Convention, art. 36(1), foreign nationals are more than incidental beneficiaries of Article 36(1)(b). The treaty language itself clearly states that the rights enumerated in sub-paragraph 36(1)(b) belong to the foreign national: `The said authorities shall inform the person concerned without delay of his rights under this sub- paragraph.' Convention, Article 36(1)(b) (emphasis added). It strains the English language to interpret `his rights' in this context to refer to the Consulate's rights. We held in United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir.1980), that `[t]he right established by the

> regulation [intended to ensure compliance with the Convention] and in this case by treaty is a personal one.'
>
> Moreover, the language of the provision is not precatory, but rather mandatory and unequivocal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 441, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1986) (contrasting mandatory obligations and `precatory' provisions under the United Nations Protocol Relating to the Status of Refugees). Accordingly, individual foreign nationals have rights under Article 36(1)(b) of the Vienna Convention.
>
> The government further contends that, even if the Vienna Convention establishes individual rights, individuals do not have standing to enforce those rights. This contention lacks merit.
>
> It has long been recognized that, where treaty provisions establish individual rights, these rights must be enforced by the courts of the United States at the behest of the individual. See United States v. Rauscher, 119 U.S. 407, 418- 19, 7 S.Ct. 234, 30 L.Ed. 425 (1886) (citing Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884)); see also United States v. Alvarez- Machain, 504 U.S. 644, 659-60 (1992) (recognizing the continuing authority of Rauscher). Because Article 36(1)(b) establishes individual rights, these rights must be enforced by our courts."[95]

4.119 Thus, an analysis of United States law and jurisprudence convincingly shows that Art. 36 (1) (b) constitutes an individual right both under the domestic law of the United States and according to the interpretation of the Vienna Convention by U.S. courts. Regrettably the U.S. courts have not applied these holdings to the (in)applicability of the doctrine of procedural default and related doctrines limiting access to federal courts, in order to enforce these individual rights.

3. Conclusion

4.120 Both under international and U.S. domestic law, Art. 36 (1) (b) of the Vienna Convention provides for an individual right of foreigners - a right which the United States has violated in the case of the LaGrand brothers. According to the law of diplomatic protection, this conduct is in breach of the right of the State of which the LaGrands were nationals. Therefore, Germany

> "is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[96]

III. Non-observance by the United States of the Order on Provisional Measures of 3 March 1999

1. Introduction

4.121 In executing Walter LaGrand, the United States acted contrary to a binding order of this Court and breached its obligations under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute of the International Court of Justice.

> The conduct of the United States was not only impermissible under international law but also showed a lack of respect for the authority of the International Court of Justice. Even though the Respondent has never gone as far as to deny the authoritative character of orders on provisional measures before this Court itself, it has refrained from taking the required steps to implement the specific Order in question.

2. Orders indicating Provisional Measures are binding on the parties

4.122 Provisional Measures indicated by the International Court of Justice are binding by virtue of the law of the United Nations Charter and the Statute of the Court. A reasonable interpretation of the applicable norms inevitably leads to this result, which is the only one permitting the Court to efficiently carry out the tasks entrusted to it, and permitting the Provisional Measures to fulfil their function by preserving the rights of both parties. Indeed, as Judge Weeramantry put it:

> "An interpretation which imposes anything short of a binding legal obligation upon the Respondent is out of tune with the letter and spirit of the Charter and the Statute."[97]

4.123 Like the preceding *Breard* Case, the present Case is a telling example of why an indication of Provisional Measures must be regarded as binding. Walter LaGrand has lost his life as a result of the deliberate conduct of the authorities of the United States. Therefore, the Court is deprived of the possibility of rendering a Judgment on the basis of Germany's original Application.

4.124 The question of the existence of a machinery for the enforcement of Orders indicating Provisional Measures has not to be dealt with in the present context. Therefore, no conclusions can be drawn from the fact that the Charter contains an express provision on enforcement only with regard to Judgments of the International Court of Justice. As Judge Weeramantry has pointed out in the *Genocide* Case:

> "Whether such an order is complied with or not, whether it can be enforced or not, what other sanctions lie behind it - all these are external questions, not affecting the internal question of inherent validity."[98]

a) The principle of institutional effectiveness

4.125 First of all, any discussion of the legal character of Provisional Measures must take into account that the Court is a judicial body whose task it is to reach a decision in a case brought before it on the basis of the equality of parties. This presupposes that the object of the dispute must remain free from unilateral interference during the entire course of the proceedings. Therefore it must be part of the authority of an international tribunal to take the necessary steps to ensure that the subject of the litigation is preserved until the final judgment is rendered. As to its source, the power to indicate interim measures can be deduced from a general principle of law reflecting the procedural laws of a great number of national legal systems.[99] In light of this, could there be any basis for maintaining that the International Court of Justice in particular, the principal judicial organ of the United Nations, were the exception and did not possess such competence inherent in the judicial function?

4.126 It would be contradictory, on the one hand, to grant the Court jurisdiction to decide a case, and, on the other, not to provide it with the necessary means to fulfil this task. To quote Judge Ajibola:

> "Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending the final judgment."[100]

And in the words of Judge Weeramantry:

> "The view that provisional orders are part of the inherent authority of a judicial tribunal is ... one which is sustainable on general principle, on practical necessity, and on the basis of a not inconsiderable body of authority. Principles that may be invoked in support of such a view include the principle of equality of parties, the principle of effectiveness, the principle of non-anticipation by unilateral action of the decision of the Court, and also the wide and universal recognition of the enjoining powers of courts as an inherent part of their jurisdiction. "[101]

If procedural orders were not binding, the Court could not work efficiently but would always remain dependent on the good will of the parties. Such a construction can hardly be reconciled with the position of this Court as the principal judicial organ of the international community. As Edvard Hambro has stated:

> "It would not be in conformity with the august character of the Court as an `organ of international law' and as the `principal judicial organ of the United Nations'... to make any decision that the parties were free to respect or ignore according to their own pleasure."[102]

4.127 This Court has an invaluable function in the peaceful settlement of disputes and the development of international law. In order to effectively fulfil

its tasks, it must possess the necessary instruments. To once more quote Judge Weeramantry:

> "To view the Order made by the Court as anything less than binding so long as it stands would weaken the régime of international law in the very circumstances in which its restraining influence is most needed."[103]

b) Procedural prerequisites for the adoption of Provisional Measures

4.128 Another factor speaking in favour of the binding force of Provisional Measures is the procedural framework within which such measures are adopted. The Court has developed a detailed jurisprudence as to the prerequisites for a Provisional Measure.[104] It balances the interests of the parties with utmost scrutiny, and refrains from issuing the requested measure if it holds that *prima facie* the rights to be protected or its jurisdiction do not exist or that there is no danger of an irreparable damage. Why should the Court be so cautious if it was acting at an exhortatory, recommendatory level only? In the words of Sir Hersch Lauterpacht:

> "It cannot be lightly assumed ... that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties."[105]

And, as Judge Ajibola put it:

> "[W]hat is the point of giving a request for an indication of provisional measure [sic] urgent attention, a quick and immediate hearing and priority ..., if in spite of all the effort put into it, the resulting order is to be considered not legally binding and ineffective?"[106]

c) Binding force of Provisional Measures as a necessary corollary to the binding force of the final judgment

4.129 As a logical result of the binding force of the final judgment, Provisional Measures have to be considered as binding as well. Once a jurisdictional link is established, an applicant is entitled to a binding Judgment. The respondent has no possibility to withdraw its consent to pending proceedings. The applicant's right to a final, binding decision on the merits must receive adequate protection by equally binding Provisional Measures. If withdrawal of consent is not permissible, it cannot be reasonably assumed that a State could be allowed to obtain the same result by action frustrating the opponent's claim.

> As the representative of the United Kingdom, Sir Gladwynn Jebb, pointed out in the Security Council in connection with the non-compliance with a Provisional Measure indicated by the Court in the *Anglo-Iranian Oil* Case:

> "[C]learly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence ... of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding."[107]

4.130 In fact, Art. 59 and 60 of the Statute of the Court would be substantially weakened if it were open to the parties to negate the final decision by action taken in advance. In the words of a commentator:

> "A provision that the final judgment is binding becomes pointless if that decision can be negatived [sic] by actions of one of the parties in advance of the judgment."[108]

> It would seem to follow, therefore, from the binding force of final Judgments that interim measures, intended to ensure the effectiveness of those final decisions, are of equally binding character.

4.131 As a general rule applying to judicial settlement of disputes at the national as well as the international level, if the final decision is binding, an interim measure must be regarded as binding, too.[109] Such symmetry is to be presumed, and wherever the situation is to be different, clear indications must exist in this regard, *e.g.*, the use of a formula such as "the Court may bring to the attention of the parties desirable measures". But otherwise, what will apply is a general rule to the effect that whenever a final Judgment is binding, the Provisional Measures will be binding as well.

d) Article 94 (1) of the United Nations Charter establishes an obligation to comply with Provisional Measures

4.132 Apart from general considerations, the legal character of Provisional Measures results from express legal provisions.

> Under Art. 94 (1) of the United Nations Charter, all parties to a dispute before this Court undertake to comply with its decisions. Admittedly, the second paragraph of that provision deals with Judgments only. But it is hardly conceivable that in one provision reference would be made to the same notion by using two different words. In legal texts, recourse to two different words generally implies two differing underlying concepts. It is thus widely accepted that the term "decision" includes both Judgments and Provisional Measures: it refers to all decisions of the Court regardless of their form.[110] The Court itself has treated Provisional Measures as decisions, as is demonstrated by Articles 74 (2), 76 (1) and 76 (3) of the Statute.[111]

> This argument has been emphasised by the United States itself in the *Hostages* Case:

> "Iran had formally undertaken, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, to comply with the decision of the Court in this case to which Iran might be is a party. Accordingly it was the hope and expectation of the United States that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by this Court in the course of the present litigation."[112]

4.133 In the view of J. Sztucki, Art. 94 (1) does not confer binding force on Provisional Measures; rather, the terms "decision" and "judgment" are to be seen as synonyms.[113] In his view, the two paragraphs of Art. 94 simply use the same language as Art. 59 of the Statute ("binding decision") and nobody ever claimed that this provision was applicable to Provisional Measures. However, logic as well as an analysis of the object and purpose of Art. 94 must lead to the opposite result.

e) Article 41 (1) of the Statute of the Court establishes an obligation to the same effect

4.134 An additional basis for the obligation to comply with Provisional Measures is to be found in Article 41 (1) of the Statute. Pursuant to this provision,

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

Some commentators have taken the view that the language used in this provision is merely precatory. However, this argument is not valid:

4.135 An interpretation of the provision according to the law of treaties clearly demonstrates that Provisional Measures do have binding force. Pursuant to Art. 31 (1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose.

4.136 First of all, any interpretation must bear in mind that the Statute is a treaty, that is, a legal instrument creating rights and obligations for the parties. The provisions of treaties are normally of a legal character, and binding as a matter of law. If a treaty prescribes duties, the rule is that these duties will be legal instead of purely moral. Of course, the parties are free to include non-binding provisions in a treaty as well, but this is the exception rather than the rule. Thus, normally, if a treaty prescribes that the parties must behave in a particular manner, it establishes a mandatory obligation. To quote Sir Hersch Lauterpacht once again:

> "It cannot be lightly assumed that the Statute of the Court - a legal instrument - contains provisions relating to any merely moral obligations of States"[114].

(1) Ordinary meaning

4.137 As for the ordinary meaning of the terms used, the terminology used in Art. 41 (1) implies a binding character.

> Thus, the use of the word "power", which in normal parlance denotes the capability to demand compliance, provides a strong argument for the obligatory character of the provision. If the Court were only supposed to deliver exhortatory advice, it would not need "power" to do so. Since it cannot be presumed that the Statute contains useless and unnecessary provisions, Art. 41 (1) must go beyond the sphere of non-bindingness. In the words of Judge Weeramantry:
>
> > "One cannot see the Statute as solemnly investing the Court with special power under Article 41 if the sole object of that power was to proffer non-binding advice, which the parties were perfectly free to disregard. A word with such heavy connotations as `power' must clearly have been meant to give the Court an authority it did not otherwise have - an authority to impose on parties an obligation which, without such a word, would not be binding on them."[115]
>
> Hence, by virtue of Article 41, which vests the Court with a special power, the indicated Measures possess binding force.

4.138 The word "ought to" connotes an obligation and can have no other meaning when used in the context of the activities of a court. Moreover, it has to be seen in context with its reference to "rights" - which implies a corresponding duty - and the "power" of the Court mentioned before.[116]

4.139 Finally, "indicate" is an expression of the judicial function of the Court, that is, "to *point out* what the parties must do in order to remain in harmony with what the Court holds to be the law."[117] Moreover, the term "indicate" must not be regarded in isolation, but in connection with "if the circumstances so *require*", which is indicative of a compulsory character as well.[118]

> The reluctance to use a stronger formula can be explained as follows:
>
> > "The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 25, 1914, and with Sweden on October 13, 1914, possesses a diplomatic flavor, being designed to avoid offense to the susceptibilities of states. It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the word *order* would have been, and it would seem to have that effect ... An indication by the Court under Article 41 is equivalent to a

> declaration of an obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect."[119]

Thus, the language used was not intended to deprive Provisional Measures of binding force but to stress the caution and wariness expected from the Court in the exercise of its powers.[120]

4.140 Another explanation for the language will be that in many cases it might be appropriate for the Court, under Art. 41 of its Statute, to limit itself to indicating broad directions and leaving the selection of the most appropriate means of implementation to the concerned State itself. Thus, the language is illustrative of the co-operation between the Court and the States in this field.[121]

(2) Context

4.141 The context within which Art. 41 (1) operates undoubtedly indicates the binding force of Provisional Measures. First of all, Art. 92 ff. of the UN Charter and the Statute of the Court as a whole have to be taken into account. What is at stake is not the functioning of any dispute settlement body, but the position of the principal judicial organ of the United Nations, the World Court, whose task is to decide legal disputes in judicial proceedings. The Statute is the statute of a Court, not of an advisory body. The Court has always been very cautious to maintain its judicial character. It held that it may only act where a judgment

> "can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations"[122].

On the other hand, it has refused to give a judgment

> "which would be dependent for its validity on the subsequent approval of the parties".[123]

If we apply this jurisprudence to Provisional Measures, if they were construed as non-binding, they *would* be dependent on the parties' approval and not affect existing rights and obligations.

Moreover, Art. 41 (1) has to be seen in connection with the obligation to comply with Provisional Measures arising under Art. 94 (1) of the Charter, which has been mentioned above.

4.142 A further argument in favour of the binding force of Provisional Measures can be supplied by reference to Art. 78 of the Rules of Court, which empowers it to

> "request information from the parties on any matter connected with the implementation of any provisional measures it had indicated".

As Judge Ajibola observed, this is a strong argument in favour of the binding force of interim measures:

> "This is a clear indication that the Court is not expected to give any order in vain."[124]

4.143 Finally, Art. 41 (1) of the Statute is part of its Chapter III on procedure. Procedural orders as such are legal in character and incorporate obligations; the parties are not free to comply with them or not. The Court may draw consequences in case of non-compliance, leading to disadvantages for the non-complying party in the course of the respective proceedings. As concerns orders under Art. 48 of the Statute, they can be enforced under Art. 53 of the Statute. If other procedural orders mentioned in the same Chapter are legally binding, why should there be a difference for Provisional Measures? Why should orders on relatively minor issues, like the form and the time for the delivery of arguments, possess binding force, whereas orders on Provisional Measures that are so crucial for the preservation of a party's rights and for the fulfilment of the judicial function do not? Such a result would contradict all common sense. *A minori ad maius*, the more solemn and serious orders under Art. 41 of the Statute have to be regarded as binding as well.[125]

4.144 To avoid misunderstandings, some clarifications should be made with regard to a statement of the Permanent Court of International Justice in the Case concerning *Free Zones of Upper Savoy and the District of Gex*, according to which interlocutory

> "orders ... have no `binding' force ... or `final' effect ... in deciding the dispute brought by the Parties before the Court".[126]

What the Court intended to say here was not that the Parties are free to respect or not respect Provisional Measures. Rather, it referred to the lack of binding force with regard to the final Judgment.[127] As Judge Weeramantry explained:

> "The Court was there merely giving expression to the principle that `an order has no binding force *on the Court* in its ultimate decision on the merits'."[128]

4.145 Provisional Measures do not achieve the status of *res judicata*, as opposed to an interim Judgment, which would constitute a final and, in principle, irreversible decision in the case, at least partially. But even if Provisional Measures are not binding on the Court, they must be obligatory for the parties in order for their purpose to be achieved. This is the normal feature of Provisional Measures in municipal law as well: they are provisional, that is, without conclusive effect on the final decision, but at the same time binding on the parties.

4.146 No argument against binding force can be deduced from the formula "measures suggested" used in Art. 41 (2) of the Statute. The word "suggested" appears in the English text only whereas the other authentic languages all use

terms equivalent to "indicated". There is no indication that by this paragraph, which regulates notification of the measures, the first paragraph was to be modified. Thus, the formula cannot change the result of our interpretation of Art. 41 (1) of the Statute of the Court.

(3) Object and purpose

4.147 Any interpretation of a treaty provision must pay particular attention to its object and purpose. As Art. 41 (1) of the Statute spells out, its objective is to preserve the respective rights of either party pending a final decision on the merits. Moreover, the provision aims at securing the Court's ability to resolve, within the ambit of its jurisdiction, disputes under international law.

> If the parties were not obliged to comply with Provisional Measures, these objectives could not be attained. If a party could render impossible the relief requested during proceedings, the rights affected would be left without effective protection. Thus, the Court would not be able to fulfil the task conferred on it by Art. 41 (1) of the Statute. Similarly, the Statute's purpose to enable States to have their disputes resolved judicially and to give them an entitlement to this effect under the condition of a jurisdictional link, could not be achieved.
>
> As Judge Koroma stated in his Declaration in the *Case concerning Legality of Use of Force*:
>
> > "Under Article 41 of the Statute of the Court, a request for provisional measures should have as its purpose the preservation of the respective rights of either party pending the Court's decision. ... Where the risk of irreparable harm is said to exist or further action might aggravate or extend a dispute, the granting of the relief becomes necessary. It is thus one of the most important functions of the Court."[129]
>
> The Court itself has frequently emphasised that its authority under Art. 41 of the Statute presupposes that its Judgment
>
> > "should not be anticipated by reason of any initiative regarding the measures which are in issue."[130]
>
> As emphasised above, a State cannot withdraw its consent after proceedings have begun; the jurisdictional link, once established, remains valid for the respective case; it is not possible for the respondent to prevent the Court from rendering a Judgment once it has jurisdiction. This being so, States must be prohibited from interfering with the subject-matter of the case.

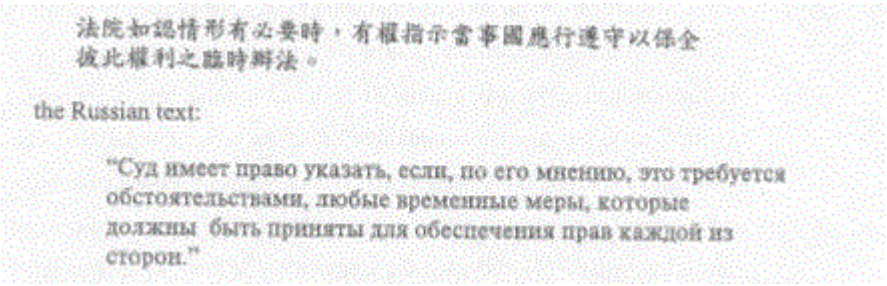
4.148 In sum, Provisional Measures can achieve their purpose only if they are construed as legally binding.[131] In the words of Sir Gerald Fitzmaurice:

> "The whole logic of jurisdiction to indicate interim measures entails that, when indicated, they are binding - for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point".[132]

(4) The other authentic languages

4.149 Finally, a look at Art. 41 (1) in the other authentic languages confirms Germany's submission that Provisional Measures are binding.

> Even if one admitted that the English formulation was somewhat imprecise, the same cannot be said about the texts in the other authentic languages. The Court's Statute is equally authentic in English, French, Spanish, Russian, and Chinese.[133] The French text reads:
>
> > "La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire";
>
> the Spanish text:
>
> > "La Corte tendrá facultad para indicar, si considera que las circunstancias así lo exigen, las medidas que deban tomarse para resguardar los derechos de cada una de las partes."
>
> the Chinese text:


法院如認情形有必要時，有權指示當事國應行遵守以保全彼此權利之臨時辦法。

the Russian text:

"Суд имеет право указать, если, по его мнению, это требуется обстоятельствами, любые временные меры, которые должны быть приняты для обеспечения прав каждой из сторон."

> All versions clearly reveal the obligatory character of the measures concerned. Both the French "devoir" and the Spanish "deber" refer to binding obligations and are to be translated with "must".[134] Similarly, "indiquer" and "indicar" carry a connotation of an obligation which is even stronger than in the English text.[135]
>
> The word "zhishi" (指示) in the Chinese version of Article 41 appears both in paragraphs 1 and 2, and can be used equally as a verb and as a

noun. This word clearly speaks in favour of the legally binding character of the Provisional Measures. For purposes of translation, the word is used not only to reproduce the English term "to indicate" but also the term "to instruct". Thus in the Chinese language, if a mere hortatory meaning were to be attributed to the powers of the Court described in Article 41, a completely different word would have to be used.

The Russian version of Article 41 (1) employs the verb "ukasat" (указать) which means *inter alia* "to direct, to order, to prescribe". The verb is also a direct translation of the English verb "to indicate". The noun "ukasanije" (указание) means "direction" or "instruction".

4.150 Thus, with regard to all authentic languages there are extremely strong indications that Provisional Measures are meant to possess binding force. Even if one assumed, *arguendo*, that the English and Russian texts were open to a "softer" meaning also and would therefore allow both an imperative and a permissive reading, the Chinese, French and Spanish versions unambiguously demand a reading in the sense of binding character of an Order. For such instances, Art. 33 (4) of the Vienna Convention on the Law of Treaties provides that in cases of a difference in meaning which the application of the other means of interpretation does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[136] Hence, if one language uses a term which embraces both the term used by the other language and a broader notion, the narrower meaning will prevail. In principle, however, in case of Art. 41 (1) of the Statute recourse to Art. 33 (4) of the Vienna Convention on the Law of Treaties is not necessary because an interpretation according to Art. 31 of the same Convention already allows the reading of the English text to the effect that Provisional Measures are binding. But assuming, *arguendo*, that this was not really clear, any remaining doubts as to whether the wording might imply the binding character of Provisional Measures disappear in view of the other authentic texts. The correct reading is thus the imperative one.

(5) The travaux préparatoires provide evidence in support of the binding character

4.151 The preparatory work and the circumstances of the adoption of Art. 41 (1) of the Statute may be considered as supplementary means of interpretation, but only insofar as they

- confirm the meaning resulting from the application of Art. 31 Vienna Convention on the Law of the Treaties, that is, under the general rule of interpretation (which has been applied above);

- determine the meaning where an interpretation according to Art. 31 leaves it ambiguous or obscure, or leads to a manifestly absurd or unreasonable result (Art. 32 Vienna Convention on the Law of Treaties).

4.152 Consequently, recourse to supplementary means cannot overturn a clear result obtained under the general rule, unless this result is manifestly absurd or unreasonable. Therefore, recourse to Art. 32 Vienna Convention on the Law of Treaties is unnecessary as regards the interpretation of Art. 41 (1) of the Statute because the interpretation pursuant to the general rule has already led to the unambiguous result that Provisional Measures are legally binding, which is the only interpretation compatible with the functions and the authority of the Court. If the supplementary means were nevertheless to be taken into account, they would also confirm the obligatory character of interim measures. The French text, as the original version of the provision, clearly establishes an obligation on States. The English text is merely a translation of the French text.[137] The French version "pouvoir d'indiquer" was originally translated by "power to suggest". However, later it was assumed that a stronger term was necessary and the word "suggest" was substituted by "indicate".[138]

4.153 Moreover, as already explained above, the drafters of the Statute of the Permanent Court of International Justice followed a diplomatic precedent, that is, they were inspired by the Bryan Treaties of 1914 and used language "with a certain diplomatic flavor" without thereby intending to deprive the Court of the means necessary to fulfil its tasks.

As Judge Weeramantry has observed:

> "The drafting history shows that the Court's power goes beyond mere suggestion or advice, but carries some connotation of obligation."[139]

f) The practice of the Court supports the binding character of Provisional Measures

4.154 As Judge Weeramantry has pointed out in the *Genocide* Case "there is much that is suggestive of the Court's implicit acceptance of the binding nature of Provisional Measures."[140] While the earlier practice of the Court was still somewhat reluctant in this regard, its more recent practice provides clearer indications in favour of binding force.

4.155 As to the earlier practice, the *Nuclear Tests* Cases may serve as an example. There, the Court recited without comment Australia's arguments that "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973."[141] Even though the position referred to was obviously that of Australia, the Court's recital of that quotation without any comment can be considered as evidence of a tacit and indirect endorsement.[142]

In the *Nicaragua* Case, the Court pointed out:

> "When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account".[143]

In the second Order on Provisional Measures issued in the *Genocide* Case, the Court first quoted this very statement but then added:

> "whereas this is particularly so in such a situation as now exists in Bosnia-Herzegovina where no reparation could efface the results of conduct which the Court may rule to have been contrary to international law."[144]

The matter became even clearer in the *Lockerbie* Cases, where the Court refrained from indicating Provisional Measures because

> "an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United Kingdom by virtue of Security Council Resolution 748 (1992)".[145]

The Court's line of argument can only be explained by attributing binding force to Provisional Measures. How could Provisional Measures interfere with rights if they were deemed to lack legal effect?[146]

4.156 President Schwebel, in his Declaration to the Court's order in the *Breard* Case, pointed to

> "the serious difficulties which this Order *imposes* on the authorities of the United States and Virginia."[147]

This wording, too, is indicative of an obligatory character of Provisional Measures.

3. The parties to a dispute before the Court have the duty to preserve its subject-matter

4.157 Apart from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending. This is a general obligation of litigant states under customary law which is merely concretised in the provisions of the Charter and the Statute just mentioned.[148] All States parties to an international dispute *sub judice* are under an absolute obligation to abstain from all acts that would nullify the result of the final judgment or aggravate or extend the dispute. In the words of H. Niemeyer of more than sixty years ago,

> "[f]rom the moment that, and as long as, a dispute is submitted to judicial decision and one is awaited, the parties to the dispute are under an obligation to refrain from any act or omission the specific factual characteristics of which would render the normative decision superfluous or impossible".[149]

4.158 This rule exists independently of its incorporation in the Charter and the Statute. It further confirms our result that both Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the ICJ Statute can only be interpreted to the effect that Provisional Measures are binding. The existence of this rule independently of treaty law was already emphasised by influential commentators on the Statute of the Permanent Court of International Justice.[150] The Permanent Court of International Justice has pointed out that Art. 41 reflects

> "the principle universally accepted by international tribunals... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".[151]

As E. Hambro observed:

> "The Court in exercising its authority under Art. 41 does only in effect give life and blood to a rule that already exists in principle".[152]

4. The international legal obligations violated by the United States' conduct with regard to the Court's Order of 3 March 1999

a) The general attitude of the United States vis-à-vis Orders of the Court

4.159 The general attitude of the United States vis-à-vis Orders of the Court can best be described as selective. On the one hand, the Respondent appears to admit in general that this Court's Orders as such are capable of imposing obligations on the parties. On the other hand, however, the United States' views on how such Orders are to be implemented have differed depending on the procedural situation in which it found itself in various cases.

4.160 The United States explicitly acknowledged the necessity to comply with Provisional Measures indicated by the International Court of Justice during the *Hostages* Case. Thus, in a situation where the United States itself was dependent on such measures for an adequate protection of its rights, it did rely on their binding force.

> Since the Court's Order on Provisional Measures of 15 December 1979 in the *Hostages* Case[153] remained without response by the Iranian Government, the subsequent action of the United States in the Security Council was, *inter alia*, based on the argument that Iran had breached its obligation to comply with that Order.[154] In its draft proposal for a Security Council Resolution under Chapter VII, the United States mentioned the Court's Order and proposed the enactment of sanctions according to Article 39 and 41 of the Charter if the Resolution was to be adopted (which did not happen because of the exercise of the veto power by a permanent member).[155] Before the Council, Secretary of

State Cyrus Vance referred to the Order of the World Court and pointed out:

> "It is not only 50 American men and women who are held hostage in Iran; it is the international community. ... The time has come for the world community to act, firmly and collectively, to uphold international law and to preserve international peace."[156]

And further:

> "My Government therefore seeks a resolution which would condemn Iran's failure to comply with earlier actions of the Security Council and of the International Court calling for the immediate release of all the hostages. ... [The resolution] would decide that if the hostages have not been released when the Council meets again at the specified early date, the Council will at that time adopt specific sanctions under Article 41 of the Charter."[157]

As Shank and Quigley put it:

> "The use of the terms `remedies' and `compliance' and the seeking of Security Council action all suggested that the United States viewed the interim order as binding on Iran."[158]

4.161 In the *Nicaragua* Case, the United States submitted that the indication of Provisional Measures would be inappropriate, arguing that

> "[i]n the present situation in Central America, the indication of such measures could irreparably prejudice the interests of a number of states and seriously interfere with the negotiations being conducted pursuant to the Contadora process"

and that

> "the other States of Central America have stated their view that Nicaragua's request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations."[159]

These statements would make no sense if they were not read in the sense of an implicit recognition of legal effects of Provisional Measures: only an order which can be the source of rights and obligations can be deemed to interfere with rights of other states.

4.162 The argument the United States advanced in the *Lockerbie* Case was similar: it objected to the indication of Provisional Measures, sustaining that

> "any indication of provisional measures would run a serious risk of conflicting with the work of the Security Council".[160]

Thus, once again, we find an implicit recognition of the legal significance of Provisional Measures indicated by the Court.

4.163 The flagrant disrespect for the Court's Order in the *Breard* Case[161] has met harsh criticism world-wide.[162] What is worth noting, however, is how careful the United States Federal Government was *not* to suggest that Provisional Measures were not binding.[163] Therefore, we do not think that even in that case the United States wanted to assert that Provisional Measures lack legal significance.

> In *Breard*, in the course of the oral proceedings before this Court, the United States did not challenge the Court's power under Art. 41 of the Statute. Instead, it argued that under the given circumstances the adoption of Provisional Measures would be inappropriate. Thus, the agent for the United States emphasised that "the indication of provisional measures is a matter of serious consequence" and was of "potentially far-reaching consequences."[164]
>
> What happened subsequently in the course of the "implementation" of the Order was a combination of insufficient and contravening action on the part of various actors. As Professor L. Henkin described it,
>
> > "[i]f the Order of the Court was mandatory and created treaty obligations for the United States, it was law for all the parties in the Breard drama who, in fact or in effect, represented the United States. Secretary Albright heard the voice of the International Court and acted upon it. But the Solicitor General seemed to be under the impression that the Order of the Court was not addressed to him (or that he was not bound by it). The Supreme Court was also perhaps under the impression that the ICJ Order was not addressed to it, that it was not bound by it, or that it had no responsibility (and no means) to honor it. The Department of Justice did not take other measures to obtain compliance by the state of Virginia with the treaty obligation of the United States to stay the execution. Governor Gilmore seemed to be under the impression that the International Court of Justice was not addressing him; perhaps he did not think he was required to honor Secretary Albright's request."[165]
>
> As in the present case, the Governor in charge made no effort to implement the Order of the Court. On the contrary, he intentionally refrained from doing so, arguing:
>
> > "Should the International Court of Justice resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the

> case, to then carry out the jury's sentence despite the rulings [of] the International Court."[166]

Thus, the Governor not only refrained from

> "tak[ing] all measures ... to ensure that Breard [was] not executed",

as requested by the Court[167], but acted in such a way as to make the relief sought by Paraguay impossible. It is a matter of common sense that such conduct is unacceptable. Besides being illegal, it contradicts every sense of justice and fairness. The Governor's action is attributable to the United States, since under international law a federal State is responsible for actions of its political sub-divisions.[168]

Moreover, it was not only the Governor himself who failed to pay due regard to the Order of this Court. The Federal Government as well refrained from taking the necessary measures; it acted only half-heartedly, by simultaneously appealing to the Governor of Virginia to halt the execution and, on the other hand, in an *amicus curiae* brief advising the U.S. Supreme Court not to intervene.[169]

4.164 In this *amicus curiae* brief, both the Department of Justice and the State Department expressed a preference for the non-binding character of Provisional Measures referring to the scholarly discussion on this issue. In the *amicus curiae* brief as well as in the letter of Secretary of State Albright to the Governor of Virginia, Gilmore, the focus was on the special features of the specific Order at stake, concluding that "measures at its disposal" left a broad discretion to the United States on the action to be taken, to the effect that the attempt by the Federal Government to persuade the Governor of Virginia would be sufficient in this regard - a conclusion as untenable in the *Breard* Case as in the case at hand. The very fact that the Department of State did take certain - though entirely inadequate - steps provides evidence that the United States acknowledged the legal significance of this Court's Order. On the other hand, the Federal Government misinterpreted both the scope of the obligation and its addressees. Thus, in her letter to the Governor of Virginia, Secretary of State Albright wrote, *inter alia*:

> "The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. *Using non-binding language*, the Court said that the United States should `take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.'"[170]

4.165 In the present Case, less than a year later, the Solicitor General of the United States took the unequivocal view that the Court's Orders on Provisional Measures are not binding, irrespective of the wording of a specific Order.[171]

b) The legal obligations arising from the Order of the Court of 3 March 1999

4.166 The Order on Provisional Measures issued on 3 March 1999 imposed an unconditional obligation on the United States not to execute Walter LaGrand pending the final decision of this Court. Even though the precise scope of the obligations stemming from an Order of the Court may vary from case to case, and may grant the addressees a more or less broad margin of appreciation, in our specific case, the Order was worded in clear and unequivocal terms:

> "The Court... indicates the following Provisional Measures: (a) The United States of America should *take all measures at its disposal to ensure that Walter LaGrand is not executed* pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order, ..."[172]

Thus, the operative part of the Order contains no ambiguity or discretion whatsoever: its objective could not be clearer, that is, the execution of Walter LaGrand was not to take place pending a final decision. Neither was the scope of the obligation, i.e. that all United States authorities in charge were to take the necessary steps within their respective competence to ensure that this objective was achieved. The discretion left to the United States concerned exclusively the selection of the instruments of municipal law necessary to reach the result. The formula "take all measures at its disposal" - far from weakening the obligation imposed by the Order - embodies a comprehensive duty directed at all State organs to make sure that Walter LaGrand was not executed.

4.167 In an earlier paragraph of the same Order, the Court had already emphasised:

> "Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be;
> whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings;
> whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona;
> whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor;
> whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;"[173]

> Thus, what the Order did was not simply to ask the United States to take into consideration whether it might be feasible to stay Walter LaGrand's execution, or that it might be fairer towards Germany to refrain from measures affecting the subject-matter of the proceedings. Rather, without leaving any room for doubts or opposing interpretations, it ordered the United States to take *all measures* to ensure that Walter LaGrand was not executed pending a final decision. Moreover, the Court made it clear that this obligation was not only incumbent on the Federal Government, but on all organs exercising public authority relevant in our context. The Order thus cut off any kind of "federal State excuse" right from the beginning. It emphasised not only that unlawful acts of all organs of a State, regardless of their status within national law, can entail the international responsibility of that State, a point self-evident for every international lawyer, but over and above that, it determined clearly how and by whom the Order was to be implemented, that is, by the Governor of Arizona, and stressed that the latter was obliged to act in conformity with the international undertakings of the United States. Consequently, it was not only the Federal Government which was obliged to take all measures to halt the execution. The Order was directed at the United States as a whole, at all its organs and authorities, and in particular at the Governor of Arizona.

c) The reaction to the Order on the part of the United States

4.168 In its Order of 3 March 1999, the International Court of Justice indicated the following provisional measures:

> "(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."[174]

In a letter to the U.S. Supreme Court concerning the Case brought by Germany on 3 March 1999,[175] the Solicitor General was, this time, unequivocal in his rejection of the binding character of Orders issued by the International Court of Justice. Before the Supreme Court, he argued that

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief ... ."[176]

4.169 In a letter to the International Court of Justice dated 8 March 1999, the Legal Counselor of the Embassy of the United States at The Hague, Mr. Allen S. Weiner, informed the Court of the measures taken in implementation of this

Order. According to this letter, the only step that the U.S. Government had undertaken was that

> "[o]n March 3, 1999, the Department of State transmitted to the Governor of Arizona a copy of the Court's Order of the same day."

What is immediately apparent is that this action only refers to the second of the measures indicated by the Court, e.g. the obligation to transmit the Order to the Governor of Arizona. At first sight it seems that the United States did comply with this part of the Order. However, what the State Department actually did was strictly limited to the purely technical process of transmitting the text of the Order to the Governor of Arizona. It undertook nothing at all to support the implementation of the Order - for instance, by adding a letter requesting the Governor to give effect to the Order of the Court or other similar steps. Rather, the State Department refrained from taking any position with regard to the substance of the matter. Hence, the speaker of the State Department, Mr. Foley, when asked at a press conference on 3 March 1999 whether or not the State Department had taken a position other than simply transmitting the documents, was undoubtedly correct in stating:

> "No, we have not. We simply transmitted the documents."[177]

4.170 Within the United States legal system, the opinion of the State Department on questions of international law is of great importance. Thus, in the view of the U.S. Supreme Court

> "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[178]

Seen in conjunction with the State Department's position in the *Breard* Case in 1998, where it qualified a virtually identical Order as "non-binding" and affirmed a right of the Commonwealth of Virginia to proceed with the execution notwithstanding an Order of the International Court of Justice,[179] the uncommented transmittal of the Order in the present Case could be regarded almost as an encouragement to the Governor of Arizona to go forward and execute Walter LaGrand. Thus, it is highly disputable whether the "neutral" attitude assumed by the State Department vis-à-vis the Order of the Court of 3 March 1999 deserves to be qualified as a measure of implementation at all, even with regard to the obligation laid down in lit. (b) of the Provisional Measures.

4.171 On the other hand, it is undisputed that the United States adopted no measures at all to implement lit. (a) of the Provisional Measures indicated by the Court. Thus, it engaged in no activities whatsoever to meet its obligation to take

> "all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."

On the contrary, it advised the Supreme Court not to intervene in the case.

If one takes a closer look at the events in the immediate aftermath of the issuance of the Provisional Measures, one arrives at an even more negative result: Leaving aside the whole range of political and legal means at the disposal of the Government of the United States to halt the execution - not used in the present Case and described elsewhere in the present Memorial[180] -, what the letter of the United States to the International Court of 8 March 1999 avoided to mention was a number of active steps, attributable to the United States, which paved the way for the execution of Walter LaGrand. Thus, instead of implementing the Order, organs of the United States, quite on the contrary, took active steps in order to deprive the Order of its object. The assessment by Professor L. Henkin on the *Breard* Case,

> "[i]ndeed, contrary to the Order of the International Court, `the United States' took some measures that helped assure that the execution would take place",[181]

is even more valid in the case of Walter LaGrand, since here the United States did not even consider it necessary to formally request the Governor that she exercise her power to stay the execution, as had been done a year before by the Secretary of State in the *Breard* Case.

4.172 Thus, the U.S. Government actively assisted in bringing about the execution of Walter LaGrand in blatant disregard of the Order of the Court in a threefold way:

(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the U.S. Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court's Order to the same effect. In the course of these proceedings - and in full knowledge of the Order of the International Court - the Office of the Solicitor General, a section of the U.S. Department of Justice - in a letter to the Supreme Court argued once again[182] that:

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."[183]

This statement of a high-ranking official of the Federal Government not only blatantly disregarded the Order of the Court in itself but also had a direct influence on the decision of the Supreme Court.

A further conclusion to be drawn from the mere existence of the letter of the Solicitor General of 3 March 1999 is that the allegation in the U.S. letter to the International Court of Justice of 8 March 1999 to the effect that

> "[i]n view of the extremely late hour of the receipt of the Court's Order, no further steps were feasible"

is unconvincing, to put it mildly. If the U.S. Department of Justice found the time to express in writing its views on the legal consequences arising from the Provisional Measures of the Court, why was it not feasible for the Department of State to do the same? If one considers that the Department of State was the first U.S. Government agency learning of the Order of the Court - and thus in a position to act under less time pressure than any other U.S. governmental body - it is quite obvious that the reason for the omission of any positive steps on the part of the State Department was not that the Department was not able to act but rather that it was simply not willing to do so.

4.173 (2) In the following, the U.S. Supreme Court - an agency of the United States - refused by a majority vote to order that the execution be stayed.[184] In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures. What deserves special attention is that, leaving aside the two dissenting Justices, two Justices of the Supreme Court expressly based their approval of the decision on the position taken by the Solicitor General in his letter of the same day. These Justices placed on record that

> "In exercising my discretion, I have taken into consideration the position of the Solicitor General on behalf of the United States."[185]

Thus, the decisive influence of the official position of the U.S. executive branch on the outcome of the Supreme Court proceedings becomes visible.

Further, in not making use of its discretionary power to stay the execution of Walter LaGrand, the U.S. Supreme Court, too, disregarded the Order of the International Court and thus contributed to the breach of a respective international legal obligation.

4.174 (3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency - for the first time in the history of this institution - had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case. Thus, legally speaking, the Governor was not subjected to any kind of legal pressure to go forward with the execution - rather to the contrary. Therefore, it is obvious that the Governor did not take all measures at her disposal - to use the wording of the Court's

Order - to meet her legal obligations vis-à-vis the Provisional Measures indicated by the Court. On the contrary, in full awareness of the Court's Order, the Governor decided to disregard the Provisional Measures indicated by the International Court of Justice.

4.175 In summary, the activities of the United States relating to the Court's Order of 3 March 1999 were manifestly contrary to what the Court had requested in its legally binding decision. Far from taking all measures at their disposal to ensure that Walter LaGrand was not executed, U.S. State organs took several steps that led to exactly the opposite result, *i.e.* the execution of Walter LaGrand. Thus, the United States acted in clear violation of the Order of the Court.

IV. Conclusion

4.176 The United States has breached its obligation to inform German nationals arrested and detained of the rights under Art. 36 (1) (b) of the Vienna Convention, in particular their right to notification of the German Consulate. By not fulfilling the obligation to inform the German Consulate according to Art. 36 (1) (b), the United States further violated the right of consular access provided for in Art. 36 (1) (a) and (c) of the Vienna Convention.

> Furthermore, the United States has violated Article 36 (2) of the Vienna Convention by not providing effective remedies against the violation of the requirements of Art. 36 (1) (b) of the Vienna Convention and by ultimately executing the LaGrand brothers.
>
> In addition, the United States has violated the individual right granted to the LaGrand brothers by Art. 36 (1) (b) of the Vienna Convention. According to the rules of international law on diplomatic protection, this conduct is in breach of the rights of Germany as the State of which the LaGrands were nationals.
>
> Finally, by executing Walter LaGrand, the United States violated the binding Order of this Court of 3 March 1999.

Part Five
Other conditions of the illegality of United States conduct

I. Attribution to the United States of the breaches of international legal obligations

5.01 It is a fundamental and well-established principle of international law that every internationally wrongful act of a State entails the international responsibility of that State. Commenting on Article 1 of its draft on State responsibility which embodies this very principle, the International Law Commission (ILC) rightly pointed out that we are here in the presence of

> "one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law."[186]

The first precondition for the rules of State responsibility to come into operation in a given case is thus the existence of certain "acts of the State".

5.02 In the present Case, the acts giving rise to the German claims, described and assessed at length in Part Four of this Memorial, stem from a variety of governmental bodies within the United States, including in particular the authorities of the State of Arizona which first failed to advise the LaGrand brothers about their rights under the Vienna Convention and later declined to give effect to the Court's Order of 3 March 1999. Furthermore, various United States courts - both at the state as well as at the federal level - refused to comply with the obligations laid down in the Vienna Convention and the Court's Order on provisional measures. Finally, actions and omissions on the part of the legislative and executive branches of the U.S. Federal Government, among them certain conduct of the Solicitor General, contributed to the internationally wrongful acts which are at stake in the present case. All this has been amply demonstrated above.[187]

5.03 As this Court has recently reconfirmed in its Advisory Opinion of 29 April 1999 on the *Difference Relating To Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it is a well-established rule of customary international law that the conduct of any organ of a State must be regarded as an act of that State.[188] In so holding, the Court was able to rely not only on its own established jurisprudence and that of its predecessor, but also on a great number of other international awards, the more or less unanimous position in legal doctrine and finally, codification drafts of both private and official nature. With regard to this latter source, the Court[189] makes an express reference to Article 6 of the draft on State responsibility adopted by the International Law Commission on first reading in 1996,[190] which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or internal character, and whether it holds a superior or a subordinated position in the organization of the State."[191]

Article 7 (1) of the same draft further specifies this very categorical and comprehensive rule with regard to the responsibility of a federal State for the conduct of organs of its component units:

> "1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question."[192]

The changes made on the 1996 text of these articles in the course of the second reading of the draft articles which is currently underway[193] are merely designed to make them

> "more user-friendly, more streamlined as well as more precise, and have freed them from considerable dead weight."[194]

No substantive changes whatsoever are intended.

5.04 The commentaries of the International Law Commission with their extensive analysis of State practice, international jurisprudence and doctrine leave no doubt that the substance of the draft articles just referred to reflects well-established rules of customary international law.[195]

5.05 This is particularly true for the status of courts, which are to be regarded as organs of a State just like organs of the legislative or executive branch. With particular attention to legislative and judicial organs, the careful analysis undertaken by the International Law Commission in its commentary on [1996] draft article 6 arrives at the conclusion that in this regard there is no need to appeal to ideas of progressive development of international law because

> "[t]oday the opinion that the respective positions of the different branches of government are important only in constitutional law and of no consequence whatsoever in international law, which regards the State as a single entity, is firmly rooted in international judicial decisions, the practice of States and the literature of international law."[196]

Concerning this point, reference is to be made to the established jurisprudence of this Court and its predecessor, the Permanent Court of International Justice, which stated in its Judgment in the *Case concerning Certain German Interests in Polish Upper Silesia*:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and *constitute the activities of States*, in the same manner as do *legal decisions* or administrative measures."[197]

This jurisprudence has since been confirmed by both judicial bodies in a whole series of judgments and advisory opinions.[198]

5.06 Likewise, there exists practical unanimity with regard to the principle that a federal State is internationally responsible for the conduct of the organs of its component states. More specifically, a consistent series of judicial decisions - beginning with the *Monteijo* Award rendered on 26 July 1875 by a U.S.-Colombian arbitral tribunal - has affirmed that this principle also applies in situations in which its internal law (allegedly) does not provide the federal State with the means of compelling the organs of the component units to conform to the deferral State's international obligations. In the words of the Umpire in the *Monteijo* case, Robert Bunch,

> "it will probably be said that by the constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the States, and that it can not in justice be made accountable for acts which it has not the power, under the fundamental charter of the republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to a treaty, not the treaty to the laws ... It may seem at first sight unfair to make the federal power .... responsible ... for events over which they have no control ... but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs, it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and can not complain if the latter now and then make themselves felt."[199]

The principle thus forcefully stated in the *Monteijo* Award has been reaffirmed in many decisions since[200] and the essence of the argumentation put forward by the Umpire in this early case still holds true after almost 125 years.

5.07 Summing up, there exists hardly any other rule of international law which is so undisputed as the rule that the position of an organ of the State in the organisation of that State does not enter into consideration for the purpose of attributing the organ's conduct to the State - that is to say, of regarding such conduct as an "act of the State" under international law.[201] Therefore, whatever organ has acted or failed to act in the present case in breach of the international legal obligations of the United States, such acts and omissions are all attributable to the United States and thus give rise to the international responsibility of the United States.

II. Irrelevance of the domestic law of the United States

5.08 The legal rule governing the relationship between the international legal obligations of a State and its municipal law in the context of the law of State responsibility is clear and simple: Whenever a State is in breach of its international legal obligations, it can under no circumstances invoke its internal law in order to justify such non-compliance.

Despite the difference of positions taken in the theoretical controversy about the relationship between municipal law and international law in general, there exists virtually an identity of views on this particular aspect. Such unanimous opinion has been expressed by Professor I. Brownlie in exemplary terms:

> "The law in this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer

> to a claim against it for an alleged breach of its obligations under international law."[202]

The fundamental character of this principle and the comprehensive scope of its field of application was already emphasised more than 40 years ago by Sir Gerald Fitzmaurice:

> "The principle that a State cannot plead the provisions (or deficiencies) of .... its constitution as a ground for the non-observance of its international obligations ... [This] is indeed one of the great principles of international law, informing the whole system and applying to every branch of it."[203]

This issue was commented upon in *Oppenheim's International Law* as follows:

> "[I]f a state's internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international law. It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law was defective or contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement which in the circumstances cannot be met or severe or political difficulties which would be caused. The obligation is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations."[204]

Finally, the *Restatement of the Foreign Relations Law of the United States* confirms that

> "[a] state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation".[205]

5.09 The legal rules thus described are deeply rooted in international practice. Starting with the *Alabama* arbitration,[206] international judicial bodies, among them the International Court of Justice and its predecessor, the Permanent Court of International Justice, have established a consistent jurisprudence on this point.[207] For example, in the *Free Zones* case the Permanent Court of International Justice observed:

> "[I]t is certain that France cannot rely on her own legislation to limit the scope of her international legal obligations ... ."[208]

The Permanent Court left no doubt that the same principle applies when constitutional provisions are at stake. Thus, in its 1932 Advisory Opinion in the case concerning *Polish Nationals in Danzig* the Court held:

> "It should ... be observed that ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[209]

Up to the present day, this jurisprudence has undergone no modifications whatsoever; rather on the contrary, it has been consistently reaffirmed ever since.[210]

5.10 As an emanation of the elementary and universally agreed maxim of *pacta sunt servanda* - rightly described by the International Law Commission as

> "the fundamental principle of the law of treaties",[211]

our principle has also been included in the Vienna Convention on the Law of Treaties. Article 27 (1) of this Convention reads as follows:

> "A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty."

This provision does not embody an innovative concept but restates a rule deeply rooted in general principles of international law, universally recognised at the time of the drafting of the Convention.[212] Thus, the fact that the United States has not yet ratified the Vienna Convention on the Law of Treaties cannot release the Respondent from the duty to observe the substance of this provision. In this respect the *Restatement of the Foreign Relations Law of the United States* rightly points out that

> "[w]hen international law is not given effect in the United States because of constitutional limitations or supervening domestic law, the international obligations of the United States remain and the United States may be in default."[213]

5.11 In view of such overwhelming evidence of the existence of a respective rule in customary international law, it is not surprising that the International Law Commission included the principle in Article 4 of its draft on State responsibility, which provides:

> "An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law."[214]

After having provided a comprehensive analysis of the entire range of practice, jurisprudence and doctrine, the Commentary of the Commission on this article could only conclude:

> "Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject."[215]

Thus, the domestic law of the United States and its application in the present case by certain organs both at the federal and state level, in particular the doctrine of procedural default, or certain restraints which the U.S. federal system allegedly imposes on the capacity of the United States to act in conformity with its international legal obligations, do not constitute circumstances precluding the wrongfulness under international law of the conduct of the United States described in detail in Part Four of the present Memorial.

III. No necessity of fault on the part of the organs of the United States

5.12 A further question to be considered at this point is whether the responsibility of the United States for the breaches of international law set out earlier is conditional upon the presence of a subjective element, *i.e.*, fault on the part of the State organs involved. This subjective element would range from malicious intent (*dolus*) to culpable negligence. While certain authors still defend this theory, particularly for the case of violations of international law taking the form of omissions, it is definitely on the retreat. The dominant view today adopts a theory of objective responsibility, under which any action or omission which produces a result that is a breach of a legal obligation gives rise to responsibility irrespective of any considerations about the mental or psychological side of things.[216]

5.13 As is well known, the International Law Commission in its project on State responsibility bases itself on such an objective approach. The only elements of an internationally wrongful act which the Commission recognises in its draft article 3[217] are (1) that a certain conduct of a State consisting of an action or omission is attributable to that State under international law, and (2) that such conduct constitutes a(n objective) breach of an international obligation of the State. In choosing this approach, the ILC does not exclude that in certain specific instances an additional subjective element might be required in order to "complete" the preconditions of international responsibility. However, for the Commission, the question of when responsibility presupposes fault, such as inadvertence or negligence, on the part of organs of the State is to be answered through the interpretation of, the primary rules breached. According to what nowadays is probably the leading view, performance of the primary rules in question will be subjected to a standard of due diligence, which "objectivises", as it were, the subjective element of fault.[218]

5.14 In the context of the present case, the issue of objective versus subjective responsibility is obviously relevant but does not pose any problems for the case

of Germany. If the Court followed the approach chosen by the International Law Commission, it would determine the presence of the two objective elements of an internationally wrongful acts - breach and attribution - in the conduct of the United States, and that would be the end of the matter. If, additionally, the Court decided to inquire whether the breach of Art. 36 (1) of the Consular Convention by way of omission was due to negligence, or a lack of due diligence, on the part of the organs of the State of Arizona, the result would undoubtedly be affirmative.

> Particularly in the light of the admission during the proceedings before the Executive Board of Clemency of the State of Arizona on 23 February 1999 by State Attorney Peasley that the authorities of the State of Arizona had been aware since 1982, that is, from the outset, that Karl and Walter LaGrand were German nationals, there can be no question that such conduct did not meet any imaginable standard of due diligence in the application of Art. 36 (1) of the Vienna Convention. It appears that the Arizona authorities simply did not care about their respective international obligations. Thus, we are in presence of gross negligence, to put it mildly.
>
> As already emphasised earlier, it was the emergence of these shocking facts that made Germany decide to change its course from pursuing the avenue of moral and political appeals for mercy to bringing this case before the world's highest Jurisdiction.

5.15 As to the later conduct of U.S. executive authorities and courts, both at the Federal and State level, leading to the breach of Art. 36 (2) of the Vienna Convention and the non-abidance with the International Court's Order on Provisional Measures, there can be no doubt that all U.S. State organs engaged in the case were fully aware that what they did or did not do involved issues of international law, indeed international legal obligations upon the United States. If they happened to commit errors regarding the law, this provides no justification or excuse.[219] If they committed the breaches in cognisance of the illegality of their acts, the situation is even more serious.

IV. Exhaustion of local remedies

5.16 The application of the rule according to which the exercise of diplomatic protection by a State presupposes that the national concerned has exhausted all legal remedies available to him or her in the State which is alleged to be the author of the injury, has no place in instances of direct injury to a State.[220] Therefore, this rule does not apply to the breaches of international law by the United States committed directly vis-à-vis Germany, as described in Part Two Chapters I and III of the present Memorial.

5.17 The local remedies rule, a "well-known principle", as J. Crawford calls it in his second report on State responsibility,[221] is generally accepted[222] and has also been embodied in the draft of the International Law Commission.[223]

The individual rights of Karl and Walter LaGrand violated by the United States and vindicated before this Court by Germany by way of diplomatic protection, have been exposed at length in Chapter II of Part Four of the present Memorial. It is obvious that both Karl and Walter LaGrand exhausted all remedies at their disposal within the judicial system of the United States, even including proceedings before the Executive Board of Clemency of the State of Arizona just shortly before their execution.[224] Hence, there is no need in the present case to further examine the exact scope of the local remedies rule and the various conditions applying to it.

In sum, in the present case, the local remedies rule does not constitute a bar to the invocation of the responsibility of United States in the present case.

V. Conclusion

5.18 All (further) prerequisites of the international responsibility of the United States exist in the present case:

The acts which led to the breach of the international obligations at stake are all attributable to the United States.

Precepts and doctrines of the domestic law of the United States as applied by its competent authorities in the case of the LaGrands may not be invoked as circumstances precluding the wrongfulness of the breaches committed.

Further, whether one follows an objective or a subjective theory of State responsibility (with regard to the element of intent or negligence), the responsibility of the United States in the present case is unquestionable.

Finally, to the extent necessary within the present context, the local remedies available to the LaGrand brothers were all exhausted.

Part Six
Consequences of the internationally wrongful acts of the United States

6.01 Germany's Memorial now turns to the question of the remedies which it requests from the United States. Since the LaGrand brothers have both been executed, their fate cannot be corrected. The Respondent being a close friend and ally of Germany, the only objective which Germany pursues in referring this case to the International Court of Justice is to secure that in the future German nationals will not be arrested and detained without being informed of their right to receive consular assistance. For this reason, Germany will not pursue further any remedies which would go beyond this objective. For the same reason, what Germany does request of the Court is that it pronounce the failure of the United States to abide by its respective commitments under

international law, and the duty of the United States to provide Germany with guarantees that it will not repeat such illegal conduct in the future.

6.02 In the following, Germany will set out its claims in detail. First, it will address preliminary issues such as the applicability of the general rules of State responsibility. In addition, it will specify the two remedies it is seeking, namely:

> (1) the pronouncement of the wrongfulness of the United States conduct in the present case;
>
> (2) a guarantee that the United States will not repeat its illegal acts and ensure the respect of its obligations towards Germany in the future.
>
> Second, Germany will show that it has been injured by the conduct of the United States and that therefore it has the right to invoke the international responsibility of the Respondent. Third, Germany will demonstrate that the prerequisites for the remedies it seeks are present. Finally, Germany will argue that no circumstances exist which would prevent or alleviate the duty of the United States to provide satisfaction and guarantee the non-repetition of its illegal conduct.

I. Preliminary issues

6.03 Under this heading, Germany will argue for the applicability of the rules of general international law on State responsibility, as embodied in the International Law Commission's draft articles, to the present case. Further, it will explain the modifications of its original claims against the United States.

1. Applicability of the general rules of State responsibility

6.04 First, Germany will argue that the general régime of State responsibility applies to the present Case. It is led to do so because in the *Breard* Case,[225] Counsel for the Respondent raised doubts regarding whether violations of the law on diplomatic and consular relations entail the same legal consequences as violations of other rules of international law, namely the duty to repair the damage. Counsel argued that the Vienna Convention of 1963 somehow excluded the application of the general remedies of State responsibility.

6.05 Such a view is based on a profound misunderstanding of the jurisprudence of the International Court of Justice. The question of remedies for violations of Art. 36 of the Vienna Convention is governed by the customary international law on State responsibility because, first, these rules are applicable even if this is not expressly foreseen in the treaty whose violation gave rise to the case, and, second, the Vienna Convention does not constitute a self-contained régime, that is, it does not embody a special régime of consequences and enforcement mechanisms in case of its violation, to the exclusion of the general rules.

6.06 With regard to the first point, Germany submits that the general rules of State responsibility are applicable to all kinds of internationally wrongful acts unless expressly stipulated otherwise. This derives from the very nature of the rules on State responsibility as "secondary rules" which are to be applied whenever "primary" obligations have not been observed. Therefore, the circumstance that Art. 36 of the Vienna Convention does not explicitly mention a remedy in case of its violation is not a valid argument against the applicability of the general régime of State responsibility. To state otherwise would mean that it would be necessary for each and every treaty or convention to reiterate the rules on State responsibility. In the *Hostages* Case, the Unites States was quite correct in arguing that

> "[t]he Court's jurisprudence establishes that `the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.' (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9,* p. 21; see also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 174, at p. 184.) Indeed, in the *Corfu Channel* case *(Merits, Judgment, I.C.J. Reports 1949,* p. 4 at pp. 23-24), this Court stated that it follows from the establishment of the responsibility of a State for the breach of an international obligation `that compensation is due.'"[226]

The ILC Draft on State responsibility (on whose authoritative character see *infra*[227]) maintains the same fundamental principle in its very first article:

> "Every internationally wrongful act of a State entails the international responsibility of that State. "[228]

Art. 17 of the same Draft further specifies:

> "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation."[229]

6.07 This position is also in line with the dominant view in U.S. doctrine. Thus, according to the *Restatement of the Foreign Relations Law of the United States*,

> "[a] state whose national has suffered injury ... has, as against the state responsible for the injury, the remedies generally available between states for violation of customary law ... *as well as* any special remedies provided by any international agreement applicable between the two states."[230]

6.08 The applicability of the general rules of State responsibility to the Vienna Convention on Consular Relations was also implied in the process of drafting the 1963 Vienna Convention by the International Law Commission. The Commission apparently considered this to be so clearly established that it did not have to be mentioned in the text of the Convention. According to the Summary Records of the Commission, Grigory Tunkin remarked:

> "If the law of the receiving State concerning the matter under discussion conflicted with international law, that State's international responsibility might well be engaged, he thought, however, that that problem exceeded the scope of the Commission's draft."[231]

Therefore, the rules of State responsibility apply to the present case just as they would to any other violation of any other rule of international law.

6.09 Second, one might possibly argue that the general régime of State responsibility is not applicable to treaties or conventions which are truly and fully self-contained - provided that such treaties or conventions exist at all (the European Union Treaty possibly being a case in point). However that may be, the Vienna Convention on Consular Relations, and particularly its Art. 36, does certainly not constitute such a self-contained régime.

6.10 Germany's argument is fully in line with the Judgment of the Court in the *Hostages* Case. In that Case, the Court described the remedies available under diplomatic law to deal with abuses of the diplomatic function, namely the expulsion of diplomats by declaring them *persona non grata*[232] or the breaking-off of diplomatic relations altogether[233]. The Court went on to say:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."[234]

In the following, the Court stated that Iran had not had recourse to such remedies provided by the Convention itself but had instead resorted to illegal coercive action against the United States Embassy.

6.11 The first observation to be made about this *dictum* is that it refers to the abuse of diplomatic and consular rights and immunities, and not to the legitimate use of rights accorded by Art. 36 (1) of the Vienna Convention on Consular Relations to foreign nationals. Regarding illicit activities by members of diplomatic or consular missions, the Court explained,

> "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."[235]

However, what is at issue in the present Case are not "illicit activities by members of diplomatic or consular missions" but rather the safeguarding of the rights accorded by Art. 36 of the Vienna Convention to individual foreigners and the sending State. In the event of violations of these rights, the Convention does not provide any specific remedies of its own but remains coupled with, and relies on, the rules of general international law on State responsibility.

6.12 Even with regard to the rights accorded to diplomats, the Court qualifies its earlier statement as follows:

> "Naturally, the observance of this principle does not mean - and this the Applicant Government expressly acknowledges - that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime."[236]

Thus, the Court recognised that the "self-contained" nature of the 1961 and 1963 Vienna Conventions is limited even as far as remedies against violations by diplomats or consuls are concerned. For the reasons stated here, this must be even more so concerning rights provided by the Convention unrelated to the privileges and obligations of foreign diplomats and consuls, such as Art. 36 of the 1963 Convention.

6.13 What the Court intended in the *Hostages* Case was the strengthening of international law, not its weakening by facilitating the disregard of treaty provisions through the absence of sanctions. Nowhere in the Judgment does the Court exclude a demand for reparation of violations of diplomatic law. Exactly the opposite: The Court decided that the Republic of Iran was

> "under an obligation to make reparation to the Government of the United States America for the injury caused to the latter".[237]

In the reasoning of the Court, the direct link between violations of consular and diplomatic law and international responsibility becomes even clearer:

> "[T]he Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations ... has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States."[238]

> Germany in no way wishes to compare the Iranian behaviour in the hostage crisis with that of the United States towards the LaGrand brothers. However, the legal rationale of the passage of the Judgment just quoted is eminently applicable to our present case. The *Hostages* Case dealt with a flagrant breach of fundamental rules of diplomatic and consular law disguised as countermeasures, a disguise which the Court could not, and did not, accept. The present Case concerns a legitimate demand for correct and comprehensive fulfilment by the United States of its obligations under Art. 36 of the Vienna Convention on Consular Relations. It cannot have been the intention of the framers of the Convention to deprive this treaty of the protection accorded by the general rules of State responsibility. Thus, the *Hostages* Case, and the remedies granted to the United States by the respective Judgment of this Court, confirm rather than contradict Germany's demand for reparation for the violation of the Vienna Convention.

6.14 In the context of both the Breard litigation and the present Case, instead of applying these universally recognised principles, the United States seems to maintain that if a treaty does not expressly provide for it, no reparation is due in case of its breach.[239] Such a view turns the concept of "self-contained régimes" - denoting treaty instruments comprising their own, custom-made set of rules on responsibility - on its head, allowing the violation of international law free of cost. It would deprive most international obligations of any remedy and would leave the largest part of international law helpless in cases of breach. As President Schwebel has recently stated in his Declaration appended to the unanimous Order of the Court demanding a stay of execution of a national of Paraguay:

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required."[240]

2. The ILC draft articles as expression of the applicable law

6.15 As to the applicable law, Germany considers the International Law Commission's draft articles on State responsibility as the most authoritative statement of customary international law on the matter.[241] This is in line with the recent jurisprudence of the Court. In its Judgment in the *Case concerning the Gabcíkovo-Nagymaros Project*, the Court applied the draft article on state of necessity as an expression of customary law[242] and later also referred to the draft provisions on countermeasures.[243] In its Advisory Opinion on the *Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights* of 29 April 1999, the Court applied draft article 6 entitled "Irrelevance of the position of the organ in the organization of the State"[244] as reflecting customary law.[245]

> As President Schwebel recently explained in an address to the International Law Commission:

> "There were indeed instances in which the Commission had produced draft conventions later adopted by a diplomatic conference - or even draft conventions not yet so adopted - on which the Court had thereafter repeatedly relied in its Judgments. The most notable example was the draft convention on State responsibility. ... On more than one occasion the Court had recognized those draft articles as an authoritative statement of the law, sometimes even citing the commentaries thereto."[246]

6.16 Specifically regarding remedies, the International Tribunal for the Law of the Sea, in its Judgment in *The M/V "Saiga" (No. 2)* Case, referred to the draft articles and stated that

> "[r]eparation may be in the form of `restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination' (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility)."[247]

Although the draft articles on State responsibility may not reflect existing law in each and every detail, they constitute the most complete body of rules of the matter, elaborated with the broadest participation of the international community to date. In its comments of October 1997, the United States has been rather critical of the 1996 draft as a whole.[248] With regard to the provisions on reparation, however, the United States took the view that they were not too strict but, on the contrary, not strict enough.[249] However this may be with regard to detail, in the opinion of Germany the ILC draft articles on reparation do appear to furnish a basis for legal argumentation that should be acceptable to both parties in the present Case. As a matter of course, in relying on these provisions, Germany will provide supplementary evidence of customary international law on the issues involved.[250]

3. The international responsibility of the United States and Germany's original claims

6.17 The internationally wrongful acts of the United States of America entail its international responsibility towards Germany. As the Permanent Court of International Justice has explained:

> "This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States."[251]

The same view was taken in the ILC's first draft article already cited.[252]

6.18 As a consequence of the breaches by the United States of its obligations under the Vienna Convention on Consular Relations and from a binding Order of the Court, it is incumbent on the United States to provide full reparation.

That reparation constitutes the consequence of any internationally wrongful act was affirmed by the Permanent Court of International Justice in its pronouncement in the *Factory at Chorzów* Case:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[253]

In a later stage of the same case, the Permanent Court used the following classic formula in order to clarify that the appropriate juridical remedy for a breach of international law is the wiping out of all of its consequences:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[254]

This phrase is still regarded as an expression of customary international law on the matter, as evidenced, in the first place, by the jurisprudence of the present Court.[255]

6.19 According to these principles, Germany would be entitled to *restitutio in integrum*, that is, to the re-establishment of the situation that existed before the detention of, proceedings against, and conviction and sentencing of Walter LaGrand, just as Germany requested in Paragraph 15 of its Application of 2 March 1999. In the following brief remarks, Germany will explain why it originally asked for such restitution even though it will not further pursue its respective claim.

6.20 The remedy of revocation of a national judgment in breach of international law is not at all alien to State responsibility. First, domestic court decisions constitute acts of the State just as acts emanating from the executive or legislative branches of government. As explained above,[0] under the law of State responsibility, a State is responsible for all acts which are attributable to its organs. Second, judicial acts of States are subjected to the same régime of State responsibility as all other acts of States. In its Commentary to the draft articles on State responsibility the ILC states that

> "[h]ypotheses of juridical restitution include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, *the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or the property of a foreigner* or the nullification of a treaty."[1]

6.21 This is in line with the general position of the draft articles to treat all acts of States alike, whatever their nature and irrespective of the branch of government from which they emanate. Third, a claim for annulment of a judgment of a domestic court would also be supported by international practice. For instance, in the *Martini* Case, an arbitral tribunal decided that the Venezuelan Government was under an obligation to annul the judgment of a domestic court in violation of treaty obligations owed to Italy.[2] Further examples are to be seen in Articles 302 (3) and 305 of the Peace Treaty of Versailles of 28 June 1919, which provided for *restitutio in integrum* in the case of judgments of German courts retrospectively considered illegal.[3] In various other instances, States have concluded treaties establishing international tribunals in which they explicitly excluded reparation in the form of annulment of judicial decisions if such annulment was to cause complications within the national legal order. In the words of the International Law Commission:

> "The fact that States deem it necessary to agree expressly in order to prevent restitution measures from gravely affecting fundamental principles of municipal law seems to indicate that they believe that at the level of general international law a correct discharge of the author State's obligation must prevail over legal obstacles." [4]

6.22 But even if one considered international practice accepting *restitutio in integrum* in case of decisions of domestic courts as being somewhat inconclusive, the existence of a rule to the opposite, *i.e.*, of a rule unequivocally excluding this remedy in case of national judicial decisions, could not be maintained either. If this is so, however, there is no escaping the application of the general rule which demands the wiping out of all the consequences of an internationally wrongful act. The teachings of publicists confirm this view. For instance, Professor Brownlie states that

> "[t]o achieve the object of reparation, tribunals may give `legal restitution' in the form of a declaration that an offending treaty, or the relevant act of the executive, legislative *or judicial organs of the respondent State is a nullity in international law.*"[5]

And the *Restatement of the Foreign Relations Law of the United States* asserts that

> "[t]he obligation of a state to terminate a violation of international law may include discontinuance, revocation or

> cancellation of the act (whether legislative, administrative or judicial) that caused the violation."[6]

> Even authors reluctant to state that international law demands a declaration of nullity of domestic judgments in violation of international law maintain that the author State must endeavour to remove the material consequences arising out of the wrongful act by all means at its disposal and must prevent further damage, for instance by granting clemency.[7]

6.23 Whatever the state of the law may be in this regard, by the non-observance of the binding Order of the Court of 3 March 1999 the United States has made the return to the *status quo ante* impossible. The execution of a death sentence being irreversible, Walter LaGrand cannot stand for a new trial or a new sentencing hearing uninfected by the lack of consular advice. Therefore, Germany's submission aiming at the restoration of the *status quo ante* in the case of Walter La Grand is moot. On the other hand, it is the duty of the United States, and of the United States alone, to bear the consequences of such impossibility of *restitutio*. If and to the extent that Germany cannot provide pieces of evidence on the impact of the violation of Art. 36 of the Vienna Convention on the trial of the LaGrands, which could have been submitted if the brothers were still alive and able to testify on this matter, it is the United States which is required to bear the burden of proof.[8]

6.24 Turning from *restitutio in integrum* to reparation in the form of compensation,

> "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it"[9].

> Nevertheless, Germany does not wish to pursue its right to financial compensation, because its intention in lodging the present proceedings is to ensure that German nationals will be provided with adequate consular assistance in the future, and not to receive material reparation. Nothing stands in the way of such a decision on the part of the injured State. To refer to a recent precedent, in the *Case concerning the Rainbow Warrior Affair* between New Zealand and France the Arbitral Tribunal held as follows:

> > "The Tribunal ... considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations ... .
> >
> > New Zealand has not however requested the award of monetary compensation ... . The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights."[10]

6.25 All Germany requests is that the Respondent in the future respects the direct treaty rights of Germany as well as the rights of its nationals to consular advice.[11] Thus, Germany now limits its claims - and correspondingly its submissions - to requests for the pronouncement of the illegality and for assurances of non-repetition of such conduct in the future, and does not wish to pursue further its claims to financial compensation and an apology.

6.26 More specifically, Germany now requests the Court to pronounce (1) that the United States violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals; and (2) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts.

> In the following, Germany will specify these claims in necessary detail and will demonstrate that they are borne out both by the facts of the case and the applicable international law.

II. Injury and its independence from domestic "prejudice"

6.27 Germany is entitled to invoke the responsibility of the United States because it is an injured State.

6.28 Contrary to the contention of the United States during the oral proceedings on Provisional Measures in the *Breard* Case[12], international law does not require a showing of damage before the offending State's international responsibility is engaged. Since any breach of international law entails either material or non-material damage to another State, damage does not constitute an independent element of an internationally wrongful act. As the International Court of Justice explained in the *South West Africa* Cases:

> > "[I]t may be said that a legal right or interest need not necessarily relate to anything material or `tangible', and can be infringed even though no prejudice of a material kind has been suffered. ... The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law; ... ."[13]
>
> The same principle is expressed in ILC draft article 3, which enumerates only the following two requirements of an internationally wrongful act:
>
> > "There is an internationally wrongful act of a State when:
> > (a) conduct consisting of an action or omission is attributable to the State under international law; and
> > (b) that conduct constitutes a breach of an international obligation of the State."[14]
>
> As the Commentary to this article explains:

> "[I]f we maintain at all costs that `damage' is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of `injury' to that other State. But this is tantamount to saying that the `damage' which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation."[15]

In the Case of the *Affaires des Biens britanniques au Maroc espagnol*, the Arbitral Tribunal coined the following classic formula:

> "La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie."[16]

An analysis of international jurisprudence[17] and doctrine[18] confirms this view. Thus, as opposed to the situation in domestic law, the question of damage and/or "prejudice", strictly speaking, only concerns the prerequisites of certain remedies and not international responsibility as such.

6.29 Nevertheless, Germany has demonstrated, and will do so once more, that even if, *arguendo*, one did not follow the overwhelming precedents in the sense that it is unnecessary to show "prejudice" in order to invoke State responsibility, such "prejudice" has undoubtedly been caused to the LaGrand brothers by the failure of the U.S. authorities to advise them about their rights under the Vienna Convention on Consular Relations.

1. Injury to Germany

6.30 In the words of the Commentary of the ILC to its draft article 40,

> "it is necessary to determine which State or States are legally considered `injured' State or States, because only that State is, or those States are, entitled to invoke the new legal relationship ... entailed by the internationally wrongful act."[19]

In its parts relevant for the present Case, draft article 40 reads as follows:

> "1. For the purposes of the present articles, `injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.
>
> 2. In particular, `injured State' means:
> (a) ...

(b) ...
(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
(d) ...
(e) if the right infringed by the act of a State arises from a multilateral treaty ..., any other State party to the multilateral treaty ... , if it is established that:
(i) the right has been created or is established in its favour;
(ii) ...
(f) ... ."[20]

Accordingly, the main requirement for the presence of "injury" is that a right of the affected State has to be infringed. In the present Case, the injury to Germany has to be analysed separately with regard to each of the three layers of obligations breached by the United States (as set out in Part Four of the present Memorial).

a) Direct injury by violations of the treaty obligations of the United States towards Germany under Article 36 of the Vienna Convention

6.31 Through its non-observance of Art. 36 of the Vienna Convention in the case of the brothers LaGrand, the United States has violated a right created in favour of Germany, and thereby infringed a right of Germany in terms of draft art. 40 (1) and 2 (e) (i).

The violation of the Vienna Convention by the United States deprived Germany of its right to protect and assist its nationals in the gravest of circumstances: where in domestic criminal proceedings in the receiving State the very life of its nationals is being threatened. The breach at issue here infringed upon the rights granted under Article 36 (1) to Germany, as the sending State of which the LaGrands were nationals. As a direct result of the violation, Germany was unable to render any consular assistance during the ten-year period comprising the most crucial stages of the proceedings against its nationals. In short, the United States deprived Germany of the right to exercise an important governmental function at the only time when that function could have fulfilled its purpose: providing meaningful protection and assistance to German nationals on trial for their lives.

6.32 The rights at issue here are undeniably substantial. The Respondent itself has acknowledged that

"Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[21]

Indeed, the United States told this Court in the *Hostages* Case that the right of consular

> "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[22]

6.33 The ten-year delay between the arrest of the LaGrands and Germany's first opportunity to provide them with consular assistance aggravated both violation and injury, because the timing of the consular notification and assistance is an express and integral aspect of the rights granted by Article 36 (1) of the 1963 Vienna Convention. The words "without delay" are repeated in each of the three sentences that constitute subpara. (1) (b) of Art. 36. This focus on the rapidity of notification and communication reflects the recognition that, in many cases, unless consular assistance can be provided at the outset of criminal proceedings, it will turn out not to be effective at all.[23] In the pertinent words of the U.S. *Foreign Affairs Manual*:

> "In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. *Prompt notification is necessary* to assure early access to the arrestee. *Early access in turn is essential*, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners. ...
>
> Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen. ...
>
> *[P]rompt personal access* . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful*."[24]

6.34 The important role of the consular officer has been well described by Leonard F. Walentynowicz, former Administrator of the Bureau of Security and Consular Affairs in the U.S. Department of State:

> "[T]he consular officer after learning of an arrest seeks access to the accused to establish his identity and citizenship, to ensure he is aware of his rights, to advise him of the availability of legal counsel, to give him a list of local attorneys, to help him get in touch with his family and friends, to alert him to the legal and penal procedures of the host country and to observe if he had been or is in danger of being mistreated."[25]

Similarly, the practices and procedures followed by the German Foreign Ministry call for its consular officers to render immediate assistance to German nationals detained abroad, particularly to those nationals facing a possible death sentence.[26] The United States' violation of Article 36 precluded Germany from rendering such assistance to the LaGrand brothers. Thus, Germany was injured in its rights by the breach on the part of the United States of the latter's

obligations towards Germany under the Vienna Convention over an extended period of time.

b) Indirect injury to Germany by violation of the rights of its nationals

6.35 By violating the rights of German nationals under Art. 36 (1) (b) of the Vienna Convention as set out in Part Four, Chapter II, of the present Memorial, the United States has also caused indirect injury to Germany. Under established principles of international law, the injury suffered by nationals is attributed to their home State.[27] As the Permanent Court of International Justice explained in the *Mavrommatis* Case:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."[28]

Therefore, the United States has also caused indirect injury to Germany.

c) Direct injury by non-observance of an Order of the Court

6.36 By the non-observance of a binding Order of the Court, the United States has infringed a further right of Germany. The Commentary of the ILC draft articles on State responsibility explains:

> "The operative part of a judgment or other binding dispute-settlement decision of an international court or tribunal may impose an obligation on a State. ... [I]f any party to the dispute fails to perform the obligations incumbent upon it under the judgment, the other party to the dispute is the `injured State'."[29]

The same is valid for the indication of interim measures of a binding character.[30] Since the Order on Interim Measures violated by the United States was binding,[31] Germany was injured by its non-observance.

2. The question of "prejudice" in domestic law

6.37 As set out above, the injury suffered by Germany is independent of any additional "prejudice" that might be required by domestic law as a precondition for raising a violation of individual rights before domestic courts at a certain stage of proceedings.[32]

6.38 Nevertheless, the United States has argued both in the *Breard* Case and in the present Case

> "that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems."[33]

As Germany has argued earlier, this opinion is based on a misunderstanding of the requirements of the law of State responsibility.[34] It amounts to saying that what States participating in the Vienna Convention have in mind is not the loyal performance of their obligations under the Convention but rather the consequences of a breach of these obligations. The opposite is much more plausible: States consenting to the Convention do so with the intention of fulfilling their treaty obligations, and assume as a matter of course that the general rules of State responsibility will apply in the case of breach.

6.39 Nevertheless, in the domestic jurisprudence of the United States, the necessity of "prejudice" caused by violation of the Vienna Convention plays an important role[35]. Following this doctrine, there might at some stage in the case of the LaGrands well have been a violation of Art. 36 by the Arizona authorities but, the argument would continue, this violation had no effect. Germany contests this view as contrary to the generally accepted - international! - law of State responsibility, which demands nowhere that "prejudice" be shown before an injured State may invoke responsibility for a breach of international law. However, as proven above,[36] even under the assumption that the United States argument were relevant at the level of international law, Germany and the LaGrand brothers did suffer "prejudice" by the violation of Art. 36 of the Vienna Convention.

a) "Prejudice" is no requirement under the Vienna Convention or the law of State responsibility

6.40 In international law, "prejudice", that, is an effect of the lack of consular advice on a criminal conviction, does not need to be made plausible, let alone proved, before reparation can be demanded. The U.S. view to the contrary does not find any support whatsoever in the text of the Vienna Convention or in the applicable law of State responsibility. Rather, all that a State invoking the international responsibility of another State has to show is that it has suffered injury by violations of its rights under international law, as Germany has already done.[37]

6.41 Thus, responsibility for the violation of the Vienna Convention does not depend on the existence of "prejudice". As Shank and Quigley put it:

> "Besides infeasibility, the United States' argument about prejudice is inconsistent with the concept of consular protection. The Vienna Convention presumes the need for consular assistance for every foreign detainee. Otherwise, the right of consular access would not be guaranteed in the first place."[38]

And the U.S. Solicitor General himself argued before the Supreme Court that

> "there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers."[39]

6.42 Aliens facing a foreign criminal justice system are necessarily disadvantaged through differences of culture and custom, and distance from their country. The normal procedural safeguards are not adequate to overcome this disadvantage and to protect the due process rights of a foreign defendant. Art. 36 of the Vienna Convention on Consular Relations guarantees consular notification and assistance precisely because the States Parties to it recognised this inherent prejudice, and likewise recognised the critical role of consular assistance in alleviating it.[40] Hence, the Vienna Convention requires advice to foreign nationals on the right to contact their consulate in order to enable them to have access to the resources and protection of their home country.

6.43 The States Parties to the Vienna Convention further recognised that if consular assistance is to effectively compensate for the inherent prejudice to detained foreign nationals, it must be available from the beginning and throughout the entire criminal legal process. Hence, Art. 36 requires notification to be given to the detained national, and if he or she so requests, to the sending State, "without delay". If promptly notified, consuls can arrange for adequate legal representation, explain the differences between the home State's legal procedures and those of the foreign country, and begin to help collecting evidence essential to the national's case.[41] Without prompt notification and access, effective consular assistance will be provided only rarely, if at all, and thus the prejudice to the national may become irreparable.

6.44 To put it in simple terms: Because the Vienna Convention assumes prejudice will occur due to the delay or lack of consular assistance, it logically does not require a showing of prejudice in order to make available a remedy for its violation. Such

> "[a]fter-the-fact assessments of whether the presumed prejudice actually resulted were not within the intent of [the States Parties]."[42]

Indeed, the United States itself acknowledged the impossibility of such an approach before this Court during the oral proceedings on Provisional Measures in the *Breard* Case, stating that it would be:

> "problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. ... Surely governments did not intend that such questions become a matter of inquiry in the courts."[43]

Thus, Germany does not need to show any "prejudice" additional to the injury already demonstrated.

b) The existence of "prejudice" in the trial of the LaGrand brothers

6.45 In any case, the argument of the necessity of "prejudice" would not operate in favour of the United States in the present context, because the violation of the right to be informed of the rights under Art. 36 of the Vienna Convention did have a decisive effect on the trial and conviction of the LaGrand brothers. As set out in Part Four, Chapter I. 3. c), the failure of the United States to advise the LaGrand brothers of their right to contact their consulate has caused them considerable damage or "prejudice", namely the death penalty, and has ultimately cost them their lives.

Thus, even if one accepted the doubtful proposition that the violation of the right to consular advice must have had an effect on the conviction of the LaGrand brothers in order to "injure" Germany, that condition would also be fulfilled because the lack of advice regarding their right to consular assistance prevented the LaGrand brothers from raising their troubled childhood and youth before United States courts and therefore contributed decisively to their being subjected to the death penalty.

3. Conclusion

6.46 By violating Art. 36 of the Vienna Convention and not observing the Order of the Court of 3 March 1999, the United States has injured Germany, both in its own rights and in the rights of its nationals. Germany is therefore entitled to invoke the international responsibility of the United States, independently of any question of domestic "prejudice".

III. Pronouncement of the wrongfulness of the conduct of the United States as a form of satisfaction

6.47 Germany now turns to the substance of its entitlement to reparation. As already stated, reparation is the normal consequence of a violation of international law. According to ILC draft article 42 (1) - which is in full accordance with the *Chorzów Factory* Judgment of the Permanent Court[44] -

> "[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and

> assurances and guarantees of non-repetition, either singly or in combination."[45]

As the Commentary to the draft article explains:

> "In the *Chorzów Factory* case, material damage had been sustained and the Court therefore singled out only two methods of reparation, ... There are however other methods of reparation which are appropriate to injuries of a non-material nature, namely satisfaction and assurances or guarantees of non-repetition."[46]

Therefore, both of the remedies requested by Germany - a pronouncement of the illegality of the conduct of the United States and the provision of guarantees of non-repetition - constitute recognised forms of reparation. These remedies are not mutually exclusive. In the following, Germany will first explain why a pronouncement of the wrongfulness of the United States conduct is an appropriate remedy. Following this, Germany will prove that all the conditions for satisfaction in the form of a pronouncement of illegality are fulfilled in the present case.

1. Pronouncement of wrongfulness as a form of satisfaction

6.48 According to ILC draft article 45,

> "[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation."

In its commentary to this article, the ILC affirms that

> "satisfaction ... has a place both in literature and in international jurisprudence, namely recognition by an international tribunal of the unlawfulness of the offending State's conduct."[47]

6.49 The most important pronouncement in this respect stems from the Judgment of the International Court of Justice in the *Corfu Channel* Case. There the Court stated that

> "the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction."[48]

The Permanent Court of International Justice described one of the purposes of such a declaration of wrongfulness in the following terms:

> "The Court's Judgment ... is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a

> situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[49]

Recently, on 30 April 1990, in the *Case concerning the Rainbow Warrior Affair* between New Zealand and France, the Arbitral Tribunal explained that

> "[t]here is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities."[50]

Accordingly, the Arbitral Tribunal came to the conclusion

> "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand."[51]

Only recently, on 1 July 1999, the International Tribunal for the Law of the Sea confirmed that

> "[r]eparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right."[52]

6.50 Pursuant to these pronouncements, the declaration of the wrongfulness of certain conduct by the Court has a twofold function: (1) It interprets a disputed point of law in a definitive way binding upon the parties, and (2) it provides satisfaction to the injured party. Germany requests the declaration of wrongfulness of the conduct of the United States in the present case for both of these purposes.

As an author observed on arbitral jurisprudence concerning satisfaction,

> "where the satisfaction is non-pecuniary there is no problem. Thus ... a declaratory judgment was held to constitute adequate satisfaction for violation of state sovereignty, ..."[53]

Thus, both the jurisprudence of the International Court and that of other international judicial bodies confirm that satisfaction in the form of a pronouncement of wrongfulness is an appropriate remedy in international law.

2. Conditions of satisfaction

6.51 Germany's claim to satisfaction also fulfils the conditions under general international law as restated in article 45 of the ILC draft: First, Germany must have suffered moral damage by the conduct of the United States. Second, this damage must have been caused by the conduct of the United States. Third, satisfaction must be necessary in order to provide full reparation. Fourth, the demand for the pronouncement of wrongfulness must not impair the dignity of the United States. In the following, Germany will set out these conditions in detail.

a) Moral damage suffered by Germany because of the internationally wrongful acts of the United States

6.52 The first condition mentioned in ILC draft article 45 is "damage, in particular moral damage" done to Germany. The damage referred to in draft article 45 is not material damage, but "moral" or "political" damage ensuing from a violation of an international legal right of the injured State; "injury" in this context understood as injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act.[54] The ILC Commentary further specifies that

> "[t]he all-embracing phrase `damage, in particular moral damage' is intended to convey the notion that the kind of injury for which satisfaction operates ... consists in any non-material damage suffered by a State as a result of an internationally wrongful act."[55]

6.53 Germany has suffered damage of this kind in the present case in several respects. First of all, Germany has suffered moral and political damage by the fact alone that its rights and the rights of its nationals were violated by the United States as set out in Part Four of the present Memorial. That a violation of the rights of a State gives rise to moral and political damage regardless and independent of any material injury is generally recognised. In the words of Dionisio Anzilotti:

> "The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element, honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that it is not required to tolerate, even if material consequences do not ensue; ... ."[56]

6.54 However, the violation of Germany's rights does not exhaust the immaterial damage caused by the wrongful conduct of the United States. The United States has caused additional moral and political damage to Germany by its disregard for Germany's interventions on behalf of its nationals: Germany intervened in favour of the LaGrand brothers several times to the U.S. authorities, the President, the Department of State, the Justice Department, and the authorities of the State of Arizona, by way of written and oral submissions from its own highest authorities - the Bundespräsident (President, *i.e.*, the Head

of State of Germany), the Bundeskanzler (Federal Chancellor, that is, the Head of Government), the Foreign Minister, the Minister of Justice, the Ambassador to the United States and the Consul General in Los Angeles - requesting respect for the rights of Germany and the LaGrands under Art. 36 of the Vienna Convention, as well as for the Order of the Court of 3 March 1999, and invoking several compelling reasons for granting clemency that would have spared the brothers from the death penalty, but to no avail.[57] Germany has even taken the extraordinary step of lodging an application against the United States and the Governor of Arizona before the U.S. Supreme Court.[58] The Governor of Arizona ignored not only these interventions, but in the case of Walter LaGrand also the Order of the International Court of Justice as well as the recommendation of the Arizona Board of Executive Clemency to postpone the execution in order to gain time to duly consider the matter.[59] As to the U.S. Federal Government, not only did it completely ignore the requests of the German Government, its Solicitor General even argued before the Supreme Court in favour of simply ignoring the Order of this Court of 3 March 1999 and against any federal interference in the course leading to the death of Walter LaGrand.[60] In contrast, in comparable cases concerning nationals of other countries, the U.S. Federal Government has at least asked the local authorities to halt the execution.[61] In the present Case, the United States did not even conform to what it itself expressly considers to be required if a breach of Art. 36 of the Vienna Convention occurs: In his brief to the U.S. Supreme Court in the *Breard* Case, the U.S. Solicitor General declared:

> "The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance."[62]

In the Case of the LaGrand brothers, the United States has done nothing of that sort, let alone fulfilled its obligation to grant *restitutio in integrum* under the applicable law of State responsibility.

6.55 Thus, the United States authorities almost completely disregarded the concerns and interventions by Germany directed against the violations of its rights and the rights of its nationals. Therefore, the United States caused considerable political and moral damage to Germany. This damage to Germany was so considerable as to justify a demand for satisfaction in the form of a pronouncement of the wrongfulness of the conduct of the United States.

b) Causation

6.56 Germany will now address the issue of causality. ILC draft article 45 (1) stipulates:

> "The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, *caused by that act*, ..."[63]

In the words of the ILC commentary, causation in this connection means

> "the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage it caused."[64]

This statement is meant to apply to all cases where causation is considered a condition for a remedy[65] and thus also comprises the case of satisfaction.

6.57 In the present instance, the damage described above was caused by the United States. As far as the moral damage resulted from the treaty violations committed by the United States *per se*, causation is self-evident. The causal link between the unlawful acts and the further political and moral damage Germany has incurred is also obvious: If the United States had respected Art. 36 of the Vienna Convention and/or the Order of the Court, Germany would not have incurred moral or political damage.

c) Necessity of the pronouncement

6.58 According to ILC draft article 45 (1), the necessity of the required measure of satisfaction for full reparation constitutes a further condition for the right to satisfaction. In the present case, in which the Respondent apparently denies any violation of international law, the content and impact of those violations is obviously subject to dispute. Therefore, a pronouncement on the wrongfulness of the conduct of the United States is absolutely necessary in order to restore and secure Germany's rights under the Vienna Convention. Such a pronouncement will counter the public impression that the United States can violate the rights of Germany and its nationals without any consequences. Therefore, the integrity of Germany's rights will only be restored if the Court pronounces with binding force the wrongfulness of the conduct of the United States.

3. Conclusion

6.59 For all of these reasons, Germany requests that the Court pronounce the wrongfulness of the conduct of the United States, as set out in Part Four of the present Memorial, as a form of satisfaction.

IV. Assurances and guarantees of non-repetition

6.60 Germany also demands guarantees of non-repetition in order to prevent further violations of its rights and those of its nationals in the future. The United States itself has always insisted - and rightly so - that compensation for

violations of its rights under international law is not sufficient, and that the wrongdoing State must also ensure the respect of its international obligations in the future. As President Lyndon B. Johnson affirmed on the occasion of attacks against the United States embassy in Moscow in 1964 and 1965:

> "The U.S. Government must insist that its diplomatic establishment and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection."[66]

The same is valid, *mutatis mutandis*, for the rights of Germany and its nationals on the territory of the United States based on Art. 36 of the Vienna Convention on Consular Relations. In this context, assurances and guarantees of non-repetition are of particular importance because the execution of the LaGrand brothers rendered retroactive relief such as *restitutio in integrum* impossible.

6.61 Unlike satisfaction and reparation in general, assurances and guarantees of non-repetition do not look to the past but to the future. They are recognised as a separate remedy in customary international law, as expressed in the ILC's draft article 46 which stipulates as follows:

> "Assurances and guarantees of non-repetition
>
> The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."[67]

6.62 This provision is in full accordance with international practice and doctrine. As Professor Przetacznik remarks:

> "En général, dans tous les cas de préjudices de caractère moral et politique, l'État lésé, entre autres formes de satisfaction demande des assurances de sécurité pour l'avenir, ce qui signifie que l'État intéressé s'acquittera avec plus de diligence ou plus d'efficacité de son devoir de protection."[68]

Only recently, on 1 July 1999, the International Tribunal for the Law of the Sea, referring to draft article 42 (1), explained that

> "[r]eparation may be in the form of `restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination'".[69]

The ILC Commentary to draft article 46 explains that

> "[t]he text adopted by the Commission provides that the injured State is entitled, where appropriate, to obtain from the wrongdoing State assurances or guarantees of non-repetition. It therefore recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant. Circumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act."[70]

6.63 Thus, assurances and guarantees of non-repetition are subject to two conditions: (1) A respective demand from the injured State; and (2) circumstances warranting those guarantees, in particular the existence of a risk of repetition and the seriousness of the injury.

To those conditions Germany will now turn.

1. The demand of Germany

6.64 In its submissions contained in the final Part of the present Memorial, Germany, as the injured State, puts forward its demand for assurances and guarantees of non-repetition in the following terms:

> "The Federal Republic of Germany respectfully requests the Court to adjudge and declare ...
>
> that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations."

6.65 State practice knows two kinds of demands for guarantees: (1) demands for safeguards against the repetition of the wrongful act without any specification, and (2) demands for specific measures to secure that the future conduct of the wrongdoing State will be in compliance with international law.[71]

6.66 Thus, in the sense of the first alternative and to begin with an instance of U.S. practice, in four cases involving the visitation and search of American merchant vessels by Spanish armed cruisers in 1880, the U.S. Secretary of State Evarts declared:

> "[T]his government will look to Spain for a prompt and ready apology for their occurrence [of the unlawful acts], *a distinct assurance against their repetition*, and such an indemnity to the owners of those several vessels as will satisfy them for the past and *guarantee our commerce against renewed interruption by*

> *engaging the interest of Spain in restraint of rash or ignorant infractions, by subordinate agents of its power, of our rights upon the seas.*"[72]

To mention the practice of other States: In the case of an attack against the Chinese Consulate General at Jakarta in March 1966, the Chinese Deputy Minister for Foreign Affairs, Mr Hang Nien-Lung, requested in a note to the Indonesian Ambassador in China, Mr Djawoto, *inter alia*,

> "une garantie contre tout renouvellement de pareils incidents à l'avenir."[73]

After an attack on an Israeli civil aircraft carried out in Zurich on 18 February 1969,

> "the Swiss Government delivered formal notes of protest to Jordan, Syria, and Lebanon in which the attack at Zurich was condemned and in which each of the three governments was urged to take steps `to prevent any new violations of Swiss territory'."[74]

In these instances, the choice of the appropriate measures remained with the wrongdoing State.

6.67 According to the second of the above-mentioned alternatives, the injured State may demand the adoption of specific measures by the wrongdoing State. The ILC Commentary lists three non-exhaustive categories of such specific measures, namely demands for
(1) formal assurances,

(3) specific instructions to agents of the wrongdoing State, and

(4) certain conduct by the wrongdoing State, in particular the adoption or abrogation of specific legislative provisions.[75]

6.68 The most prominent example pertaining to the third group, which is of particular significance in the present instance, is the *Trail Smelter* Case, in which an Arbitral Tribunal was empowered to create a detailed régime of environmental protection in order to "effectively prevent future significant fumigations in the United States".[76] In the case of *A. K. Cutting*, it was the United States which demanded the change of a Mexican law granting universal jurisdiction to Mexican criminal courts for alleged crimes committed by foreigners abroad. Pursuant to this law, the United States citizen Mr. Cutting was imprisoned in Mexico for an alleged offence committed in the United States. Following Cutting's arrest, the United States not only demanded his immediate release but also a change of Mexican law. As U.S. President Cleveland told Congress on 8 December 1886,

> "I trust that in the interests of good neighborhood the statute referred to will be so modified as to eliminate the present possibilities of danger to the peace of the two countries."[77]

U.S. Secretary of State Bayard instructed the United States ambassador in Mexico as follows:

> "You are therefore instructed to say to the Mexican Government, not only that an indemnity should be paid to Mr. Cutting for his arrest and detention in Mexico on the charge of publishing a libel in the United States against a Mexican, but also, in the interests of good neighborhood and future amity, that the statute proposing to confer such extraterritorial jurisdiction should, as containing a claim invasive of the independent sovereignty of a neighboring and friendly state, be repealed."[78]

As the Secretary of State explained, such a demand was not exceptional. The United States itself had amended its laws to meet international standards:

> "Nor is a change of municipal law to meet the exigencies of international intercourse without precedent in the United States. In the case of McLeod, in 1842, when, in reply to the demand of the British Government for the release of the prisoner ... this Government was compelled to return a reply not dissimilar to that made by Mr. Mariscal ... . Congress amended the law regulating the issuance of writs of habeas corpus so as to facilitate the performance by the Government of the United States of its international obligations. So that nothing is suggested to the Government of Mexico in this relation which has not been put in practice by the Government of the United States."[79]

6.69 Recent examples of demands for the change of domestic legislation stem from international institutions for the protection of human rights, such as the Human Rights Committee overseeing the implementation of the International Covenant for Civil and Political Rights.[80] For instance, in its decision of 23 July 1980 in the *Torres Ramírez* Case under Article 5 (4) of the Optional Protocol to the Covenant,[81] the Human Rights Committee adopted the following view:

> "The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future."[82]

> Following these precedents, Germany would even be entitled to demand an express change of United States domestic law as a guarantee of non-repetition.

6.70 The German request for "formal" assurances is appropriate in the present Case if only because it will be decided by the International Court of Justice after a formal procedure. In addition, since all informal requests of Germany, and even the formal Order of the Court on Provisional Measures were ignored by the United States, Germany cannot be content any longer with mere informal assurances on the part of the United States.

6.71 In precise terms, Germany demands formal assurances that the United States will bring its practice in conformity with the requirements of international law, without laying out in detail whether these modifications are to be brought about by formal changes in its domestic law or simply by changing the practical application of its respective legislation. Nevertheless, Germany wishes to emphasise that the result of the endeavour must be complete conformity of United States conduct with Art. 36 of the Vienna Convention on Consular Relations. By so couching its demand, Germany on the one hand seeks to ensure that the United States will respect Germany's rights and the rights of its nationals in the future. On the other hand, Germany has no intention to unnecessarily interfere with the domestic legal system of the United States. Thus, the choice of means is left to the United States.

2. Circumstances requiring the pronouncement of assurances and guarantees of non-repetition

6.72 According to ILC draft article 46, guarantees of non-repetition are to be accorded only "where appropriate". The Commentary explains that

> "[c]ircumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act."[83]

> As Germany will show, both circumstances mentioned in the ILC Commentary are present in our case.

a) Risk of repetition

6.73 In the present context, the primary evidence pointing to a risk of repetition is to be seen in the fact that the present Case is the second instance within less than one year in which the International Court of Justice had to deal with the omission of consular advice and notification by the United States.[84]

6.74 Secondly, as already pointed out in Part Four of the present Memorial, Germany knows of at least eight more cases in the very recent past in which advice by its consulates could not be provided due to a lack of information from the United States authorities.[85] In addition, it is in the nature of such lack of information that Germany will not be, and probably never will become,

aware of all or even most of the cases concerned due to what amounts to almost a pattern of failure by the U.S. authorities to properly inform German nationals arrested and detained of their rights.

6.75 Thirdly, as the Arizona authorities have themselves admitted, they knowingly refrained from informing the LaGrand brothers about their rights. As was set out in Part Four in necessary detail, due to the denial of remedies against such failure of information in United States procedural law, even such intentional disregard of the rights of German citizens under international law cannot be remedied once a jury trial has taken place. As long as United States domestic law encourages the omission of information on consular access on the part of the authorities rather than prevents it, to the disadvantage of the defence, such violations of the rights under Art. 36 of the Vienna Convention will certainly occur time and again as long as these laws and practices are not changed.

b) Seriousness of the injury suffered by Germany

6.76 As set out in detail above,[86] the intentional disregard of Germany's rights and the rights of its nationals, and the consistent refusal of United States authorities, whether federal, state or local, whether executive or judicial, to respect Germany's rights and the rights of its nationals under Art. 36 of the Vienna Convention in spite of Germany's interventions, have created serious political and moral injury to Germany. The present Case involves not "only" the lives of two German nationals, executed in breach of international law and of an Order of the highest Jurisdiction of the world. Its significance goes far beyond that. Ultimately, this Case deals with the question of whether German nationals present on the territory of the United States can effectively assert their rights. Therefore, Germany's injury is serious.

3. Conclusion

6.77 Germany's demand for assurances and guarantees of non-repetition meets all the requirements of ILC draft article 46 and the customary international law of State responsibility. It is in the interest neither of the United States nor of Germany - nor of the Court, for that matter - that Germany appears again and again in this forum to ascertain its rights and the rights of its nationals. The appropriate remedy under these circumstances is the provision of guarantees and assurances of non-repetition.

V. No circumstances precluding these remedies

6.78 The ILC draft contains several factors which preclude satisfaction even if the normal prerequisites for such a remedy were present. In the following, Germany will prove that none of these circumstances affect the appropriateness of the remedies sought in the present Case.

1. No impairment of the dignity of the United States

6.79 According to ILC draft article 45 (3),

> "[t]he right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act."[87]

Even though it is not expressly mentioned in draft article 46, the ILC considers this condition applicable to assurances and guarantees of non-repetition as well.[88]

Whether this requirement follows from already existing international law on the matter may be doubtful.[89] In any case, no such impairment of the dignity of the United States is involved in the present Case. Germany has taken utmost care to respect the dignity of the Respondent by not requesting any remedy that could offend the United States. What Germany maintains are two requests which both fully respect the dignity of the United States:

6.80 (1) The pronouncement of the wrongfulness of the conduct of the United States is indispensable for ensuring respect of Germany's rights and the rights of its nationals in the future. The entire task of the International Court of Justice consists in upholding the rule of law in international relations. A pronouncement of the Court on the legality or illegality of this or that conduct can never impair the dignity of the members of the international community but only restore the integrity of the international legal system. The dignity of the members of this community can only be maintained when international law is fully respected.

6.81 (2) This argument is also valid for guarantees of non-repetition which are to ensure that Germany's rights and the rights of its nationals will be respected in the future.

2. No contribution of Germany or its nationals to the damage caused

6.82 ILC draft article 42 (2) mentions another circumstance to be taken into account:

> "In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:
>
> (a) the injured State; or
> (b) a national of that State on whose behalf the claim is brought;
>
> which contributed to the damage."[90]

6.83 The customary law character of this condition may be doubtful.[91] But it is obvious that neither Germany as the injured State, nor the LaGrand brothers contributed in any way to the damage caused to Germany and the brothers themselves by the non-fulfilment of the international legal duties of the United States. After becoming aware of the German nationality and the detention of the LaGrand brothers, Germany assisted the brothers and their attorneys in raising the omission of information on the right to consular access by the

Arizona authorities. As Germany has described above, after the brothers had become aware of their German nationality, they raised the violation of Art. 36 of the Vienna Convention in both state and federal Courts. However, in every instance from the Arizona Superior Court to the U.S. Supreme Court, their claim to a new trial or a new sentencing hearing was rejected as "procedurally defaulted".[92]

> Thus, Germany and the LaGrand brothers did everything at their disposal to prevent the damage from arising. Therefore, the United States alone is responsible for the damage caused to Germany.

3. The domestic law of the United States providing no justification for failure to provide reparation

6.84 Germany's entitlement to a pronouncement of the wrongfulness of United States conduct in the present Case and to guarantees of non-repetition do not depend on the current state of United States domestic law. As Germany has already explained above, it is a universally recognised principle of international law that, in the words of Art. 27 of the 1969 Vienna Convention on the Law of Treaties,

> > "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[93]

> This is no different in the case of international legal remedies requiring a change of domestic law. As Germany has explained above, the guarantees which it requests leave the choice of means, especially the answer to the question whether future compliance with the relevant obligations of the United States requires changes of domestic law, to the United States itself. However, if the result is that the United States will only be able to meet the requirements of the Vienna Convention if it effects changes to its law, it will have to do so. As ILC draft article 42 (4) puts it:

> > "The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation."[94]

> Analysing certain arbitral awards in which compensation instead of *restitutio* was awarded, the Commission concludes:

> > "The Commission would however tend to view those decisions as based on excessive onerousness or lack of proportion between the injury caused and the burden represented by a specific form of reparation rather than on obstacles deriving from municipal law."[95]

6.85 An argument to the effect that the provision of guarantees by the United States to implement the international obligations relevant here in the future would place an excessive burden on the United States essentially amounts to

an admission that the United States is incapable of keeping its obligations under the Vienna Convention. Such an admission cannot excuse breaches of international law, however. In the words of the International Law Commission:

> "Any State which is well aware of its international obligations - secondary as well as primary - is bound to see to it that its legal system, not being opposable to the application of international legal rules, is adapted or adaptable to any exigencies deriving from such rules. ... The juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law. Hence they should not be treated as strictly legal obstacles in the same sense as obstacles deriving from international legal rules."[96]

Thus, even if the choice of means of how to fulfil its international legal obligations is within the discretion of the United States - that is, as far as no specific method of implementation is required by a rule of international law -, a State cannot invoke its internal law as justification to disregard its obligations under international law.

6.86 An analysis strictly limited to the international legal aspects of the question might stop at this point. After all, the domestic law of the United States is not a matter for this Court to review - except if expressly provided otherwise, like in Art. 36 (2) of the 1963 Vienna Convention. Nevertheless, Germany emphasises that nothing requested in the present Memorial will force the United States to act contrary to its Constitution, or would otherwise do violence to any principle of United States law. However, especially in view of Art. 36 (2) of the Vienna Convention, certain changes of U.S. domestic law regarding rights of foreigners in the United States might well be necessary.

In this regard, the following points merit particular emphasis:

6.87 (1) Concerns of federalism are not relevant to the performance of international legal obligations. According to a well-known statement of the U.S. Supreme Court,

> "in respect of our foreign relations generally, state lines disappear. As to such purposes, the state of New York [or, one might add, the state of Arizona] does not exist."[97]

(2) The Federal Government has several measures at its disposal of how to ensure compliance by states with the obligations of the United States derived from Art. 36 (1) of the Vienna Convention. These measures include, *inter alia*,

(a) The President of the United States could use his or her power, "to take Care that the Laws be faithfully executed", which the United States Constitution obliges him or her to do in Art. 2 Sect. 3, to intervene in the case of non-compliance with international law on the part of the states. Several authorities in U.S. constitutional and foreign

relations law have emphasised that such action would be possible, either by Executive Order or by suing the state concerned before a federal court.[98]

(b) The United States Congress could change the Antiterrorism and Effective Death Penalty Act of 1996,[99] in order to allow suits against the disregard of the right to consular information in federal courts.

(c) The United States Congress could issue legislation authorising suits for damages for failure of federal or state authorities to comply with the Vienna Convention.

(d) The U.S. Congress could use its power of "conditional preemption" to permit states the arrest of foreign nationals only if the states provide notice upon arrest of the right of consular notification.[100]

(e) The U.S. courts could interpret the Antiterrorism and Effective Death Penalty Act and the procedural default rule in accordance with the requirements of international law pursuant to the so-called *Charming Betsy* rule. This rule derives its name from an early Supreme Court decision in which the Court stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains".[101]

(f) The U.S. courts should, if not as a matter of law at least as a matter of comity, respect binding Orders of this Court in line with the "global allocation of judicial responsibility", as Professor Anne-Marie Slaughter has put it.[102]

6.88 All of these measures would be fully consistent with the constitutional structure and governing legal principles of the United States. It is unnecessary for the International Court of Justice to endorse any particular means of ensuring more effective compliance. What is important is that the United States Federal Government is perfectly capable of enforcing compliance with the Vienna Convention through its own agencies as well as through states and thus to give the assurances requested by Germany.

6.89 As Germany itself is a federal State, it has a great deal of respect for the federal system of the United States, which has provided the framers of its own constitution, the *Grundgesetz*, with invaluable inspirations. The pronouncement Germany seeks from the world's highest Jurisdiction does not encroach upon the internal legal system of the United States and its freedom to choose the means of implementing its international obligations. However, it is a universally accepted proposition that a State must not and cannot invoke its federal system as an excuse for the non-performance of its international obligations. Therefore, the United States cannot invoke federalism as a justification for disregarding the rights of Germany and its nationals. The same is valid regarding the implementation of the remedies decided upon by the International Court of Justice. The United States is obliged to comply with Judgments of the Court pursuant to Art. 94 (1) of the United Nations Charter

and Art. 41 (1) of the Statute of the Court. According to Art. VI sect. 2 of the United States Constitution, treaties constitute "the supreme Law of the Land". Thus, a pronouncement of this Court could help to ensure the implementation of Art. 36 of the Vienna Convention by the U.S. federal, state and local authorities and the legislative, judicial and executives branches.

VI. Conclusion

6.90 For the reasons thus given, Germany's claims to remedies for the breaches of international law committed by the United States are fully supported by the law of State responsibility. The United States may not invoke its dignity, its internal law, or any other consideration in order to evade the consequences of these remedies.

6.91 In specific terms, pursuant to international law, Germany has a right to demand the following remedies from the United States:

(1) A pronouncement of the wrongfulness of the conduct of the United States towards Germany and its citizens described in Part Four of the present Memorial;

(2) the provision of assurances and guarantees of non-repetition of such wrongful conduct towards Germany and its citizens.

Part Seven
Conclusions and Submissions

I. Conclusions

7.01 On the basis of the foregoing, the Federal Republic of Germany arrives at the following conclusions:

(1) Since the present dispute arises out of the interpretation and application of the Vienna Convention on Consular Relations, it falls within the scope of Article I of the Optional Protocol to the Convention. Accordingly, the International Court of Justice has jurisdiction to hear all claims brought by the Federal Republic of Germany in its Application of 2 March 1999, as modified in the following Submissions.

(2) Neither the timing of the German Application nor the fact of the execution of Walter LaGrand subsequent to its filing stand in the way of the admissibility of the Application.

(3) By not informing Karl and Walter LaGrand of their right to have the authorities of the United States notify the German consulate of their arrest and detention, and by thus not providing the consulate with

access to them, the United States has violated the following obligations embodied in Art. 36 (1) of the Vienna Convention on Consular Relations:

(a) The obligation to advise the LaGrands without delay about their right to inform the German consulate of their arrest in accordance with Art. 36 (1) (b) of the Vienna Convention;

(b) The obligation to grant the German consulate the freedom of communication with its nationals, including its right to visit, and, *vice versa*, the obligation to grant the brothers LaGrand the freedom to communicate with and have access to the German consulate, according to Art. 36 (1) (a) and (c) of the Convention.

Had these violations not occurred, German consular officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, in obtaining competent counsel and in collecting mitigating evidence. Thus, the case of the LaGrands would have been thoroughly investigated and essential mitigating evidence, mainly located in Germany, would have been presented at the decisive steps of the criminal proceedings. There are compelling reasons to believe that the LaGrands would have escaped the death penalty if this evidence had been introduced in time. Hence, the lack of consular advice was decisive for the infliction of the death penalty.

(4) By applying rules of its domestic law which prevented the LaGrands from raising the said violations of Art. 36 (1) of the Vienna Convention subsequent to their conviction in the courts of Arizona, in particular the rule of procedural default, and by not providing for any effective mechanism to remedy this situation in the post-conviction phase of the proceedings, the United States has committed a breach of its obligation to enable full effect to be given to the purposes for which the rights embodied in Art. 36 (1) are accorded (Art. 36 [2] of the Vienna Convention). A prerequisite of "prejudice" under domestic law is not in line with Art. 36 (2) of the Vienna Convention. But even if it were held otherwise, the law of the United States still does not meet the requirements of Art. 36 (2) of the Convention because it does not provide effective remedies even in the face of such prejudice, as in the case of the LaGrand brothers.

(5) By its failure to allow the LaGrands the exercise of the individual rights accruing to them as foreign nationals under Art. 36 (1) (b) of the Vienna Convention, the United States has also breached the minimum rights of aliens in foreign States under customary international law, entitling Germany to exercise its right of diplomatic protection.

(6) By not observing the Order on Provisional Measures pronounced by this Court on 3 March 1999, committing it "to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision_ of the International Court of Justice on the matter, the United States has not abided by its obligation under Art. 94 of the Charter of the United Nations and Art. 41 of the Statute of the International Court of Justice to comply with the decision of the International Court of Justice in any case to which it is a party and its corresponding duty not to frustrate the judicial task of the Court.

(7) The United States did not prevent the execution of Karl and Walter LaGrand irrespective of German demands. By thus making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law.

(8) The actions and omissions of the United States described in the preceding Conclusions (3) to (7) entail the international responsibility of the Respondent, according to the rules of general international law on the subject. The Vienna Convention on Consular Relations does not constitute a "self-contained régime" (to the exclusion of the generally applicable law of State responsibility). All the actions or omissions of the United States, including in particular those of United States courts, are attributable to the Respondent. Precepts and doctrines of the domestic law of the United States as applied by its authorities in the case of the LaGrands may not be invoked as justification for its failure to perform the obligations under the Vienna Convention. Further, independently of the view taken with regard to the subjective element in State responsibility, in the present case, negligence, at least, on the part of the United States authorities is undeniable. Also, to the extent necessary within the present context, the local remedies available to the LaGrand brothers were all exhausted.

(9) By violating Art. 36 of the Vienna Convention on Consular Relations and by not observing the Provisional Measures indicated by this Court, the United States has injured Germany both in its own rights and in the rights of the LaGrands as its nationals. Germany is therefore entitled to invoke the international responsibility of the United States.

(10) As a consequence of the breaches described in Conclusions (3) to (7), it is incumbent on the United States to provide full reparation. However, through its non-observance of the binding Order of this Court, the United States has rendered the restoration of the *status quo*

ante in the case of Walter LaGrand impossible. Germany concentrates its requests on - and limits the remedies it seeks from this Court to - what it considers absolutely necessary to ensure that German nationals in the United States will be provided with adequate consular assistance in the future. Thus, Germany limits its claims to reparation of the injury incurred by the treatment of the LaGrand brothers to

> (a) satisfaction in the form of a pronouncement of the wrongfulness of the actions and omissions of the United States described above, and
>
> (b) assurances and guarantees of non-repetition to prevent further violations of its rights and those of its nationals.

Neither of these remedies impairs the dignity of the United States. Neither Germany nor the LaGrands have contributed to the damage caused by the acts of the United States. The state of U.S. domestic law may not be invoked as a justification for the failure to provide the requested forms of reparation.

(11) As to the requested pronouncement of illegality of the conduct of the United States, Germany's claim fulfils all conditions under the law of State responsibility: The conduct of the United States has inflicted moral damage upon Germany. A pronouncement of the wrongfulness of this conduct is necessary in order to restore and secure Germany's rights under the Consular Convention.

(12) Concerning the requested assurances and guarantees of non-repetition of the United States, they are appropriate because of the existence of a real risk of repetition and the seriousness of the injury suffered by Germany. Further, the choice of means by which full conformity of the future conduct of the United States with Art. 36 of the Vienna Convention is to be ensured, may be left to the United States.

II. Submissions

7.02 Having regard to the facts and points of law set forth in the present Memorial, and without prejudice to such elements of fact and law and to such evidence as may be submitted at a later time, and likewise without prejudice to the right to supplement and amend the present Submissions, 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 obligation 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 a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.

16 September 1999

Bruno Simma Gerhard Westdickenberg

Co-Agent and Counsel Agent of the Government
of the Federal Republic of Germany

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FOOTNOTES

1 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, para. 24.

2 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, Declaration of President Schwebel, I.C.J. Reports 1998*, p. 259.

3 The following is a short description of the endeavours of Germany to outlaw the death penalty at the international level:

> Within the Council of Europe, Germany supported from the outset the endeavours to encourage member States to abolish the death penalty. Germany played a key role in the elaboration of Protocol No. 6 of 28 April 1983 to the European Convention on Human Rights concerning the abolition of the death penalty.
>
> The Federal Republic of Germany is particularly closely linked with the Second Optional Protocol of 15 December 1989 to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. On 19 November 1980, the Federal Government, along with a few other States, presented the "Draft of a Convention on the Abolition of the Death Penalty in the form of a Second Optional Protocol to the International Covenant on Civil and Political Rights" to the Third Committee of the United Nations General Assembly, which is responsible for human rights issues. Lengthy negotiations involving the substantial commitment of the Federal Government and its diplomatic missions abroad eventually led to the adoption of the Second Optional Protocol.
>
> The Federal Government has also worked assiduously within the United Nations Commission on Human Rights towards the world-wide abolition of the death penalty. It played an active part in negotiating on the resolutions on the abolition of the death penalty at the 53rd and 54th sessions of the Commission on Human Rights (1997 and 1998). At the 55th session of the Commission (1999), a resolution to this effect was sponsored by the European Union as a whole.
>
> During its Presidency of the European Union in the first half of 1999, Germany made substantial improvements to the substance of the resolution of the UN Commission on Human Rights and so was able also to improve the result of the vote as compared to previous years. Its special success lay in obtaining such marked improvement in the result of the vote despite tightening the substance of the text, i.e. the rejection of the death penalty. For the first time, the resolution calls upon parties not to extradite people to States in which they risk being sentenced to death, to await the outcome of both national and international legal procedures before executing a person, and to take account of the consular rights of foreign citizens. These last two points are directly linked to the present case of the LaGrand brothers.
>
> Thirty of the 53 members of the Commission on Human Rights voted in favour of the resolution (1998: 26). Thus, for the first time an absolute majority was achieved. 11 members voted against (1998: 13) and 12 abstained (1998: 12). The number of co-sponsors increased to 72 (1998: 45). On the fringe of the 55th session of the Commission, Germany, in collaboration with the European Commission, the Council of Europe and the British Government, organised a podium discussion on the death penalty's deterrent effect, which most experts on criminology reject. On the basis of this success in the Commission on Human Rights, the European Union intends to table a resolution on the death penalty in the UN General Assembly as well.
>
> In parallel to endeavours at the multilateral level, the Federal Government, together with its partners from the European Union, also calls for the abolition of the death penalty or for the introduction of moratoria in direct contacts with third States. The

Federal Government played an essential part in drawing up the guidelines for representations the European Union will make on capital punishment towards third countries, which the General Affairs Council adopted on 29 June 1998. These have since led to a considerable intensification of joint activities opposing the death penalty and especially to a pronounced increase in the number of joint démarches in individual cases of the imposition or execution of the death sentence.

4 *LaGrand*, *supra* note 1, para. 25.

5 See *infra* Part Four, Ch. I. 3. b).

6 ANNEX 1.

7 ANNEX 2.

8 See the statement of facts in the Judgments of the Supreme Court of Arizona *State v. (Walter) LaGrand*, 734 P.2d 563 (Ariz. 1987), ANNEX 3, at pp. 565 ff.; *State v. (Karl) La Grand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4, at pp. 1067 ff.

9 For the transcript of the Aggravation-Mitigation (Sentencing) Hearing, see ANNEX 5. For the Judgment of 14 December 1984, see ANNEX 6.

10 *State v. (Walter) LaGrand*, 734 P.2d 563 (Ariz. 1987), ANNEX 3; *State v. (Karl) LaGrand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4.

11 *State v. Karl LaGrand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4, at p. 1069.

12 *Karl LaGrand v. Arizona*, 484 U.S. 872, 108 S.Ct. 206 (Mem.); *Walter LaGrand v. Arizona*, 484 U.S. 872, 108 S.Ct. 207 (Mem.), ANNEX 7.

13 See *infra*, Part III, Ch. V. 3. and the documents annexed thereto.

14 Order of 24 January 1995, ANNEX 8; Order of 16 February 1995, *LaGrand v. Lewis*, 883 F.Supp. 451 (D.Ariz. 1995), ANNEX 9.

15 *LaGrand v. Stewart*, 133 F.3d 1253, ANNEX 10, at pp. 1261 f. (9th Cir.).

16 *LaGrand v. Stewart*, 119 S.Ct. 422 (1998); Rehearing denied on 7 December 1998, 119 S.Ct. 610, ANNEX 11.

17 For the respective "Notice of Consulate Assistance" to Karl LaGrand of 21 December 1998, see ANNEX 12.

18 See for the Warrant of Execution concerning Walter LaGrand, ANNEX 13.

19 Letter of German President Herzog to President Clinton of 5 February 1999, ANNEX 4.

20 See letter of Chancellor Schröder to President Clinton of 2 February 1999, ANNEX 15; letter of Chancellor Schröder to Arizona Governor Hull of 2 February 1999, ANNEX 16.

21 Letters of Foreign Minister Fischer to U.S. Secretary of State Albright of 27 January 1999, ANNEX 17, and 22 February 1999, ANNEX 18; to Arizona Governor Hull of 27 January 1999, ANNEX 19.

22 Letter of Minister of Justice Däubler-Gmelin to Attorney General Reno of 27 January 1999, ANNEX 20.

23 ANNEX 18.

24 Transcript of a video recording of the proceedings before the Clemency Board on 23 February 1999 (lodged with the Court).

25 *LaGrand v. Stewart*, 170 F.3d 1158 (9th Cir. 1999), ANNEX 21.

26 *LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999), ANNEX 22.

27 *Stewart v. LaGrand*, 119 S.Ct. 1107 (Stevens and Ginsburg, JJ., dissenting); ANNEX 23.

28 ANNEX 24.

29 See ANNEX 25.

30 ANNEX 26.

31 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29).

32 *Germany v. United States and Jane Dee Hull*, Complaint of 3 March 1999 and supporting materials, ANNEX 27.

33 ANNEX 28.

34 *Ibid*. For the reply of Germany of the same day, see ANNEX 29.

35 *LaGrand v. Arizona*, 119 S.Ct. 1137 (Breyer and Stevens, JJ., dissenting), ANNEX 30.

36 *Stewart v. LaGrand*, 119 S.Ct. 1018, ANNEX 31.

37 *Germany v. United States*, 119 S.Ct. 1016 (Stevens and Breyer, JJ., dissenting), ANNEX 32.

38 ANNEX 33.

39 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9.

40 596 UNTS, p. 487.

41 Thus the words of Judge Butzner in his concurring opinion in *Breard v. Pruett*, 134 F.3d 622 (4th Cir. 1998).

42 The letter is reprinted in Annex 22 of the Memorial of the Republic of Paraguay of 9 October 1998 in the *Breard* Case. The text of the letter is also to be found in J. Charney/W. Reisman, Agora: Breard. The Facts, 92 *American Journal of International Law* (1998), pp. 671 f.

43 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, pp. 248 ff.

44 *Ibid.*, p. 259.

45 See S. Rosenne, *The Law and Practice of the International Court* (1997), vol. II, pp. 659 f., with further references.

46 596 UNTS, p. 261.

47 See Bundesgesetzblatt (German Federal Gazette) 1971 II, p. 1285; international source: Multilateral Treaties deposited with the Secretary-General. Status as at 31 December 1997, UN Doc. ST/LEG/SER.E/16, p. 78. At the time of ratification, Germany was not yet a member of the United Nations. Therefore, in a communication deposited on 24 January 1972 with the Registrar of the International Court of Justice, who transmitted it to the Secretary-General pursuant to operative paragraph 3 of Security Council resolution 9 (1946) of 15 October 1946, the Government of the Federal Republic of Germany stated as follows:

> "In respect of any dispute between the Federal Republic of Germany and any Party to the Vienna Convention on Consular Relations of 24 April 1963 and to the Optional Protocol thereto concerning the Compulsory Settlement of Disputes that may arise within the scope of that Protocol, the Federal Republic of Germany accepts the jurisdiction of the International Court of Justice. This declaration also applies to such disputes as may arise, within the scope of article IV of the Optional Protocol concerning the Compulsory Settlement of Disputes, in connexion with the Optional Protocol concerning Acquisition of Nationality.
>
> It is in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the International Court of Justice that the jurisdiction of the Court is hereby recognized.
>
> The Federal Republic of Germany undertakes to comply in good faith with the decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter."

48 Consolidated text (including the modification of 18 December 1978) in 859 UNTS, p. XII.

49 *United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980,* p. 144.

50 These provisions read as follows:

> "Article II:
>
> The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice, but to an arbitral tribunal.
>
> Article III:
>
> 1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.
>
> 2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

51 *I.C.J. Pleadings 1980, supra* note 49, p. 145.

52 *I.C.J. Pleadings 1980, ibid.*, at p. 149 (emphasis added).

53 *United States Diplomatic and Consular Staff in Tehran, Judgment,* I.C.J. Reports 1980, p. 25 (para. 48).

54 *I.C.J. Pleadings 1980, supra* note 49, at p. 142.

55 "We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or

arbitration." *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 1.2. (Mr. Andrews).

56 *I.C.J. Reports 1998*, *supra* note 43, at p. 255 (para. 26).

57 *I.C.J. Reports 1980*, *supra* note 53, at p. 26 (para. 48).

58 *I.C.J. Pleadings 1980*, *supra* note 49, at p. 149.

59 *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A No. 2,* p. 11. The authoritative French text reads as follows: "Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes."

60 Worth to be mentioned is the replacement of the expression "persons" by the more accurate formulation "parties", *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995,* p. 99 (para. 22).

61 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 314 f. (para. 87). See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 122 (para. 21) and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 17 (para. 22).

62 The Court referred to its judgement in *East Timor, I.C.J. Reports 1995,* pp. 99 f. (para. 22) where reference is made to the following earlier decisions: *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2,* p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963,* p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 27 (para. 35).

63 *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328.

64 Referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74 and *East Timor*, I.C.J. Reports 1995, pp. 99f. (para. 22).

65 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74.

66 *I.C.J. Pleadings, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* pp. 238 f.

67 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 28 (para. 38).

68 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para 3.10 (Mr. Crook).

69 See *infra* Part Four.

70 ANNEX 12.

71 See *infra* Part Four, Ch. I. 3. c).

72 *I.C.J. Pleadings 1980*, *supra* note 49, at p. 279.

73 *Cf.* the treatment of this question by the International Court in its Judgment in the *Hostages Case, supra* note 53, at pp. 24 ff. (paras. 46 ff.).

74 See in detail *infra* Part Four, Ch. I. 3. b) and c).

75 See *ibid.*

76 See, e.g., Brief for the United States as *Amicus Curiae* in the Cases of *Paraguay v. Gilmore* and *Breard v. Greene* before the U.S. Supreme Court, 1997 U.S. Briefs 1390, at pp. 40 ff., ANNEX 34.

77 Original German text: "Der Internationale Gerichtshof (IGH) hat eine völkerrechtlich verbindliche Entscheidung getroffen" (see ANNEX 35).

78 See Memorandum in support of Motion for leave to file a Bill of Complaint and Motion for Preliminary Injunction, ANNEX 27, p. 2.

79 Original German text: "[D]er IGH [hat] nicht nur eine Verhaltensempfehlung ausgesprochen, sondern eine verbindliche Entscheidung getroffen. Er hat am 3. März 1999, also noch vor der Hinrichtung von Walter LaGrand am 4. März 1999, dem Antrag der Bundesregierung auf Erlaß vorsorglicher Maßnahmen in vollem Umfange stattgegeben und den USA durch Beschluß gemäß Artikel 41 IGH-Statut in Verbindung mit Artikel 75 der Verfahrensordnung des IGH folgendes aufgegeben:

> `Die USA haben alle ihr zur Verfügung stehenden Maßnahmen zu ergreifen, um sicherzustellen, daß die Hinrichtung von Walter LaGrand bis zu einer Entscheidung in der Hauptsache nicht vollstreckt wird.'
>
> Bekanntlich sind die USA der verbindlichen Entscheidung des IGH nicht gefolgt." Bundestags-Drucksache Nr. 14/784, see ANNEX 36.

80 *I.C.J. Pleadings 1972, Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* p. 347.

81 *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* p. 47.

82 ANNEX 28.

83 German Complaint, ANNEX 27, p. 2.

84 ANNEX 34, at p. 49.

85 ANNEX 37.

86 ANNEX 38.

87 See *infra* note 481 and accompanying text.

88 See *infra*, Part IV, Ch. III. 4. a).

89 See in detail *infra* Part Six.

90 46 *Annuaire de l'Institut de Droit international* (1956), p. 360: "Tout différend relatif à l'interprétation ou à l'application de la présente convention relèvera de la compétence obligatoire de la Cour internationale de Justice qui, à ce titre, pourra être saisie par requête de toute Partie au différend." The direct impact of this recommendation on the drafting of the Optional Protocol is described in detail by H. Briggs, The Optional Protocols of Geneva (1958) and Vienna (1961, 1963) concerning the Compulsory Settlement of Disputes, in: *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp. 628 ff.

91 44 *Annuaire de l'Institut de Droit international* (1952), p. 461.

92 *Mavrommatis Jerusalem Concessions, 1925, P.C.I.J., Series A No. 5* and *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9.*

93 *Mavrommatis, supra* note 92, at p. 48.

94 *Chorzów Factory, supra* note 92, at p. 24.

95 See, *e.g.*, P. Reuter, *Introduction to the Law of Treaties* (2nd ed. 1995), p. 96.

96 *Chorzów Factory, supra* note 92, at p. 24.

97 See, *e.g.*, the very comprehensive presentation by P. You, *Le préambule des traités internationaux* (1941); exactly on the point in question here see also P. You, L'interprétation des traités et le rôle du préambule des traités dans cette interprétation, 20 *Revue de Droit International* (1942), pp. 25 ff. Cf. also J. Corriente Cordoba, Valoración jurídica de los preámbulos de los tratados internacionales (1973); G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and other Treaty Points, 33 *British Yearbook of International Law* (1957), pp. 227 ff.; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984), pp. 127 ff.; H. Köck, *Vertragsinterpretation und Vertragsrechtskonvention*, p. 30 Fn. 63 (with references to international jurisprudence). See also in detail already J. Basdevant, La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités, 15 *Recueil des Cours* (1926-V), pp. 563 ff.

98 See in particular *I.C.J. Pleadings* 1980, *supra* note 49, at pp. 142 ff.

99 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 311 (Mr. Crook).

100 *I.C.J. Reports 1998, supra* note 43, p. 256 (para. 31).

101 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 142 (para. 283) recalling the finding of the Permanent Court of International Justice in *Chorzów Factory, supra* note 92, p. 21.

102 *ICJ Reports 1998, supra* note 61, at p. 18 (para. 259) and at p. 123 (para. 24).

103 See already the Permanent Court of International Justice in its Judgment of 25 August 1925 in *Certain German Interests in Polish Upper Silesia, Jurisdiction, 1925, P.C.I.J., Series A, No. 6*, p. 16: "It follows that the differences of opinion contemplated by Article 23 [jurisdictional clause which provided for the competence of the Court in cases "résultant de l'interprétation et de l'application" of a certain treaty] ... may also include differences of opinion as to the extent of the sphere of application ..." (recalled in *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, pp. 20 f.).

104 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, para. 23, referring to earlier decisions.

105 *Ibid*., para. 24.

106 *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Memorial of the Republic of Paraguay (9 October 1998), p. 28 (para. 3.19).

107 P. Reuter, *Introduction to the Law of Treaties* (2d ed. 1995), p. 96.

108 *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199 (emphasis added).

109 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 30; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 12 July 1973, I.C.J. Reports 1973,* p. 313.

110 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 203 (para. 72)

111 The following presentation confines itself to the quotation of the relevant passages from the Judgment in Germany v. Iceland. However, the statements of this Court cited in the following are also to be found - in identical terms - in the Judgment on the respective dispute between the United Kingdom and Iceland (*ibid*., 21 f.).

112 *Ibid*., p. 190 (para. 39).

113 *Ibid*., para. 40.

114 *Ibid*.

115 *Ibid*.

116 *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974,* pp. 259 f. (para. 23).

117 *Ibid*. See also Rosenne, *supra* note 45, p. 602: "In addition to that `mainline' or `merits' jurisdiction and the related incidental jurisdiction, the Court possesses inherent jurisdiction to control all aspects of the proceedings themselves."

118 See *infra* 1. and 2.

119 See *infra* 3. Since nationality is also a constituent element of Art. 36 of the Vienna Convention itself, the existence of this legal bond also constitutes a basic condition of the assumption of a breach of a treaty obligation on the part of the United States vis-à-vis Germany.

120 *Cf*. the letter of the Solicitor General to the U.S. Supreme Court, ANNEX 28.

121 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 253 (para. 32).

122 *Ibid*., at pp. 253 f. (para. 32).

123 *Ibid*., at p. 254 (para. 36).

124 *Ibid*., at pp. 254 f. (para. 36).

125 See *supra* Part Two (Statement of Facts).

126 See *supra* Part Two, para. 2.06.

127 See for the factual and legal background of this case, inter alia, R. Lillich, The Soering Case, 85 *American Journal of International Law* (1991), pp. 128 ff. and J. Quigley/S. Shank, Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?, 30 *Virginia Journal of International Law* (1990), pp. 24 ff. On subsequent developments - in particular the assurance on the part of the United States that Soering would not face the death penalty if extradited - see R. Steinhardt, Recent Developments in the Soering Litigation, 11 *Human Rights Law Journal* (1990), pp. 453 ff.

128 *I.C.J. Reports 1998, supra* note 61, pp. 296 f. (paras. 38 f.).

129 Memorandum, ANNEX 27, pp. 3 f.

130 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), ICJ Reports 1998*, p. 26 (para. 46) referring to *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95 (para. 66); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 272 (para. 62) and *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38.

131 K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The Breard Case As a Miscarriage of (International) Justice, in: *In Memoriam Judge José Maria Ruda*, manuscript, pp. 14 f. (emphasis added, footnotes omitted), ANNEX 39.

132 One consequence was, of course, that Germany had to adapt and alter one of its submissions which was indeed affected by the execution, due to the very nature of the death penalty.

133 *I.C.J. Reports 1974*, *supra* note 116, p. 256 (para. 11) (emphasis added).

134 Application, Paragraph 15.

135 See copies of the certificates of birth of the brothers as well as of the passport of their mother, Ms. Emma M. Gebel, in ANNEX 40.

136 "Durch Geburt erwirbt das eheliche Kind eines Deutschen die Staatsangehörigkeit des Vaters, das uneheliche Kind einer Deutschen die Staatsangehörigkeit der Mutter"; cf. A. Makarov, *Deutsches Staatsangehörigkeitsrecht. Kommentar* (1966), p. 43.

137 ANNEX 41.

138 See, *e.g.*, Makarov, *supra* note 136, p. 43: "Der § 4 des Reichs- und Staatsangehörigkeitsgesetzes bildet eine der Grundlagen des deutschen Staatsangehörigkeitsrechts, indem er das reine jus sanguinis-Prinzip proklamiert." [§ 4 of the RuStAG, being based on the pure *jus sanguinis* principle, is one of the pillars of the German law of nationality].

139 See in particular *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20 ff.

140 J. Rezek, Le droit international de la nationalité, 198 *Recueil des Cours* (1986-III), p. 360.

141 See *supra* Part Two, note 6 and 7 and accompanying text.

142 Alien Registration Cards Nos. A-14 865 867 and A-14 865 868.

143 ANNEX 42.

144 See, *e.g.*, the letter of the U.S. Immigration and Naturalization Service to the German Consulate in Los Angeles of 10 December 1992, ANNEX 43.

145 *Vienna Convention on Consular Relations (Paraguay v. United States of America), supra* note 43, at pp. 256 ff. (paras. 31 ff.).

146 *LaGrand (Germany v. United States of America), Provisional measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29).

147 *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 174.

148 L. Lee, *Consular Law and Practice* (2d ed. 1991), p. 134.

149 *Ibid*., at p. 136; J. Steinkrüger, in: G. Hecker/G. Müller-Chorus (eds.), *Handbuch der konsularischen Praxis* (2d ed. 1999), § 9, margin note 4.

150 See G. Hackworth, *Digest of International Law*, vol. IV (1942), pp. 836 f.

151 Cabled instruction to the U.S. Consul in Syria, *reprinted in*: E. McDowell (ed.), *Digest of United States Practice in International Law* 1975, pp. 249 f.

152 W. Aceves, The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies, 31 *Vanderbilt Journal of Transnational Law* (1998), p. 275.

153 These cases include the arrest and detention of German nationals in California (Ms. Katharina Grant), Connecticut (Ms. Susann Hanisch), Florida (Mr. Sven Olaf Diemer, Mr. Thomas Eichner, Mr. Ronny Wirth), Oregon (Ms. Marieluise Veronika Kashefi), and Virginia (Mr. Otto Bresselau von Bressendorf, Ms. Barbara Lichtenberg).

154 *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248.

155 See also the cases reported by Aceves, *supra* note 152, at pp. 267 ff.; R. Doherty, Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law, 82 *Virginia Law Review* (1996), pp. 1318 ff.; S. Shank/J. Quigley, Foreigners on Texas's Death Row and the Right of Access to a Consul, 26 *St. Mary's Law Journal* (1995), pp. 722 ff.

156 See the case of the Canadian Stanley Faulder executed in Texas on 17 June 1999; *Faulder v. Johnson*, 178 F.3d 741 (5th Cir.), *cert. denied*, 119 S.Ct. 2363; *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied* under the name *Faulder v. Texas*, 119 S.Ct. 909 (1999).

157 Request for an Advisory Opinion No. OC-16 to the Inter-American Court of Human Rights, submitted by the Government of the United Mexican States of 17 November 1997, ANNEX 44. Oral hearings in this case have been held on 12 and 13 June 1998.

158 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS, p. 331.

159 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21 f. (para. 41), quoted also in *Maritime Delimitation and Territorial Questions between Qatar and Bahrein, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18 (para. 33): "Il peut être fait appel à titre complémentaire à des moyens d'interprétation tels les travaux préparatoires et les circonstances dans lesquelles le traité a été conclu." See also I. Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984), p. 19 (with further references): "[T]here is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary law."

160 Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, UN Doc. A/CONF.25/6, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/CONF.25/16/Add. 1, p. 24 (emphasis added).

161 *Yearbook of the International Law Commission* 1960, vol. I, p. 51 (para. 25).

162 The text is based on a proposal by the United Kingdom, UN Doc. A/CONF.25/C.2/L.107, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/CONF.25/16/Add.1, p. 85 (emphasis added). See also the discussion of the UK amendment to the International Law Commission's Draft in the 18th meeting of the Second Committee of the 1963 Conference, in: *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/CONF.25/16, p. 346 (para. 47). The amendment was adopted by 42 votes to 14, with 11 abstentions; *ibid*., 19th Meeting of the Second Committee, pp. 347 f.

163 By 33 to 32, with 16 abstentions, see 12th plen. mtg., Agenda Item 1, *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/CONF.25/16, p. 40 (paras. 2-9).

164 *Ibid*., para. 7.

165 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 3.27 (Mr. Crook).

166 See S. Shank/J. Quigley, Obligations to Foreign Nationals Accused of Crime in the United States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 108.

167 1997 U.S. Briefs 1390, ANNEX 34, at p. 39.

168 Cf. L. Tribe, *American Constitutional Law* (2d ed. 1988), pp. 171 ff.; J. Liebman/R. Hertz, *Federal Habeas Corpus Practice and Procedure* (3d ed. 1998). For a historical overview of the jurisprudence of the Supreme Court on the question, see *Coleman v. Thompson*, 501 U.S. 722, 744 ff. (1991) (O'Connor, J.); *Murray v. Carrier*, 477 U.S. 478 (1986), at 485 (O'Connor, J); *Wainwright v. Sykes*, 433 U.S. 72, 77 ff. (1977) (Rehnquist, J., now C.J.).

169 See Article III of the U.S. Constitution. Cf. also the Tenth Amendment of 1791 which reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For details concerning the borderline between federal and state jurisdiction drawn by the Supreme Court see L. Tribe, *American Constitutional Law* (2d ed. 1988), pp. 162 ff.

170 404 U.S. 270, 275 (1971).

171 *Ibid*., at pp. 276, 278.

172 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (O'Connor, J.); see also *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (O'Connor, J.); *Engle v. Isaac*, 456 U.S. 107 (1982), at p. 134, n. 43 (O'Connor, J.); *Francis v. Henderson*, 425 U.S. 536, 542 (1976) (Stewart, J.); *Wainwright v. Sykes*, 433 U.S. 72, 87, 90 (1977) (Rehnquist, J., now CJ.).

173 *Murray v. Carrie*r, 477 U.S. 478, 488 (1986) (O'Connor, J.).

174 *United States v. Frady*, 456 U.S. 152, 170 (1982) (O'Connor, J.).

175 *Sykes*, at p. 91.

176 *Murray v. Carrier*, 477 U.S. 478, 488 f. (1986) (O'Connor, J.); see also *Engle v. Isaac*, 456 U.S. 107, 133 f. (1982) (O'Connor, J).

177 *Carrier*, at p. 488 (O'Connor, J.), footnote added, also cited in *Coleman*, at p. 752 (O'Connor, J.).

178 *Strickland v. Washington*, 466 U.S. 668, 690 (O'Connor, J.).

179 *Coleman*, at p. 771.

180 Art. VI cl. 2 U.S. Constitution. See also *Breard v. Greene*, 118 S.Ct. 1352 (1998), 37 *International Legal Materials* (1998), p. 828; *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

181 *Carrier*, at p. 496 (O'Connor, J.): "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." See also *Teague v. Lane*, 489 U.S. 288, 313 (O'Connor, J.); *Sawyer v. Whitley*, 505 U.S. 333, 335 ff. (1992) (Rehnquist, C.J.).

182 *Sawyer*, at p. 336. For an application of this doctrine in the LaGrand case, see *Karl LaGrand v. Stewart*, U.S. District Court (D. Arizona), 23 February 1999, ANNEX 45, at p. 14.

183 *Sawyer*, at pp. 345 ff. (Rehnquist, C.J.).

184 *Teague v. Lane*, 489 U.S. 288, 311 ff. (1989). *Cf. ibid*., at p. 313: "[W]e believe it unlikely that many such components of basic due process have yet to emerge."

185 See *infra* note 198 for a judgment concerning a similar provision in a legislative act.

186 See, *e.g., Karl LaGrand v. Stewart*, U.S. District Court (D. Arizona), 23 February 1999, ANNEX 45, pp. 6 f.

187 Pub.L. No. 104-132, 110 Stat. 1214 (1996).

188 28 U.S.C. § 2254(a), (e) (2) (ii) (Supp. 1998):

> "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on -
>
> (i) ... .
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

189 *Breard*, 37 *International Legal Materials* 826, 828 (1998): "[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." The AEDPA "prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him."

190 28 U.S.C. 2253 (c) reads:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ...
>
> (B) ... .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

191 *Ohio v. Loza*, 1997 WL 634348 (Ohio App. 12 Dist.), p. 2. This judgment denied a motion concerning the violation of Art. 36 at state postconviction proceedings which are reserved for the violations of constitutional rights. See also *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993); *Murphy v. Netherland*, 116 F.3d 97, 100 (1997).

192 *LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998), ANNEX 10.

193 *Sawyer*, at pp. 345 (1992).

194 *LaGrand v. Stewart*, 133 F.3d 1253, 1262 (9th Cir. 1998), ANNEX 10.

195 119 S.Ct. 422 (1998).

196 *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999), ANNEX 21:

> "Federal habeas review is not available on this claim unless LaGrand can show cause for his default and actual prejudice. ... Having been `presented in a prior application' for federal habeas relief under § 2254, LaGrand's arguments cannot be presented in an [extraordinary] SOS petition. See 28 U.S.C. § 2244 (b) (1)."

Previously, the Arizona state court had dismissed the claim because it found it procedurally barred under an Arizona Rule of Criminal Procedure, 32.2 (a) (3), which provides: "A defendant shall be precluded from ... relief ... based upon any ground ... that has been waived at trial, appeal, or in any previous collateral proceeding."

197 *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *cert. denied*, 519 U.S. 995, 117 S.Ct. 487. To the same effect, see *Murphy v. Netherland*, 116 F.3d 97, 100 f. (4th Cir. 1997), *cert. denied*, 118 S.Ct. 26; *Breard v. Pruett*, 134 F.3d 615, 619 f. (4th Cir. 1998).

198 *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) referring to 28 U.S.C. § 2253 (c) (2).

199 *Ibid*. See also *Breard v. Pruett*, 134 F.3d 615, 619 f. (4th Cir. 1998); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996).

200 See *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir.), ANNEX 21; *La Grand v. Stewart*, 133 F.3d 1253, 1262 (9th Cir.), ANNEX 10, *cert. denied*, 119 S.Ct 422 (1998), ANNEX 11.

201 For a detailed presentation of this claim, see *infra*, Part Four, Ch. I 3 c). For evidence on the effect of procedural default on challenges of violations of Art. 36 Vienna Convention in other cases, see Shank/Quigley, *supra* note 155, at pp. 722 ff.. See, in particular, *Santana v. State*, 714 S. W. 2d 1 (Tex. Crim. App. 1986) (mitigating circumstances not raised; *cf*. Shank/Quigley, *ibid*.); *Faulder v. State*, 745 S. W.2d 327 (Tex. Crim. App. 1987) (lack of contact with the Consulate prevented Faulder from presenting evidence on his quality as a responsible parent and on his organic brain damage, see Shank/Quigley, *ibid*., at p. 724).

202 *People v. Dorado*, 62 Cal. 2d 338, at p. 351, 398 P.2d 361, at pp. 369 f. (Tobriner J.), cited by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (Warren, C.J.).

203 Shank/Quigley, Obligations to Foreign Nationals, *supra* note 166, at p. 127.

204 *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

205 Aceves, 31 *Vanderbilt Journal of Transnational Law* (1998), pp. 277 f. (footnote omitted), citing *U.S. v. Calderon-Medina*, 521 F.2d 529, 531 (9th Cir. 1979); *U.S. v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980) (finding that prejudice had been shown); *Waldron v. Immigration and Naturalization Service*, 17 F.3d 511, 514 ff. (2d Cir. 1993).

206 Shank/Quigley, *supra* note 155, at p. 751 (footnote omitted).

207 Shank/Quigley, *supra* note 166, at p. 110.

208 K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice, in: *In Memoriam Judge José Maria Ruda*, manuscript, p. 6, ANNEX 39.

209 See *Republic of Paraguay v. Allen*, 949 F.Supp. 1269, 1272 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert. denied*, 118 S.Ct. 1352, 1356 (1998), reprinted in 37 *International Legal Materials* (1998), p. 826;

Germany v. U.S., 119 S.Ct. 1016, 1017 (per curiam); *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997), but see *Germany v. U.S.*, 119 S.Ct. 1016, p. 1017 (Souter, J. concurring; Ginsburg, J. joining): "I do not rest my decision to deny leave to file the bill of complaint on any Eleventh Amendment principle"; Aceves, *supra* note 152, at p. 296 (asserting that the Supremacy Clause in Art. VI cl. 2 of the U.S. Constitution, which determines that treaties are "the supreme law of the land", "provides one possible basis for challenging state immunity from suit under the Eleventh Amendment").

210 See also Shank/Quigley, *supra* note 155, at p. 748, speaking of "the need for a system to ensure that the United States complies with the Vienna Convention." *Id*., *supra* note 166, at p. 122: The use of procedural default rule "violates, in particular, paragraph 2 of article 36, which says that while article 36 issues operate in the context of domestic procedures, those procedures must allow full effect to the purposes of consular access."

211 Manuscript, *supra* note 208, at p. 7.

212 On the legally binding character of an Order on Provisional Measures, see *infra* Ch. III.

213 *Application of the Convention on the Prevention an Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993,* Sep. Op. Shahabuddeen, *I.C.J. Reports 1993,* p. 368, citing E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 161.

214 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus by a Person in State Custody, *LaGrand v. Lewis*, 8 March 1993, ANNEX 46, p. 68 (describing how the German consulate would have assisted immediately had they been contacted when the LaGrands were arrested in 1982).

215 *Ibid*., at pp. 67 f. (describing how immediately upon being informed of the LaGrands' situation, German consular officials travelled to Arizona to visit them and thereafter remained in "constant communication" and offered the support of the Federal Republic of Germany in opposing their capital sentences).

216 See Vienna Convention, Art. 5 (i): "Consular functions consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State"; see also M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997), p. 565; Shank/Quigley, *supra* note 155.

217 Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) of 11 September 1974, Bundesgesetzblatt (Federal Gazette) 1974, vol. I, p. 2317. In the German original, the respective paragraphs read:

> "§ 1. Die Konsularbeamten (Berufskonsularbeamte oder Honorarkonsularbeamte) sind berufen, ... Deutschen sowie inländischen juristischen Personen nach pflichtgemäßem Ermessen Rat und Beistand zu gewähren. ...
>
> § 7. Die Konsularbeamten sollen in ihrem Konsularbezirk deutsche Untersuchungs- und Strafgefangene auf deren Verlangen betreuen und ihnen insbesondere Rechtsschutz vermitteln."

218 Runderlaß as of 15 October 1998, Ch. I guideline 1, with an English translation of the relevant parts, ANNEX 47. This Runderlaß consolidates earlier versions dating back to 1975.

219 *Ibid*., Ch. II guideline 1.

220 *Ibid*., Ch. II guideline 4 b) and c).

221 *Ibid*., Ch. II guideline 5.

222 For details see *infra* note 248 and accompanying text.

223 Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico in Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore*, ANNEX 48, at p. 1.

224 L. Bilionis/R. Rosen, Lawyers, Arbitrariness, and the Eighth Amendment, 75 *Texas Law Review* (1997), p. 1315.

225 In Arizona, the trial judge presides over the penalty phase and alone decides the sentence. In other states the jury from the merits phase also decides sentencing, or the court empanels a new jury for the sentencing phase.

226 *Godfrey v. Georgia*, 446 U.S. 420, 427-428 (states must specifically define crimes or aggravating circumstances for which death is a possible punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (the execution of a person under 16 years of age is prohibited by the Eighth and Fourteenth Amendments); *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986) (the Eight Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane).

227 *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Arizona's death penalty statute includes a non-exhaustive list of aggravating and mitigating factors which may be introduced at the sentencing phase. A.R.S. § 13-703.01(A).

228 *State v. Rogovich*, 932 P.2d 794, 800-801 (1997).

229 *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

230 *State v. Barreras*, 181 Ariz. 516, 892 P.2d 852, 857-858 (1995).

231 *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality); see also *Penry v. Lynaugh*, 492 U.S. 302, 328, (1989) ("in order to ensure reliability in the determination that death is the appropriate punishment in a particular case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality).

232 *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Lockett v. Ohio*, 438 U.S. 586, 603-605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976).

233 *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (holding that constitutional imposition of the death penalty depends on "consideration of the character and record of the individual offender and the circumstances of the particular offense"); see also *California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion of O'Connor, J.); *Lockett v. Ohio*, 438 U.S. 586, 603-605 (1978).

234 *Hendricks v. Calderon*, 864 F. Supp. 929, 944-945 (N.D. Cal. 1994), *aff'd by* 64 F.3d 1340 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996); Affidavit of Scharlette Holdman, Ph.D, ANNEX 49, paras. 7, 18; J. Tomes, Damned if you do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Litigation, 24 *American Journal of Criminal Law* (1997), p. 361; L. Bilionis/R. Rosen, *supra* note 224, at p. 1317: defence lawyers must "unearth, develop, present, and insist on the consideration of those `compassionate or mitigating factors stemming from the diverse frailties of humankind.'" (Citations omitted).

235 *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

236 Affidavit of Scharlette Holdman, Ph.D. (Mitigation Specialist with the Center for Capital Assistance, a non-profit organisation providing legal assistance to court-appointed counsel in capital cases involving indigent defendants), ANNEX 49, paras. 7, 10-12; J. Tomes, *supra* note 234, at p. 361 (1997).

237 Affidavit of Scharlette Holdman, ANNEX 49, paras. 7-12; Affidavit of Robert Hirsh, Esq., ANNEX 50, paras. 10-13.

238 *State v. Perez*, 148 Ill. 2d 168, 193; 592 N.E. 2d 984, 996 (1992); see also S. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake, *Annual Survey of American Law* 1997, p. 792 (describing a case where after one defendant was sentenced to death without any

mitigating evidence of his mental retardation having been put before the jury, one juror read newspaper accounts saying that the defendant was mentally retarded and stated that she would not have voted for the death penalty if she had known).

239 S. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 *Yale Law Journal* (1994), p. 1837, n. 10-14 and accompanying text (discussing cases where failure to present mitigating evidence contributed to death sentences for severely retarded and mentally ill defendants).

240 Transcript of Aggravation-Mitigation (sentencing) Hearing, *State of Arizona v. LaGrand and LaGrand* (17 Sept. 1984), ANNEX 5.

241 Walter LaGrand's attorney also called their half-sister to testify, but she was not asked, and probably did not recall sufficiently to testify, about the early years in Germany.

242 Affidavit of Scharlette Holdman, ANNEX 49, paras. 10-12; Affidavit of Robert Hirsh, ANNEX 50, paras. 10-13 (commenting on inadequacy of mitigation case due in part to lack of collateral evidence); *State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 226 (1996) (finding expert opinion based solely on defendant's own necessarily self-serving description insufficient to mitigate); *Hendricks v. Calderon*, 864 F. Supp. 929, 944 ff. (N.D. Cal. 1994), *aff'd by* 64 F.3d 1340 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111, 134 L.Ed. 2d 485, 116 S.Ct. 1335 (1996) (granting writ of habeas corpus vacating death sentence because ineffective assistance of counsel in presenting inadequate mitigation case where, *inter alia*, no independent corroborating was presented of defendant's traumatic childhood).

243 *State of Arizona v. Walter LaGrand*, Third Petition for Post-Conviction Relief, 2 March 1999, pp. 1-9, and exhibits 1-20, ANNEX 51.

244 *Ibid*.

245 *Ibid*.

246 *Ibid*.

247 *Ibid*.

248 Not only was this information vitally important in and of itself, but it was because of vital statistics located in these records that subsequent counsel for Walter LaGrand was able to locate his father and step-father and obtain affidavits from them containing additional mitigating evidence. Affidavit of Kelley Henry, ANNEX 52, para. 4.

249 Affidavit of Scharlette Holdman, ANNEX 49, para. 8.

250 *State v. Wallace*, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990).

251 951 P.2d 869, 884-86 (1997).

252 *State v. Richmond*, 886 P.2d 1329, 1338 (1994) (death sentence reduced to life imprisonment because of mitigating evidence of defendant's mental disorder and changed character while in prison); see also *State v. Mauro*, 766 P.2d 59, 69 (1988) (defendant's mental disorder was a "sufficiently substantial" mitigating circumstance to reduce death sentence).

253 Affidavit of Robert Hirsh, Esq., ANNEX 50, paras. 10-13; Affidavit of Scharlette Holdman, ANNEX 49, paras. 11-12.

254 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus (8 March 1993), ANNEX 46, at pp. 23 ff., 106 ff., 130 and Appendix Exhibit I, Affidavit of Dr. Timothy J. Derning.

255 For importance of corroborating mitigation evidence see sources cited *supra* note 242.

0 Affidavit of Kelley Henry, ANNEX 52, para. 6.

1 Affidavit of Jeannette Laura Sheldon (3 March 1999), ANNEX 53, para. 6.

2 See *McFarland v. Scott*, 512 U.S. 1256, 1256 (1994) (dissenting opinion of Blackmun, J.) (describing capital cases as "more costly and difficult to litigate than ordinary criminal trials"); S. Bright, *supra* note 239, at pp. 1839 f., 1859, 1863.

3 Bilionis/Rosen, *supra* note 234, at pp. 1315 (emphasis added).

4 See Bilionis/Rosen, *ibid*., at pp. 1316 ff.; Bright, *supra* note 239.

5 Leroy D. Clark, All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice, 81 *Marquette Law Review* (1997), pp. 48 f.; Bright, *supra* note 234, at p. 1835.

6 Clark, *supra* note 261, at p. 50; Bright, *supra* note 234.

7 Even U.S. courts held that view; see, *e.g.*, *State v. LaGrand*, 733 P.2d, ANNEX 4, at p. 1069.

8 Bilionis/Rosen, *supra* note 234, at pp. 1304 ff., n. 13 ff. (listing articles by scholars, students, capital defenders, jurists and journalists re ineffective counsel for capital defendants); Bright, *supra* note 234, at p. 1835, n. 10-14 and accompanying text; Panel Discussion: The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases, 31 *Houston Law Review* (1994), p. 1105.

9 512 U.S. 1256 (1994) (dissenting opinion of Blackmun, J.); Bright, *supra* note 234, at p. 1837 (calling "competent representation by counsel" the "most fundamental component of the adversary system").

10 *McFarland v. Scott*, *ibid.*, at p. 1259; Bright, *supra* note 234, at pp. 1837, 1862.

11 *McFarland v. Scott*, *ibid*., at p. 1263.

12 *Ibid.*, at pp. 1259-61; Bright, *supra* note 238, at pp. 789 ff., 829 ff. (describing cases of drunk, dishonest and unconscious capital defence lawyers); Bright, *supra* note 239, at p. 1835 f. (describing case where woman sentenced to death for killing her abusive husband was represented by an attorney who appeared in court so intoxicated that he was sent to jail in contempt of court; the next morning both attorney and client were produced from the jail, and the trial recommenced).

13 Justice T. Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 *Columbia Law Review* (1986), pp. 3 f.

14 Affidavit of Kelley Henry, ANNEX 52, para. 4.

15 Affidavit of Tirso Molina Lopez, ANNEX 54, paras. 18, 20-23.

16 Affidavit of Masie LaGrand, ANNEX 55, paras. 6, 9.

17 *Ibid.*, para. 7.

18 *Ibid.*, para. 13.

19 *Ibid.*, para. 11.

20 *Ibid.*, paras. 11 ff.

21 *Ibid.*, para. 13.

22 Declaration of Pansy Shields, 2 March 1999, ANNEX 56.

23 Declaration of Ada I. Berrios, 2 March 1999, ANNEX 57, para. 6.

24 *Ibid*. (listing the background records she was able to obtain on Walter LaGrand, including 16 pages of assessment and evaluation reports from social workers at VisionQuest Youth Placement Facility; 75 pages of assessment and evaluation reports from Arizona Boys Ranch; 9 pages of high school records and transcripts).

25 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46, Appendix Exhibit N (lodged with the Court).

26 *Ibid*., Appendix Exhibit I, Affidavit of Dr. Timothy J. Derning, p. 4 (listing interview with Emma LaGrand as one of the documents he reviewed); Third Petition for Post-Conviction Relief, 2 March 1999, ANNEX 51, Exhibit 2 (Barstow interview).

27 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46, at pp. 23 ff., 106 ff., 130 and Appendix Exhibit I, Affidavit of Dr. Timothy J. Derning.

28 *Ibid*., Appendix Exhibit N (YOU and VisionQuest record), lodged with the Court; Third Petition for Post Conviction Relief, 2 March 1999, ANNEX 51, Exhibit 2 (Barstow interview); Shields Affidavit, ANNEX 56, paras. 3 ff., 9 f.; LaGrand Affidavit, ANNEX 55; paras. 13 f.

29 In the trial of the LaGrand brothers, the jury received instructions on felony murder, which requires that defendant either be the killer or be an active participant in the killing to receive death, and first degree murder, which requires premeditation. The jury returned a general verdict, not indicating under which crime it had convicted. If the crime was committed impulsively by Karl alone, then under either charge Walter was not eligible for the death penalty.

30 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46; Third Petition for Post-Conviction Relief, 2 March 1999, ANNEX 51, at pp. 9 f.

31 *State v. LaGrand*, 733 P.2d 1066, 1068 (1987).

32 Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46.

33 *Ibid*., Appendix Exhibit B (Affidavit of David Gerson).

34 R. Jennings/A. Watts (eds.), *Oppenheim's International Law*, vol. I (9th ed. 1992), p. 934.

35 *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 184.

36 *Mavrommatis Palestine Concessions, Judgment, P.C.I.J., 1924, Serie A, No. 2*, p. 12.

37 *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32 (para. 33).

38 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181f.; confirmed in *Barcelona Traction, supra* note 293, at p. 32 (para. 35).

39 *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16; confirmed in *Barcelona Traction, supra* note 293, at 33 (para. 36).

40 See *supra* Part Three, Ch. V. 3.

41 *Oppenheim's International Law*, *supra* note 290, p. 905.

42 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* pp. 21 f. (para. 41), quoted also in *Maritime Delimitation and Territorial Questions between Qatar and Bahrein, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995,* p. 18 (para. 33)

43 Apart from the passages quoted in note 298, *cf. Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952,* p. 196 .

44 1997 U.S. Briefs 1390, ANNEX 34, at p. 37.

45 *Oppenheim's International Law*, *supra* note 297, at pp. 1143 ff.

46 *Cf.* Art. IV, Sect. 14 of the UN Convention on the Privileges and Immunities of the United Nations, 1 UNTS, p. 15; 90 UNTS, p. 327 (corr.):

> "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations."

47 18 Apr. 1961, 500 UNTS, p. 96 (1964).

48 "*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States, ...".

49 Resolution II, Consideration of Civil Claims, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on Apr. 14, 1961, 500 UNTS, pp. 218 ff. (1964); also in: *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, UN Doc. A/CONF.20/14/Add. 1, at p. 90. The resolution reads:

> "*The United Nations Conference on Diplomatic Intercourse and Immunities*,
> *Taking note* that the Vienna Convention on Diplomatic Relations adopted by the Conference provides for immunity from the jurisdiction of the receiving State of members of the diplomatic mission of the sending State,
> *Recalling* that such immunity may be waived by the sending State,
> *Recalling further* the statement made in the preamble to the convention that the purpose of such immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,
> *Mindful* of the deep concern expressed during the deliberations of the Conference that claims of diplomatic immunity might, in certain cases, deprive persons in the receiving State of remedies to which they are entitled by law,
>
> *Recommends* that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims."

50 See *supra* note 159.

51 *Yearbook of the International Law Commission* 1960, vol. I, p. 42 (para. 1).

52 *Ibid*., p. 46 (para. 28).

53 *Ibid*., p. 50 (para. 23).

54 *Ibid.*, p. 51 (para. 25).

55 *Ibid.*, p. 47 (para. 41).

56 *Yearbook of the International Law Commission* 1961, vol. I, p. 33 (para. 16).

57 *Yearbook of the International Law Commission* 1960, vol. I, p. 50 (para. 20).

58 *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, p. 332 (para. 36).

59 *Ibid*., p. 333 (para. 50).

60 *Ibid*., p. 338 (para. 11).

61 *Ibid*., p. 82 (para. 58).

62 UN Document A/CONF.25/C.2/L.3, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/Conf.25/16/Add. 1, p.73.

63 *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, p. 337 (para. 39).

64 *Ibid*., p. 38 (para. 21).

65 *Ibid*., p. 38 (para. 24).

66 *Ibid*., p. 36 (para. 8).

67 *Ibid*., p. 37 (para. 13).

68 UN Doc. A/CONF.25/L.49, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/Conf.25/16/Add.1, p. 171.

69 UN Doc. A/CONF.25/L.50, *ibid*.

70 *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, pp. 83 f. (para. 73).

71 *Ibid.*, p. 332 (para. 37).

72 *Ibid*., p. 333 (para. 51).

73 *Ibid.*, p. 334 (para. 2).

74 *Ibid*., p. 339 (para. 13).

75 *General Assembly, Official Records*, Supplement No. 53, Resolutions and Decisions, UN Doc. A/40/53, p. 253.

76 Reply to the Secretary-General concerning the question of the international legal protection of the human rights of individuals who are not citizens of the country in which they live, UN Doc. A/40/638/Add.2, at p. 3. See also UN Doc. A/C.3/40/12, p. 27, para. 124 for a similar Japanese proposal.

77 UN Doc. E/CN.4/1354, p. 19.

78 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp. 254 f. (para. 70).

79 Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by United Nations General Assembly resolution 3452 (XXX) of 9 Dec. 1975.

80 *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).

81 See *supra* note 298 and accompanying text. On the use of subsequent practice for the interpretation of treaties by the Court, see *Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949,* p. 25: "The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation." See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 22 (para. 22); I. Sinclair, *supra* note 159, pp. 137 f., with further references.

82 Remarks in Hearings before the Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, 91st Cong. 1st Sess. 2 & 5 (appendix) (1969), cited according to W. Aceves, *supra* note 152, p. 268.

83 For the relationship between U.S. domestic law and international law generally, see, *e.g.*, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 115 (1) (b): "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."

84 1997 U.S. Briefs 1390, ANNEX 34, at p. 17 n. 4.

85 *Ibid.*

86 C. Vázquez, The Four Doctrines of Self-Executing Treaties, 89 *American Journal of International Law* (1995), p. 721.

87 *Ibid*., at p. 722 n. 135.

88 C. Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 *Columbia Law Review* (1992), p. 1157.

89 See Part Six of the present Memorial.

90 C. Vázquez, The Four Doctrines of Self-Executing Treaties, *supra* note 342, at pp. 719 ff. (citation at p. 721, footnotes omitted).

91 *U.S. v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

92 28 C.F.R. Section 50.5, 32 Fed. Reg. 5619 (1967) (concerning arrest and detention by federal officers).

93 8 C.F.R. Section 236.1 (e), 32 Fed. Reg. 1040 (1967); amended 62 Fed. Reg. 10312, 10360 (1997)

94 *U.S. v. Rangel-Gonzales*, 617 F.2d 529, 530 (1980); referring to *U.S. v. Calderon-Medina*, 591 F.2d 529 (1979), at 531, para. 3 and note 6. But see *Waldron v. INS*, 17 F.3d 511, 518 (1993) (denying that Art. 36 (1) (b) constitutes "any underlying fundamental constitutional or statutory right.")

95 *U.S. v. Lombera-Camorlinga*, 170 F.3d 1241, 1242 f. (9th Cir. 1999).

96 *Mavrommatis, supra* note 292.

97 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, Sep. Op. Weeramantry, I.C.J. Reports 1993, p. 389.

98 Sep. Op. Weeramantry, *supra* note 353, p. 374.

99 A. Tanzi, Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations, 9 *European Journal of International Law* (1995), p. 569. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 267 ff.

100 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, Sep. Op. Ajibola*, I.C.J. Reports 1993, p. 399.

101 Sep. Op. Weeramantry, *supra* note 353, p. 379.

102 E. Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice, in: W. Schätzel/ H.-J. Schlochauer (eds*.), Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg* (1956), pp. 165 ff., whom Judge Weeramantry cites with approval, Sep. Op., *supra* note 353, at p. 378.

103 Sep. Op. Weeramantry, *ibid.*, at p. 389.

104 J. Merrills, Interim measures of protection in the recent jurisprudence of the International Court of Justice, 44 *International and Comparative Law Quarterly* (1995), pp. 90 ff.

105 H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254.

106 Sep. Op. Ajibola, *supra* note 356.

107 United Nations, *Official Records of the Security Council*, Sixth Session, 559th Meeting, p. 20, Document S/PV 559 (1951).

108 E. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1966), p. 153

109 Many authors have based their argument as to the binding force of Provisional Measures on the binding force of the final judgment; see, for example, A. El Ouali, *Effets juridiques de la sentence internationale* (1984), pp. 99 f.; A. W. Ford, *The Anglo-Iranian Oil Dispute of 1951 - 1952* (1954), p. 93; J. Stone, *Legal Controls of International Conflicts* (1954), p. 132; Tanzi, *supra* note 355, at pp. 568 f.

110 S. Rosenne, *The Law and Practice of the International Court of Justice* (3d ed. 1997), vol. 1, p. 216; Sep. Op. Weeramantry, *supra* note 353, at pp. 383 ff.

111 Sep. Op. Weeramantry, *ibid.*, at p. 383.

112 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), I.C.J. Pleadings* 1980, p. 266 (statement of Robert Owens).

113 J. Sztucki, *Interim Measures in the Hague Court* (1983), p. 289.

114 Lauterpacht, *supra* note 361, at p. 254.

115 Sep. Op. Weeramantry, *supra* note 353, at p. 382.

116 Sep. Op. Weeramantry, *ibid.*, at p. 380 f.

117 E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 169 (emphasis in original, footnotes omitted).

118 V. Mani, Interim Measures of Protection: Article 41 of the I.C.J. Statute and Article 94 of the UN Charter, 10 *Indian Journal of International Law* (1970), p. 365: "Most naturally `circumstances' can never require if the final judgment is not going to be of any effect and if it has to face a *fait accompli* by the time it is pronounced." Nantwi, *supra* note 364; Stone, *supra* note 365, p. 132; Tanzi, *supra* note 365, p. 569.

119 M. Hudson, *The Permanent Court of International Justice, 1920 - 1942* (1943), pp. 425 f. (emphasis in original, footnotes and internal quotation marks omitted). See also V. S. Mani, *supra* note 374, pp. 359, 365; C. Crockett, The Effects of Interim Measures of Protection in the International Court of Justice, 7 *California Western International Law Journal* (1977), pp. 348, 354.

120 Report of the Advisory Committee of Jurists, in: P.C.I.J., Procès-Verbaux of the Proceedings of the Committee, June 16- July 24th, 1920, p. 735; Mani, *supra* note 374, p. 365.

121 M. Addo, Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations, to be published in 10 *European Journal of International Law* (1999), Number 4, ANNEX 58, p.17.

122 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, p. 34.

123 *Ibid*., p. 29 quoting *Free Zones of Upper Savoy and the District of Gex, Judgment, P.C.I.J., 1932, Series A/B, Nr. 46*, p. 161.

124 B. Ajibola, Compliance with Judgments of the International Court of Justice, in: M. Bulterman/M. Kuijer (eds.), *Compliance with Judgments of International Courts* (1996), p. 16.

125 Sep. Op. Weeramantry, *supra* note 353, at pp. 382 f.; E. Hambro, *supra* note 358, at p. 170; L. I. Sánchez Rodríguez, Sobre la obligariedad y efectividad de las medidas provisionales adoptadas por la Corte Internacional de Justicia: A proposito de la demanda de la República de Paraguay contra los Estados Unidos en el asunto Breard, Paper delivered at the 20th Congress of the Instituto Hispano-Luso-Americano de Derecho Internacional in Manila 1998, p. 11 (also published in *Anuario Hispano-Luso-Americano de Derecho Internacional*, vol. XIV (1999), p. 158), regards the systematic context as a strong argument for the binding force of Provisional Measures.

126 *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.

127 Sep. Op. Weeramantry, *supra* note 353, at p. 385.

128 Sep. Op. Weeramantry, *ibid.*, at p. 383, quoting Crockett, *supra* note 375, at p. 377 (emphasis added).

129 *Legality of Use of Force (Yugoslavia v. Belgium), (Yugoslavia v. Canada), (Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v, Portugal), (Yugoslavia v. Spain), (Yugoslavia v. United Kingdom), (Yugoslavia v. United States of America)*, Orders of 2 June 1999, Declaration of Judge Koroma.

130 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34; *Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 9.

131 Addo, *supra* note 377, at p. 19.

132 G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. II (1986), p. 548 (footnotes omitted).

133 Art. 92, 111 UN Charter; Art. 33 (1) Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS, p. 331.

134 Council of the EC, *EC Glossary French-English* (8th ed. 1990): il doit - it shall (legal instruments); E. Le Docte, *Dictionnaire de termes juridiques en quatre langues* (1987), p. 228, devoir = deber = duty; C. Smith, *Collins Spanish-English, English-Spanish Dictionary* (3d ed. 1998), p. 144; G. Cabanellas de las Cuevas/ E. C. Hoague, *Diccionario jurídico- Law Dictionary* (1990), p. 179: deber = to owe, to be in debt, to have to; María Molinar, *Diccionario de uso del español* (2nd ed. 1998), vol. A-H, p. 864: tener obligación de hacer lo que el verbo expresa = being obliged to do what the verb expresses.

135 Sep. Op. Weeramantry, *supra* note 353, at p. 380: "Indeed, the French word `indiquer' probably goes even further in this direction [of creating a connotation of an obligation] than the English word `indicate', for one of the meanings of `indiquer' is `to draw up (a procedure, etc.); to dictate, to prescribe, lay down a line of action, etc."; quoting *Harrap's Standard French and English Dictionary*, vol. 1, p. I:18. As for the Spanish text, see Cabenellas de las Cuevas/Hoague, *supra* note 390, at p. 308 (indicar = to indicate, to express, to instruct); Smith, *supra* note 390, at p. 277.

136 Vienna Convention on the Law of Treaties, *supra* note 389.

137 In the Assembly of the League of Nations it was agreed to take the French version as basis, see Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920, reprinted in League of Nations, *Permanent Court of International Justice, Documents Concerning the Action Taken by the Council of the League of Nations*, vol. 3 (1920), at p. 134. See also Sztucki, *supra* note 369, at pp. 263 ff., and Sep. Op. Weeramantry, *supra* note 353, at p. 380.

138 *Ibid.*

139 *Ibid*., at p. 380.

140 *Ibid*., at p. 384.

141 *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 259 (para.19).

142 Sztucki, *supra* note 369, at pp. 272 f.; Sep. Op. Weeramantry, *supra* note 353, at pp. 384 f.

143 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289.

144 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 349.

145 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15 (para. 41) (p. 127 [para. 44] in the parallel Case instituted against the United States).

146 M. Aznar-Gómez, A propos de l'affaire relative à la Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), 102 *Révue Générale de Droit international public* (1998), pp. 933 f.:

> "[T]oute la discussion doctrinale, par exemple, après l'ordonnance du 14 avril 1992 en l'affaire *Lockerbie* perdrait une partie de sa signification si l'on n'admettait pas la nature obligatoire des mesures conservatoires. ... Comment les mesures indiquées par la Cour pourraient-elles `porter atteinte' aux droits conférés par ladite résolution si elles ne sont pas sensées avoir de force obligatoire?"

147 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 9 April 1998, I.C.J. Reports 1998*, Declaration of President Schwebel, p. 259; emphasis added.

148 K. Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (1975), pp. 110 f., 115; Hambro, *supra* note 358, at p. 167; Mani, *supra* note 375, at pp. 362 f. As explained by P. Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 *American Journal of International Law* (1974), p. 260: "The practice of states reveals acceptance of a general obligation to maintain the status quo pending a final decision in a dispute". See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations of 24 October 1970, General Assembly Resolution 2625 (XXV), reprinted in 9 *International Legal Materials* (1970), p. 1292; J. Elkind, *Interim Protection: A Functional Approach* (1981), p. 162 stresses the universal recognition of the binding nature of interlocutory injunctions and similar measures and concludes that this rule may even be considered to be a "general principle of law recognized by civilized nations" under Art. 38 (1) (c) of the Court's Statute.

149 H. Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932), pp. 15 f. (as quoted and translated in the Separate Opinion of Judge Weeramantry, *supra* note 353, at p. 378); R. St. J. MacDonald, Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights, 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1992), p. 730, summarizes the general rule as follows: "[P]arties who submit to the jurisdiction of a court have the implied obligation not to act in such a way as to render the judgment of the court meaningless."

150 Dumbauld, *supra* note 373, at pp. 173 ff.; Niemeyer, *supra* note 405, at pp. 15 f.

151 *Electric Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No.79*, p.199.

152 Hambro, *supra* note 358, at p. 167. In his Separate Opinion in the *Genocide* Case, Judge Weeramantry cites this statement with approval, *supra* note 353, at p. 377.

153 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7.

154 See S. Shank/J. Quigley, Obligations to Foreigners Accused of Crime in the United States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 117.

155 The U.S. proposal read as follows:

> "*The Security Council* ...
>
> *Having taken into account* the Order of the International Court of Justice of 15 December 1979 calling on the Government of the Islamic Republic of Iran to ensure the immediate release, without any exception, of all persons of United States nationality who are being held as hostages in Iran and also calling on the Government of the United States of America and the Government of the Islamic Republic of Iran to ensure that no action will be taken by them which will aggravate the tension between the two countries, ...
> *Bearing in mind* that the continued detention of the hostages constitutes a continuing threat to international peace and security,
> *Acting* in accordance with Articles 39 and 41 of the Charter of the United Nations,
>
> 1. Urgently calls once again on the Government of the Islamic Republic of Iran to release immediately all persons of United States nationality ...".

Security Council, Official Records, Thirty-fifth Sess., Suppl. (Jan. - March 1980), U.N. Doc. S/13735 (1980), p. 10, footnote omitted.

156 Statement of the U.S. Secretary of State, Cyrus Vance, *Security Council, Official Records*, Thirty-fourth Sess., 2182nd mtg., U.N. Doc. S/PV.2182 (1979), p. 6.

157 *Ibid.*

158 Shank/Quigley, *supra* note 410, at p. 120.

159 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 183 (para. 33) and p. 184 (para.35).

160 *Lockerbie*, *supra* note 401, at p. 126 (para. 40).

161 For a summary of the facts, see J. Charney/W. Reisman, Agora: Breard- The Facts, 92 *American Journal of International Law* (1998), pp. 666 ff.

162 Addo, *supra* note 377; M. Aznar-Gómez, *supra* note 402; R. Carnerero Castilla, Algunas cuestiones de derecho internacional suscitadas por el ,,caso Breard" XIV *Anuario Hispano-Luso-Americano de Derecho Internacional*, (1999), p. 239; E. Rieter, Interim Measures by the World Court to Suspend the Execution of an Individual: The Breard Case, 16 *Netherlands Quarterly of Human Rights* (1998), p. 475; L. Sánchez Rodríguez, *supra* note 381. See also the contributions of various authors to the Agora: Breard in 92 *American Journal of International Law* (1998), pp. 666 ff.

163 Addo, *supra* note 377, at p. 22.

164 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, paras. 3.2 (Mr. Crook) and 4.13 (Mr. Matheson).

165 L. Henkin, Provisional Measures, U.S. Treaty Obligations and the States, 92 *American Journal of International Law* (1998), p. 680 (footnotes omitted).

166 Statement of Jim Gilmore, Governor of Virginia, 14 April 1998, ANNEX 59, p. 2.

167 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures*, Order of 9 April 1998, I.C.J. Reports 1998, p. 258 (para.41).

168 See on this question in detail *supra* Part Five, Ch. I.

169 Brief for the United States as Amicus Curiae, 1997 U.S. Briefs 1390, ANNEX 34, at p. 51.

170 Letter of Secretary of State Albright to the Governor of Virginia, 13 April 1998, ANNEX 37 (emphasis added). Obviously, this reference to "non-binding language" cannot convince, given the clear prescriptions expressed in the Order, see L. Henkin, *supra* note 421, at p. 680.

171 See *infra* note 439 and accompanying text.

172 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29), emphasis added.

173 *Ibid*., p. 16 (para. 28).

174 *Ibid*., p. 16 (para. 29).

175 See the Statement of Facts, *supra* Part II, note 33 and accompanying text; *Germany v. United States*, 119 S.Ct. 1016, ANNEX 33.

176 ANNEX 28, p. 2.

177 ANNEX 38.

178 *Sumitomo Shoji Arica, Inc. v. Avagliano*, 457 U.S. 176, 184, 185 (1982); *United States v. Stewart*, 489 U.S. 353, 369 (1989).

179 See the letter of the Secretary of State of 13 April 1998, ANNEX 37.

180 See *infra*, Part Six, Ch. IV.

181 Henkin, *supra* note 421, at p. 681.

182 As it had already done in 1998 in the similar Brief in the *Breard* Case, 1997 U.S. Briefs 1390, ANNEX 34, at pp. 49 ff.

183 Letter of Solicitor General Seth P. Waxman of 3 March 1999, ANNEX 28.

184 *Germany v. United States*, 119 S.Ct. 1016 (1999), ANNEX 32.

185 *Ibid.*

186 *Yearbook of the International Law Commission* 1973, vol. II, p. 173, with numerous further references.

187 See Part Four of the present Memorial.

188 *I.C.J. Reports 1999*, not yet published, para. 62.

189 *Ibid.*

190 See Report of the International Law Commission on the work of its forty-eighth session, *General Assembly, Official Records*, Fifty-first Session, Suppl. No. 10, UN Doc. A/51/10, p. 124.

191 *Ibid.*, at p. 126.

192 *Ibid.*, at p. 127.

193 Thus, the content of the "old" Articles 5, 6 and 7 para. 1 is now to be found in Article 5 of the draft articles provisionally adopted by the ILC's Drafting Committee in 1998, which reads as follows:

> "1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State."

(Text in: B. Simma, The Work of the International Law Commission at Its Fiftieth Session [1998], 67 *Nordic Journal of International Law* [1998], p. 479).

194 B. Simma, *ibid.*, at p. 449.

195 See *Yearbook of the International Law Commission* 1973, vol. II, pp. 193 ff., and *Yearbook of the International Law Commission* 1974, vol. II part 1, pp. 277 ff. See also the Commentary on the draft article 5, *Yearbook of the International Law Commission* 1973, vol. II, pp. 191 ff.

196 *Yearbook of the International Law Commission* 1973, vol. II, p. 196.

197 *P.C.I.J., Series A, No. 7, 1926,* p. 19; emphasis added.

198 *S.S."Lotus", 1927, P.C.I.J., Series A, No. 10,* p. 24; *Jurisdiction of the Courts of Danzig,* Advisory Opinion, 1928, P.C.I.J., Series B, No. 15, p. P. 24; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 28; *Ambatielos, Merits, Judgment, I.C.J. Reports 1953,* pp. 21 ff. See also most recently the Advisory Opinion concerning the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* General List No. 100, unpublished, for the text see Internet-Website of the International Court of Justice, http://www.icj-cij.org, para. 63: "The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur. ... Consequently, Malaysia did not act in accordance with its obligations under international law."

199 *"Monteijo"* Case, J. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), vol. II, pp. 1440 f.

200 See for further references *Yearbook of the International Law Commission* 1974, vol. II part 1, pp. 279 ff.

201 See also *Yearbook of the International Law Commission* 1973, vol. II, pp. 193 f.

202 I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 34 (footnote omitted).

203 G. Fitzmaurice, The general principles of international law considered from the standpoint of the rule of law, 92 *Recueil des Cours* (1957-II), p. 85.

204 R. Jennings/A. Watts (eds.), *Oppenheim's International Law,* vol. I (9th ed. 1992), pp. 84 f. (footnotes omitted).

205 *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, p. 64, § 115, Comment b.

206 See J. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), vol. I, p. 656: "And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed ...".

207 See the extensive references in *Oppenheim's International Law*, *supra* note 460, pp. 34 f., note 15 ff.

208 *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 167.

209 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44,* p. 24.

210 See from the jurisprudence of the International Court of Justice, *inter alia*, the Judgments in the *Fisheries* Case (I.C.J. Reports 1951, p. 132) and in the *Nottebohm* Case (*I.C.J. Reports 1955,* pp. 20f.).

211 *Yearbook of the International Law Commission* 1966, vol. II, p. 211.

212 The article was not included in the draft prepared by the International Law Commission because it was thought that the principle belonged to the field of State responsibility rather than to the law of treaties. See I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), p. 84, with further references.

213 *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, Introduction to Chapter Two, p. 40.

214 Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446, at p. 126. In the version provisionally adopted by the Drafting Committee in 1998, Art. 4 reads as follows: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." See Simma, s*upra* note 449, at p. 479.

215 Yearbook of the International Law Commission 1973, vol. II, at p. 185.

216 *Cf.* Brownlie, *supra* note 458, pp. 439 ff.

217 See Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446, at p. 126. On second reading, the substance of the Article remained unchanged, see Simma, *supra* note 449, at p. 479.

218 For a good (critical) exposition of the ILC view see A. Gattini, La notion de faute à la lumière du project de convention de la Commission du Droit International sur la responsabilité internationale, 3 *European Journal of International Law* (1992), pp. 253 ff.; *id.*, Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility, 10 *European Journal of International Law* (1999), pp. 397 ff. For the most recent Commission debate on this point see the Report of the International Law Commission on the work of its fifty-first session, 3 May to 23 July 1999. *General Assembly Official Records, Fifty-fourth Session*, Supplement No. 10 (A/54/10), paras. 416 ff.

219 *Cf.* J. Crawford, Second report on State responsibility, International Law Commission, Fifty-first session (1999), UN Doc. A/CN.4/498/Add. 2, p. 20, para. 260.

220 See with extensive references Brownlie, *supra* note 458, pp. 496 ff.

221 *Cf.* J. Crawford, Second report on State responsibility, International Law Commission, Fifty-first session (1999), UN Doc. A/CN.4/498, p. 56, para. 137.

222 The International Court of Justice for example has characterized it as "an important rule of international law": *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 (para. 50).

223 See for the text of article 22 of the draft as adopted on first reading, Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446., at p. 132, and for a new proposal by Special Rapporteur J. Crawford (article 26bis), Second report, *supra* note 477, at p. 67.

224 See for the exact account of the legal remedies resorted to in both cases *supra* Part Two of the Present Memorial (Statement of Facts).

225 See *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 3.20 (Mr. Crook).

226 *United States Diplomatic and Consular Staff in Tehran*, Memorial of the United States, *I.C.J. Pleadings 1980*, p. 188.

227 Ch. I 2.

228 Report of the International Law Commission on the work of its forty-eighth session (1996), General Assembly, Official Records, 51st Session, Suppl. No. 10, UN Doc. A/51/10, p. 125. In the version provisionally adopted by the Drafting Committee of the International Law Commission in the course of the second reading in 1998, *reprinted in*: B. Simma, The Work of the International Law Commission at Its Fiftieth Session (1998), 67 *Nordic Journal of International Law* (1998), p. 479, the provision has remained unchanged.

229 Report of the International Law Commission on the work of its forty-eighth session, *supra* note 484, at p. 130. In the course of the second reading of the 1996 draft, the ILC Drafting Committee embodied the content of Art. 17 of 1996 in a newly-formulated draft article 16 which now reads:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

UN Doc. A/CN.4/L.574 and Corr. 1.

230 *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 216 (§ 713 (1)), emphasis added. *See also* Comment h, *ibid*., at p. 220.

231 *Yearbook of the International Law Commission* 1960, vol. I, p. 51 (para. 27).

232 See Art. 9 of the Vienna Convention on Diplomatic Relations; Art. 23 (1) and (4) of the Vienna Convention on Consular Relations.

233 *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 39 (para. 85).

234 *Ibid*., at p. 40 (para. 86).

235 *Ibid*., at p. 38 (para. 83).

236 *Ibid*., at p. 40 (para. 86).

237 *Ibid*., at p. 45 (para. 5 of the dispositif).

238 *Ibid*., at p. 42, paras. 90 f.

239 See the statement to this effect in the public hearing in the *Breard* Case, *supra* note 481.

240 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 259.

241 *Cf*. Report of the International Law Commission on the work of its fiftieth session, *General Assembly Official Records*, Fifty-third Session, Suppl. No. 10, UN Doc. A/53/10, paras. 202-214.

242 *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 39 ff. (paras. 49 ff.)

243 *Ibid*., at p. 55 (para. 83).

244 For its relevance in the present context, see *supra*, Part Five, Ch. I.

245 General List No. 100, unpublished, for the text see Internet-Website of the International Court of Justice, http://www.icj-cij.org, para. 62.

246 International Law Commission, Fifty-first session, Provisional Summary Record of the 2585th meeting, 10 June 1999, UN Doc. A/CN.4/SR.2585 of 17 June 1999.

247 *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal of the Law of the Sea, Judgment of 1 July 1999, unpublished, available under http://www.un.org/Depts/los/Judg_E.htm (last visited 17 August 1999), para. 171.

248 See United States Comments on the Draft articles on State responsibility (October 22, 1997), 37 *International Legal Materials* (1998), p. 468: "In particular, the sections on countermeasures, crimes, dispute settlement, and state injury contain provisions that are not supported by customary international law."

249 *Ibid*.: "*Reparation*: While many of the points in the section on reparation reflect customary international law, other provisions contain qualification that undermine the well-established principle of `full reparation.'" (emphasis in the original). In detail see *ibid*., at pp. 478 ff.

250 Germany will also refer to the second reading of the draft articles which is currently under way in the Commission. On the progress made so far by the ILC in this regard, see Report of the International Law Commission on the work of its fifty-first session, 3 May to 23 July 1999, *General Assembly Official Records*, Fifty-fourth Session, Suppl. No. 10, UN Doc. A/54/10, paras. 49 ff.

251 *Phosphates in Morocco, Preliminary Objections, Judgment of 14 June 1938, Series A/B 74*, p. 28.

252 See *supra* note 484 and accompanying text.

253 *Factory at Chorzów (Claim for Indemnity), Jurisdiction, Judgment of 26 July 1927, Series A No. 9*, p. 21.

254 *Factory at Chorzów (Claim for Indemnity), Merits, Judgment of 13 September 1928, Series A No. 17*, p. 47.

255 See, recently, *Gabcíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at 77 (para. 149). See also *M/V "Saiga" (No. 2)*, International Tribunal for the Law of the Sea, *supra* note 503, para. 170.

0 *Supra*, Part V, Ch. I.

1 Commentary to Art. 43 of the Draft articles on State responsibility, para. (6), *Yearbook of the International Law Commission* 1993, vol. II part 2, p. 64 (footnotes omitted, emphasis added).

2 *Affaire Martini (Italie c. Venezuela)*, Decision of 3 May 1930, 2 UNRIAA, p. 1002:

> "[E]n raison de l'attitude ainsi prise par la Cour Fédérale et de Cassation vis-à-vis de la Maison Martini & C^{ie} dans ledit procès, le Gouvernement Vénézuélien est tenu, de reconnaître, *à titre de réparation*, l'annulation des obligations de paiement imposées à la Maison Martini & C^{ie}"

(emphasis added).

3 Parry, *Consolidated Treaty Series*, vol. 225, at pp. 337 f.

4 See Commentary to draft article 43, *supra* note 513, at p. 61 (para 12).

5 I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (1983), p. 210 (emphasis added).

6 *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 341, § 901, comment c). See also M. Aznar-Gómez, A propos de l'affaire rélative à la Convention de Vienne sur les relations consulaires (paraguay c. États-Unis d'Amérique, 98 *Revue générale de Droit international public* (1998), pp. 941 ff.; B. Graefrath, Responsibility and Damages Caused: Relationship between Responsibility and Damages, 185 *Recueil des Cours* (1984 II), p. 78: Restitution ,,can be directed towards enactment, repeal or modification of ... court decisions". Similarly, K. Zemanek, in: H. Neuhold, W. Hummer, and C. Schreuer eds., *Österreichisches Handbuch des Völkerrechts* (3d ed. 1998), vol. 1, p. 458 (§ 2487); A. Verdross/B. Simma, *Universelles Völkerrecht* (3d ed. 1984), p. 875 (§ 1295). For further references, see Commentary to Art. 43, *supra* note 513, at p. 60 (para. 12, n. 162 s.).

7 K. Zemanek, *supra* note 518, § 2488; H. Urbanek, Die Unrechtsfolgen bei einem völkerrechtsverletzenden nationalen Urteil; seine Behandlung durch internationale Gerichte, 11 *Österreichische Zeitschrift für öffentliches Recht* (1961), pp. 81f.

8 For further details, see *supra* Part Four, Ch. I 3 c).

9 *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81 (para. 152).

10 Decision of 30 April 1990, 20 *Reports of International Arbitral Awards*, p. 272 (paras. 118 f.).

11 *Cf.* C. Gray, *Judicial Remedies in International Law* (1987), p. 105: "One of the main advantages of the declaratory judgment is that its use avoids the decree for reparation which could injure the dignity of the respondent state."

12 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, paras. 3.30 f. (Mr. Crook).

13 *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 32 (para. 44).

14 Draft articles on State responsibility, *supra* note 485, at p. 126. In the version adopted by the ILC's Drafting Committee in the course of the current second reading, the substance of the provision remained unchanged, see Simma, *supra* note 506, at p. 479.

15 Commentary to the Draft articles on State responsibility, *Yearbook of the International Law Commission* (1973), vol. II, p. 183 (para. 12). Similarly, C. Rousseau, *Droit international public*, vol. V (1983), p. 14; *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 901 and Comment a; A. Verdross/B. Simma, *Universelles Völkerrecht* (3d ed. 1984), p. 849 (para. 1264).

16 *Affaires des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni)*, 1 May 1925, 2 *Reports of International Arbitral Awards*, p. 641.

17 See, *e.g., Factory at Chorzów, Jurisdiction, P.C.I.J. 1927, Series A, No. 9*, p. 21; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23.

18 See, *e.g., Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 340, § 901: "Under international law, every state that violates an obligation to another state is required to terminate the violation and, ordinarily, to make reparation. . . ."; Ch. Rousseau, *Droit International Public*, vol. V (1983), p. 210: "La réparation est une conséquence necessaire de l'acte illicite."

19 *Yearbook of the International Law Commission* 1985, vol. II part 2, at p. 25 (para. 3).

20 Draft articles on State responsibility, *supra* note 485, at p. 140.

21 Cf. Arthur W. Rovine (ed.), *Digest of United States Practice in International Law* (1973), p. 161.

22 *United States Diplomatic and Consular Staff in Tehran*, Memorial of the United States, *I.C.J. Pleadings 1980*, p. 174 (citations omitted).

23 In the United States, timely notification is particularly vital because of the death penalty and the doctrine of procedural default, discussed in Part Four, Ch. I 3. This doctrine prevented U.S. courts from hearing essential evidence in both the *Breard* and *LaGrand* Cases once Paraguay and Germany, respectively, had discovered the situation of their nationals. The home country's consulates being prevented from immediately involving themselves in the judicial proceedings in the United States, prejudice to Germany's rights to render consular protection and assistance turned out to be undeniable and indelible. For details see *supra*, Part Four, Ch. I.

24 U.S. Department of State, *Foreign Affairs Manual* (1984), ANNEX 60, 7 FAM 411 (emphasis added).

25 Testimony of Mr. Walentinowicz before the House Committee on International Relations on 29 April 1975, in: E. McDowell (ed.), *Digest of United States Practice in International Law 1975*, p. 252.

26 See *supra* Part Four, Ch. I 3 c) (2), note 217 and accompanying text.

27 See *Mavrommatis Palestine Concessions, Jurisdiction, Judgment, 1924, P.C.I.J., Series A, No. 2*, p. 12. See also *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.

28 *Ibid*.

29 Commentary to draft article 40, *supra* note 531, at p. 26 (paras 11 f.).

30 *Ibid*. (para. 14).

31 See *supra* Part Four, Ch. III.

32 For "prejudice" in United States law, see *supra* Part Four, Ch. I. 3.

33 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 2.14 (Ms. Brown), from where the citation above in the text is taken. For the present Case, see also the letter of the Solicitor General to the U.S. Supreme Court in the Case of Walter LaGrand, ANNEX 28, as well as the brief of the Solicitor General to the U.S. Supreme Court in the *Breard* Case, 1997 U.S. Briefs 1390, ANNEX 34, at pp. 12 f.

34 See *supra*, Ch. II 1.

35 See *supra*, Part Four, Ch. I 3 b and the cases cited there.

36 *Ibid*.

37 See *supra*, Part VI, Ch. I 3.

38 S. Shank/J. Quigley, Obligations to Foreign Nationals Accused of Crime in the United States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 110.

39 Brief to the Supreme Court in *Breard v. Greene*, 1997 U.S. Briefs 1390, ANNEX 34, at p. 23. Similarly Ms. Brown, Counsel for the United States, *supra* note 545, para. 2.18.

40 See S. Shank/J.Quigley, Foreigners on Texas' Death Row and the Right of Access to a Consul, 26 *St. Mary's Law Journal* (1995), p. 720.

41 See generally M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997), p. 565; Shank/Quigley, *supra* note 552, at p. 719.

42 Kadish, *supra* note 553, at p. 565, Fn. 244, quoting Reply Brief Amicus Curiae of the United Mexican States, No. 96-14, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997).

43 *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 2.18 (Ms. Brown).

44 See *supra* note 510. *Cf.* also U.S. Comments, *supra* note 504, at pp. 479 f. with further references.

45 See *supra* note 484, at p. 141.

46 ILC Commentary, *supra* note 513, at p. 59 (para. 3).

47 *Ibid*., at p. 79 (para. 10), footnotes omitted. For further references, see *ibid*., at p. 79 notes 305 f. See also I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 462, who distinguishes between a judicial pronouncement as a form of satisfaction and purely declaratory judgments.

48 *Corfu Channel Case (Merits), I.C.J. Rep. 1949,* p. 4.

49 *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), P.C.I.J., 1927, Series A, No. 13,* p. 20.

50 20 *Reports of International Arbitral Awards*, pp. 272 f. (para. 122).

51 *Ibid*., at 275.

52 *M/V "Saiga" (No. 2), supra* note 503, para. 171.

53 C. Gray, *Judicial Remedies in International Law* (1987), p. 42.

54 Commentary to draft article 45, in: *Yearbook of the International Law Commission* 1993, vol. II part 2, p. 77 (para. 4).

55 *Ibid*., para. 5.

56 D. Anzilotti, *Corso di diritto internazionale*, vol. 1 (4th ed. 1955), p. 404. The passage is cited according to the English translation in the ILC Commentary to Art. 45, *supra* note 566, at p. 77 (para. 4), emphasis of the Commission removed. The Italian original reads: "Il momento essenziale dei rapporti tra gli Stati non è il momento economico, anche se questo ne costituisce, in ultima analisi, il sustrato; è piuttosto un momento ideale; l'onore, la dignità, il valore etico dei subietti. Ne segue che il solo fatto che uno Stato veda disconosciuto da un altro Stato un suo diritto, implica un danno che esso non può essere tenuto a sopportare, quand'anche non sieno per derivarne conseguenze materiali: ... ." For further references see ILC Commentary, *ibid.*

57 See the Statement of Facts, Part Two of the present Memorial.

58 See *supra* note 32 and accompanying text as well as ANNEX 27.

59 See Statement of Governor Hull, ANNEX 33.

60 See the letter of the Solicitor General to the U.S. Supreme Court, ANNEX 28.

61 *Cf.* letters of Secretary of State Albright to the Governor of the Commonwealth of Virginia in the case of the Paraguayan Angelo Breard (ANNEX 37) and to the Chairman of the Texas Board of Pardons and Paroles in the case of the Canadian national Stanley Faulder, ANNEX 61.

62 1997 U.S. Briefs 1390, ANNEX 34, at p. 13.

63 *Supra* note 484, at p. 143; emphasis added.

64 Commentary to draft article 44, *Yearbook of the International Law Commission* 1993, vol. II part 2, at p. 69 (para. 7), footnote omitted.

65 See also the reference in the ILC Commentary to draft article 42, *Yearbook of the International Law Commission* 1993, vol. II part 2, at p. 59 (para. 6).

66 4 *International Legal Materials* (1965), p. 698, reproduced in: Commentary to draft article 43, *Yearbook of the International Law Commission* (1993), vol. II part 2, p. 82 (para. 2).

67 Draft articles on State responsibility, in: ILC Report 1996, *supra* note 484, at p.143.

68 F. Przetacznik, La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre Ètat, 78 *Revue Générale de Droit international public* (1974), pp. 966 f., and the examples cited therein. See also, *inter alia*, R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, vol. 1 (9th ed. 1992), p. 532, and the judgment cited there in note 14; Brownlie, *Principles*, *supra* note 559, at p. 463 (counting guarantees among measures of satisfaction). See also the judgments cited in the Commentary to draft article article 46, *Yearbook of the International Law Commission* (1993), vol. II part 2, pp. 81 ff. and *infra*.

69 *M/V "Saiga" (No. 2)*, *supra* note 503, para. 171.

70 See ILC Commentary, *supra* note 580, at p. 83 (para. 5).

71 *Ibid*., at p. 82 (paras. 3 and 4), with further references; Przetacznik, *supra* note 580, at pp. 967 f.

72 Letter of Secretary of State Evarts to the Minister to Spain, Mr. Fairchild, of 11 Aug. 1880, in: J. Moore (ed.), *A Digest of International Law* (1906), vol. 2, pp. 907 f., emphasis added.

73 Note of 11 March 1966, 70 *Revue Générale de Droit international public* (1966), p. 1013.

74 R. Falk, The Beirut Raid and the International Law of Retaliation, 63 *American Journal of International Law* (1969), p. 419.

75 Commentary to draft article 46, *supra* note 580, at pp. 82 f. (para. 4).

76 *Trail Smelter Case (Canada v. United States)*, Award of 16 April 1938, 3 *Reports of International Arbitral Awards*, p. 1934.

77 Annual Message, 6 December 1886, in: J. Moore, *A Digest of International Law* (1906), vol. 2, p. 232.

78 Correspondence with Mr. Connery, Chargé to Mexico, Nov. 1, 1887, *ibid*., at p. 238.

79 *Ibid*., at p. 239.

80 International Covenant on Civil and Political Rights of 19 December 1966, 999 *UNTS*, p. 171.

81 Optional Protocol to the International Covenant on Civil and Political Rights of 19 December 1966, 999 *UNTS*, p. 302.

82 *General Assembly Official Records*, Thirty-fifth Session, Suppl. No. 40, UN Doc. A/35/40, p. 126 (para. 19). For further examples, see the *Lanza* case, Decision of 3 April 1980, *ibid*., p. 119 (para. 17) and the *Dermit Barbato* case, Decision of 12 October 1982, *General Assembly Official Records*, Thirty-eighth Session, Suppl. No. 40, UN Doc. A/38/40, p. 133 (para. 11).

83 Commentary to draft article 46, *supra* note 580, at p. 83 (para. 5).

84 See *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, pp. 248 ff.

85 See Part Four, n. 153 and accompanying text.

86 See *supra*, Part Six, Ch. III 2 a).

87 *Supra* note 484, at p. 143.

88 See ILC Commentary, *supra* note 580, at p. 83 (para. 5).

89 *Cf*. United States Comments on the Draft articles on State responsibility, 37 *International Legal Materials* (1998), pp. 482 f.

90 Draft articles on State responsibility, *supra* note 484, at p. 141.

91 Cf. the United States comments, *supra* note 504, at pp. 478 f.

92 For details see *supra*, Part Four, Ch. I 3 b (2).

93 For details see *supra*, Part Five, Ch. II.

94 Draft articles on State responsibility, *supra* note 484, at p. 142.

95 ILC Commentary, *supra* note 580, at p. 61 (para. 14).

96 ILC, *supra* note 513, at p. 61 (para. 15).

97 *U.S. v. Belmont*, 301 U.S. 324, 331 (1937) (Sutherland, J.). For an extensive treatment of the relationship between international law and U.S. federalism see L. Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996), pp. 149 ff.

98 To this effect, see L. Henkin, Provisional Measures, U.S. Treaty Obligations, and the States, 92 *American Journal of International Law* (1998), p. 681; C. Vázquez, Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, *ibid*., at pp. 683 ff.

99 For details concerning this act, see *supra* Part Four, Ch. I.

100 For details see F. Kirgis, Zschnering v. Miller and the Breard Matter, 92 *American Journal of International Law* (1998), pp. 704 ff.; C. Vázquez, Breard, Printz, and the Treaty Power, 70 *Colorado Law Review* (1999), pp. 1324 ff.

101 *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); J. Paust, Breard and Treaty-based Rights Under the Consular Convention, 92 *American Journal of International Law* (1998), p. 692. On this canon of interpretation see also *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, p. 62 (§ 114).

102 A.-M. Slaughter, Court to Court, 92 *American Journal of International Law* (1998), p. 708.