INTERNATIONAL COURT OF JUSTICE

THE JADHAV CASE

THE REPUBLIC OF INDIA v. THE ISLAMIC REPUBLIC OF PAKISTAN

COUNTER-MEMORIAL OF THE ISLAMIC REPUBLIC OF PAKISTAN

13TH DECEMBER 2017

EXHIBIT

VOLUME 4: ANNEXURES 75 – 81

Jadhav Case (India v Pakistan)

Counter-Memorial on behalf of the Islamic Republic of Pakistan

Index of Annexures

(4) VOLUME 4 (ANNEXURES 75 – 81)

CASE LAW (continued)	
75	*Avena and Other Mexican Nationals (Mexico v United States of America)*, Order on the Request for the Indication of Provisional Measures dated 5 February 2003
76	*Vienna Convention on Consular Relations (Paraguay v United States of America)*, verbatim transcript, 07/04/1998 at 10am, paragraph 2.18
77	*Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Judgment of 19 June 2012, Separate Opinion of Judge Cançado Trindade, paragraph 52
78	*LaGrand (Germany v United States of America)*, Application dated 2 March 1999, paragraph 15
79	*LaGrand (Germany v United States of America)*, Memorial dated 16 September 1999, paragraph 7.02
80	*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)*, Judgment dated 19 January 2009, paragraph 47
81	*Said Zaman Khan v Pakistan* (Civil Petition No. 842 of 2016), Decision of the Supreme Court of Pakistan handed down on 29 August 2016

13th December 2017

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 5 FEBRUARY 2003

2003

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE AVENA ET AUTRES RESSORTISSANTS MEXICAINS

(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ORDONNANCE DU 5 FÉVRIER 2003

Official citation:

Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 77

Mode officiel de citation:

Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 5 février 2003, C.I.J. Recueil 2003, p. 77

ISSN 0074-4441
ISBN 92-1-070970-5

Sales number
N° de vente: 863

5 FEBRUARY 2003

ORDER

AVENA AND OTHER MEXICAN NATIONALS
(MEXICO *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

AVENA ET AUTRES RESSORTISSANTS MEXICAINS
(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

5 FÉVRIER 2003

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

2003
5 February
General List
No. 128

YEAR 2003

5 February 2003

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 9 January 2003, whereby the United Mexican States (hereinafter "Mexico") instituted proceedings against the United States of America (hereinafter the "United States") for "violations of the Vienna Convention on Consular Relations (done on 24 April 1963)" (hereinafter the "Vienna Convention") allegedly committed by the United States,

Makes the following Order:

1. Whereas in its aforementioned Application Mexico bases the juris-

diction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the "Optional Protocol");

2. Whereas the Application states that 54 Mexican nationals are on death row in the United States; whereas it is alleged that these individuals were arrested, detained, tried, convicted and sentenced to death by competent authorities of the United States following proceedings in which those authorities failed to comply with their obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention; whereas it is contended that this provision requires that the authorities of the receiving State inform without delay any national of another State detained by those authorities of his right to contact his consulate, that, if the detained national so requests, it further requires those authorities to inform without delay the nearest consular post of the State concerned of the detention, and lastly that it obliges those authorities to forward without delay any communication addressed to the consular post by the detained individual; and whereas it is alleged that, in the cases of 49 of the detained Mexican nationals, the competent authorities of the United States made no attempt at any time to comply with Article 36 of the Vienna Convention, that in the cases of four other detained individuals, the required notification was not made "without delay", and finally that in one case, while the detained national was informed of his rights, it was in connection with proceedings other than those involving capital charges against him;

3. Whereas in its Application Mexico states that "[t]he rights conferred by Article 36 . . . are not rights without remedies" and that in particular, as the Court determined in the Judgment delivered on 27 June 2001 in the case concerning *LaGrand (Germany* v. *United States of America)*:

> "If the receiving State fails to comply with Article 36, and the sending State's national has been subjected to 'prolonged detention or convicted and sentenced to severe penalties', . . . the receiving State must 'allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention'";

4. Whereas Mexico alleges that various rules of United States municipal law, specifically "[t]he rule of procedural default, the need to show prejudice and the interpretation of the Eleventh Amendment of the United States Constitution followed by the United States tribunals", rendered ineffective all actions brought before state or federal courts in the United States seeking relief for the violations of the Vienna Convention, whether those actions were brought by Mexican nationals or by Mexico itself;

5. Whereas in the Application Mexico explains that it has made numerous démarches to the competent authorities of the United States with a view to vindicating its rights and those of its nationals, but that these authorities have consistently refused to provide relief adequate to put an end to these violations and to ensure Mexico that they will not reoccur in the future;

6. Whereas Mexico further notes that the diplomatic démarches which it has made over the last six years to the executive branch of the federal Government of the United States and to the competent authorities of the constituent States have been ineffective; whereas, despite many diplomatic protests during that period, those authorities carried out the execution of several Mexican nationals whose rights under the Vienna Convention had been violated; and whereas the only response ever received by Mexico from those authorities has consisted of formal apologies made after the executions;

7. Whereas in its Application Mexico maintains that the United States, by breaching its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention, prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 of the Convention, which "could have prevented the convictions and death sentences"; whereas it contends that the steps taken by the United States to improve compliance with the Vienna Convention do not enable full effect to be given to the rights established by the Convention; whereas it claims that apologies by the United States in cases of breaches of the Convention are an insufficient remedy; and whereas Mexico accordingly asserts that it has suffered injury, in its own right and in the form of injury to its nationals, and that it is entitled to *restitutio in integrum*, that is to say, to the "reestablish[ment of] the situation which would, in all probability, have existed if [the violations] had not been committed";

8. Whereas Mexico asks the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts";

9. Whereas, on 9 January 2003, after filing its Application Mexico also submitted a request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

10. Whereas in its request for the indication of provisional measures Mexico refers to the basis of jurisdiction of the Court invoked in its

Application, and to the facts set out and the submissions made therein; and whereas it reiterates in particular that the United States has systematically violated the rights of Mexico and its nationals under Article 36 of the Vienna Convention;

11. Whereas in the request for the indication of provisional measures Mexico states that three Mexican nationals, namely Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, risk execution within the next six months and that many other Mexican nationals could be executed before the end of 2003; and whereas Mexico further states that César Roberto Fierro Reyna's execution could take place as early as 14 February 2003;

12. Whereas in the request for the indication of provisional measures Mexico notes that the Court indicated provisional measures to prevent executions in two prior cases involving claims brought under the Vienna Convention by States whose nationals were subject to execution in the United States as a result of criminal proceedings conducted in violation of the Convention; whereas it states that "[t]here can be no question of the importance of the interests at stake", that "[i]nternational law recognizes the sanctity of human life" and that "Article 6 of the International Covenant on Civil and Political Rights, to which the United States is a State party, establishes that every human being has an inherent right to life and mandates that States protect that right by law"; and whereas Mexico states in the following terms the grounds for its request and the possible consequences if it is denied:

> "Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court's decision on the merits of Mexico's claims, the executive officials of constituent states of the United States will execute Messrs. Fierro [Reyna], Moreno Ramos, Torres [Aguilera], or other Mexican nationals on death row before the Court has had the opportunity to consider those claims. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals. As the Court recognized in the *LaGrand* case, such circumstances would constitute irreparable prejudice . . .";

13. Whereas Mexico concludes that "[p]rovisional measures are therefore clearly justified in order both to protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks";

14. Whereas Mexico adds in its request that "[t]here can also be no question about the urgency of the need for provisional measures";

15. Whereas Mexico states that, while it recognizes that the Court may

wish to leave to the United States the choice of means to ensure compliance with the provisional measures ordered, it nevertheless requests that the Court "leave no doubt as to the required result";

16. Whereas Mexico notes specifically in its request that "[a]s a matter of international law, both the United States and its constituent political subdivisions have an obligation to abide by the international legal obligations of the United States"; and whereas Mexico takes the view that, "[h]aving undertaken international obligations on behalf of its constituent political entities, the United States should not now be heard to suggest that it cannot enforce their compliance with its obligations";

17. Whereas Mexico further states that,

> "[g]iven the clarity of both international law and United States municipal law, there can be no doubt that the United States has the means to ensure compliance with an order of provisional measures issued by this Court pursuant to Article 41 (1) [of its Statute]";

18. Whereas Mexico asks that, pending final judgment in this case, the Court indicate:

> "*(a)* that the Government of the United States take all measures necessary to ensure that no Mexican national be executed;
>
> *(b)* that the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national;
>
> *(c)* that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraphs *(a)* and *(b)*; and
>
> *(d)* that the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case";

and whereas Mexico further asks the Court to treat its request as a matter of the greatest urgency "[i]n view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican citizen";

19. Whereas on 9 January 2003, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith sent it originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of that filing;

20. Whereas on 9 January 2003 the Registrar informed the Parties that the President of the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 20 January 2003 as the date for the opening of the oral proceedings;

21. Whereas, pending notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission, in two languages, of the printed text of the Application to the States entitled to appear before the Court, on 9 January 2003 the Registrar informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

22. Whereas, following the Registrar's subsequent consultations with the Parties, the Court decided to hear the Parties on 21 January 2003 concerning Mexico's request for the indication of provisional measures; and whereas the Parties were so advised by letters of 14 January 2003 from the Registrar;

23. Whereas by a letter of 17 January 2003, received in the Registry on the same day, the United States Government informed the Court of the appointment of an Agent and a Co-Agent for the case;

24. Whereas by a letter of 20 January 2003 Mexico informed the Court that, further to the decision of the Governor of the State of Illinois to commute the death sentences of all convicted individuals awaiting execution in that State, it was withdrawing its request for provisional measures on behalf of three of the 54 Mexican nationals referred to in the Application: Messrs. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero; whereas it further stated that its request for provisional measures would stand for the other 51 Mexican nationals imprisoned in the United States and that "[t]he application stands, on its merits, for the fifty-four cases";

25. Whereas, at the public hearings held on 21 January 2003 in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the following representatives of the Parties:

On behalf of Mexico:	H.E. Mr. Juan Manuel Gómez Robledo, H.E. Mr. Santiago Oñate, H.E. Mr. Alberto Székely, Ms Sandra Babcock, Mr. Donald Francis Donovan;
On behalf of the United States:	The Honorable William H. Taft, IV, Mr. Stephen Mathias, Ms Catherine W. Brown, Mr. James H. Thessin, Sir Elihu Lauterpacht, Mr. Daniel Paul Collins;

and whereas at the hearings a question was put by a Member of the Court, to which an oral reply was given;

* * *

26. Whereas in the first round of oral argument Mexico restated the position set out in its Application and in its request for the indication of provisional measures, and stressed that the requirements for the indication by the Court of the provisional measures requested were met in the present case;

27. Whereas Mexico has stressed that neither the apologies offered by the Government of the United States following the execution of Mexican nationals whose rights under the Vienna Convention had been violated, nor the review by an executive official "as a matter of grace and not of legal right" could represent a sufficient remedy for violations by competent authorities in the United States of obligations arising from the Vienna Convention; that a "meaningful 'review and reconsideration' of its nationals' claims in accord with the Judgment in *LaGrand*" requires the provision of "a remedy *at law*"; and that only the restoration of the *status quo ante*, that is, the re-establishment of the situation that existed before the violation, would be such a remedy;

28. Whereas Mexico has insisted that, unless provisional measures are indicated by the Court, three of its nationals, namely Messrs. Fierro Reyna, Moreno Ramos and Torres Aguilera, risk execution in the next few months and that many others could also be at risk of execution before the Court rules on the merits; and whereas it accordingly contends that the condition of urgency required for the indication of provisional measures is satisfied;

29. Whereas in the first round of oral argument the United States contended that the request by Mexico was without foundation in fact or in law and that the requirements for the Court to indicate provisional measures were not met;

30. Whereas the United States submitted that the Court had ruled in the *LaGrand* case that, where there had been a violation of the obligation of notification prescribed by Article 36, paragraph 1 *(b)*, of the Vienna Convention "in death penalty cases", the remedy to be provided by the receiving State was to ensure that there was in every case review and reconsideration of the decision; whereas it stated that, following the *LaGrand* case, the competent authorities in the United States had instituted measures providing for review and reconsideration in all such cases, that so far these measures had proved effective and that there was no reason to think that they would not be effective in future cases; whereas it added that the receiving State was, on the other hand, under no obligation to quash all convictions and to recommence the trial process in such cases; and whereas the United States accordingly concluded that the request by Mexico seeking, by way of indication of provisional measures,

to preserve a right to the restoration of the *status quo ante* was not a request seeking preservation of a right protected by the Vienna Convention, and that therefore the request should be denied;

31. Whereas the United States further contended that the request by Mexico did not satisfy the condition of urgency and did not show that imminent serious harm was likely, because United States proceedings in each of the 51 cases were continuing and none of the Mexican nationals covered by the request for indication of provisional measures was scheduled to be executed; and whereas it pointed out that in some of the cases referred to by Mexico no violation of Article 36 of the Vienna Convention had been established, that in others Mexico would have an opportunity to raise any failure of notification at a later stage in the domestic legal proceedings, and, finally, that review and reconsideration remained available in all the cases;

32. Whereas the United States further maintained that the request by Mexico was too sweeping and did not respect the essential balance of the rights of the Parties because, if it were accepted by the Court, it would prejudice the sovereign right of the United States to operate its criminal justice system; and whereas the United States concluded that the order for the indication of provisional measures requested by Mexico "would constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States even as it goes far beyond preserving Mexico's rights under the Convention";

33. Whereas in its second round of oral argument Mexico stated that it could not accept the conclusions derived by the United States from the Court's Judgment in the *LaGrand* case in regard to the remedies available for breaches of its obligations under Article 36 of the Vienna Convention; whereas Mexico added that the Court would not, however, need to address those issues until its examination of the merits of the case; and whereas it submitted that the purpose of its request was unquestionably to preserve rights arising out of the Vienna Convention and that its request should accordingly be upheld;

34. Whereas Mexico contended that, for the condition of urgency to be met, it was sufficient that there was a "likely" threat of irreparable prejudice, and that in the present case, since execution dates for the Mexican nationals named in the request could be set at any time by the competent authorities of the United States and since, once those dates had been set, those nationals could be executed at very short notice, the condition of urgency was accordingly met;

35. Whereas, finally, Mexico argued that an order of the Court enjoining the United States not to proceed with the execution of the said Mexican nationals could not be considered as capable of causing any real

harm to the legitimate interest of the United States in operating its criminal justice system;

36. Whereas in its second round of oral argument the United States stressed the fact that, following the Court's Judgment in the *LaGrand* case, it had put in place a vast programme to ensure compliance with the obligation of notification under Article 36, paragraph 1 *(b)*, of the Vienna Convention and had also taken measures to ensure review and reconsideration in all death penalty cases where that obligation had been breached; and whereas the United States reiterated its view that Mexico's request for the indication of provisional measures was not consistent with the *LaGrand* Judgment and that it was seeking to preserve non-existent rights, so that there was neither any risk of irreparable prejudice nor any urgency; whereas the United States further pointed out that, according to the United States Supreme Court, "the clemency power . . . [was] an integral mechanism in the administration of our criminal laws", and "clemency 'has provided a fail-safe in our criminal justice system'";

37. Whereas at the hearings a Member of the Court put the following question to the Agent of the United States:

> "Under what circumstances will the Legal Adviser of the State Department notify an appellate court rather than later notify a clemency body of the obligations of the United States consequent upon an admitted violation of Article 36 of the Vienna Convention? Is the matter simply one of timing?";

whereas, in response to that question, the Agent stated *inter alia* the following:

> "We . . . have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in *LaGrand*. [That Judgment] expressly left the choice of means of providing the review and reconsideration to the United States[.] . . . [C]lemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles, the review and reconsideration this Court called for";

and whereas the Agent added that his

> "Government would . . . inform a court upon request, at any time, of the international legal obligations of the United States, and how in the particular posture of a given case they [might] or [might] not apply and whether and how they might be carried out under the applicable domestic law in that court",

while explaining that "a court [might] determine . . . that domestic law

principles still preclude[d] an express judicial remedy for a failure of consular notification";

* * *

38. Whereas, on a request for the indication of provisional measures, the Court need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

39. Whereas Article I of the Optional Protocol, which Mexico invokes as the basis of jurisdiction of the Court 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 a written application made by any party to the dispute being a Party to the present Protocol";

40. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Mexico and the United States have been parties to the Vienna Convention since 16 June 1965 and 24 November 1969 respectively, and to the Optional Protocol since 15 March 2002 and 24 November 1969 respectively, in each case without reservation;

41. Whereas Mexico has argued that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it has accordingly concluded that the Court has the jurisdiction necessary to indicate the provisional measures requested; and whereas the United States has said that it "does not propose to make an issue now of whether the Court possesses prima facie jurisdiction, although this is without prejudice to its right to contest the Court's jurisdiction at the appropriate stage later in the case";

42. Whereas, in view of the foregoing, the Court accordingly considers that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to hear the case;

* *

43. Whereas in its Application Mexico, as stated previously (see paragraph 8 above), asks the Court to adjudge and declare that, the United States "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals,

as provided by Articles 5 and 36, respectively of the Vienna Convention"; whereas Mexico seeks various measures aimed at remedying these breaches and avoiding any repetition thereof; whereas it contends, the Court should preserve the right to such remedies by calling upon the United States to take all necessary steps to ensure that no Mexican national is executed and that no execution date be set in respect of any such national;

44. Whereas the United States acknowledges that, in certain cases, Mexican nationals have been prosecuted and sentenced without being informed of their rights pursuant to Article 36, paragraph 1 *(b)*, of the Vienna Convention; whereas it argues, however, that in such cases, in accordance with the Court's Judgment in the *LaGrand* case, the United States has the obligation "by means of its own choosing, [to] allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention"; whereas it submits that in the specific cases identified by Mexico the evidence indicates the commitment of the United States to providing such review and reconsideration; whereas the United States contends that such review and reconsideration can occur through the process of executive clemency — an institution "deeply rooted in the Anglo-American system of justice" — which may be initiated by the individuals concerned after the judicial process has been completed; whereas it claims that such review and reconsideration has already occurred in several cases during the last two years; that none of the Mexicans "currently under sentence of death will be executed unless there has been a review and reconsideration of the conviction and sentence that takes into account any failure to carry out the obligations of Article 36 of the Vienna Convention"; that, under the terms of the Court's decision in the *LaGrand* case, this is a sufficient remedy for its breaches, and that there is accordingly no need to indicate provisional measures intended to preserve the rights to such remedies;

45. Whereas, according to Mexico, the position of the United States amounts to maintaining that "the Vienna Convention entitles Mexico only to review and reconsideration, and that review and reconsideration equals only the ability to request clemency"; whereas "the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court's mandate [in the *LaGrand* case]";

46. Whereas there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; whereas that dispute belongs to the merits and cannot be settled at this stage of the proceedings; whereas the Court must accordingly address the issue of whether it should indicate provisional measures to preserve any rights that may subsequently be adjudged on the merits to be those of the Applicant;

47. Whereas the United States argues, however, that it is incumbent upon the Court, pursuant to Article 41 of its Statute, to indicate provisional measures "not to preserve only rights claimed by the Applicant, but 'to preserve the respective rights of either party'"; that, "[a]fter balancing the rights of both Parties, the scales tip decidedly against Mexico's request in this case"; that the measures sought by Mexico to be implemented immediately amount to "a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law", which "would drastically interfere with United States sovereign rights and implicate important federalism interests"; that this would, moreover, transform the Court into a "general criminal court of appeal", which the Court has already indicated in the past is not its function; and that the measures requested by Mexico should accordingly be refused;

48. Whereas the Court, when considering a request for the indication of provisional measures, "must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 35), without being obliged at this stage of the proceedings to rule on those rights; whereas the issues brought before the Court in this case "do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes"; whereas "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal"; (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 25); whereas the Court may indicate provisional measures without infringing these principles; and whereas the argument put forward on these specific points by the United States accordingly cannot be accepted;

* *

49. Whereas

> "the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" (*ibid.*, pp. 14-15, para. 22);

50. Whereas, moreover,

> "provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given" (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23);

51. Whereas Mexico's principal request is that the Court should order the United States "to take measures sufficient to ensure that no Mexican national be executed and that no date for the execution of a Mexican national be set"; whereas the jurisdiction of the Court is limited in the present case to the dispute between the Parties concerning the interpretation and application of the Vienna Convention with regard to the individuals which Mexico identified as being victims of a violation of the Convention; whereas, accordingly, the Court cannot rule on the rights of Mexican nationals who are not alleged to have been victims of a violation of that Convention;

52. Whereas, however, Mexico argues that 54 of its nationals have been sentenced to death following proceedings that allegedly violated the obligations incumbent on the United States under Article 36, paragraph 1 *(b)*, of the Vienna Convention; whereas Mexico provides a list of those nationals and some information relating to their respective cases; whereas it adds that three of them have had their sentences commuted; whereas at the oral proceedings its Agent requested that the United States be ordered "to refrain from fixing any date for execution and from carrying out any execution in the case of the 51 Mexican nationals covered by the Application, until the Court has been able to decide on the merits of the case";

53. Whereas the United States argues that no execution date has been scheduled with respect to any of the Mexican nationals concerned (see paragraph 31 above); whereas it points out that this is so both for the three individuals specifically named in its request for the indication of provisional measures and in regard to the others; whereas it observes that, in the case of these latter, "any execution date is even more remote"; and whereas it accordingly concludes that the request for the indication of provisional measures is thus premature;

54. Whereas "the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time" *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 14, para. 19); whereas, moreover, the Supreme Court of the United States observed, when considering a petition seeking the enforcement of an Order of this Court, that: "It is unfortunate that this matter came before us while proceedings are pending before the ICJ

that might have been brought to that court earlier" (*Breard* v. *Greene*, 523 US 371, 378 (1998)); whereas, in view of the rules and time-limits governing the granting of clemency and the fixing of execution dates in a number of the states of the United States, the fact that no such dates have been fixed in any of the cases before the Court is not *per se* a circumstance that should preclude the Court from indicating provisional measures;

55. Whereas it is apparent from the information before the Court in this case that three Mexican nationals, Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, are at risk of execution in the coming months, or possibly even weeks; whereas their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides;

56. Whereas the other individuals listed in Mexico's Application, although currently on death row, are not in the same position as the three persons identified in the preceding paragraph of this Order; whereas the Court may, if appropriate, indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgment in this case;

* *

57. Whereas it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; whereas it is therefore appropriate that the Court, with the cooperation of the Parties, ensure that a final judgment be reached with all possible expedition;

58. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of Mexico and the United States to submit arguments in respect of those questions;

* * *

59. For these reasons,

THE COURT,

Unanimously,

I. *Indicates* the following provisional measures:

(a) The United States of America shall take all measures necessary to

ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

II. *Decides* that, until the Court has rendered its final judgment, it shall remain seised of the matters which form the subject of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of February, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge ODA appends a declaration to the Order of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

Non-Corrigé
Uncorrected

CR 98/7

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning the Application of the Vienna Convention on Consular Relations

(Paraguay v. *United States of America)*

Request for the Indication of Provisional Measures

VERBATIM RECORD

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires

(Paraguay c. Etats-Unis d'Amerique)

Demande en indication de mesures conservatoires

COMPTE RENDU

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia — Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily — be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

2.17. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification *automatically*

required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally 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. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

III. The United States Response To The Failure of Notification

2.19. Against this background, I would now like to advise the court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

*

49. This is the situation, how it stands, in the present *Diallo* case, resolved by the ICJ on the basis of the applicable treaties on the protection of the rights of the human person. In other and entirely distinct situations (e.g., in territorial and boundary matters, in the regulation of spaces, in diplomatic relations, among others) damage may be found to have been done to the State. And in yet other circumstances (e.g., in situations of armed conflicts), damage may be found to have been done to *both* the State and the human person. This is what happened, e.g., in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Judgment, I.C.J. Reports 2005)*, wherein the Court, in recalling that a State responsible for international wrongful acts is under the obligation to make full reparations for the injury caused by those acts, added that, in the *cas d'espèce*, those acts resulted in injury done to the Democratic Republic of the Congo "and to persons on its territory" (*ibid.*, p. 257, para. 259)[69]. Circumstances vary from case to case; but at least they leave it clear that a strict inter-State approach to the State's compliance with the duty to provide reparation, irrespective of such circumstances, appears anachronistic and unsustainable.

3. The Distinct Forms of Reparation

50. It has been in the domain of international human rights protection that reparations have been reckoned as comprising, in the light of the general principle of *neminem laedere*, the *restitutio in integrum* (re-establishment of the prior situation of the victim, whenever possible), in addition to the indemnizations, the rehabilitation, the satisfaction, and the guarantee of non-repetition of the acts or omissions in violation of human rights. The duty of reparation, corresponding to a general principle, has found judicial recognition *(supra)*, and support in legal doctrine[70]. The duty of reparation for damages stands as the indispensable

---

paras. 27-28; there follow successive references to, and assertions of, the *humanization* of international law, in my other individual opinions in the IACtHR, also from 2004 to 2008. For earlier writings, likewise followed by subsequent ones to the same effect, cf., *inter alia*, A. A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999), pp. 425-434; A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Belo Horizonte/Brazil (2001), pp. 11-23.

[69] And cf. also *I.C.J Reports 2005*, p. 278-279, paras. 342 and 344.

[70] Cf., *inter alia*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 1994 (reprint), p. 233; J. A. Pastor Ridruejo, *La Jurisprudencia del Tribunal Internacional de La Haya — Sistematización y Comentarios*, Madrid, Edit. Rialp, 1962, p. 429; H. Wassgren, "Some Reflections on *Restitutio in Integrum* Especially in the Practice of the European Court of Human Rights", 6 *Finnish Yearbook of International Law*, Helsinki (1995), pp. 575-595.

complement of the breach of a conventional obligation of respect for human rights [71].

51. Contemporary doctrine has identified the aforementioned distinct *forms* of reparation *from the perspective of the victims*, of their claims, needs and aspirations. By the *restitutio in integrum* one seeks the re-establishment — whenever possible[72] — of the *statu quo ante*. The *rehabilitation* comprises all the measures — medical, psychological, juridical and others — to be taken to re-establish the dignity of the victims. The *indemnizations*, often and unduly confused with the reparation, of which they are but one of the forms, comprise the pecuniary sum owed to the victims for the damages (material[73] and moral or immaterial[74]) suffered. The *satisfaction* is linked to the purported aim to cease the effects of the violations, and the *guarantee of non-repetition* (of the breaches) discloses a preventive dimension.

52. Juridical concepts, while encompassing values, are a product of their time, and as such are not unchangeable. The juridical categories crystallized in time and which came to be utilized — in a context distinct from the ambit of the international law of human rights — to govern the determination of reparations were strongly marked by analogies with solutions of private law, and, in particular, of civil law *(droit civil)*, in the ambit of national legal systems: such is the case, e.g., of the concepts of material damage and moral or immaterial damage, and of the elements of *damnum emergens* and *lucrum cessans*. Such concepts have been strongly determined by a patrimonial content and interest — which is explained by their origin — marginalizing what is most important in the human person, namely, her condition of spiritual being[75].

53. The pure and simple transposition of such concepts onto the international level was bound to generate uncertainties and discussion. The criteria of determination of reparations, of an essentially patrimonial content (ensuing from civil law analogies), does not appear to me entirely adequate or sufficient when transposed into the domain of the international law of human rights, endowed with a specificity of its own. It is not surprising that, as from the early 1990s, the matter began to be reassessed

[71] Cf., *inter alia*, P. Reuter, "Principes de droit international public", 103 *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 103, 1961, pp. 585-586; R. Wolfrum, "Reparation for Internationally Wrongful Acts", *Encyclopedia of Public International Law* (ed. R. Bernhardt), Vol. 10, Amsterdam, North Holland, 1987, pp. 352-353.

[72] In case of violation of the right to life, for example, restitution becomes impossible.

[73] Not seldom, in relation to this point, in practice, reference is made to *damnum emergens* and *lucrum cessans*.

[74] Which, in most cases, is determined by a judgment of equity.

[75] This is disclosed by the fact that even the moral damage itself is commonly regarded, in the classical conception, as amounting to the so-called "non-patrimonial damage". The point of reference still keeps on being the patrimony.

in the realm of this latter, at the United Nations[76], well before the endorsement by the UN General Assembly in 2005 of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[77], elaborated and adopted by the [former] UN Commission on Human Rights[78] (cf. *infra*).

54. The important point here to retain is that, in the ambit of the international law of human rights, the *forms* of reparation (*restitutio in integrum*, indemnizations, rehabilitation, satisfaction, guarantee of non-repetition) are to be necessarily approached *as from the perspective of the victims themselves*, keeping in mind their claims, their needs and aspirations. Reparations for human rights breaches are, in fact, directly and ineluctably linked to the condition of the victims and their next of kin, who occupy in it a central position herein. Reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfilment of their aspirations as human beings and the restoration of their dignity[79].

55. It is crystal clear that the aforementioned 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations is also ineluctably *victim-oriented*: it rightly pursues a victim-centred approach, envisaging the right to reparation as a right of the individuals victimized, entailing the corresponding duty to have justice done to the individuals victimized, what becomes fundamentally important in cases of grave breaches of their rights[80]. Under certain circumstances, next of kin or dependants of the direct victims may also

---

[76] Cf. Th. van Boven (special rapporteur), *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms — Final Report*, UN/Commission on Human Rights, UN doc. E/CN.4/Sub.2/1993/8, of 2 July 1993, pp. 1-65; and cf. also: [Various Authors], *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Proceedings of the Seminar of Maastricht of 1992), Maastricht, SIM/Univ. Limburg, 1992, pp. 3-253. And cf., subsequently, M. C. Bassiouni (special rapporteur), *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms — Final Report*, doc. E/CN.4/2000/62, of 18 January 2000, pp. 1-11.

[77] UN General Assembly resolution 60/147, of 16 December 2005.

[78] By its resolution 2005/35, of 19 April 2005.

[79] It is significant that the IACtHR, in its judgment (of 27 November 1998) in the case of *Loayza Tamayo* v. *Peru*, has, besides the measures of reparation that it ordered, also rightly recognized the existence of a damage to the *project of life* (linked to satisfaction) of the victim, caused by her detention (in the circumstances in which it took place). Cf. IACtHR, case of *Loayza Tamayo* v. *Peru* (reparations), judgment (of 27 November 1998), Series C, No. 42, paras. 83-192, and joint separate opinion of Judges A. A. Cançado Trindade and A. Abreu Burelli, paras. 1-17.

[80] Cf. P. d'Argent, "Le droit de la responsabilité internationale complété? Examen des principes fondamentaux et directives concernant le droit à un recours et à réparation des

be regarded as "victims", entitled to make use of the right of access to justice.

56. The 2005 UN Basic Principles and Guidelines, at last adopted on 16 December 2005, were preceded by a unique and innovative jurisprudential construction of the IACtHR on this subject-matter (in particular on the distinct forms of reparation), which took place largely in the years 1998-2004, and which has been attracting growing attention of expert writing in recent years[81] (cf. *infra*). It can safely be stated that, in some respects, that jurisprudential construction of the IACtHR has, in its conceptualization, for the purposes of reparation, gone further than the 2005 UN Basic Principles and Guidelines, in fostering the expansion of the notion of victim, by encompassing as such the next of kin, also regarded as "direct victims" in their own right (given their intense suffering), without conditionalities (such as that of accordance with domestic law), in individualized as well as collective cases[82].

57. The centrality of the position of the victims, as *justiciables*, has implications for the approach to distinct forms of reparations. Let us take, as an example to illustrate this point, *satisfaction* as a form of reparation. Within the framework of strictly inter-State relations, satisfaction as a form of reparation has been met with criticism, given the susceptibilities surrounding the relations between States *inter se*[83]. However, in the framework of the relations between States and individuals under their

---

victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire", 51 *Annuaire français de droit international* (2005), pp. 34-35, 40, 43, 45 and 52.

[81] Cf., e.g., [Various Authors], *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Société de législation comparée, 2010, pp. 17-334; M. Scalabrino, "Vittime e Risarcimento del Danno: L'esperienza della Corte Interamericana dei Diritti dell'Uomo", 22 *Comunicazioni e Studi*, Milan (2002), pp. 1013-1092; C. Sandoval-Villalba, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations", *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 243-282; K. Bonneau, "La jurisprudence innovante de la Cour interaméricaine des droits de l'homme en matière de droit à reparation des victimes des violations des droits de l'homme", *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pedone, 2009, pp. 347-382; I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 133-145; J. Schönsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights", 23 *American University International Law Review* (2007), pp. 127-164.

[82] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, Annex IV, pp. 313-340.

[83] Cf., e.g., B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 185, 1984, pp. 84-87.

respective jurisdictions, satisfaction has proven to be a very appropriate form of reparation, and a particularly important one for the human beings, victims of breaches of their rights by the States at issue.

58. The reassuring centrality of the victims in human rights protection (an imperative of justice) has other implications as well, beyond the realm of reparations. It is not my intention to dwell upon them, as they lie beyond the scope of the present separate opinion. I shall limit myself to observing that the victims' central position has helped to awaken conscience as to their importance, and the corresponding need of honouring them, the victims. In our times, over the last decades, attention is at last turning from the past praises of the deeds of national heroes (including military and war heroes, conquerors and the like), to the memory of the silent victims, to the need to honour their suffering in enduring the violations of their fundamental rights, and to avoid dropping their suffering into oblivion[84].

59. In my dissenting opinion in the case on the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*Judgment, I.C.J. Reports 2012 (I)*, pp. 267-268, paras. 247-249), I have referred to endeavours, throughout the last decade, to secure reparations also to individuals, in the realm of international humanitarian law (e.g., the 2000 legal regime of the Ethiopia-Eritrea Claims Commission, the 2004 Report of the UN International Commission of Inquiry on Darfur, the 2010 Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) of the International Law Association's International Committee on Reparation for Victims of Armed Conflict. There appears thus to be an ever-growing awareness nowadays of the individual victims' right to reparation, not only in the domain of the international law of human rights, but encompassing also the realm of international humanitarian law.

VII. The Contribution of the Case Law of the International Human Rights Tribunals (IACtHR and ECHR)

1. The Relevance of Their Case Law on Reparations Due to the Victims

60. In the light of all the aforesaid, the contribution of the case law of the international human rights tribunals (the IACtHR and the ECHR) is

[84] Cf., e.g., [Various Authors], *Commémorer les victimes en Europe — XVI^e-XXI^e siècles* (eds. D. El Kenz and F.-X. Nérard), Champ Vallon, 2011, pp. 10, 18, 25, 65, 144, 262 and 328-330.

INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 2 March 1999

LAGRAND CASE
(Germany v. United States of America)

_____

1999
General List
No. 104

I. THE AMBASSADOR OF THE FEDERAL REPUBLIC OF GERMANY TO THE NETHERLANDS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 2 March 1999.

Upon instruction of my Government, I have the honour to submit herewith an Application of the Federal Republic of Germany as well as an urgent request for provisional measures pursuant to Articles 40 and 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court against the United States of America for violations of the Vienna Convention on Consular Relations.

The request for provisional measures is of extreme urgency. The execution of the German national Walter LaGrand, set to take place in the State of Arizona on 3 March 1999, would deprive both this Court and Germany of the opportunity to have the case decided on its merits

(Signed) E. VON PUTTKAMER,

Ambassador of the Federal Republic of Germany.

_____

II. APPLICATION OF THE FEDERAL REPUBLIC OF GERMANY

On behalf of the Federal Republic of Germany and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Federal Republic of Germany against the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has

jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

I. THE VIENNA CONVENTION

1. Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations (the "Vienna Convention") requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36:

> "If 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."

2. As the United States stated before the International Court of Justice in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tel1ran,*

> "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 . . . Article 36 establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings, p.* 174.)

3. In the recent case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America),* Judge Schwebel, in his declaration appended to the unanimous Order of the Court for a stay of execution of a national of Paraguay, stated:

> "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)." (Order of 9 April 1998, *I.C.J. Reports 1998, p.* 259.)

II. STATEMENT OF FACTS

4. In 1982, the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand. These German nationals were tried and sentenced to death without being advised of their rights to consular assistance, as guaranteed to them by Article 36, subparagraph 1 *(b)*, of the Vienna Convention.

It was only in 1992, when all legal avenues at the state level had been exhausted, that the German consular officers were made aware, not by the authorities of the State of Arizona, but by the detainees themselves, of the case in question.

5. It had been, until very recently, the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany.

While maintaining that under the requirement of due diligence and good faith applicable in international relations, the authorities of the State of Arizona should have established the foreign nationality of the detainees (Karl and Walter LaGrand were born in Germany. Their mother was a German national. These informations, gleaned by the authorities of the State of Arizona from the detention forms, clearly laid grounds for further investigation as to the nationality of the detained brothers, and put the onus on the authorities per Article 36, subparagraph I *(b)*, of the Vienna Convention—to determine their nationality and to inform the German consular officers), Germany accepted as true the contention of the authorities of the State of Arizona that they had not actually been aware of the German nationality of the detainees.

However, during the proceedings before the Arizona Mercy Committee on 23 February 1999, State Attorney Peasley admitted that the authorities of the State of Arizona had indeed been aware all along, since 1982, that Karl and Walter LaGrand had been German nationals. It was thus in full knowledge of the German nationality of the detainees that the authorities of the State of Arizona held, tried and convicted Karl and Walter LaGrand without informing them of their rights under Article 36 of the Vienna Convention.

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

7. The possibility cannot be excluded that this lack of consular assistance did have an impact on the criminal proceedings. Indeed, when Karl and Walter LaGrand, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the federal court of first instance, that court rejected the assertion of this and other claims based on a municipal 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 state level, they could not assert them in the federal *habeas corpus* proceedings. This municipal law doctrine was held to bar such relief even though, first, Karl and Walter LaGrand were unaware of their rights under the Convention at the time of the earlier proceedings, and second, they were unaware of their rights precisely because the legal authorities failed to comply with their obligations under the Vienna Convention promptly to inform them of those rights.

The intermediate federal appellate court affirmed. Karl and Walter LaGrand's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to them as of right.

8. Karl LaGrand was executed on 24 February 1999, after last attempts had failed in front of the Arizona Mercy Committee to prevent the sentence of death being carried out.

The date of execution of Walter LaGrand has been set for 3 March 1999.

III. GERMANY'S EFFORTS TO PREVENT THE CARRYING OUT OF THE DEATH SENTENCES

9. The Government of the Federal Republic of Germany has used every diplomatic means at its disposal in order to prevent the carrying out of the death sentences against Karl and Walter LaGrand. Numerous interventions have been made. Both the President and the Chancellor of the Federal Republic of Germany have appealed to the President of the United States. Foreign Minister Fischer and Justice Minister Dàubler-Gmelin have raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. Démarches have been undertaken by the German Ambassador to the United States. The German Ambassador and the German Consul-General have appeared before the Mercy Committee of the State of Arizona on the day prior to the execution of Karl LaGrand. They intend to do the same at the hearing of the Mercy Committee that is to decide on the fate of Walter LaGrand.

Germany had asked for the death sentences against Karl and Walter LaGrand to be set aside on humanitarian grounds. Germany was not only motivated by its opposition, in principle, to the death penalty, but by the special circumstances of the case. Indeed, Karl and Walter LaGrand were only 18 and 19 years of age when they committed the crimes. They have spent a total of 15 years on death row, a period which, even by United States standards, is unusually long.

Germany did also raise the issue to no avail—of a violation of the Vienna Convention. German Foreign Minister Fischer, in a letter to United States Secretary of State Albright dated 22 February 1999, did assert a violation—through negligence—of Article 36 of the Vienna Convention in the case of the two detainees. A detailed Memorandum of the German Government was enclosed in that letter. The United States of America, to this day, has failed to respond.

It was only on 24 February 1999 that the authorities of the State of Arizona did reveal that they had, since 1982, actual knowledge of the German nationality of Karl and Walter LaGrand.

10. Germany was not and is not seeking any relief barring the competent authorities of the United States from enforcing its criminal law. Germany did and does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

IV. THE JURISDICTION OF THE COURT

11. Under Article 36, paragraph 1, of the Statute of the Court, "the jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

12. The Federal Republic of Germany and the United States of America are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

> "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."

13. Germany therefore submits that, upon the filing of the present Application, the matters in dispute between Germany and the United States concerning Germany's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

V. THE CLAIMS OF THE FEDERAL REPUBLIC OF GERMANY

14. The Government of the Federal Republic of Germany claims that

(a) Pursuant to Article 36, subparagraph I *(b)*, of the Vienna Convention, the United States was and is under the international legal obligation to Germany, a State party to the Convention, to inform "without delay" any German national, such as Karl and Walter LaGrand, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(b) Pursuant to Article 36, subparagraph I *(b)*, of the Vienna Convention, the United States was and is under the international legal obligation to an arrested national of Germany, such as Karl and Walter LaGrand, to inform him or her "without delay" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Germany can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph I *(b)*, of the Vienna Convention, has effectively prevented Germany from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of the Convention. The United States has therefore violated the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States was and is under an international legal obligation to ensure that its national law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36 of the Vienna Convention. The United States has violated the foregoing obligation.

(e) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated the foregoing obligation.

VI. THE JUDGMENT REQUESTED

15. Accordingly the Federal Republic of Germany asks the Court to adjudge and declare

> (1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,
>
> (2) that Germany is therefore entitled to reparation,
>
> (3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
>
> (4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

> (1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
>
> (2) the United States should provide reparation, in the form of compensation and satisfaction. for the execution of Karl LaGrand on 24 February 1999:
>
> (3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and
>
> (4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts.

VII. RESERVATION OF RIGHTS

16. The Federal Republic of Germany reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VIII. PROVISIONAL MEASURES

17. The Federal Republic of Germany requests the Court to indicate provisional measures of protection, as set forth in a separate request filed concurrently with this Application.

The Hague, 2 March 1999.

(Signed) E. VON PUTTKAMER,

Ambassador of the Federal Republic of Germany
to the Kingdom of the Netherlands.

INTERNATIONAL COURT OF JUSTICE

LAGRAND CASE

(Germany v. United States of America)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

Volume I

(Text of the Memorial)

16 September 1999

TABLE OF CONTENTS

VOLUME I

VOLUME III

ANNEXES 38 - 61

Part

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.

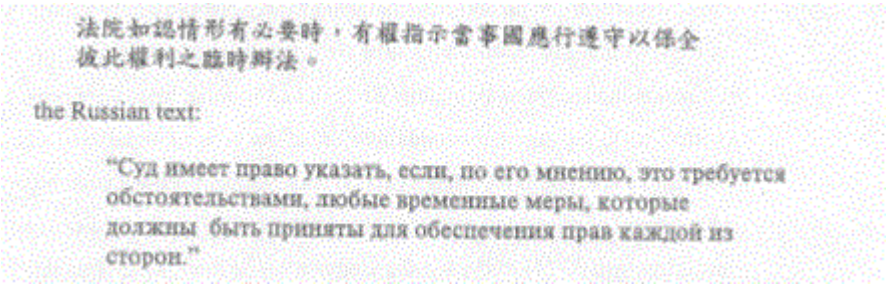
4.148 In sum, Provisional Measures can achieve their purpose only if they are construed as legally binding.[131] In the words of Sir Gerald Fitzmaurice:

> "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

_____

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.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 31 MARCH 2004 IN THE CASE CONCERNING *AVENA AND OTHER MEXICAN NATIONALS (MEXICO* v. *UNITED STATES OF AMERICA)*

(MEXICO *v.* UNITED STATES OF AMERICA)

JUDGMENT OF 19 JANUARY 2009

2009

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE EN INTERPRÉTATION DE L'ARRÊT DU 31 MARS 2004 EN L'AFFAIRE *AVENA ET AUTRES RESSORTISSANTS MEXICAINS (MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)*

(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 19 JANVIER 2009

Official citation:

Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 3

Mode officiel de citation:

Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) *(Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2009*, p. 3

ISSN 0074-4441
ISBN 978-92-1-071055-8

Sales number
N° de vente: **946**

19 JANUARY 2009

JUDGMENT

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 31 MARCH 2004 IN THE CASE CONCERNING *AVENA AND OTHER MEXICAN NATIONALS (MEXICO* v. *UNITED STATES OF AMERICA)*

(MEXICO *v.* UNITED STATES OF AMERICA)

DEMANDE EN INTERPRÉTATION DE L'ARRÊT DU 31 MARS 2004 EN L'AFFAIRE *AVENA ET AUTRES RESSORTISSANTS MEXICAINS (MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)*

(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

19 JANVIER 2009

ARRÊT

INTERNATIONAL COURT OF JUSTICE

2009
19 January
General List
No. 139

YEAR 2009

19 January 2009

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 31 MARCH 2004 IN THE CASE CONCERNING *AVENA AND OTHER MEXICAN NATIONALS (MEXICO* v. *UNITED STATES OF AMERICA)*

(MEXICO *v.* UNITED STATES OF AMERICA)

Article 60 of the Statute of the Court — Independent basis of jurisdiction.

Conditions on the exercise of jurisdiction to entertain a request for interpretation — Question of the existence of a dispute as to the meaning or scope of paragraph 153 (9) of the Judgment of 31 March 2004 — For the Court to determine whether a dispute exists — No dispute as to whether paragraph 153 (9) lays down an obligation of result.

Question of the existence of a dispute as to those upon whom the obligation of result specifically falls — Two possible approaches based on the Parties' positions — Possible existence of a dispute as to those upon whom the obligation specifically falls — Possible absence of a dispute on this point failing a sufficiently precise indication.

Question of the direct effect of the obligation established in paragraph 153 (9) — No decision in the Judgment of 31 March 2004 as to the direct effect of the obligation — Question of direct effect therefore cannot be the subject of a request for interpretation — Reiteration of the principle that considerations of domestic law cannot in any event relieve the Parties of obligations deriving from judgments of the Court.

*

Question of breach by the United States of its legal obligation to comply with the Order indicating provisional measures of 16 July 2008 — Court's jurisdiction to rule on this question in proceedings on a request for interpretation

— Question of possible violation by the United States of the Judgment of 31 March 2004 — Lack of jurisdiction of the Court to consider this question in proceedings for interpretation.

*

Mexico's request for the Court to order the United States to provide guarantees of non-repetition — Binding character of the Judgment of 31 March 2004 — Undertakings already given by the United States.

JUDGMENT

Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, KOROMA, BUERGENTHAL, OWADA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Registrar* COUVREUR.

In the case concerning the Request for interpretation of the Judgment of 31 March 2004,

between

the United Mexican States,

represented by

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, Under-Secretary for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs of Mexico,
H.E. Mr. Joel Antonio Hernández García, Ambassador, Legal Adviser, Ministry of Foreign Affairs of Mexico,
H.E. Mr. Jorge Lomónaco Tonda, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agents,

and

the United States of America,

represented by

Mr. John B. Bellinger, III, Legal Adviser, United States Department of State,

as Agent;

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

as Co-Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 5 June 2008, the United Mexican States (hereinafter "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter "the United States"), whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, it requests the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (*I.C.J. Reports 2004 (I)*, p. 12) (hereinafter "the *Avena* Judgment").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately transmitted to the Government of the United States by the Registrar; and, pursuant to Article 40, paragraph 3, all States entitled to appear before the Court were notified of the Application.

3. On 5 June 2008, after filing its Application, Mexico, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a request for the indication of provisional measures in order "to preserve the rights of Mexico and its nationals" pending the Court's judgment in the proceedings on the interpretation of the *Avena* Judgment.

By an Order of 16 July 2008 (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*), the Court, having rejected the submission by the United States seeking the dismissal of the Application filed by Mexico (p. 331, para. 80 (I)) and its removal from the Court's General List, indicated the following provisional measures (pp. 331-332, para. 80 (II)):

> "*(a)* The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*;
>
> *(b)* The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order."

It also decided that, "until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters" which form the subject of the Order (p. 332, para. 80 (III)).

4. By letters dated 16 July 2008, the Registrar informed the Parties that the Court, pursuant to Article 98, paragraph 3, of the Rules of Court, had fixed 29 August 2008 as the time-limit for the filing of Written

Observations by the United States on Mexico's Request for interpretation.

5. By a letter dated 1 August 2008 and received in the Registry the same day, the Agent of the United States, referring to paragraph 80 (II) *(b)* of the Order of 16 July 2008, informed the Court of the measures which the United States "ha[d] taken and continue[d] to take" to implement that Order.

6. By a letter dated 28 August 2008 and received in the Registry the same day, the Agent of Mexico, informing the Court of the execution on 5 August 2008 of Mr. José Ernesto Medellín Rojas in the State of Texas, United States of America, and referring to Article 98, paragraph 4 of the Rules of Court, requested the Court to afford Mexico the opportunity of furnishing further written explanations for the purpose, on the one hand, of elaborating on the merits of the Request for interpretation in the light of the Written Observations which the United States was due to file and, on the other, of "amending its pleading to state a claim based on the violation of the Order of 16 July 2008".

7. On 29 August 2008, within the time-limit fixed, the United States filed its Written Observations on Mexico's Request for interpretation.

8. By letters dated 2 September 2008, the Registrar informed the Parties that the Court had decided to afford each of them the opportunity of furnishing further written explanations, pursuant to Article 98, paragraph 4, of the Rules of Court, and had fixed 17 September and 6 October 2008 as the time-limits for the filing by Mexico and the United States respectively of such further explanations. These were filed by each Party within the time-limits thus fixed.

*

9. In the Application, the following requests were made by Mexico:

> "The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing';
> and that, pursuant to the foregoing obligation of result,
>
> 1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment; and
> 2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation."

10. In the course of the proceedings, the following submissions were presented by the Parties:

On behalf of Mexico,

in the further written explanations submitted to the Court on 17 September 2008:

"Based on the foregoing, the Government of Mexico asks the Court to adjudge and declare as follows:

(a) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment is that it is an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences';
and that, pursuant to the interpretation of the foregoing obligation of result,

(1) the United States, acting through all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153 (9); and

(2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation;

(b) That the United States breached the Court's Order of 16 July 2008 and the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of the *Avena* Judgment; and

(c) That the United States is required to guarantee that no other Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation."

On behalf of the United States,

in its Written Observations submitted on 29 August 2008:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the *Avena* Judgment in accordance with paragraph 62 above." (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

"And the United States *agrees* with Mexico's requested interpretation; it agrees that the *Avena* Judgment imposes an 'obligation of result'. There is thus nothing for the Court to adjudicate, and Mexico's application must be dismissed."

Paragraph 62 of the Written Observations of the United States includes the following:

"the United States requests that the Court interpret the Judgment as Mexico has requested — that is, as follows:

> "[T]he obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing'";

in the further written explanations submitted to the Court on 6 October 2008:

"On the basis of the facts and arguments set out above and in the United States' initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the *Avena* Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(a) that the following supplemental requests by Mexico are dismissed:

(1) that the Court declare that the United States breached the Court's July 16 Order;
(2) that the Court declare that the United States breached the *Avena* Judgment; and
(3) that the Court order the United States to issue a guarantee of non-repetition;

(b) an interpretation of the *Avena* Judgment in accordance with paragraph 86 *(a)* of Mexico's Response to the Written Observations of the United States."

* * *

11. The Court recalls that in paragraph 153 (9) of the *Avena* Judgment the Court had found that:

> "the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment".

12. Mexico asked for an interpretation as to whether paragraph 153 (9) expresses an obligation of result and requested that the Court should so state, as well as issue certain orders to the United States "pursuant to the foregoing obligation of result" (see paragraph 9 above).

13. Mexico's Request for interpretation of paragraph 153 (9) of the Court's Judgment of 31 March 2004 was made by reference to Article 60 of the Statute. That Article provides that "[t]he judgment is final and without appeal. In the event of dispute ['contestation' in the French version] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

14. The United States informed the Court that it agreed that the obligation in paragraph 153 (9) was an obligation of result and, there being no dispute between the Parties as to the meaning or scope of the words of which Mexico requested an interpretation, Article 60 of the Statute did not confer jurisdiction on the Court to make the interpretation (Order, p. 322, para. 41). In its Written Observations of 29 August 2008, the United States also contended that the absence of a dispute about the meaning or scope of paragraph 153 (9) rendered Mexico's Application inadmissible.

15. The Court notes that its Order of 16 July 2008 on provisional measures was not made on the basis of prima facie jurisdiction. Rather, the Court stated that "the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case" (*ibid.*, p. 323, para. 44).

The Court also affirmed that the withdrawal by the United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes since the rendering of the *Avena* Judgment had no bearing on the Court's jurisdiction under Article 60 of the Statute (*ibid.*, p. 323, para. 44).

16. In its Order of 16 July 2008, the Court had addressed whether the conditions laid down in Article 60 "for the Court to entertain a request for interpretation appeared to be satisfied" (*ibid.*, p. 323, para. 45), observing that "the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a 'dispute as to the meaning or scope of [the said] judgment'" (*ibid.*, p. 323, para. 46).

17. In the same Order, the Court pointed out that "the French and English versions of Article 60 of the Statute are not in total harmony" and that the existence of a dispute/"contestation" under Article 60 was not subject to satisfaction of the same criteria as that of a dispute ("différend" in the French text) as referred to in Article 36, paragraph 2, of the Statute (*ibid.*, p. 325, para. 53). The Court nonetheless observed that "it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result" (*ibid.*, p. 326, para. 55).

18. However, the Court also observed that

> "the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authori-

ties and whether that obligation falls upon those authorities" (Order, p. 326, para. 55).

19. The Court stated that the decision rendered on the request for the indication of provisional measures "in no way prejudges any question that the Court may have to deal with relating to the Request for interpretation" (*ibid.*, p. 331, para. 79).

20. Accordingly, in the present procedure it is appropriate for the Court to review again whether there does exist a dispute over whether the obligation in paragraph 153 (9) of the *Avena* Judgment is an obligation of result. The Court will also at this juncture need to consider whether there is indeed a difference of opinion between the Parties as to whether the obligation in paragraph 153 (9) of the *Avena* Judgment falls upon all United States federal and state authorities.

21. As is clear from the settled jurisprudence of the Court, a dispute must exist for a request for interpretation to be admissible (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 216-217, para. 44; see also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12).

22. As recalled above in paragraphs 4 and 8, by letters dated 16 July 2008 and 2 September 2008, the Registrar informed the Parties that the Court had afforded the United States and Mexico the opportunity of furnishing Written Observations and further written explanations pursuant to Article 98, paragraphs 3 and 4, of the Rules of Court.

23. The Court has duly considered the observations and further written explanations of the Parties regarding the existence of any dispute requiring interpretation as to whether the obligation to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals referred to in the *Avena* Judgment is an obligation of result.

24. Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the *Avena* Judgment. According to Mexico, this difference of views manifested itself in the position taken by the United States Government in the Supreme Court: that the *Avena* Judgment was not directly enforceable under domestic law and was not binding on domestic courts without action by the President of the United States; and further that the obligation under Article 94 of the United Nations Charter to comply with judgments of

the Court fell solely upon the political branches of the States parties to the Charter. In Mexico's view,

> "the operative language [of the *Avena* Judgment] establishes an obligation of result reaching all organs of the United States, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments".

Mexico maintains that the United States Government's narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States. In particular, Mexico noted that the United States Government had not sought to intervene in support of Mr. Medellín's petition for a stay of execution before the United States Supreme Court. This course of conduct is alleged to reflect a fundamental disagreement between the Parties concerning the obligation of the United States to bring about a specific result by any necessary means. Mexico further argues that the existence of a dispute is also shown by the fact that the competent executive, legislative and judicial organs at the federal and Texas state levels have taken positions in conflict with Mexico's as to the meaning or scope of paragraph 153 (9) of the *Avena* Judgment.

25. The United States has, in its Written Observations of 29 August 2008 and its further written explanations of 6 October 2008, insisted that each of the matters brought to the attention of the Court by Mexico concerns not a dispute regarding whether the Parties perceive the obligations of paragraph 153 (9) as an obligation of result, but Mexico's dissatisfaction with the implementation to date of that obligation by the United States. The United States claims that it has consistently agreed with Mexico's interpretation of paragraph 153 (9) of the *Avena* Judgment. Specifically, it concurs that subparagraph 9 requires it to take all necessary steps to ensure that no Mexican national named in the Judgment is executed without having received the prescribed review and reconsideration and without a determination having been made that he has suffered no prejudice from the violation of the Convention. In particular, the United States contends that, in accordance with the discretion left to the United States by the Court as to the choice of means of compliance with the Judgment, the President elected to comply by, *inter alia*, determining that the state courts were to give effect to the Judgment, as set out in a Memorandum of 28 February 2005 to the Attorney General of the United States. The executive branch thus argued in the case *Medellín* v. *Texas* in the Supreme Court that the President's determination was lawful and binding on the state courts. According to the United States, no finding as to the existence of a difference of views between the Parties can be inferred from the controversy before the Supreme Court as to whether or not the Court's judgments are self-executing, because that is strictly a matter of United States domestic law. The Supreme Court found that the *Avena* Judgment created an international obligation incum-

bent upon the United States. Further, the United States argues that positions taken by other governmental officials in the United States cannot provide any basis for a finding of a divergence of views between the Parties in respect of the interpretation of the *Avena* Judgment; it points out that Mexico's argument in this regard is founded on positions taken by organs without the authority to express the State's official position on the international plane. The fact that Texas, or any other constituent part of the United States, may hold a different interpretation of the Court's Judgment is therefore irrelevant to the question before the Court.

26. The United States on several occasions reiterated that the relevant obligation was one of result, and that while the *Avena* Judgment allowed it a choice of means, it was certain that the obligation had to be complied with.

27. In its Order of 16 July 2008 the Court observed that "it seems both Parties regard paragraph 153 (9) as an international obligation of result" (Order, p. 326, para. 55). Its observations on the matter being provisional, the Court has reviewed the contentions of the Parties in the Written Observations of 29 August 2008 and the further written explanations of 17 September and 6 October 2008 as to whether they both accept that the obligation in paragraph 153 (9) is one of result — that is to say, an obligation which requires a specific outcome. This means, in the particular case, the obligation upon the United States to provide review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment to those Mexican nationals named in the *Avena* Judgment who remain on death row without having had the benefit of such review and reconsideration. In addition, Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos were the subject of the Order on provisional measures relating to that obligation issued by the Court on 16 July 2008. The Court observes that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, would not be regarded as fulfilling this obligation of result.

28. The United States has insisted that it fully accepts that paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result. It therefore continues to assert that there is no dispute over whether paragraph 153 (9) expresses an obligation of result, and thus no dispute within the meaning of the condition in Article 60 of the Statute. Mexico contends, making reference to certain omissions of the federal government to act and of certain actions and statements of organs of government or other public authorities, that in reality the United States does not accept that it is under an obligation of result; and that therefore there is indeed a dispute under Article 60.

29. It is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist (see *Interpretation*

of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 12).

To this end, the Court has in particular examined the Written Observations and further written explanations of the Parties to ascertain their views in the light of the comments of the Court in paragraph 55 of the Order that they

> "apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities".

30. The Court observes that whether, by reference to the elements described above, there is a dispute under Article 60 of the Statute, the resolution of which requires an interpretation of the provisions of paragraph 153 (9) of the *Avena* Judgment, can be perceived in two ways.

31. On the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute.

Mexico observes that, in *Medellín* v. *Texas* (*Supreme Court Reporter*, Vol. 128, 2008, p. 1346), "the Federal Executive argued [in the United States Supreme Court] that Article 94 (1) [of the United Nations Charter] was directed only to the political branches of States Party . . . rather than to the State Party as a whole", and adds that "[t]here is no support for that reading of Article 94 (1) in either its text, its object and purpose, or principles of general international law". Mexico maintains that it was on the basis of this "erroneous interpretation" that

> "the [Supreme] Court found that the expression of the obligation to comply in Article 94 (1) . . . precluded the judicial branch — the authority best suited to implement the obligation imposed by *Avena* — from taking steps to comply",

the Supreme Court being of the view that the Charter provision referred to "a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision" (*ibid.*, p. 1358). In Mexico's contention, it thus follows that the highest judicial authority in the United States has understood the Judgment in *Avena* as not laying down an obligation of result binding on all constituent organs of the United States, including the federal and state judicial authorities. From this perspective, not only is the obligation in paragraph 153 (9) not really regarded as an obligation of result, but, argues Mexico, such an interpretation puts to one side the finding in the *Avena* Judgment that:

> "in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 *(b)*, of the [Vienna Convention on Consular Relations] has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 65-66, para. 140.)

Further, Mexico contends that this understanding by the Supreme Court is inconsistent with the interpretation of the *Avena* Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including the judiciary.

32. From this viewpoint, the wording in Mexico's concluding submissions — wording introduced in its further written explanations of 17 September 2008 — was directed to affirming that the obligation in paragraph 153 (9) of the *Avena* Judgment is incumbent on all the constituent organs to be seen as comprising the United States (see paragraph 10 above).

Mexico moreover rejects the argument of the State of Texas that Mr. Medellín had, prior to his execution, received the review and reconsideration required by paragraph 153 (9) of the *Avena* Judgment from state and federal courts.

33. According to Mexico, the United States, by word and deed, has contradicted its avowed acceptance of review and reconsideration as an obligation of result. Reference is made to the choice of the United States Government not to appear at the Supreme Court hearings on Mr. Medellín's petition for a stay of execution. Mexico also points to the very tardy attempts to engage Congress in ensuring that all constituent elements do indeed act upon this obligation.

34. Further, Mexico contends that the Supreme Court found that the obligation within paragraph 153 (9) could not be directly enforced by the judiciary on the basis of a Presidential memorandum nor otherwise without intervention of the legislature. In Mexico's view, this necessarily means that the obligation is not really regarded as one of result — a viewpoint not shared by the United States.

35. The Court observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute.

36. On the other hand, there are factors that suggest, on the contrary,

that there is no dispute between the Parties. The Court notes — without necessarily agreeing with certain points made by the Supreme Court in its reasoning regarding international law — that the Supreme Court has stated that the *Avena* Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic law, and that it cannot be given effect by a Presidential Memorandum.

37. Referring to the Court's statement in its Order of 16 July 2008 that there seemed to be a dispute as to the scope of the obligation in paragraph 153 (9), and upon whom precisely it fell, the United States reiterated in its Written Observations of 29 August 2008 that the federal government both "spoke for" and had responsibility for all organs and constituent elements of governmental authority. While that statement seems to be directed at matters different from what the Court perceived as the possible dispute in paragraph 55 of its Order of 16 July 2008, it could be said that Mexico addressed this question only somewhat indirectly in its further written explanations of 17 September 2008.

38. The Court notes that Article 98 (2) of the Rules of Court stipulates that when a party makes a request for interpretation of a judgment, "the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated".

Mexico has had the opportunity to indicate the precise points in dispute as to the meaning or scope of the *Avena* Judgment, first in its Application of 5 June 2008 and then in the submissions made at the conclusion of its further written explanations of 17 September 2008.

The Application made reference to a dispute about whether the obligation in paragraph 153 (9) of the *Avena* Judgment was one of result; the United States rapidly signalled its agreement that the obligation incumbent upon it was an obligation of result. The matters emphasized by Mexico seemed particularly directed to the question of implementation by the United States of the obligations incumbent upon it as a consequence of the *Avena* Judgment. The various passages in the further written explanations of Mexico of 17 September 2008, while referring to certain actions and statements of the constituent organs of the United States and perceived failures to act in certain regards by the federal government, nonetheless remain very non-specific as to what the claimed dispute precisely is. Further, it is difficult to discern, save by inference, Mexico's position regarding the existence of a dispute as to whether the obligation of result falls upon all state and federal authorities and as to whether they share an understanding that it does so fall.

39. The Court observes that, in its Application of 5 June 2008, Mexico simply asked that the Court affirm that the obligation incumbent upon

the United States paragraph 153 (9) constitutes an obligation of result.

When Mexico formulated its submissions in the oral hearings on the request for the indication of provisional measures, it submitted:

> "*(a)* that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's *Avena* Judgment;"

40. Mexico had a further opportunity to indicate the precise points it regarded as in dispute when it reformulated its concluding submissions in paragraphs 86 *(a)* (1) and (2) of its further written explanations of 17 September 2008 (see paragraph 32 above).

41. The Court observes it could be argued that the claim in paragraph 86 *(a)* (1) that the United States "acting through all its competent organs . . . must take all measures necessary to provide the reparation of review and reconsideration" does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9).

The same wording of "the United States, acting through all its competent organs and all its constituent subdivisions" appears in paragraph 86 *(a)* (2) of Mexico's concluding submissions. Whether in terms of meeting the requirements of Article 98 (2) of the Rules, or more generally, it could be argued that in the end Mexico has not established the existence of any dispute between itself and the United States. Moreover, the United States has made clear that it can agree with the first concluding submission (point *(a)*) of Mexico, requesting in its own concluding submissions, as a subsidiary submission, that the Court adjudge and declare "*(b)* an interpretation of the *Avena* Judgment in accordance with paragraph 86 *(a)* of Mexico's Response to the Written Observations of the United States".

Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or

officials, although this might be inferred from the arguments it presented, in particular in its further written explanations.

* *

42. The Court notes that, having regard to all these elements, two views may be discerned as to whether or not there is a dispute within the meaning of Article 60 of the Statute.

* *

43. Be that as it may, the Court considers that there would be a further obstacle to granting the request of Mexico even if a dispute in the present case were ultimately found to exist within the meaning of Article 60 of the Statute. The Parties' different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein.

44. The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 402).

45. Mexico's argument, as described in paragraph 31 above, concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the "meaning or scope" of the *Avena* Judgment, as Article 60 of the Court's Statute requires. By virtue of its general nature, the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. Whether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9).

46. For these reasons, the Court cannot accede to Mexico's Request for interpretation.

* *

47. Before proceeding to the additional requests of Mexico, the Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.

* * *

48. In the context of the proceedings instituted by the Application requesting interpretation, Mexico has presented three additional claims to the Court. First, Mexico asks the Court to adjudge and declare that the United States breached the Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín on 5 August 2008 without having provided him with the review and reconsideration required under the *Avena* Judgment. Second, Mexico also regards that execution as having constituted a breach of the *Avena* Judgment itself. Third, Mexico requests the Court to order the United States to provide guarantees of non-repetition.

49. The United States argues that the Court lacks jurisdiction to entertain the supplemental requests made by Mexico. As regards Mexico's claim concerning the alleged breach of the Order of 16 July 2008, the United States is of the opinion, first, that the lack of a basis of jurisdiction for the Court to adjudicate Mexico's Request for interpretation extends to this ancillary claim. Second, and in the alternative, the United States suggests that such a claim, in any event, goes beyond the jurisdiction of the Court under Article 60 of the Statute. Similarly, the United States submits that there is no basis of jurisdiction for the Court to entertain Mexico's claim relating to an alleged violation of the *Avena* Judgment. Finally, the United States disputes the Court's jurisdiction to order guarantees of non-repetition.

* *

50. Concerning Mexico's claim that the United States breached the Court's Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín, the Court observes that in that Order it found that "it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation" (Order, p. 326, para. 57). The Court then indicated in its Order that:

> "The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on

the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America).*" (Order, p. 331, para. 80 (II) *(a)*.)

51. There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.

52. Mr. Medellín was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and after having been refused a stay of execution through the clemency process. Mr. Medellín was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008.

53. The Court thus finds that the United States did not discharge its obligation under the Court's Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas.

54. The Court further notes that the Order of 16 July 2008 stipulated that five named persons were to be protected from execution until they received review and reconsideration or until the Court had rendered its Judgment upon Mexico's Request for interpretation. The Court recalls that the obligation upon the United States not to execute Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos pending review and reconsideration being afforded to them is fully intact by virtue of subparagraphs (4), (5), (6), (7) and (9) of paragraph 153 of the *Avena* Judgment itself. The Court further notes that the other persons named in the *Avena* Judgment are also to be afforded review and reconsideration in the terms there specified.

55. The Court finally recalls that, as the United States has itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the *Avena* Judgment have

had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment, the United States has not complied with the obligation incumbent upon it.

* *

56. As regards the additional claim by Mexico asking the Court to declare that the United States breached the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of that Judgment, the Court notes that the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and that that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret.

57. In view of the above, the Court finds that the additional claim by Mexico concerning alleged violations of the *Avena* Judgment must be dismissed.

* *

58. Lastly, Mexico requests the Court to order the United States to provide guarantees of non-repetition (point (2) *(c)* of Mexico's submissions) so that none of the Mexican nationals mentioned in the *Avena* Judgment is executed without having benefited from the review and reconsideration provided for by the operative part of that Judgment.

59. The United States disputes the jurisdiction of the Court to order it to furnish guarantees of non-repetition, principally inasmuch as the Court lacks jurisdiction under Article 60 of the Statute to entertain Mexico's Request for interpretation or, in the alternative, since the Court cannot, in any event, order the provision of such guarantees within the context of interpretation proceedings.

60. The Court finds it sufficient to reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it.

* * *

61. For these reasons,

THE COURT,

(1) By eleven votes to one,

Finds that the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its

Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: *Judge* Sepúlveda-Amor;

(2) Unanimously,

Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;

(3) By eleven votes to one,

Reaffirms the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment and *takes note* of the undertakings given by the United States of America in these proceedings;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

AGAINST: *Judge* Abraham;

(4) By eleven votes to one,

Declines, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: *Judge* Sepúlveda-Amor;

(5) By eleven votes to one,

Rejects all further submissions of the United Mexican States.

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: *Judge* Sepúlveda-Amor.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of January, two thousand and nine, in three copies, one of which will be placed in the archives of the Court

and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA and ABRAHAM append declarations to the Judgment of the Court; Judge SEPÚLVEDA-AMOR appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.H.
(Initialled) Ph.C.

DECLARATION OF JUDGE KOROMA

Article 60 of the Statute — Existence of a dispute concerning whether review and reconsideration must be effective — Existence of a dispute as to whether obligation imposed by Avena *paragraph 153 (9) is subject to domestic implementation — Court's Judgment should be interpreted to mean that the subject-matter of these disputes is not addressed in* Avena *paragraph 153 (9)* — Avena *Judgment remains binding under Article 94 of the Charter.*

1. While I have voted in favour of the operative part of the Judgment, in my view the basis on which the Court has reached its conclusion needs to be clarified. It is for this reason that I have decided to append this declaration, in order to elucidate my understanding as to the application of Article 60 of the Statute regarding this matter.

2. Article 60 provides: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

3. According to its jurisprudence, the Court will apply Article 60 of the Statute when two parties hold opposite views with regard to the scope and meaning of a judgment. The Court has further elaborated on this by stating that the existence of a dispute under Article 60 is

> "limited to whether the difference of views between the Parties which has manifested itself before the Court is 'a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force', including 'A difference of opinion as to whether a particular point has or has not been decided with binding force' (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 11-12)" (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 218).

4. On the basis of these criteria, there are at least two differences between the Mexican and United States positions that could be considered a "dispute" under the terms of Article 60. First, Mexico appears to take the position that the United States has only met its obligations under *Avena* if its efforts to assure review and reconsideration are effective; whereas the United States believes that those efforts are to be pri-

oritized among the "many other pressing priorities" of government. Second, Mexico argues that the obligation of result imposed by *Avena* paragraph 153 (9) automatically and directly "reach[es] all organs, including the federal and state judiciaries"; whereas the United States believes that that obligation is subject to domestic implementation according to domestic law. This is, indeed, very similar to the dispute identified by the Permanent Court of International Justice in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* (*Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 9-15 (finding that a dispute as to interpretation did exist by virtue of the States' differing views regarding the role of Polish law in implementing Judgments Nos. 7 and 8 of the Permanent Court)).

5. The Court in this Judgment states in paragraph 43 that:

> "The Parties' different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein."

In my view, this paragraph is not entirely clear. It should have been clearly stated that the Request for interpretation is not admissible because the issues in dispute are not within the scope of paragraph 153 (9) of that Judgment, which requires the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" mentioned therein. In this regard, the Court should have concluded that paragraph 153 (9) does not address whether review and reconsideration should lead to a specific result; and that paragraph 153 (9) also does not directly address whether the obligation of result it imposes directly reaches all organs, including federal and state judiciaries, or whether it is subject to domestic implementation according to domestic law. It is because neither of these points is clearly within the scope of paragraph 153 (9) that I have voted in favour of the operative paragraph.

6. On the other hand, applying the criteria stated above and for consistency of jurisprudence, the Court could have found the request for interpretation admissible on the basis of either of the two disputes identified above. With respect to the first, concerning whether efforts to assure review and reconsideration must be effective, the Court's jurisprudence provides that the subject of dispute may also relate to the Court's reasoning to the extent that that reasoning is "inseparable from the operative part" (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary

Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10). Taking this principle into account, the Court could very well have found the request for interpretation admissible as to this dispute (see *Avena*, p. 65, para. 138 (emphasizing that review and reconsideration must be "effective")).

7. Likewise, with regard to the second dispute concerning the question of domestic implementation, the Court could have found this issue to lie within the scope of paragraph 153 (9), because the phrase "by means of its own choosing" could be considered to address the issue of domestic implementation. The Court therefore could have found Mexico's Request for interpretation admissible and proceeded to interpret that paragraph, examining the relatively narrow question of whether paragraph 153 (9) of *Avena* creates a direct obligation on state and local officials in the United States to provide review and reconsideration, or whether it creates an international obligation which is subject to domestic implementation in the United States according to United States law.

8. Furthermore, in interpreting the first dispute, the Court could have agreed that the efforts to carry out review and reconsideration must be effective in order to be in compliance with *Avena*. Indeed, even without reaching the interpretation, the Court does recall in its Judgment that, contrary to what has at times been implied by the United States,

> "the United States itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the *Avena* Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment, the United States has not complied with the obligation incumbent upon it" (para. 55).

The Court has found that the obligation will only be met when the United States, by means of its own choosing, has in fact carried out review and reconsideration of the convictions at issue in *Avena*, and that the United States has not yet met its obligations under the Judgment.

9. With regard to the second dispute, the Court could have reached the conclusion that the obligation of result imposed by paragraph 153 (9) is subject to domestic implementation, as the Court had indicated that the United States should carry out review and reconsideration "by means of its own choosing". This necessarily implies that the United States has a choice of means as to how to implement its obligation under the Judgment.

10. In the light of the above considerations, in this case where the question of whether a dispute exists regarding the scope and meaning of

paragraph 153 (9) of *Avena*, and based on the Court's jurisprudence, the Court could have found a dispute to exist between the Parties. However, the Court has found that the Application itself is not predicated on a matter which it had previously decided. Be that as it may, the Judgment, by reiterating the obligation of the Respondent in respect of the individuals named in *Avena*, has upheld the object and purpose of Article 60 of the Statute. First, as stated clearly at the conclusion of the Judgment, the "*Avena* Judgment remains binding and . . . the United States continues to be under an obligation fully to implement it" (para. 60). Second, as stated at paragraph 55 of the Judgment and mentioned above, the United States will not have complied with the obligation incumbent upon it under *Avena* until all the Mexican nationals mentioned therein "have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment".

11. Thus, while the Court may not be in a position to interpret its *Avena* Judgment, the binding force of that Judgment remains, and certain obligations in that Judgment have not yet been met. Under Article 94 of the Charter — and in this case also fundamental principles of human rights — international law demands nothing less than the full and timely compliance with the *Avena* Judgment for all the Mexican nationals mentioned therein.

(Signed) Abdul G. KOROMA.

DÉCLARATION DE M. LE JUGE ABRAHAM

J'ai voté en faveur de tous les points du dispositif du présent arrêt, sauf un.

Il s'agit du point 3), à propos duquel j'ai dû, à mon grand regret, me singulariser, en ne rejoignant pas l'ensemble de mes collègues.

Je crois devoir expliquer pourquoi, en quelques lignes.

Dans le point 3) du dispositif, la Cour

> «*[r]éaffirme* que les obligations énoncées au point 9) du paragraphe 153 de l'arrêt *Avena* continuent de s'imposer aux Etats-Unis d'Amérique et *prend acte* des engagements pris par les Etats-Unis d'Amérique en la présente instance».

Naturellement, je ne conteste ni le bien-fondé de la première de ces deux propositions ni l'intérêt de la seconde.

Que les obligations découlant du point 9) du dispositif de l'arrêt *Avena*, à savoir l'obligation d'assurer le réexamen et la revision des condamnations prononcées à l'égard de chacun des cinquante et un ressortissants mexicains visés par l'arrêt, continuent de s'imposer aux Etats-Unis, voilà qui est évident et qui n'a d'ailleurs pas fait l'objet de la moindre contestation entre les Parties. Si l'on met à part le cas de José Ernesto Medellín Rojas, dont l'exécution capitale rend à présent sans objet cette obligation en ce qui le concerne, il est clair que pour les autres condamnés les Etats-Unis restent tenus de se conformer à l'arrêt de la Cour, pour autant qu'ils ne s'y seraient pas déjà conformés dans le cas de certains d'entre eux, question que la Cour n'était pas appelée à trancher et n'a pas entendu trancher. Par ailleurs, il est exact que les Etats-Unis, par la voix de leurs représentants qualifiés devant la Cour, ont réaffirmé leur engagement à tout mettre en œuvre pour que ceux des condamnés qui n'ont pas encore reçu la «réparation appropriée» définie au point 9) du dispositif de l'arrêt *Avena* en bénéficient dans les meilleurs délais, et il n'y a pas de doute que la Cour ne peut qu'en prendre note avec intérêt.

Ce n'est donc pas parce que je serais en désaccord avec le contenu des propositions qui figurent au point 3) que j'ai voté contre. C'est parce que ces énoncés outrepassent manifestement les limites de la compétence que la Cour tient de l'article 60 du Statut, et qu'elle exerce, ou est supposée exercer, en la présente espèce. Cette compétence a pour seul objet l'interprétation de l'arrêt précédemment rendu, et ne saurait englober quelque question que ce soit se rapportant à l'exécution dudit arrêt, soit pour le passé, soit pour l'avenir.

C'est d'ailleurs bien ce que dit la Cour lorsqu'elle rejette la demande du Mexique tendant à ce qu'elle constate que les Etats-Unis ont violé l'arrêt

Avena en exécutant Medellín. Au paragraphe 56, l'arrêt rappelle les limites de la compétence que l'article 60 confère à la Cour et en déduit que celle-ci ne saurait accueillir ce chef de conclusions. Pourtant, que les Etats-Unis aient violé l'arrêt *Avena* par le comportement en cause peut se déduire logiquement du point 2) du dispositif, qui constate que l'exécution de Medellín a violé l'ordonnance de la Cour du 16 juillet 2008 portant mesures conservatoires. La Cour a accepté de faire droit à la demande du Mexique tendant à ce qu'elle constate la violation de son ordonnance, car, celle-ci ayant été rendue «dans le cadre de la même instance» (en interprétation), le titre de compétence que met en œuvre la Cour en l'espèce englobe, incidemment, la question du respect des mesures conservatoires ordonnées par elle (par. 51). En revanche, la Cour refuse, à bon droit, d'accueillir la demande tendant à ce qu'elle constate que le même comportement (l'exécution de Medellín) constitue également une violation de l'arrêt *Avena* — alors même que logiquement les deux propositions ne peuvent être que simultanément vraies — parce que cette demande ne saurait se rattacher, ni directement ni incidemment, à la compétence qu'elle tient de l'article 60.

Le même raisonnement aurait dû conduire la Cour à s'abstenir d'introduire dans le dispositif de l'arrêt des constatations — aussi indiscutables soient-elles — telles que celles qui figurent au point 3).

Une chose est de faire figurer dans les *motifs* d'un arrêt des remarques, constatations ou propositions juridiquement superfétatoires et pouvant apparaître comme dépassant les strictes limites de la compétence qu'exerce la Cour. Ce n'est jamais de très bonne méthode, mais il se peut que la Cour trouve parfois des raisons d'ordre pédagogique de procéder ainsi. Cela peut être acceptable, à condition que ce soit fait avec modération et discernement (comme ici, par exemple, aux paragraphes 54 et 55).

Autre chose, en tout cas, est de faire figurer dans le *dispositif* d'un arrêt des constatations outrepassant les limites de la compétence que la Cour met en œuvre. Car, alors que ceux des motifs qui présentent un caractère surabondant sont dépourvus de l'autorité de la chose jugée, tout ce qui figure dans le dispositif d'un arrêt est en principe *res judicata*. Il peut y avoir des motifs surabondants, il ne devrait pas y avoir de mention surabondante dans un dispositif. Par suite, tout ce qui figure au dispositif doit se tenir strictement dans les limites de la compétence de la Cour.

Tel n'est pas le cas du point 3). La Cour n'y répond aucunement à une demande d'interprétation de l'arrêt *Avena*, aucune des Parties n'ayant jamais évoqué la moindre contestation relative aux effets dans le temps dudit arrêt, qui pût appeler une interprétation.

En réalité, le point 3) apparaît plutôt comme une sorte de préambule au point 4), par lequel la Cour rejette la demande mexicaine tendant à ce que soient exigées des Etats-Unis des garanties de non-répétition (de la violation de l'arrêt *Avena*). C'est à la lumière des constatations du point 3) («dans ces conditions») que la Cour rejette cette demande au point suivant.

Mais, à mon avis, ce qui justifie le rejet du chef de conclusions que la

Cour écarte, à juste titre, au point 4) du dispositif, ce n'est pas que les Etats-Unis aient pris l'engagement de se conformer pleinement, désormais, à l'arrêt *Avena*, c'est que ce chef de conclusions est lui-même étranger à la compétence découlant de l'article 60 du Statut, la seule invoquée en l'espèce par le Mexique.

Ayant voté contre le point 3), pour les raisons que je viens d'exposer, je n'ai cependant pas cru devoir voter aussi contre le point 4), bien qu'il comporte à mes yeux un renvoi fâcheux au point précédent; l'essentiel étant, pour moi, qu'il rejette la demande que la Cour ne pouvait accueillir.

J'ajouterai, pour conclure, que les observations qui précèdent ne mettent nullement en cause mon adhésion à l'essentiel de l'arrêt que la Cour vient de rendre et qui se trouve, selon moi, aux paragraphes 29 à 46 des motifs, et au point 1) du dispositif.

(Signé) Ronny ABRAHAM.

DISSENTING OPINION OF JUDGE SEPÚLVEDA-AMOR

Agreement with most of the reasoning and most of the decisions — Regret that Court did not settle issues incontrovertibly characterized by a degree of opacity — Implicit recognition by the Court that a dispute exists — Interpretation of obligation of result as one which requires specific outcome and within reasonable period of time — Failing success, need for alternative and effective means, such as legislative action — Medellín was executed without the required review and reconsideration — The Court finds that the United States has breached its obligations — But there is no determination of the legal consequences flowing from this breach — The Avena *Judgment remains binding.*

Article 36 confers individual rights — Mexico and the United States hold different views — The procedural default rule has not been revised — Non-application of procedural default rule is required to allow review and reconsideration to become operative — Binding force of the Judgment — United States Supreme Court's ruling is at odds with the one provided by Mexico and by the United States — The Court should have settled the issue raised by the conflicting interpretations — Review and reconsideration received by only one Mexican national out of 51 listed in the Avena *Judgment — The obligation falls upon all state and federal authorities — Importance of role played by the judicial system, especially the United States Supreme Court — Mexico has established the existence of a dispute — State responsibility — It engages the action of the competent organs and authorities acting in that State —* LaGrand *found that a United States Governor is under the obligation to act in conformity with United States undertakings — In the present case, all competent organs and all constituent subdivisions must comply with mandated review and reconsideration, as Mexico claims — Interpretation of the dispute by the Court would have rendered an invaluable construction to the clarification of rules and its enforcement.*

1. I am in agreement with most of the reasoning of the Court in the present Judgment, as well as with most of the decisions expressed in the operative clause of the Judgment. It is with regret that I am unable to join the Court in some of its conclusions. My regret stems not only from my disagreement with some of these views, but also from my belief that the Court has missed a splendid opportunity to settle issues calling for interpretation and to construe the meaning or scope of the *Avena* Judgment in certain respects incontrovertibly characterized by a degree of opacity.

2. Before I embark on the process of setting out and explaining my points of disagreement with the Judgment, I believe it useful to revisit some of the important considerations that the Court has found worthy of stating; to a large extent, these follow from an interpretation of the

Avena Judgment. In the present Judgment, the Court has clearly established what is meant by an obligation of result: it is "an obligation which requires a specific outcome" (Judgment, paragraph 27). It is clear that an obligation falls upon the United States to provide the Mexican nationals named in the *Avena* Judgment who remain on death row with review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment. But then the Court construes the scope of the obligation:

> "The Court observes that this obligation of result is one *which must be met within a reasonable period of time*. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, *would not be regarded as fulfilling this obligation of result*." (Para. 27; emphasis added.)

3. If the obligation of result is one which "must be met within a reasonable period of time", then there has been a failure by the United States to comply with it. According to Mexico, since March 2004, when the *Avena* Judgment was issued,

> "at least 33 of the 51 Mexican nationals named in the Court's Judgment have sought review and reconsideration in United States state and federal courts.
>
> To date, only one of these nationals — Osbaldo Torres Aguilera — has received review and reconsideration consistent with this Court's mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. All other efforts to enforce the *Avena* Judgment have failed." (CR 2008/14, p. 20, paras. 2 and 3 (Babcock).)

Almost five years have elapsed since the *Avena* Judgment was handed down. Since, as the Court considers, time is of the essence and the actual compliance performance has been poor, to say the least, the specific outcome associated with the obligation of result cannot be regarded as having been brought about by the United States.

4. A careful reading of the Court's Judgment in the present case suggests an implicit recognition by the Court that Mexico and the United States have in fact shown themselves as holding opposing views in regard to the meaning and scope of the *Avena* Judgment. It was stated in the Order indicating provisional measures, in paragraph 55, that

> "while it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope

of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities" (Order, p. 326, para. 55).

5. Although the Court reaches the conclusion that the matters claimed by Mexico as requiring an interpretation are not matters decided by the Court in its *Avena* Judgment and thus cannot give rise to the interpretation requested by Mexico (Judgment, operative clause, paragraph 59 (1)), the Court accepts that "[o]n the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute" (*ibid*., paragraph 31). And then, after reviewing some of Mexico's contentions, the Court "observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute" (*ibid*., paragraph 35). Additionally, the Court indicates — in a paragraph to be examined later, for it gives rise to divergent interpretations — that

> "Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, *although this might be inferred from the arguments it presented, in particular in its further written explanations*." (*Ibid*., paragraph 41; emphasis added.)

6. The fact is that the Judgment comes close to recognizing that there is a "dispute", "*contestation*", or "*desacuerdo*", as the term is translated in the Spanish version of Article 60 of the Statute. Whether or not Mexico complied with Article 98, paragraph 2, of the Rules of Court, which states that "the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated", is a question requiring further consideration, which it will receive later in this dissenting opinion.

7. In the present Judgment, the Court further construes the meaning and scope of the *Avena* Judgment when it states that

> "*considerations of domestic law which have so far hindered the implementation of the obligation* incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, *failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.*" (*Ibid*., paragraph 47; emphasis added.)

As the United States Supreme Court has ruled, the alternative and effective means rapidly to implement the obligation of result incumbent on the United States is through legislative action: "The responsibility for transforming an international obligation arising from a non-self-executing

treaty into domestic law falls to Congress" (*Medellín* v. *Texas*, 128 S. Ct. 1346, 1368 (2008), attached as Annex B, p. 60, of Mexico's *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America)*).

8. The means available to the United States is essentially legislative action, preferably at the federal level, quickly to attain effective compliance with the obligation. As the Permanent Court of International Justice found

> "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken" (*Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20).

The Court has repeatedly affirmed in its jurisprudence that a State cannot invoke its domestic law to justify its failure to perform an international legal obligation. In taking the action required of it under the *Avena* Judgment, the United States "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" (*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).

9. The Court has clearly established that José Ernesto Medellín Rojas

> "was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008" (Judgment, paragraph 52).

In the operative clause of the Judgment, the Court has found unanimously that the United States "has breached the obligation incumbent upon it" under the Court's Order (*ibid.*, paragraph 61 (2)). The Court leaves no doubt in its decision that the obligation upon the United States not to execute the other four Mexican nationals named in the Order of 16 July 2008 "pending review and reconsideration being afforded to them is fully intact by virtue" of the *Avena* Judgment itself (*ibid.*, paragraph 54). In the operative clause of the Judgment, the Court reaffirms "the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment" (*ibid.*, paragraph 61 (3)).

10. The Court has found that the United States is in breach of its obligations for having executed Mr. Medellín in violation of the Order of 16 July 2008. What is missing from the present Judgment is a determination of the legal consequences which flow from the serious failure by the United States to comply with the Order and the *Avena* Judgment.

11. The Court, in its Order of 16 July 2008, placed clear emphasis on certain commitments undertaken by the United States. The Court took note of the following understandings and pledges voiced by the Agent of the United States:

> "the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law . . . in particular, the Agent of the United States declared before the Court that '[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment';
> the United States has recognized that 'it is responsible under international law, for the actions of its political sub-divisions', including 'federal, state, and local officials', and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment . . . in particular, the Agent of the United States acknowledged before the Court that 'the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials'" (Order of 16 July 2008, pp. 330-331, paras. 76-77).

12. On 5 August 2008, Mr. Medellín was executed in the State of Texas without having been afforded the required review and reconsideration, and after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and having been refused a stay of execution through the clemency process, as the Judgment indicates in paragraph 52. Yet the Court has not found it necessary even to mention in the present Judgment the commitments assumed by the Agent of the United States through his recognition: that Mr. Medellín's execution would constitute a violation of an international obligation; that it would be inconsistent with the *Avena* Judgment; that the United States was responsible under international law for the actions of its political subdivisions; and that the responsibility of the United States would be engaged, under the principles of State responsibility, for the internationally wrongful acts of federal, state and local officials.

13. It is to be deeply regretted that the Court has decided not to pass judgment on a failure by the United States to discharge an international obligation. It is difficult to understand and accept this forbearance, especially when the United States Agent himself has recognized that a breach of its international obligations entails the responsibility of the State he represents. By refraining from attributing any legal significance to a violation of the *Avena* Judgment and of the Order of 16 July 2008, the Court

has let pass an opportunity to further the development of the law of State responsibility and has ignored the need to adjudge the consequences of the internationally wrongful acts of a State and to determine the remedial action required in such circumstances.

14. In spite of this unexplained legal omission, the Court feels the need to "reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it" (Judgment, paragraph 60). It is to be hoped that the United States Congress will enact legislation so as to comply with the decision of the Court. In the absence of federal legislation, the obligations stipulated in the *Avena* Judgment will become a mere abstraction, devoid of any legal substance. In the words of the United States Supreme Court,

> "The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources — the Optional Protocol, the U.N. Charter, or the ICJ Statute — creates binding federal law in the absence of implementing legislation and no such legislation has been enacted." (*Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), *Syllabus*; attached as Annex B to the Application, p. 44.)

I. DISPUTE/*CONTESTATION*/*DESACUERDO*

15. In order properly to ascertain whether there is a "dispute"/"*contestation*"/"*desacuerdo*" for purposes of Article 60 of the Statute, it is necessary to consider the wider perspective of the litigation between the United States and Mexico. The legal proceedings have involved federal and state authorities, particularly the Executive branches of government at the federal and state levels, as well as federal and state courts.

16. The *Avena* Judgment clearly applies broadly to all Mexican nationals facing severe penalties or prolonged incarceration. Thus the Judgment includes not only the 51 Mexican nationals mentioned therein but also Mexican nationals sentenced to "severe penalties" in the future. The Court found, unanimously, that

> "should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 73, para. 153 (11)).

17. On the basis of this finding of the Court, which is part of the operative clause of the Judgment, it is perfectly legitimate to examine the opposing views propounded to the United States Supreme Court in the *Sanchez-Llamas* v. *Oregon* case, involving a Mexican national sentenced to more than 20 years of imprisonment; though not named in the *Avena* Judgment, he is entitled to the benefit of the judicial remedy mandated therein. It is also instructive to read the views expressed by the United States Supreme Court in the *Sanchez-Llamas* case, views which diverge substantially from Mexico's contentions and from what this Court decided in the *LaGrand* and the *Avena* cases, as will be shown in the following paragraphs.

II. Article 36 Confers Individual Rights

18. In the *Amicus Curiae* Brief in support of Sanchez-Llamas as petitioner for the writ of *certiorari* before the United States Supreme Court, Mexico emphatically stated:

> "the *Avena* Judgment reaffirmed in the clearest possible terms that Article 36 of the Vienna Convention *confers individual rights on all Mexican nationals* who are detained or arrested in the United States" (Brief *Amicus Curiae* of the Government of the United Mexican States in support of Petitioner 3, 4, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct 2669 (2006); emphasis added).

To support its contention, Mexico resorts to paragraph 40 of the *Avena* Judgment: the individual rights of Mexican nationals "are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 35, para. 40).

19. To strengthen its argument in the *Sanchez-Llamas* case, Mexico cited what the United States had pleaded before the Court in the *Tehran* case. There, the United States argued that Article 36 "*establishes rights . . . for the nationals of the sending State* who are assured access to consular officers and through them to others" (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, 1979, p. 174; emphasis added).

20. It is clear that the United States holds a different view in the *Sanchez-Llamas* case on the question of individual rights conferred by Article 36 of the Convention. In its Brief to the United States Supreme Court, the United States asserted that the principle that the United States Supreme Court "should give 'respectful consideration' to an international court's interpretation of a treaty *does not lead to the conclusion*

that Article 36 affords an individual a right to challenge his conviction and sentence" (Brief for the United States as *Amicus Curiae* Supporting Respondents, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006), p. 28; emphasis added).

21. But the *Amicus Curiae* Brief for the United States not only contradicts the Mexican view; it also strongly challenges the interpretations handed down by the International Court of Justice in the *LaGrand* and *Avena* cases. In the words of the Brief,

> "The United States *has no obligation to accept the reasoning underlying the ICJ's Judgments* . . . As we have demonstrated, the ICJ's reasoning is inconsistent with principles of treaty construction . . . Moreover, the weight to be given an ICJ Judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least 'great weight', has considered the ICJ's decisions and determined that its own long standing interpretation of the treaty is the correct one. Notably, *the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ's interpretation of the Convention*. Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 *does not give a criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 (consular access) was breached.*" (*Ibid.*, p. 30; emphasis added.)

22. It is to be noted that the Agent of the United States in the present case, who vehemently argued that "in the field of international relations, the United States speaks with one voice through the executive branch" (CR 2008/17, p. 11, para. 15 (Bellinger)), was also responsible, in his capacity as Legal Adviser to the Department of State and together with the United States Solicitor General, for the Brief for the United States to the United States Supreme Court in the *Sanchez-Llamas* case.

23. One of the questions answered by the United States Supreme Court in the *Sanchez-Llamas* case was "whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding". The Court noted:

> "Respondents and the United States as *amicus curiae*, strongly dispute this contention. They argue that '*there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts* . . .'. Because we conclude that

> Sanchez-Llamas and Bustillo *are not in any event entitled to relief on their claims*, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights." (126 S. Ct. 2669, 2677-2678 (2006); emphasis added.)

The United States Supreme Court nevertheless decided to affirm the judgment of the Supreme Court of Oregon, to the effect that Article 36 "does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" (*ibid.*, p. 2676).

24. When the *Medellín* case was argued before the Texas Court of Criminal Appeals, Mexico contended:

> "The very purpose of Article 36 is to permit the nations that signed the Vienna Convention — including Mexico, the United States and 164 other countries — *to protect the interests of their citizens* when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when *a citizen is facing trial in another country for a cause that may lead to his execution.*" (Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, *Ex Parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006) at (ix); emphasis added.)

25. The United States took an opposing view:

> "Medellín contends that, standing alone, the *Avena* decision constitutes a binding rule of federal law that he may privately enforce in this Court. While the United States has an international obligation to comply with the decision of the International Court of Justice in this case under Article 94 of the United Nations Charter, *the text and background of Article 94 make clear that an I.C.J. decision is not, of its own force, a source of privately enforceable rights in court.*" (*Ibid.*, 223 S.W. 3d 315 (Tex. Crim. App. 2006); emphasis added.)

26. The Texas Court of Criminal Appeals wrote:

> "while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court. Our decision is controlled by the Supreme Court's recent opinion in *Sanchez-Llamas* v. *Oregon*, and accordingly, we hold that *Avena is not binding federal law.*" (*Ibid.*, 223 S.W. 3d 315, 330 (Tex. Crim. App. 2006); emphasis added.)

27. In the *Medellín* case argued before the United States Supreme Court, counsel for the United States asserted:

> "Petitioner contends that the *Avena* decision is privately enforceable because the Optional Protocol and the United Nations Charter obligate the United States to comply with the decision . . . Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations."

Those determinations are related to a decision by the President to comply with an International Court of Justice judgment and the measures that should be taken (Brief for the United States as *Amicus Curiae*, *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), p. 19). Without addressing the issue of individual rights recognized under *LaGrand* and *Avena*, the United States Supreme Court decided in 2008 that the *Avena* Judgment was not directly enforceable as domestic law in state court.

28. This Court, in its *LaGrand* and *Avena* Judgments, has ruled that Article 36, paragraph 1, creates individual rights for those in detention. That pronouncement runs counter to the legal arguments advanced by United States federal authorities and sustained by state and federal courts. In *LaGrand*, the Court stated that it

> "cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. *The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State*, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, *but also to the rights of the detained individual*." (*LaGrand (Germany* v. *United States of America), Judgment*, *I.C.J. Reports 2001*, p. 497, para. 89; emphasis added.)

In the present case, the Court could have better fulfilled its judicial function by dispelling all doubts raised by federal and state authorities in the executive and judicial branches of government in the United States. That should have been done by reaffirming the binding force of the *LaGrand* and *Avena* Judgments and the existence of individual rights under Article 36, even if that had meant acting on its own initiative, in order properly to construe the meaning or scope of the *Avena* Judgment.

III. The Procedural Default Rule

29. In the *Avena* case, Mexico contended that the United States, by applying provisions of its municipal law, had failed to provide meaningful and effective review and reconsideration of convictions and sentences. Specifically, Mexico argued that

> "The United States uses several municipal legal doctrines to prevent

finding any legal effect from the violations of Article 36. *First,* despite this Court's clear analysis in *LaGrand*, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 55, para. 109.)

30. The Court found in the *Avena* Judgment that "the procedural default rule has not been revised, nor has any provision been made to prevent its application" (*ibid.*, p. 57, para. 113). Then the Court added:

"The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention . . ." (*ibid.*, p. 63, para. 134).

31. After recalling that the *LaGrand* and *Avena* Judgments were entitled only to "respectful consideration", the United States Supreme Court in the *Sanchez-Llamas* case went on to say:

"the International Court of Justice concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give 'full effect' to the purposes of Article 36 because it prevented courts from attaching 'legal significance' to the Article 36 violation. *This reasoning overlooks the importance of procedural default rules in an adversary system*, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication . . . The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. *As a result, rules such as procedural default routinely deny 'legal significance' — in the* Avena *and* LaGrand *sense — to otherwise viable legal claims*." (*Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2685-2686 (2006); emphasis added.)

32. The Texas Court of Criminal Appeals, when reviewing Medellín's application for a writ of *habeas corpus*, provided a procedural history of Medellín's case:

"Medellín filed an initial application for a writ of *habeas corpus*, claiming for the first time, among other things, that his rights under

> Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested. The district court found that Medellín *failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review*.
>
> Medellín appealed to the U.S. Court of Appeals for the Fifth Circuit, which also denied his application. The Fifth Circuit noted the I.C.J. decision in *Avena*, but determined that it was bound by the Supreme Court's decision in *Breard* v. *Greene*, which held that *claims based on a violation of the Vienna Convention are subject to procedural default rules*.
>
> [W]e are bound by the Supreme Court's determination that I.C.J. decisions are not binding on United States courts. As a result, *Medellín . . . cannot show that Avena requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.*" (*Ex Parte Medellín*, 223 S.W. 3d 315, 321, 332 (2006); emphasis added.)

33. When submitting the Brief for the United States as *amicus curiae* before the United States Supreme Court in the *Sanchez-Llamas* case, in his capacity as Legal Adviser to the Department of State, the Agent of the United States in the present case pleaded that

> "The I.C.J. decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case . . . [T]he United States undertaking under Article 94 of the United Nations Charter to comply with a decision of the I.C.J. in a dispute to which it is a party, is to comply with the I.C.J.'s ultimate resolution of the dispute, *not to accept all the reasoning that leads to that resolution. In this case, the I.C.J.'s reasoning is not persuasive* . . . By that reasoning, any procedural rule that prevented a court from deciding the substance of a Vienna Convention claim — such as a State's statute of limitations for seeking collateral review — would have to be set aside as inconsistent with Article 36 (2)." (Brief for the United States as *Amicus Curiae* Supporting Respondents, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006); emphasis added.)

34. In principle, only the operative clause of an International Court of Justice judgment has binding force. However, under certain circumstances and in certain cases, the reasoning underlying the conclusions reached in the operative clause is inseparable from them and, because of

this link, part of the reasoning in the *Avena* Judgment must also be the subject-matter of interpretation by the Court. I believe that construing the meaning or scope of most of the subparagraphs of paragraph 153, the operative clause of the Judgment, requires resort to the reasoning of the Court, for it is there that an explanation is found as to how the procedural default rule represents a judicial obstacle which renders inoperative and dysfunctional the rights embedded in Article 36 of the Vienna Convention. It is not sufficient to claim that the operative clause has binding force if its provisions become legally ineffective in the face of enforcement by United States federal and state courts of the procedural default rule. Such a domestic doctrine precludes compliance with international obligations, vitiates treaty rights of substance and renders a judgment nugatory.

35. The Court has already had occasion to consider the relationship between the reasoning in a judgment and the operative clause when entertaining requests for interpretation of a judgment. The Court recently explained that

> "any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment *except in so far as these are inseparable from the operative part*" (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10; emphasis added).

36. In the present case, the Court could have reached beyond the operative clause in the *Avena* case and examined one of the essential foundations for the proper functioning of that judgment: the non-application of the procedural default rule so as to enable the required review and reconsideration of convictions and sentences.

IV. Binding Force of the Judgment

37. Mexico has claimed in its Application that the *Avena* Judgment is final and binding as between Mexico and the United States, invoking Article 59 of the Statute of the Court in support of its contention. Mexico asserts that, in spite of the obligation under Article 94, paragraph 1, of the United Nations Charter to comply with decisions of the Court,

> "requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied. On 25 March 2008, the Supreme Court of the United States determined in the case of José Ernesto Medellín Rojas, one of the Mexican nationals subject to the *Avena* Judgment, that *the Judgment itself did not directly require US courts to provide review and reconsideration under domestic law* . . . The Supreme Court, while

expressly recognizing the United States's obligation to comply with the Judgment under international law, further held that the means chosen by the President of the United States to comply were unavailable under the US Constitution and indicated alternate means involving legislation by the US Congress or voluntary compliance by the State of Texas." (Application, p. 10, para. 4; emphasis added.).

According to Mexico,

"the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach." (*Ibid.*, p. 10, para. 5.)

38. It is apparent that Mexico and the United States take opposing views on the issue of the automatic application of the *Avena* Judgment in the domestic realm of the United States. Quoting the United States Brief as *amicus curiae* in the last *Medellín* case before the United States Supreme Court, Mexico notes that the United States, while having acknowledged an "international law obligation to comply with the I.C.J.'s decision in *Avena*", contended that the Judgment was not independently enforceable in domestic courts absent intervention by the President. The United States is quoted as follows:

"[W]hile petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination." (See Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 2, para. 6; emphasis in the original.)

39. Mexico points out that

"the Supreme Court expressly adopted the United States' argument as to the lack of enforceability of the Judgment in domestic courts. Hence, the Court held that neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's determination to comply, constituted directly enforceable federal law that precluded Texas from applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim." (*Ibid.*, p. 2, para. 7.)

40. The United States Supreme Court in its ruling in the *Medellín* case provided an interpretation which is at odds with those proffered by

Mexico and by the United States. The Supreme Court's understanding of the legal significance of Article 94 of the United Nations Charter and of Article 59 of the Court's Statute is expressed in the following terms:

> "The Executive Branch contends that the phrase 'undertakes to comply' is not 'an acknowledgement that an I.C.J. decision will have immediate legal effect in the courts of UN members', but rather *'a commitment on the part of UN Members to take* future *action through their political branches to comply with an I.C.J. decision'*. We agree with this construction of Article 94. The Article *is not a directive to domestic courts*. It does not provide that the United States 'shall' or 'must' comply with an I.C.J. decision, nor indicate that the Senate that ratified the United Nations Charter intended to vest I.C.J. decisions with immediate legal effect in domestic courts." (128 S. Ct. 1346, 1358 (2008); emphasis added.)

41. The conclusion by the United States Supreme Court that the *Avena* Judgment does not by itself constitute binding federal law confutes the contention of the United States Executive Branch that,

> "while the *Avena* Judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power 'to establish binding rules of decision that preempt contrary state law'" (*ibid*., p. 1367).

42. After making clear that unilaterally converting a non-self-executing treaty into a self-executing one is not among the means available to the United States President to enforce an international obligation, the Supreme Court stated:

> "When the President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate." (*Ibid.*, p. 1369.)

43. Three different interpretations are advanced as to the domestic effects of an international obligation. Three different interpretations are advanced as to domestic implementation of the United Nations Charter, the Court's Statute and the *Avena* Judgment. The Court could have made an important contribution to the development of international law by settling the issues raised by these conflicting interpretations.

V. Review and Reconsideration

44. It is justifiable to conclude that a dispute arises in the present case out of the fundamentally different views taken by Mexico and the United States on the interpretation to be given to the obligation imposed by the *Avena* Judgment. But there is not only a conflict of legal views and of interests between the two countries. There is a disagreement on several points of law and, also, on the facts.

45. In its oral pleadings, Mexico recalled that the review and reconsideration mandated by the *Avena* Judgment must take place as part of the "judicial process". Mexico pointed out that

> "since March 2004, at least 33 of the 51 Mexican nationals named in the Court's Judgment have sought review and reconsideration in United States state and federal courts.
>
> To date, *only one of these nationals* — Osbaldo Torres Aguilera — *has received review and reconsideration* consistent with the Court's mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. *All other efforts to enforce the Avena Judgment have failed*." (CR 2008/14, p. 20, paras. 2 and 3 (Babcock); emphasis added.)

46. In contrast, the United States claims that "*several Mexican nationals* named in *Avena* have already received review and reconsideration of their convictions and sentences" (CR 2008/15, p. 56, para. 22 (Bellinger); emphasis added). But only Osbaldo Torres is mentioned as a beneficiary of the remedy.

47. Fifty-one Mexican nationals fell within the scope of the review and reconsideration mandated in the *Avena* Judgment. At present only 50 are on the list, after the execution of José Medellín Rojas by the State of Texas on 5 August 2008 without review and reconsideration of his conviction and sentence. The case of Torres Aguilera has already been mentioned. Seven other cases have been disposed of without recourse to review and reconsideration. Rafael Camargo Ojeda, in Arkansas, under a plea agreement facilitated by *Avena*, waived his right to review and reconsideration in exchange for the reduction of his death sentence to life imprisonment. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero had their sentences commuted by the Governor of Illinois in 2003, a measure which benefited all persons on death row in that state at that time. Martin Raul Soto Fong and Osvaldo Regalado Soriano in Arizona had their sentences commuted after the United States Supreme Court declared unconstitutional the application of a death sentence to those under age at the time they committed the crime. Daniel Angel Plata Estrada in Texas had his death sentence commuted after the

United States Supreme Court ruled unconstitutional the execution of a mentally retarded person (source: http://www.internationaljusticeproject.org/nationals-Stats.com and http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us). It is now almost five years since the *Avena* Judgment was handed down and 42 Mexican nationals have yet to receive the relief required by it.

VI. The Obligation Falls upon all State and Federal Authorities

48. Mexico contends that the obligation of result falls upon all state and federal authorities and, particularly, upon the United States Supreme Court, taking into account the "judicial process" remedy mandated by *Avena*. The conclusion reached by Mexico on this matter cannot be regarded as anything else but proof of a clash of views — reflecting a disagreement with the United States on a point of law — and therefore a dispute. According to Mexico,

> "the [United States Supreme] Court found that the expression of the obligation to comply in Article 94 (1) somehow *precluded the judicial branch — the authority best suited to implement the obligation imposed by* Avena *— from taking steps to comply*. There is nothing in the text or object and purpose of Article 94 (1) that suggests such an incongruous result. It is moreover fundamentally inconsistent with the interpretation of the *Avena* Judgment as *imposing an obligation of result incumbent on all constituent organs, including the judiciary. Needless to say, Mexico does not agree with the Supreme Court's interpretation.*" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 15, para. 53; emphasis added.)

49. Clearly, this is an issue on which Mexico has indicated "the precise point or points in dispute as to the meaning or scope of the judgment". Mexico's contention is that the United States Supreme Court

> "does not share Mexico's view of the *Avena* Judgment — that is, *that the operative language establishes an obligation of result reaching all organs, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments*" (*ibid.*, p. 16, para. 56; emphasis added).

50. In the light of all these considerations, it is obvious that there is a misreading and a misinterpretation in the present Judgment of Mexico's position. The Court's mistaken assumptions are reflected in paragraph 24 of this Judgment:

> "Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the *Avena* Judgment. According to Mexico, *this difference of views manifested itself in the position taken by the United States Government in the Supreme Court* . . . Mexico maintains that the United States Government's narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States." (Emphasis added.)

51. It is not Mexico's position that the failure to comply with the *Avena* obligation is attributable only to the United States federal Executive. What Mexico has argued is that the definitive determination to deny the judicial review and reconsideration mandated by *Avena* is attributable to the United States Supreme Court for having decided that: "while a treaty may constitute an international commitment, it is not domestic law unless Congress has enacted statutes implementing it"; "the *Avena* Judgment . . . is not automatically domestic law"; "*Avena* does not by itself constitute binding federal law";

> "the President's Memorandum does not independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules".

52. Given these judicial determinations, there can be no doubt that the United States Supreme Court does not share the understanding that the mandate of the *Avena* Judgment is an obligation of result. The same is true of other authorities, and especially federal and state courts, as is evident from decisions adopted by such jurisdictions, including the Supreme Court of Oregon, the Texas Court of Criminal Appeals, the United States Supreme Court, state trial courts, federal district courts and the United States Court of Appeals for the Fifth Circuit.

53. In paragraph 48 of the Order of 16 July 2008, indicating provisional measures, the Court stated:

> "in Mexico's view, the fact that '[n]either the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature has taken any legal steps at this point that would stop th[e] execution [of Mr. Medellín] from going forward . . . reflects a dispute over the meaning and scope of [the] *Avena* [Judgment]' ".

Mexico reiterated this position in its further written explanations.

54. The United States however submitted in its oral pleadings that

> "the United States agrees that it is responsible under international law for the actions of its political subdivisions. That is not the same, however, as saying that the views of a state court are attributed to the United States for purposes of determining whether there is a dispute between the United States and Mexico as to the meaning and scope of the *Avena* Judgment." (CR 2008/17, p. 11, para. 13 (Bellinger).)

The question of attribution of responsibility for the conduct of State organs will be dealt with at a later stage in this opinion. But what is important at present is to observe that there is undeniably a dispute between Mexico and the United States on this point. Of course, the issue relates not only to the views of a state court, as the United States would have us believe, although those views may also have legal consequences in the implementation of the *Avena* Judgment.

55. The crux of the dispute turns on the decision of the highest federal judicial authority of the United States. The interpretation by the United States Supreme Court is conclusive as a matter of domestic law and binding on all state and federal courts and officials — including the federal Executive. Mexico rightly points out that "the views of the Supreme Court as to the scope and meaning of the United States' treaty obligations are relevant for purposes of the objective determination of a dispute" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 14, para. 51).

56. In the present Judgment, the Court states, in paragraph 38, that "it is difficult to discern, save by inference, Mexico's position regarding the existence of a dispute as to whether the obligation of result falls on all state and federal authorities". But it is not only by inference that the Mexican position can be discerned. As shown in the preceding paragraphs, there is a dispute: Mexico clearly argues that "each of the Federal Executive, Judiciary, and Legislature have failed to treat the *Avena* Judgment as imposing an obligation of result" (*ibid.*, p. 11, para. 40).

57. The United States disputes this contention:

> "under established international law, whether Texas, or any other U.S. state, has a different interpretation of the Court's judgment is irrelevant to the issue before the Court. Similarly irrelevant are any interpretations by officials of other entities of the federal government that are not deemed by international law to speak on behalf of

> the United States." (Written Observations of the United States of America, 29 August 2008, p. 20, para. 44.)

In this statement, it is worth noting that great care has been taken to avoid any mention of state and federal courts and, in particular, the role of the United States Supreme Court. The question is not who speaks for the United States. The question is what is the legal consequence of a decision by the United States Supreme Court interpreting a United States international obligation as not constituting binding federal law without implementing legislation.

58. In its final submissions to the Court on 17 September 2008, Mexico asked the Court to adjudge and declare

> "*(a)* That *the correct interpretation of the obligation incumbent upon the United States* under paragraph 153 (9) of the *Avena* Judgment is *that it is an obligation of result . . .*
> and that, *pursuant to the interpretation of the foregoing obligation of result*,
>
> (1) the United States, acting through *all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary* to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153 (9)" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 24, para. 86; emphasis added; Judgment, paragraph 10).

59. After a careful reading of this submission, I find it incomprehensible that the Court could conclude that

> "Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, although this might be inferred from the arguments it presented, in particular in its further written explanations." (*Ibid.*, paragraph 41).

All the required specificity is there; there is no need to resort to inferences.

60. In its concluding remarks and submissions, Mexico indicated that it

> "welcomes any good faith attempt to ensure its nationals are provided with effective review and reconsideration that is fully consistent with this Court's mandate in the *Avena* Judgment. Nonetheless, *it is clear that constituent organs of the United States do not share Mexico's view that the* Avena *Judgment imposes an obligation of*

> *result.* It is thus clearly established that *there is a dispute between the United States and Mexico* as to the meaning and scope of paragraph 153 (9) of said Judgment." (CR 2008/16, p. 21, para. 2 (Lomónaco); emphasis added.)

Contrary to what is stated in paragraph 41 of this Judgment, I do not believe that it can be argued that "Mexico has not established the existence of any dispute between itself and the United States". It is not sufficient to find that the United States claims there is no dispute. The positions and actions taken by various United States federal and state authorities, particularly the federal judiciary, prove otherwise.

VII. State Responsibility

61. In 1999 the Court decided that the international responsibility of a State was engaged by the actions of the competent organs and authorities of that State, whatever they may be. Thus in the *LaGrand* case, when the Court ordered the provisional measures to be taken by the United States, it concluded that

> "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*" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 16, para. 28; emphasis added).

62. It is crystal clear in its final submissions (see paragraph 10 of the Judgment) that Mexico has taken into account the language used by the Court in the *LaGrand* Order, even employing the same terminology. Mexico asserts that there is an *obligation of result* incumbent upon the United States under the *Avena* Judgment. The international responsibility of the United States is "engaged *by the actions of its competent organs and authorities*". Thus,

> "the United States, *acting through all of its competent organs and all its constituent subdivisions*, including all branches of government and any official, state or federal, exercising government authority,

must take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153 (9)" (emphasis added).

63. Article 4 of the International Law Commission's Articles on State Responsibility provides:

"1. The conduct of any State organ 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, and whatever its character as an organ of the central government or of the territorial unit of the State." (Report of the International Law Commission, Fifty-third Session, *General Assembly Official Records*, Supplement No. 10 (A/56/10).)

64. In its Commentary to Article 4, the International Law Commission holds that the "reference to a 'State organ' covers all the individual and collective entities which make up the organization of the State and *act on its behalf*". It adds that "the State is responsible for the conduct of its own organs, *acting in that capacity*", something that has long been recognized in international judicial decisions. The Commission also points out that

"the reference to a State organ in Article 4 is intended in the most general sense. *It is not limited* to the organs of the central government, to officials at a high level or *to persons with responsibility for the external relations of the State*. *It extends to organs of government of whatever kind or classification*, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level." (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries Ch. II, Art. 4, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two; emphasis added.)

65. It is obvious that Mexico's final submission, in keeping with the *LaGrand* Order and with what is indicated in the Articles on State Responsibility, asserts that there is an obligation of result falling upon the United States and its competent organs and constituent subdivisions. These must be understood to include *inter alia* the State of Texas, the Supreme Court of the State of Oregon, the United States federal courts, the United States Government, and the United States Supreme Court. Clearly, the wrongful conduct must be attributed to the United States, as a political entity under international law, a political entity that must necessarily act through its competent organs, its constituent subdivisions and all officials exercising government authority.

66. When these considerations are kept in mind, it is extremely difficult to understand the scope of paragraph 41 of this Judgment. The Court contends that it could be argued that Mexico's final submission

> "does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9)".

Contrary to what the Court states, a reading of Mexico's final submissions shows that it asserts that there is an obligation of result, in Mexico's interpretation, and that pursuant to such obligation the United States, acting through any and all organs of the State, must take all necessary measures to provide the *Avena* remedy.

VIII. CONCLUSION

67. I have done my utmost to demonstrate in this dissenting opinion that there is a dispute between Mexico and the United States, a dispute which is ongoing. In my view, a dispute exists as to the meaning or scope of the *Avena* Judgment, in the sense of Article 60 of the Statute of the Court, since it is clear that Mexico and the United States have fundamentally different views on the interpretation of the obligation imposed by the *Avena* Judgment. But it is my understanding that it is not only a dispute/*contestation*/*desacuerdo* under Article 60. There is also a dispute in the sense of Article 38, paragraph 1, since there is a disagreement on several points of law and on the facts. I am convinced that there is a conflict of legal views and of interests between Mexico and the United States on the substance of the obligations incumbent upon the United States under the *Avena* Judgment.

68. Had it interpreted the scope and meaning of the *Avena* Judgment, the Court could have made an invaluable contribution to the settlement of a dispute which runs the risk of self-perpetuation. The Court had at its disposal all the necessary elements to identify the precise point or points in dispute as to the meaning or scope of the *Avena* Judgment. It decided otherwise and the consequence is that the international legal order has been deprived of an enlightened construction of its fundamental rules and principles and, equally important, guidance in enforcing them.

(*Signed*) Bernardo SEPÚLVEDA-AMOR.

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ANWAR ZAHEER JAMALI, CJ
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MANZOOR AHMED MALIK
MR. JUSTICE FAISAL ARAB

CIVIL PETITIONS NO.842 OF 2016, 3331, 3332, 3674 & 3777 OF 2015, 06, 32, 211, 278, 417, 1263, 1306, 1335, 1353, 1503 AND 1541 OF 2016

(On appeal from the judgment dated 26.01.2016 Lahore High Court, Rawalpindi Bench in WP No.05/2016, judgment dated 14.10.2015 of the Peshawar High Court, Peshawar passed in WP No.2915/ 2015, judgment dated 14.10.2015 of the Peshawar High Court, Peshawar passed in WP No.2979 of 2015, order dated 09.12.2015 of the Peshawar High Court, Peshawar passed in WP No.3219-P/2015, order dated 09.12.2015 of the Peshawar High Court, Peshawar passed in WP No.3076-P/2015, order dated 09.12.2015 of the Peshawar High Court, Peshawar passed in WP No.(HCP) No.3878-P/2015), order dated 23.12.2015 of the Peshawar High Court, Peshawar passed in WP No.4433-P/2015, order dated 27.01.2016 of the Lahore High Court, Rawalpindi Bench passed in WP No.197/2016, order dated 19.01.2016 of the Peshawar High Court, Peshawar passed in WP No.133-P/2016, judgment dated 12.4.2016 of the Peshawar High Court, Peshawar passed in WP No.1048-P/2016. judgment dated 12.4.2016 of the Peshawar High Court, Peshawar passed in WP No.1184-P/2016, judgment dated 12.4.2016 of the Peshawar High Court, Peshawar passed in WP No.1190-P/2016, order dated 19.01.2016 of the Lahore High Court, Rawalpindi Bench passed in WP No.117/2016, judgment dated 12.4.2016 of the Peshawar High Court, Peshawar passed in WP No.1271-P/2016, order dated 12.5.2016 of the Lahore High Court, Bahawalpur Bench passed in WP No.3315 of 2016 respectively)

1. Said Zaman Khan v. Federation of Pakistan through Secretary Ministry of Defence, Government of Pakistan Superintendent HSP, Sahiwal (In CP No.842/2016)

2. Mst. Bacha Liaqa v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and others (In CP No.3331/2015)

3. Mst. Anwar Bibi v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and others (In CP No.3332/2015)

4. Ali-ur-Rehman v. Government of Pakistan through Secretary Defence, Ministry of Defence Rawalpindi and others (In CP No.3674/2015)

5. Mst. Nek Maro v. Special Military Court and others (In CP No.3777/2015)

6. Sakhi Muhammad v. Special Military Court and others (In CP No.06/2016)

7. Sher Alam v. The Superintendent, District Jail Timergarah, District Dir Lower and others (In CP No.32/2016)

8. Mashooqa Bibi v. The Superintendent, District Jail Temergara District Dir Lower (In CP No.211/2016)

9. Mr. Javed Iqbal Ghauri v. Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and others (In CP No.278/2016)

10. Mohibullah v. Government of Pakistan through Secretary Defence Ministry of Defence, Rawalpindi and others (In CP No.417/2016)

11. Fazal Ghaffar v. The State through Deputy Attorney General for Pakistan and others (In CP No.1263/2016)

12. Mst. Zarba Khela v. Federation of Pakistan through Secretary Defence, Islamabad (In CP No.1306/2016)

13. Ajab Gul v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and others (In CP No.1335/2016)

14. Aqsan Mahboob v. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan (In CP No.1353/2016)

15. Khan Afsar Khan v. SHO Police Station Bugnotar, District Abboottabad and others (In CP No.1503/2016)

16. Hafiz Muhammad Sadiq v. Government of Pakistan through Secretary Defence, Ministry of Defence and others (In CP No.1541/2016)

For the Petitioners : Ms. Asma Jahanghir, ASC
Ch. Akhtar Ali, AOR
(in CPs Nos.3331/2015, 3332/2015, 32, 211, 1335 & 1503/2016)

Abdul Latif Afridi, Sr. ASC
and Khalid Anwar Afridi, ASC
(in CPs Nos.3674, 3777/2015 & 278/2016)

Malik Muhammad Akram, ASC
Ch. Akhtar Ali, AOR
(in CP No.842/2016)

Mr. Mehmood Raza, ASC
Ch. Akhtar Ali, AOR
(in CP No.417/2016)

Sahibzada Ahmed Raza Khan Qasuri, Sr. ASC
Mr. Ahmed Nawaz Ch. AOR (Absent)
(in CP No.1263/2016)

Mr. Khalid Anwar Afridi, ASC
Haji Muhammad Zahir Shah, AOR
(in CP No.06/2016)

Mr. Laiq Khan Swati, ASC
Syed Rafaqat Hussain Shah, AOR
(in CP No.1306/2016)

Col (R) Muhammad Akram, ASC
Ch. Akhtar Ali, AOR
(in CP No.1353/2016)

Sardar Muhammad Shahzad Khan Dhukhan, ASC
Syed Rafaqat Hussain Shah, AOR
(in CP No.1541/2016)

For Federation (On Court's notice)	:	Mr. Ashtar Ausaf Ali, AGP Syed Attique Shah, Addl. AGP Mr. Sajid Ilyas Bhatti, DAG assisted by Barrister Asad Rahim Khan, Consultant to AGP Major Asad, JAG Branch (in all cases)
For Govt. of KPK	:	Mian Arshad Jan, Addl. AG Mr. Tahir Saleem, SHO, Bagnoter (in CP No.1503/2016) Mr. Iqbal Ahmed Durrani, Standing Counsel, FATA
Date of hearing	:	13th, 14th and 20th June, 2016

JUDGMENT

SH. AZMAT SAEED, J.- This judgment is proposed to decide Civil Petitions for Leave to Appeal Nos.842 of 2016, 3331, 3332, 3674 and 3777 of 2015, 06, 32, 211, 278, 417, 1263, 1306, 1335, 1353, 1503 and 1541 of 2016.

2. Civil Petition for Leave to Appeal No.842 of 2016 is directed against the Order dated 26.01.2016 of the learned Lahore High Court, Rawalpindi Bench, whereby a Constitutional Petition i.e. Writ Petition bearing No.5 of 2016, filed by Mst. Momin Taj, mother of the present Petitioner, was dismissed.

3. The brief facts as narrated in the Petition are that the Petitioner was allegedly taken into custody by the Military Intelligence on 10.12.2014 from Kurri Road, Rawalpindi and despite best efforts his whereabouts

could not be ascertained by his family. In October, 2015, the family of the Petitioner was informed through an unknown telephonic call that the Petitioner was confined in Adyala Jail, Rawalpindi and he had been awarded a death sentence by a Field General Court Martial (FGCM). The Petitioner's Appeal filed through the Jail before the Court of Appeal, constituted under the Pakistan Army Act, 1952 as well as his Mercy Petition to the Chief of Army Staff, was rejected. Thereafter, the Petitioner sent a Mercy Petition through the Jail to the President of Pakistan, which is allegedly pending.

4. In the above backdrop, the Petitioner's mother (Mst. Momin Taj) challenged his conviction by invoking the Constitutional Jurisdiction of the learned Lahore High Court, Rawalpindi Bench by filing Writ Petition No.5 of 2016, which has been dismissed vide the Order impugned dated 26.01.2016. However, instead of Petitioner's mother, he himself has approached this Court by filing the instant Civil Petition for Leave to Appeal.

5. Civil Petition for Leave to Appeal No.3331 of 2015 is directed against the judgment dated 14.10.2015, passed by the learned Peshawar High

Court, whereby a Constitutional Petition i.e. Writ Petition No.2915 of 2015, filed by the present Petitioner, was dismissed.

6. The brief facts necessary for disposal of the instant Petition are that the Petitioner invoked the Constitutional Jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition bearing No.2915 of 2015, contending therein that his son Haider Ali was taken into custody on 21.09.2009 when he was a student of Class 10 on being produced by the Petitioner's husband before the Law Enforcement Agencies, as directed. It was contended that the Petitioner was not informed about the whereabouts of her son Haider Ali. Eventually through a news item in the daily Mushriq dated 03.4.2015, it was discovered that her son Haider Ali had been convicted by a FGCM and sentenced to death. Through the Writ Petition, the conviction and sentence of the Petitioner's son was called into question. The said Petition was heard and eventually dismissed vide judgment dated 14.10.2015, which has been impugned through the instant Civil Petition for Leave to Appeal.

7. Civil Petition for Leave to Appeal No.3332 of 2015 is directed against the impugned judgment dated 14.10.2015 of the learned Peshawar High Court, Peshawar, whereby Constitutional Petition i.e. Writ Petition No.2979 of 2015, filed by the present Petitioner, was dismissed.

8. The brief facts of the instant case are that the Petitioner filed a Constitutional Petition before the learned Peshawar High Court, Peshawar contending therein that the Petitioner's son Qari Zahir Gul was taken into custody by the Law Enforcement Agencies on 27.04.2011 from an Internal Displaced Persons (IDPs) Camp, whereafter his whereabouts were kept secret from the present Petitioner. In the above circumstances, his other son Waheed Gul filed Writ Petition No.815-P of 2012 and later Writ Petition No.1976 of 2014 before the learned Peshawar High Court seeking production of Qari Zahir Gul. During course of the aforesaid proceedings, it was contended that, it was disclosed by the Respondents that the Petitioner's son had been detained under Actions (In Aid of Civil Power) Regulations, 2011. Subsequently, in April, 2015, the Petitioner through the

press learnt that his son Qari Zahir Gul had been tried by a FGCM and convicted and sentenced to death.

9. In the above backdrop, the said Constitutional Petition i.e. Writ Petition No.2979 of 2015, was filed by the Petitioner challenging the conviction and sentence of his son Qari Zahir Gul awarded by the FGCM. The wife of Qari Zahir Gul had also brought the matter before this Court by filing Constitution Petition No.50 of 2015, which was disposed of vide Order dated 07.10.2015 by directing her to approach the learned Peshawar High Court. Eventually, the learned Peshawar High Court dismissed the aforesaid Constitutional Petition filed by the present Petitioner vide the impugned judgment dated 14.10.2015.

10. Civil Petition for Leave to Appeal No.3674 of 2015 is directed against the impugned Order dated 09.12.2015 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition No.3219-P of 2015, filed by the present Petitioner, was dismissed.

11. The brief facts necessary for a just decision of the instant case are that the Petitioner filed a Constitutional Petition i.e. Writ Petition No.3219-P of

2015, stating therein that he is an ex-army personnel whose son namely, Atteeq-ur-Rehman was missing for the last eight months and he tried to locate his son but in vain. The Petitioner in this regard has also lodged FIR No.369 dated 06.12.2014, under Section 365, 324/34 PPC at Police Station, Nowshera Cantt. However, on 14.08.2015, he came to know through a news item published in different newspapers that his said son along with others has been tried by a FGCM on the charge of attacking the Army Public School, Peshawar on 16.12.2014 and had been sentenced to death.

12. With the above contentions, the Petitioner filed Constitutional Petition i.e. Writ Petition No.3219-P of 2015 before the learned Peshawar High Court, challenging the conviction and sentence awarded to the Petitioner's son Atteeq-ur-Rehman and also seeking an order for the production of the said Convict. The said Writ Petition was dismissed by the learned Peshawar High Court vide Order dated 09.12.2015. Hence, this Civil Petition for Leave to Appeal.

13. Civil Petition for Leave to Appeal No.3777 of 2015 is directed against the Order dated 09.12.2015 of the learned Peshawar High Court, Peshawar, whereby a

Constitutional Petition i.e. Writ Petition bearing No.3076-P of 2015, filed by the present Petitioner, was dismissed.

14. The brief facts as narrated in the instant Petition are that the Petitioner is the mother of one Taj Muhammad alias Rizwan, who was allegedly picked-up from his house by some personnel of the Law Enforcement Agencies accompanied by the local police of Pishtakhara Police Station on 07.02.2015. The male members of the family searched for Taj Muhammad alias Rizwan but could not discover his whereabouts. It was contended that the said Taj Muhammad alias Rizwan neither had a criminal history nor he or his family was associated with any banned or terrorist organization, except that in the year 2007, Taj Muhammad, in the company of one Nazeer of the same tribe, visited South Waziristan, where he stayed in Wana for 40 days.

15. Eventually, it was contended that, through a news item dated 14.08.2015, it was discovered that the son of the Petitioner (Taj Muhammad alias Rizwan) had been tried and convicted by a FGCM and sentenced to death in the Army Public School's case.

16. The Petitioner challenged the such conviction by invoking the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition No.3076-P of 2015, which was dismissed vide the Order impugned dated 09.12.2015.

17. Civil Petition for Leave to Appeal No.6 of 2016 is directed against the impugned Order dated 09.12.2015 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition bearing No.4019-P of 2015, filed by the present Petitioner, was dismissed.

18. The brief facts as narrated in this Petition are that the Petitioner is the father of one Qari Zubair Mohammad, who was allegedly picked up from his house by Army personnel and Intelligence Agencies, accompanied by the local police on 16.08.2009. In respect of his disappearance, the Petitioner filed an application before the Commission of Inquiry of Enforced Disappearance (COIOED), to locate and recover his son. The COIOED inquired into the matter and gave direction to lodge an FIR against the responsible police officials. After lodging the FIR, the police officials were brought to trial by the Senior Civil Judge/Judicial

Magistrate, Nowshera, and a formal charge was framed. However, subsequently the proceedings were stopped under Section 249 Cr.P.C. on 07.07.2012.

19. Eventually, through the Internet on 10.11.2015, it was disclosed that Qari Zubair Mohammad had been tried and convicted by a FGCM and sentenced to death.

20. The Petitioner challenged such conviction by invoking the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar, through Writ Petition No.4019-P of 2015, which has been dismissed vide the impugned Order dated 09.12.2015.

21. Civil Petition for Leave to Appeal No.32 of 2016 is directed against the impugned Order dated 09.12.2015 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition (HCP) No.3878-P of 2015, filed by the present Petitioner, was dismissed.

22. The brief facts as narrated in the instant Petition are that the nephew of the Petitioner, namely, Jameel ur Rehman was taken into custody by the Intelligence Agencies in the year 2014. Eventually, through a news item published on 22.09.2015 in Daily

Aaj, it was disclosed that Jameel ur Rehman had been tried and convicted by a FGCM and sentenced to death.

23. The Petitioner challenged such conviction by invoking the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition (HCP) No.3878-P of 2015, which has been dismissed vide the Order impugned dated 09.12.2015.

24. Civil Petition for Leave to Appeal No.211 of 2016 is directed against the impugned Order dated 23.12.2015 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition bearing No.4433-P of 2015, filed by the present Petitioner, was dismissed.

25. The brief facts as narrated in the instant Petition are that the brother of the Petitioner, namely, Aslam Khan, was taken into custody by the security forces about 4-5 years ago, while he was returning from Afghanistan after visiting his relatives, and was shifted to an unknown destination. The whereabouts of Aslam Khan remained unknown.

26. In due course, it was contended, that through a news item published in the Daily Aaj, Peshawar, dated 22.09.2015, it was revealed that the Petitioner's brother

Aslam Khan had been tried and convicted by a FGCM and sentenced to death.

27. The Petitioner challenged such conviction by invoking the constitutional jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition No.4433-P of 2015, which was dismissed *in limine* vide the Order impugned dated 23.12.2015, upholding the conviction and sentence awarded to the said Aslam Khan.

28. Civil Petition for Leave to Appeal No.278 of 2016 is directed against the impugned Order dated 27.01.2016 of the learned Lahore High Court, Rawalpindi Bench, whereby a Constitutional Petition i.e. Writ Petition bearing No.197 of 2016, filed by the present Petitioner, was dismissed.

29. The brief facts as narrated in this Petition are that the son of the Petitioner, namely, Muhammad Ghauri went missing on 07.01.2010. In respect of his disappearance, the Petitioner filed an application on 21.01.2010 in the concerned Police Station and FIR No.107 dated 16.02.2011 was registered at the Police Station Shalimar, Islamabad. In order to procure the recovery of his son, the Petitioner invoked the

Constitutional jurisdiction of the learned Lahore High Court, Rawalpindi Bench as well as this Court. The Petitioner also approached the COIOED but to no avail. Eventually, it was disclosed that the Petitioner's son was confined in the Internment Center, Lakki Marwat.

30. In due course, it was contended, that through a news item dated 01.01.2016, it was revealed that the Petitioner's son Muhammad Ghauri had been tried by a FGCM and sentenced to death.

31. The Petitioner challenged such conviction by invoking the Constitutional jurisdiction of the learned Lahore High Court, Rawalpindi Bench through Writ Petition No.197 of 2016, which has been dismissed vide the Order impugned dated 27.01.2016.

32. Civil Petition for Leave to Appeal No.417 of 2016 is directed against the impugned Order dated 19.01.2016 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition bearing No.133-P of 2016, filed by the present Petitioner, was dismissed.

33. The brief facts as narrated in the instant Petition are that the younger brother of the Petitioner, namely, Tahir, was arrested on 23.02.2014 from Lahore.

On 03.09.2015, the Petitioner came to know through a news item published in the daily Mashriq, Peshawar that his brother has been convicted by a FGCM at Peshawar and awarded a death sentence. Earlier the Petitioner's father invoked the Constitutional jurisdiction of the learned Islamabad High Court by filing a Constitutional Petition i.e. Writ Petition bearing No.2788 of 2015, seeking information regarding the whereabouts of Tahir and to meet him, which was disposed of on 18.09.2015. In order to meet his said brother who it was discovered was confined in District Jail, Peshawar, the Petitioner invoked the jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition bearing No.3468-P of 2015, whereupon a direction was issued to the Respondents to act in accordance with the law and the Petitioner was permitted to meet his brother.

34. In the above backdrop, the Petitioner challenged the conviction of his brother by invoking the Constitutional Jurisdiction of the learned Peshawar High Court, Peshawar, through a Constitutional Petition i.e. Writ Petition No.133-P of 2016, which was dismissed vide the Order impugned dated 19.01.2016.

35. Civil Petition for Leave to Appeal No.1263 of 2016 is directed against the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition bearing No.1048-P of 2016, filed by the present Petitioner, was dismissed.

36. The brief facts as narrated in the Petition are that the Petitioner voluntarily surrendered himself before the Army Authorities on 27.12.2009 and was confined at Internment Center, Gulibagh. Neither any FIR nor any criminal case was registered against him. On 16.03.2016, the Petitioner's family came to know through various newspapers that the Petitioner along with some others has been awarded death sentence by the FGCM and the Chief of Army Staff has given assent to the death warrants of all the said Convicts, including the Petitioner.

37. In the above backdrop, the Petitioner challenged his conviction and sentence by invoking the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition No.1048-P of 2016, which has been dismissed vide the impugned judgment dated 12.04.2016.

38. Civil Petition for Leave to Appeal No.1306 of 2016 is directed against the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ Petition No.1184-P of 2014, filed by the present Petitioner, was dismissed.

39. The brief facts of the case, as narrated in this Petition are that on 20.11.2014, the Petitioner's son namely, Fateh Khan was allegedly arrested by the Law Enforcement Agencies from Sarband, Peshawar. The whereabouts of her son, despite hectic efforts, could not be discovered. The Petitioner in this regard approached the Police Station Sarband, Peshawar, for registration of the FIR in November, 2014 but could not succeed.

40. Being aggrieved of the conduct of the police and the Political Agent, she sent an application to the learned Chief Justice, Peshawar High Court, who took up the action and repeatedly directed the concerned quarters to record the statement of the Complainant and submit a report. It is alleged that neither the police recorded her statement nor submitted any comments, in this behalf.

41. On 25.03.2016, she received information through the Political Agent, Barah that her son would be hanged on 30.03.2016.

42. In view of the above, the Petitioner invoked the Constitutional jurisdiction of the learned Peshawar High Court by filing the above said Constitutional Petition, which was dismissed vide impugned judgment dated 12.04.2016. Hence, this Civil Petition for Leave to Appeal.

43. Civil Petition for Leave to Appeal No.1335 of 2016 is directed against the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, Peshawar, whereby Writ Petition No.1190-P of 2016, filed by the present Petitioner, was dismissed.

44. The brief facts necessary for disposal of this Petition are that the Petitioner, who is the brother of Convict Taj Gul stated in his Petition that in the year 2011, his brother was handed over by the elders of the locality to the Law Enforcement Agencies as directed and thereafter, he was shifted to some unknown place and later detained/confined at Internment Center, Paitham, Swat, where he was allowed visits by his relatives and the last such visit took place in the year

2015. Subsequently, through the print media, the Petitioner came to know about the confirmation of death sentence awarded to his brother by the FGCM.

45. The Petitioner invoked the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar, by challenging the said conviction and sentence awarded to the Convict through the Writ Petition bearing No.1190-P of 2016, which was dismissed through the judgment impugned dated 12.04.2016. Hence, this Civil Petition for Leave to Appeal.

46. Civil Petition for Leave to Appeal No.1353 of 2016 is directed against the impugned Order dated 19.01.2016 of the learned Lahore High Court, Rawalpindi Bench, whereby a Constitutional Petition i.e. Writ Petition No.117 of 2016, filed by the mother of the Petitioner was, dismissed *in limine.*

47. The brief facts of this case as narrated in this Petition are that allegedly on 14.07.2014 the son of the Petitioner namely, Aksan Mehboob disappeared from Lahore. The Petitioner tried her best to locate her son but in vain. Subsequently, through the print media, it was revealed that on 18.07.2014 the Petitioner's son

had been killed alongwith another terrorist in an encounter near Raiwind. She tried unsuccessfully to get the dead body from the Law Enforcement Agencies. On 22.07.2014, she came to know that her son was alive and in the custody of the Military Intelligence. She tried to meet her son but failed. On 01.01.2016, it was discovered through a press release issued by the Inter-Services Public Relations (ISPR) that her son had been convicted and sentenced to death by a FGCM and such sentence had been confirmed by the Chief of Army Staff.

48. The Petitioner invoked the Constitutional jurisdiction of the learned Lahore High Court, Rawalpindi Bench, challenging her son's conviction and sentence by filing a Constitutional Petition i.e. Writ Petition No.117 of 2016, which was dismissed by the learned High Court vide the Order impugned dated 19.01.2016. Hence, this Civil Petition for Leave to Appeal.

49. Civil Petition for Leave to Appeal No.1503 of 2016 is directed against the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, Peshawar, whereby a Constitutional Petition i.e. Writ

Petition bearing No.1271-P of 2016, filed by the present Petitioner, was dismissed.

50. The brief facts as narrated in the instant Petition are that the Petitioner is the father of the Convict, namely, Nasir Khan, who was allegedly taken into custody by the security forces on 03.07.2014 from Harno Azizabad and shifted to an unknown destination. Thereafter, a daily diary dated 08.07.2014 was recorded by Respondent No.1 i.e. SHO, Police Station Bugnotar, District Abbottabad in respect of the disappearance of Nasir Khan. Subsequently, the Petitioner invoked the Constitutional jurisdiction of the learned Peshawar High Court, Abbottabad Bench by filing Writ Petition bearing No.268 of 2016, which was dismissed, being not pressed, pursuant to the progress report, submitted by Respondent No.1. It was eventually discovered that the Petitioner's son has been convicted under the Pakistan Army Act, 1952.

51. The Petitioner challenged such conviction by invoking the Constitutional jurisdiction of the learned Peshawar High Court, Peshawar through Writ Petition No.1271-P of 2016, which was dismissed vide the judgment impugned dated 12.04.2016.

52. Civil Petition for Leave to Appeal No.1541 of 2016 is directed against the impugned Order dated 12.05.2016 of the learned Lahore High Court, Bahawalpur Bench, whereby a Constitutional Petition i.e. Writ Petition No.3315 of 2016, filed by the present Petitioner, was dismissed, being not maintainable.

53. The brief facts, as narrated in the instant Petition are that the Petitioner's son namely Muhammad Arbi was falsely involved in a criminal case FIR No.39 of 2014 dated 07.02.2014, under Section 365-B PPC registered with Police Station Nowshehra Jadeed, District Bahawalpur but was acquitted in the said case and was never involved in any other case. However, through print media, the Petitioner discovered that his son has been convicted and sentenced to death by a "Military Court" on the basis of alleged confession.

54. It appears that the Petitioner had earlier invoked the jurisdiction of this Court by filing a Constitutional Petition, which was returned by the Office vide Order dated 22.02.2016, being not maintainable and with a direction to seek his remedy before an appropriate forum.

55. The Petitioner filed a Constitutional Petition i.e. Writ Petition No.3315 of 2016 before the learned Lahore High Court, Bahawalpur Bench, challenging the said conviction and sentence of his son, which was dismissed vide the Order impugned dated 12.05.2016. Hence, this Civil Petition for Leave to Appeal.

56. In the aforementioned Civil Petitions for Leave to Appeal, the convictions and sentences awarded by the FGCMs to various Convicts have been called into question. No doubt, the learned counsel for the Petitioners advanced some arguments, which were case specific, yet the main thrust of their contentions was on a legal plane and common in all these Civil Petitions for Leave to Appeal

57. In this behalf, it was contended by the learned counsels for the Petitioners that the Convicts in the instant cases have been subjected to a secret trial without access to legal assistance, having been deprived of the right to be represented by a Legal Practitioner of their own choice in violation of rights so guaranteed by Articles 10 and 10A of the Constitution of the Islamic Republic of Pakistan, 1973. Thus, the procedure adopted and followed denuded the proceedings of the

requirements of a “fair trial” and “due process”. It was further contended that even otherwise, the Fundamental Rights of the Convicts guaranteed under Articles 10 and 10A of the Constitution have thus been violated and the trials were also not in consonance with Article 4 of the Constitution. It was added that the Rules applicable i.e. the Pakistan Army Act Rules, 1954, were violated to the prejudice of the Convicts, as a consequence whereof, the trials and the convictions were illegal and invalid. Reference, in this behalf, was made to Rules 23 and 24 as well as Rules 81 to 87 of the Pakistan Army Act Rules, 1954. It was further contended that the Convicts were deprived of their rights to produce evidence in their defence or to cross-examine the prosecution witnesses. It was further added that sufficient time and opportunity to prepare the defence was not provided in terms of Rule 23 of the Pakistan Army Act Rules, 1954. The learned counsels for the Petitioners next added that the trials were conducted more than three years after the alleged occurrence in violation of the bar contained in Section 91 of the Pakistan Army Act, 1952, hence, the said trials were without jurisdiction.

58. It was also contended by the learned counsels for the Petitioners that in respect of the alleged occurrences for which the Convicts were tried and sentenced, no FIR was ever registered. It was added that the Convicts were kept in illegal detention for years on end and the proceedings of the FGCMs, were a *mala fide* attempt to cover up such illegalities. The convictions are based primarily on the alleged confessions before the Judicial Magistrates, which were not recorded in accordance with the law and the Convicts were handed back to the Law Enforcement Agencies after recording the alleged confessions. Furthermore, the Convicts were kept in the Internment Centers under the Actions (in aid of Civil Power) Regulation, 2011 and the very *vires* thereof are *sub judice* before this Court for being, *inter alia,* in violation of Articles 10 and 10A of the Constitution.

59. It was added that no pre-trial proceedings were conducted, which is a requirement under the Pakistan Army Act, 1952, nor such summary of evidence was provided to the accused nor has been made available to their counsels or has been presented

to this Court establishing beyond any doubt that the Pakistan Army Act Rules, 1954, have been violated.

60. The learned counsels further contended that the privilege has been claimed with regard to the record of the trials, which is not permissible under the law with respect to criminal proceedings in view of the judgments, reported as Mohtarma Benazir Bhutto v. The President of Pakistan through the Secretary to the President (1992 SCMR 1357 & PLD 1992 SC 492) and Muhammad Uris v. Government of Sindh through Secretary, Revenue Department, Board of Revenue, Hyderabad and 2 others (1998 CLC 1359).

61. An issue was also raised with regard to the selection of the cases for trial by the FGCMs in respect of the matters at hand. In this behalf, it is contended, no objective criteria exists nor was employed and nothing is on the record to illustrate the basis for the selection of these cases for trial by the FGCMs.

62. It was further contended that the Convict Haider Ali (in Civil Petition for Leave to Appeal No.3331 of 2015) was a juvenile at the time of the alleged occurrence, hence, could not be tried by the FGCM especially as the factum of his age stood established

through documentary evidence placed before the learned High Court, which has been ignored.

63. It is the case of the Petitioners that the aforesaid failures in the mode and method of the trial renders the same illegal and unconstitutional and the convictions and sentences awarded without jurisdiction, *coram non judice* and suffering from *mala fides,* therefore, the learned High Court as well as this Court were not only vested with the jurisdiction to entertain, examine and adjudicate upon the contentions raised on behalf of the Petitioners but also to set aside the convictions and sentences awarded by the FGCMs in the instant cases notwithstanding the bar contained in Article 199(3) of the Constitution especially in view of the interpretation thereof as set forth in the various judgments of this Court. The learned counsels also complained that they were handicapped by their limited access to the record of the trials.

64. The learned DAG for Pakistan has controverted the contentions raised on behalf of the Petitioners by contending that the Convicts and the offences for which they were tried in each and everyone of the cases at hand were subject to the Pakistan Army

Act, hence, the convictions could not be challenged before the learned High Court in exercise of its jurisdiction conferred under Article 199 of the Constitution in view of Sub Article (3) thereof. It is added that it is settled law that the jurisdiction of the High Court and this Court is limited, in this behalf, to the cases of *coram non judice,* without jurisdiction and *mala fides* and the contentions raised on behalf of the Petitioners do not fall in any of three categories. It was further contended that no objection was raised or established on record that the FGCMs in question were not legally constituted in accordance with the law so as to render the convictions and sentences handed down *coram non judice*. The learned DAG further added that no *mala fide* had been alleged against the Members of the FGCMs nor such *mala fides* have been pleaded with the requisite particularity or *ex facie* established on the record. It was added that it has been conclusively held by a Larger Bench of this Court in the case, reported as District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 SC 401) that the Convicts in view of the offences for which they were accused, were subject to the Pakistan Army Act

and the FGCMs constituted under the said Act were vested with the jurisdiction to try the Convicts and sentence them, hence, the convictions and sentences awarded are not without jurisdiction.

65. The learned DAG for Pakistan also contended that each and every Convict was given full opportunity to defend himself. The option to engage a Legal Practitioner of their own choice was afforded and upon failure to take advantage of such option, an Officer was deputed to defend them in terms of the Pakistan Army Act Rules, 1954. The procedure, as provided in the Pakistan Army Act and the Rules framed thereunder was meticulously followed in letter and spirit and no specific deviation therefrom have been pointed out by the Petitioners. The learned DAG stated that the convictions are the result of a "fair trial", which were held in accordance with the law i.e. the Pakistan Army Act and the Rules framed thereunder without in any manner transgressing against any of the provision of the Constitution or violating any right guaranteed thereby. It is added that the aforesaid Convicts not only admitted their guilt but in fact boasted of their “exploits” of waging war against Pakistan and killing innocent

civilians and the Members of the Law Enforcement Agencies, yet as required by the Pakistan Army Act, their pleas of guilty were altered to not guilty, and evidence produced by the prosecution to establish the charges against them. It was further contended that full access was given to the learned counsels for the Petitioners under the Orders of this Court to examine the record of the trials in question, subject only to the constraints necessitated by the concern for safety and security of the Members of the FGCMs and the witnesses in accordance with the provisions of Section 2-C of the Pakistan Army Act. The learned DAG further contended that reference to Section 91 of Pakistan Army Act is misconceived, as the provisions thereof were inapplicable to the offences for which the Convicts in the instant cases have been tried and sentenced.

66. With regard to Convict, Haider Ali (in Civil Petition for Leave to Appeal No.3331 of 2015), it was contended by the learned DAG that he was not a juvenile at the time of the occurrence. During the proceedings before the learned High Court, the relevant record was examined by the learned High Court, which recorded its satisfaction with regard to the age of the

Convict and he being a major at the time of the occurrence. Even otherwise, the Pakistan Army Act has an overriding effect over any other law, in this behalf, in view of Section 4 of the Pakistan Army (Amendment), Act, 2015.

67. The learned Deputy Attorney General for Pakistan added that pre-trial proceedings were conducted and the summary of evidence recorded, as is evident from the record of the trial by the FGCMs. It was added that the Pakistan Army Act and the Rules framed thereunder were followed in letter and spirit, however, any deviation therefrom does not vitiate the trial in view of Rule 132. Furthermore, neither the learned High Court nor this Court in exercise of their respective constitutional jurisdiction can examine or set aside the trial only on the ground that the procedure was not followed. In his behalf, reliance was placed on the judgments, reported as Brig. (Retd) F.B. Ali and another v. The State (PLD 1975 SC 506), Muhammad Din and others v. The State (PLD 1977 SC 52), Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632) and District Bar Association, Rawalpindi and others v. Federation of Pakistan and

others (PLD 2015 SC 401). With regard to Articles 10 and 10A of the Constitution, 1973, it was contended that since the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment Act), 2015, has been incorporated in the First Schedule of Article 8, therefore, the provisions thereof and proceedings conducted thereunder are immune from challenge on the ground of any alleged violation of the Fundamental Rights, including Articles 10 and 10A of the Constitution and the benefit thereof is not available to the Convicts in the instant cases.

68. Heard. Available record perused.

69. The instant Civil Petitions for Leave to Appeal are directed against the various Judgments/Orders of the different learned High Courts, whereby Writ Petitions calling into question the convictions and sentences of individuals awarded by the FGCMs were dismissed. The Convicts in respect whereof the Constitutional Petitions had been filed before the learned High Courts were all civilians, who were tried by FGCM purportedly in view of the Constitution (Twenty-first Amendment) Act (Act I of 2015) read with the Pakistan Army (Amendment) Act (Act II of 2015). The

Constitutionality of the Twenty-first Amendment as well as the Pakistan Army (Amendment) Act of 2015, were called into question before this Court and a Larger Bench by majority of 11 to 6 held the aforesaid Twenty-first Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015, not to be *ultra vires* the Constitution vide judgment, reported as District Bar Association, Rawalpindi and others (*supra*).

70. In the proceedings culminating in the impugned Judgments/Orders, the jurisdiction of the learned High Courts under Article 199 of the Constitution, had been invoked. The said Article contains a non-obstantive provision i.e. sub-article (3) thereof, which reads as under:

> "(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law."
>
> (emphasis supplied)

71. A bare perusal of the aforesaid provision would suggest that *prima facie* a High Court in exercise of its jurisdiction under Article 199(1) of the Constitution

cannot pass any order in respect of any person who even for the time being is subject to any law pertaining to the Armed Forces with regard to any action taken under such law. The Pakistan Army Act, 1952, is one of the laws applicable to the Armed Forces of Pakistan. The jurisdiction of the learned High Courts with regard to the exercise of the powers of Judicial Review with respect to trial by the FGCM under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, and the convictions and sentences handed down thereunder were also examined in the case of District Bar Association, Rawalpindi and others (*supra*). This Court considered, *inter alia,* the ratio of the previous judgments of this Court, reported as The State v. Zia-ur-Rahman and others (PLD 1973 SC 49), Brig. (Retd) F.B. Ali and another v. The State (PLD 1975 SC 506), Federation of Pakistan and another v. Malik Ghulam Mustafa Khar (PLD 1989 SC 26), Mrs. Shahida Zahir Abbas and 4 others v. President of Pakistan and others (PLD 1996 SC 632), Ex.Lt. Col. Anwar Aziz (PA-7122) v. Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and 2 others (PLD 2001 SC 549), Mst. Tahira Alams and another v.

Islamic Republic of Pakistan through Secretary, Ministry of Interior, Islamabad and another (PLD 2002 SC 830), Federation of Pakistan and others v. Raja Muhammad Ishaque Qamar and another (PLD 2007 SC 498), Ghulam Abbas Niazi v. Federation of Pakistan and others (PLD 2009 SC 866), Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61), Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (1993 SCMR 1171), Begum Syed Azra Masood v. Begum Noshaba Moeen and others (2007 SCMR 914), Syed Rashid Ali and others v. Pakistan Telecommunication Company Ltd and others (2008 SCMR 314), Federation of Pakistan through Secretary Defence and others v. Abdul Basit (2012 SCMR 1229), Rana Muhammad Naveed and another v. Federation of Pakistan through Secretary M/o Defence (2013 SCMR 596), Karamat Ali v. State (PLJ 1976 SC 341) and Ex.PJO-162510 Risaldar Ghulam Abbas v. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and others (PLJ 2013 SC 876).

The settled law as gleaned from the aforesaid judgments was reiterated in the following terms:

> "171. In view of the above, there can be no manner of doubt that it is a settled law that any order passed or sentence awarded by a Court Martial or other Forums under the Pakistan Army Act, 1952, included as amended by the Pakistan Army (Amendment) Act, 2015, is subject to the Judicial Review both by the High Courts and this Court, *inter alia,* on the ground of *coram-non-judice*, without jurisdiction or suffering from *mala fides* including malice in law. This would also hold true for any decision selecting or transferring a case for trial before a Court Martial. ..."
>
> (emphasis supplied)

72. Before the contentions of the learned counsels for the Petitioners in the context of the available record with regard to the individual's case can be examined, it would perhaps be appropriate to ascertain the extent and contours of the jurisdiction of Judicial Review available with the learned High Courts under Article 199 of the Constitution in such like matters.

73. The grounds on the basis whereof a challenge can be thrown to the proceedings taken, convictions and sentences awarded by the FGCM have been specified hereinabove so as to include the grounds of *coram non judice,* without jurisdiction or suffering from *mala fides*, including malice in law only.

An overview of the judicial pronouncements on the point reveals that the expression *coram non judice* is usually employed in conjunction with the expression "without jurisdiction" and occasionally as synonymous therewith. However, in Black's Law Dictionary, Ninth Edition, the term *coram non judice* has been defined as follows:

> *"Coram non judice* (**kor**-em non **joo**-di-see). [Latin "not before a judge"] **1.** Outside the presence of a judge. **2.** Before a judge or court that is not the proper one or that cannot take legal cognizance of the matter."

Hamoodur Rahman, C.J., as he then was, in the judgment of this Court, reported as Chittaranjan Cotton Nulls Ltd v. Staff Union (1971 PLC 499) very succinctly observed as follows:

> "Where the Court is not properly constituted at all the proceedings must be held to be coram non judice and, therefore, non-existent in the eye of law. There can also be no doubt that in such circumstances. ..."

74. Thus, it appears that the *coram non judice* in fact is perhaps a fatal flaw germane to the very constitution of the judicial forum rendering its proceedings non-est in the eye of law. Though a forum may be vested with the jurisdiction yet its actions may be invalid, if such forum has been set up in clear and

absolute violation of the law applicable in this behalf. The purpose of undertaking this exercise is not to circumscribe or limit the jurisdiction of the learned High Court but to amplify the same.

75. The other expression which needs to be dilated upon, in this behalf, is "*mala fides* including malice in law". The expression "*mala fides*" has been explained in great detail by this Court in the judgment, reported as The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan, Rawalpindi v. Saeed Ahmad Khan and others (PLD 1974 SC 151), in the following terms:

> *"Mala fides"* literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorised by the law under which the action is taken or action taken in fraud of the law are also *mala fide.* It is necessary, therefore, for a person alleging that an action has been taken *mala fide* to show that the person responsible for taking the action has been motivated by any one of the considerations mentioned above. A mere allegation that an action has been taken wrongly is not sufficient to establish a case of *mala fides,* nor can a case of *mala fides* be established on the basis of universal malice against a particular class or section of the people. ..."

In the above-said judgment, it was also observed as follows:

> "In order to establish a case of *mala fides,* some such specific allegation is necessary and it must be supported by some *prima facie* proof to justify the Court to call upon the other side to produce evidence in its possession."

A similar view was also taken by this Court in the cases, reported as Abdul Baqi Baluch v. Government of Pakistan through the Cabinet Secretary, Rawalpindi (PLD 1968 SC 313).

In the case, reported as Abdul Rauf and others v. Abdul Hamid Khan and others (PLD 1965 SC 671), this Court observed as follows:

> "... A *mala fide* act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a *mala fide* exercise of power. A *mala fide* order is a fraud on the statute. It may be explained that a *mala fide* order means one which is passed not for the purpose contemplated by the enactment granted the power to pass the order, but for some other collateral or ulterior purposes."

In the case, reported as Zafar-ul-Ahsan v. The Republic of Pakistan (through Cabinet Secretary, Government of Pakistan) (PLD 1960 SC 113) this Court held as follows:

> "... If an appellate authority is provided by the statute the omissions or irregularity alleged will be a matter for that authority, and not, as rightly observed by the High Court, for a Court of law. Of course where the proceedings are taken *mala fide* and the statute is used merely as a cloak to cover an act which in fact is not taken though it purports to have been taken under the statute, the order will not, in accordance with a long line of decisions in England and in this sub-continent, be treated as an order under the statute."

This Court in the case, reported as Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) observed as follows:

> "... It is not to be turned into a roving enquiry permitting the detenu to hunt for some ground to support his case of *mala fides* nor should an enquiry be launched upon merely on the basis of vague and indefinite allegations. *Mala fide* must be pleaded with particularity and once one kind of *mala fide* is alleged, the detenu should not be allowed to adduce proof of any other kind of *mala fide*."

76. Malice in law is a term distinct from *mala fides* of fact. In this behalf, reference may be made to the Black's Law Dictionary, Ninth Edition, where "implied malice" has been defined as follows:

> *"**Implied malice.*** Malice inferred from a person's conduct. – Also termed *constructive malice; legal malice; malice in law.* Cf. *actual malice."*

(emphasis supplied)

Bayley, J. in Bromage v. Prosser (4 B. & C. 255) observed:

> "... Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. ..."

77. These observations were quoted with approval by the House of Lords in the case of Allen v. Flood (1897 A.C. 1) where Lord Watson said:

> "..... The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. ..."

78. The House of Lords in its judgment, reported as Shearer and another v. Shields (1914 A.C. 808) held as follows:

> "Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently."

79. The aforesaid has been quoted with approval by the Indian Supreme Court in the judgment, reported

as Addl. Distt. Magistrate, Jubalpur v. Shivakant Shukla (AIR 1976 SC 1207) and by the Lahore High Court in the judgment, reported as Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and 3 others (PLD 1997 Lahore 38).

80. Muhammad Haleem, J., as he then was, in the case reported as Haji Hashmatullah and 9 others vs. Karachi Municipal Corporation and 3 others (PLD 1971 Karachi 514), observed as follows:

> "... An order in violation of law is *mala fide* in law, though actual malice may not be present in the mind of the authority passing the order."

81. The Supreme Court of India in the case, reported as State of Andhra Pradesh and others v. Goverdhanlal Pitti (AIR 2003 SC 1941) held as under:

> "12. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in act". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, 'it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others. (See Words and Phrases legally defined in Third Edition, London Butterworths 1989.)"

82. All judicial and quasi-judicial forums for that matter even the Executive Authorities exercise only the powers conferred upon them by law so as to fulfill the mandate of such law and to achieve its declared and self-evident purpose. However, where any action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully hurt somebody or benefit oneself or another, it is said to suffer from malice of facts. In such cases, the seat of the malice or bad faith is the evil mind of the person taking the action be it spite or personal bias or ulterior motive. Mere allegations, in this behalf, do not suffice. Malice of fact must be pleaded and established at least *prima facie* on record through supporting material.

83. All persons purporting to act under a law are presumed to be aware of it. Hence, where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and act would be deemed to suffer from malice in law or constructive malice. Strict

proof of bad faith or collateral propose in such cases may not be required.

84. Having explored the concept of malice in law to the extent of its most liberal connotation, we cannot lose sight of the fact that the jurisdiction exercised by the learned High Court, in this behalf, has to be navigated through a non-obstantive provision in the Constitution i.e. Article 199(3), reproduced herein above. In this behalf, it may perhaps be appropriated to refer the note of caution expressed in the judgment of this Court, reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61), wherein it has been observed as follows:

> "... This is settled principle of law that constitutional protection and immunity of judicial review in performance of constitutional duty cannot be extended to the mala fide acts and actions, therefore distinction must be drawn between malice in fact and malice in law for the purpose of interpretation of the relevant provision of the Constitution or a statute so that an impression must not be created that such provision has been amended, altered or reconstituted which may make the same redundant. The Supreme Court has always been careful and conscious in interpreting the Constitution so as in a manner that it may not create chaos or conflict or

> make the provision ineffective or nullified."

85. This Court in the specific context of challenging the sentences and convictions awarded by the FGCM in the case, reported as Ex-gunner Muhammad Mushtaq and another v. Secretary Ministry of Defence through Chief of Army Staff and others (2015 SCMR 1071), after examining the previous case law on the subject, observed as follows:

> "9. ... Neither the order passed by the Field General Court Martial is a case of no evidence nor the evidence led by the prosecution is insufficient. There is sufficient material available to prove the guilt of the appellants. In absence of any *mala fide* on the part of the prosecution, the conviction and sentences awarded to the appellants by the Field General Court Martial cannot be stamped to be *coram non judice*. ..."

86. In the case reported as Ex. Lt.-Col. Anwar Aziz (PA-7122) v. Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and 2 others (PLD 2001 SC 549), it was held as under:

> "8. This Court can interfere only in extraordinary cases involving question of jurisdictional defect when proceedings before that forum become coram non judice or mala fide. ..."

87. Again after an overview of the case law on the subject, this Court in the case of Ghulam Abbas v.

Federation of Pakistan through Secretary, Ministry of Defence and others (2014 SCMR 849), held as follows:

> 6. ... It would further be seen that the High Court in its constitutional jurisdiction is not a Court of Appeal and hence is not empowered to analyze each and every piece of evidence in order to return a verdict. In this regard its jurisdiction would be limited to scanning the evidence in order to ensure that the accused has been given a fair trial. Indeed, in the case of Sabur Rehman v. The Government of Sindh (supra) it was observed by this Court (majority view), "That in some of the decided cases it has been held that if a finding is based on no evidence it will be a case of without jurisdiction but again the basic question is as to whether the High Court in exercise of constitutional jurisdiction or this Court while hearing an appeal arising out of a refusal of the High Court to set aside the conviction can take upon itself the role of an Appellate Court to reappraise the entire evidence on record and to analyze it and then to conclude that it is a case of no evidence in order to render the conviction as without jurisdiction. In my humble opinion, this is not permissible. The High Court, after going through the record, was satisfied that it was not a case of no evidence. In our view, the approach of the High Court was correct that it had not reappraised the evidence and had not analyzed the same in the judgment as it was not hearing a regular appeal". We would respectfully agree with the majority view in the instant case but would hasten to add that where a finding is perverse or based on no evidence at all, then certainly the High Court in exercise of its constitutional jurisdiction could interfere."
>
> "7. Consequently, in order to do full justice to the petitioner, we have with

> the assistance of learned Advocate Supreme Court, gone through the evidence and we do not find that either it is a case of no evidence or that evidence led by the prosecution was insufficient to convict the petitioner. Indeed, the victim has himself very candidly described the petitioner's forced sexual encounter when he committed the unnatural offence. This has been corroborated by the medical evidence on record."

88. In the case reported as Ex. Lt.-Col. Anwar Aziz (PA-7122) (*supra*), it was held as under:

> "6. As per record it is noticed that petitioner had candidly admitted the jurisdiction of Field General Court Martial, the trial Court; and that of the Court of Appeals, the Appellate Court. Admittedly he did not challenge the jurisdiction of the Army Courts at any stage. He voluntarily surrendered to their jurisdiction and remained silent and contested the proceedings fully. It was after exhausting the remedies available to him according to the Act, he resorted to the Constitutional jurisdiction of the High Court without any legal justification. The learned counsel of the petitioner frankly conceded that during the hearing of the petition before the High Court the petitioner had accepted the jurisdiction of Army Courts and failed to convince that the conviction was either mala fide or coram non judice or without jurisdiction. The petitioner being member of Armed Forces was thus rightly tried, convicted and sentenced by the properly constituted forums under the Act, as such his case does not attract the question of public importance."

89. In the case of Mushtaq Ahmed and others v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others (PLD 2007 SC 405), against the convictions and sentences awarded by the FGCM, the contention raised pertaining to the “merits” of the case was rejected in the following terms:

> "33. In this behalf it may be noted that these are the questions which relate to the merits of the case. Further more, during the trial no such objection was raised on behalf of the appellants, therefore, the same is not entertainable for want of jurisdiction of the High Court, as concluded herein above."

90. From the above law as declared through various precedents, it can be gathered that any proceedings taken, convictions and sentences awarded by the FGCM can be called into question on the ground of *mala fides* of fact i.e. being tainted with bias or bad faith or taken for a collateral purpose or inspired by a personal motive to hurt a person or benefit oneself or another. The mere allegation that an action has been taken wrongly is not sufficient to establish *mala fide* of facts. Specific allegations of the collateral purpose or an ulterior motive must be made and proved to the satisfaction of the Court.

91. A challenge can also be thrown on the independent ground of malice in law or constructive or implied malice for which purpose it is sufficient to establish that the action complained of was not only illegal but so unreasonable and improbable that it cannot be said to be contemplated or countenanced by the law whereunder such action has purportedly been taken. It would include an act done wrongfully and willfully without reasonable or probable justification. Unlike cases of malice in fact evil intention need not necessarily exist or required to be proved. Any action suffering from *mala fides* of fact or malice in law constitutes a fraud upon the law and is without jurisdiction.

92. Similarly, if there is a fundamental legal flaw in the constitution of the forum (in our case FGCM) the actions taken thereby would be *coram non judice,* hence, also without jurisdiction.

93. It may be noted that the actions complained of can even otherwise be without jurisdiction, a separate and independent ground available to challenge the sentences and convictions of the FGCM, therefore, it must necessarily be examined whether the FGCM had

the jurisdiction over the person tried and the offence for which such trial has taken place and to ascertain existence or otherwise of any other defect or a gross illegality in the exercise of jurisdiction denuding the same of validity.

However, we cannot lose sight of the non-obstantive provision [in the Constitution i.e. Article 199(3)] impeding the exercise the powers of Judicial Review by the High Court under Article 199 of the Constitution. Consequently, the boundaries of the available jurisdiction cannot be pushed so as to negate and frustrate the said provision of the Constitution. An exception to the rule barring exercise of jurisdiction cannot be extended so as to defeat and destroy the rule itself. It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn

by the FGCM nor can the High Court venture into the realm of the "merits" of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction.

94. It is in the above backdrop, the contentions of the learned counsels in respect of each individual's case at hand needs to be examined.

95. Subject matter of Civil Petition for Leave to Appeal No.842 of 2016 is the conviction and sentence awarded to a civilian Said Zaman Khan (Convict) son of Said Nawas Khan by a FGCM convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. The Convict was accused of several counts of the commission of offences of being a Member of a known religiously motivated terrorist organization and attacking, alongwith others, the Armed Forces of Pakistan, while armed with deadly weapons and thereby causing death of several Army personnel. The place of occurrence, it is alleged, was North Waziristan.

The Convict was accused of the commission of an offence under clause 2(1)(d)(iii) of the Pakistan Army Act,

1952, as incorporated by the Pakistan Army (Amendment) Act, 2015. Hence, by operation of law became subject to the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, in view of Section 2(1) thereof, therefore, the Convict became liable to be dealt with under the Pakistan Army Act, including by way of trial thereunder by a FGCM.

The offence of which the Convict was accused is obviously punishable under the ordinary law of the lands triable by a Criminal Court, hence, constituted a "civil offence" as defined by sub-section (3) of Section 8 and liable to be tried by the FGCM in view of the provisions of Section 59 of the said Act.

It may be noted that no new offence has been created and only a change of Forum has been brought about by the Pakistan Army (Amendment) Act, 2015. The date of occurrence has no real significance. The offence in question as noted above is a "civil offence", as defined in Sections 8(3) of the Pakistan Army Act, and was thus not only triable by the FGCM *per-se* but also regardless of the date when the offence was committed, as is clear not only from the First Proviso to Section 2(1)(d)(iii) but also Section 59(4) of the Pakistan Army

Act, which is reproduced hereunder for ease of reference:

> 59. Civil Offences.—(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly."

96. From the aforesaid it appears that in view of the nature of the offences of which, the Convict was accused of, he became subject to the Pakistan Army Act and thus liable to be tried by the FGCM, for such offences regardless of the fact where he became subject to the Pakistan Army Act or when the offence was committed. Therefore, the FGCM was vested with the jurisdiction to proceed against the Convict. Hence, the conviction and sentence cannot be held to be without jurisdiction on this account especially, as the learned counsel for the Petitioner was unable to point out any jurisdictional defect, in this behalf. Furthermore, during the course of the trial, the Convict did not object to the

jurisdiction of the FGCM, when granted an opportunity to do so, as is evident from the record.

97. The learned counsels for the Petitioners complained of limited access to the record of the proceedings conducted by the FGCM. We cannot ignore the fact that in view of the peculiar nature of the offences for the commission whereof the Convicts have been accused, it was imperative that efforts should be made to ensure the security and safety of the Members of the FGCM, witnesses produced, the Prosecuting and the Defending Officers and the Interpreters. Such sensitivity necessitated by the existing extra-ordinary circumstances has been reflected in Section 2-C of the Pakistan Army Act, incorporated through a subsequent Amending Act dated 19.11.2015. In the instant cases through specific Order passed by this Court, all the learned counsels were permitted to examine the record of the proceedings of the FGCM, which has been made available to this Court. It has also been noticed that at no point of time after the confirmation of the sentence by the FGCM, any application was filed to the Competent Authority for the supply of the copies of the proceedings, if so required, in terms of Rule 130 of the

Pakistan Army Act Rules, 1954. Such applications were not even moved during the pendency of the proceedings before the High Courts or even before this Court. In the circumstances, we are not persuaded that any prejudice has been caused to the Petitioners, in this behalf.

98. At no point of time during the course of trial by the FGCM or the pendency of the proceedings before the High Court or even before this Court any allegation of specific *mala fides* of fact were made against the Members of the FGCM. It is not the case of the Petitioners that any Member of the FGCM either had any personal bias against the Convict or established on record that any proceeding or conviction by the FGCM was the result of any evil intention of any Member thereof or otherwise conducted in bad faith for a collateral purpose. It has been noticed that during the course of proceedings, the Convict was specifically inquired from as to whether he had any objection against any Member of the FGCM. He responded in the negative, which fact is apparent from the record of the proceedings. In the above circumstances, no case for *mala fides* of fact has been made out. Consequently, the

conviction and sentence of the Convict cannot be set aside on the ground of *mala fides* of fact.

99. It is not the case of the Petitioner that the FGCM was not duly convened and constituted in terms of the Pakistan Army Act, 1952, as amended. No illegality or infirmity, in this behalf, was pointed out or noticed. In the circumstances, the conviction and sentence cannot be said to be *coram non judice*.

100. The learned counsels for the Petitioners, by relying upon Article 10 sub-article (2) of the Constitution, contended that the trial before the FGCM was vitiated as the Convict was not defended by a Civil Defence Counsel or Legal Practitioner of his own choice.

101. The convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. This Court in its judgment in the case of District Bar Association, Rawalpindi and others (*supra*) has held that the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, was validly and effectively incorporated through the Amendment in the First Schedule to the Constitution, as a consequence whereof, the provisions thereof cannot be called into question on the ground of

being in violation of the Fundamental Rights guaranteed under the Constitution in view of Article 8 sub-article (3).

Be that as it may, it is, even otherwise, apparent from the record that prior to the commencement of the trial, the Convict was specifically asked by the FGCM whether he needed an adjournment to prepare his defence or to engage a Civil Defence Counsel. The Convict responded in the negative. In the above circumstances, a Defending Officer was appointed in terms of Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in accordance with the applicable law and the dictum of this Court, as laid down in the judgment, reported as Ex-Gunner Muhammad Mushtaq and another (*supra*). Thus, the contentions, in this behalf, are misconceived.

102. It was also urged on behalf of the Petitioner that the trial by the FGCM in the instant case was invalid in view of Section 91 of the Pakistan Army Act, 1952, as the period of more than three years had passed between the alleged occurrence and the commencement of the trial. The Convict, being subject to the Pakistan Army Act, 1952, was tried for the civil offence in terms of

Section 59. The provisions of Section 91 were thus not attracted, as a trial for a civil offence under Section 59 has been specifically excluded from the operation of Section 91 as is mentioned therein. Thus, the contentions of the learned counsel, in this behalf, cannot be accepted.

103. The nature and extent of the power of Judicial Review in matters arising from an action taken under the Pakistan Army Act, 1952, has by and large been settled by this Court through its various judgments, referred to above. It now stands clarified that neither the High Court nor this Court can sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the "merits" of the case. However, we have scanned the evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges, which were altered to not guilty by operation of the law. There was a judicial confession of the Convict before a learned Judicial Magistrate, which was proved in evidence by the said Judicial Magistrate, who appeared as a witness. Such confession was never retracted by the Convict. Other relevant evidence, including eye witnesses of the

occurrence was also produced. The prosecution witnesses made their statements on Oath and were cross-examined by the Defending Officer. Opportunity to produce evidence in defence was given, which was declined. The Convict was permitted to address the Court and made a statement, wherein he again admitted his guilt. In the above circumstances, it is not possible for us to conclude that it was a case of no evidence or insufficient evidence nor is it possible to hold that the conclusions drawn by the FGCM are blatantly unreasonable or wholly improbable.

104. A perusal of the record of the FGCM reveals that in order to ensure a fair trial and to protect the rights of the Convict, the relevant Rules were complied with. The Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. An Interpreter was appointed with the consent of the Convict in terms of Rule 91 of the Pakistan Army Act Rules, 1954. The nature of the offence for the commission whereof, the Convict was charged, was explained to him as too the possible sentence that would be awarded, as required by Rule 95. He was given an opportunity to prepare his defence

and engage Civil Defence Counsel, if he so desired, in terms of Rules 23 and 24. On his exercising the option not to do so, a Defending Officer was appointed in terms of Rule 81. He was given an opportunity to object to the constitution of the FGCM and to the Prosecutor as well as the Defending Officer, in terms of Section 104 and Rule 35 also. No objection, in this behalf, was raised. The Members of the FGCM, the Prosecutor, the Defending Officer and the Interpreter were duly sworn in, as required by Rules 36 and 37. The charge was formally framed to which incidentally, the Convict pleaded guilty. The evidence was recorded on Oath. An opportunity to cross-examine was granted, which was availed off and an opportunity was also given to produce evidence in defence in terms of Rule 142, which was declined. He was also allowed to record his own statement and to address the Court in terms of Rule 143 wherein he admitted his guilt. The sentence was passed, which has been confirmed in accordance with Section 130 and the Appeal therefrom was dismissed by the Competent Authority. It appears that the provisions of the Pakistan Army Act and the Rules framed thereunder, applicable to the trial at hand have not been

violated. Even otherwise, the procedural defects, if any, would not vitiate the trial in view of Rule 132 of the Pakistan Army Act Rules, 1954 nor did the High Court have the jurisdiction to enter into the domain of the procedural irregularities in view of the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*), especially as no prejudice appears to have been caused to the Convict nor any such prejudice has been pointed out by the learned counsel or specifically pleaded before the High Court.

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

105. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments.

The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or otherwise was without jurisdiction or *coram non judice.*

106. In view of the above, the Convict was subject to the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, and liable to be tried thereunder and the offence was also triable by the FGCM, hence, the proceedings are not without jurisdiction. No *mala fide*s of fact were pleaded or proved on record. The conviction did not suffer from *coram non judice*. No case of malice in law has been made out. Consequently, no ground for interference with the impugned Order dated 12.05.2016 of the Lahore High Court, Bahawalpur Bench, has been made out. Accordingly, this Civil Petition for Leave to Appeal No.842 of 2016, being without merit is liable to be dismissed.

107. Civil Petition for Leave to Appeal No.3331 of 2015, arises from the conviction and sentence awarded

to a civilian Haider Ali alias Asmatullah (Convict) son of Zahir Shah by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Haider Ali was accused of the offences of being Member of a known religiously motivated terrorist organization, who, alongwith others, attacked the Armed Forces of Pakistan, causing the death of Army personnel. He was also accused separately of kidnapping, attacking and causing the death of civilians and the officials of the Law Enforcement Agencies and for abetment in the killing of the civilians. He was also charged with the possession of arms, ammunitions and explosives.

108. The learned counsel for the Petitioner at the very outset contended that the Convict Haider Ali was a minor at the time of the commission of the alleged offence, hence, could not be tried by the FGCM. The learned Deputy Attorney General for Pakistan not only disputed such assertion on the factual plane but also contended that the Pakistan Army Act, 1952, in view of Section 4 of the Pakistan Army (Amendment) Act, 2015, had an overriding effect over all the other laws. Be that as it may, the question of the age of Convict Haider Ali

was raised before the learned Peshawar High Court by the Petitioner. However, by way of the impugned judgment, the learned High Court was not satisfied that the Convict Haider Ali was a minor at any material point of time and understandably so, as the primary basis for such assertion was a Birth Certificate, purportedly pertaining to the Convict Haider Ali. The entry in the said Certificate regarding the birth of the Convict Haider Ali was inserted in the record on 05.08.2015, after the Writ Petition had been filed before the learned High Court and many decades after the alleged birth of the Convict Haider Ali. The other documents were private documents, having no evidentiary significance. We are not persuaded to interfere in the said findings.

109. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3) of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section

2(1), the Convict, by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

110. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever filed to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

111. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal

bias against the Convict or that the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any objection, in this behalf. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

112. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. Reference, in this behalf, was made to Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi (*supra*), was validly and effectively incorporated in the First Schedule of the Constitution, hence, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, in view of Article 8(3) of the Constitution, are immune from challenge on the ground of being in violation of the Fundamental Rights,

including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not claim to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

113. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of the trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and

preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

114. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity

if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954, and furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the learned High Court, as has been stated above.

115. It is settled law that while exercising the power of Judicial Review in the matters of this nature neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have examined the record in the instant case, the Convict pleaded guilty to the charges framed against him. This was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to

persuade us that the conclusions drawn, conviction recorded and sentence passed are not as countenanced by the law. Hence, no case of malice in law has been made out.

116. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act, 1952, and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

117. In short, it appears from the record that the Convict being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fides* or conducted in bad faith for a collateral purpose. The FGCM was validly convened and constituted, hence, the conviction and sentence was not *coram non judice.* It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn are wholly unreasonable and improbable. No illegality in the conduct of the trial exists. The Law and

the Rules, more particularly, those protecting the rights of the accused were adhered to.

118. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

119. In this view of the matter, we find ourselves unable to interfere with the impugned judgment dated 14.10.2015 of the learned Peshawar High Court dismissing the Constitutional Petition i.e. Writ Petition No.2915 of 2015, challenging the conviction and sentence of the Convict.

120. Civil Petition for Leave to Appeal No.3332 of 2015, arises from the conviction and sentence awarded to a Civilian Qari Zahir Gul alias Qari (Convict) son of Rehmat Gul by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Qari Zahir Gul was accused of the offences of being a Member of a known religiously motivated terrorist organization, who attacked the Armed Forces of Pakistan, causing the injuries to Army personnel. He was also accused separately of abducting persons for ransom and causing the death of civilians. He was also charged with receiving funds from local sources for illegal activities.

121. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3), therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act.

In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused, hence, the FGCM, was vested with the requisite jurisdiction, in this behalf, that too irrespective to the point of time when the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM when afforded an opportunity to do so, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

122. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

123. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the record is also misconceived as such access was given in terms of the specific order passed by this Court. It has also been noticed that no application was ever filed to the Competent Authority for the supply of copies of the proceedings of the FGCM in terms of Rule 130 of the

Pakistan Army Act Rules, 1954, at any point of time, not even when the matter was pending before the learned High Court or before this Court.

124. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or that the proceedings were taken in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case of *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

125. The learned counsel for the Petitioner had argued that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which, as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*), was validly and effectively incorporated in the First Schedule of the

Constitution, hence, in view of Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in accordance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict too are of little significance and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

126. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Army Act, was not applicable, as a consequence whereof, the period between the date of the occurrence and the date

of the trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in according to the law. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

127. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954, and even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the learned High Court, as has been stated above.

128. It is settled law that in the exercise of its jurisdiction in the instant cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record of evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges framed against him, which was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again

admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable and unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusions drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

129. In short, it appears from the record that the Convict being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias by any Member of the FGCM against the Convict has been established nor that the proceedings conducted were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

130. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act

and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

131. In this view of the matter, we are not persuaded to interfere with the impugned judgment dated 14.10.2015 of the learned Peshawar High Court dismissing the Constitutional Petition i.e. Writ Petition No.2979 of 2015, challenging the conviction and sentence of the Convict.

132. Civil Petition for Leave to Appeal No.3674 of 2015, arises from the conviction and sentence awarded to a Civilian Ateeq-ur-Rehman (Convict) alias Usman son of Ali Rehman by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan

Army (Amendment) Act, 2015. Ateeq-ur-Rehman was accused of the offences of being Member of a known religiously motivated terrorist organization, who, alongwith others, attacked the Army personnel/ employees of a Security Organization through suicide bombers and Vehicle Borne Explosive Device (VBIED) and thereby caused death of Army personnel and civilian, and in the like manner attacking an Education Institution. He was also accused of providing funds to a terrorist organization.

133. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3), therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the

offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

134. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of the specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever filed with the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

135. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object the Members of the FGCM but he did not raise

any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

136. The learned counsel for the Petitioner contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, the provisions of the Pakistan Army Act, 1952, as amended by Pakistan Army (Amendment) Act, 2015, in view of Article 8(3) of the Constitution, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a

course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

137. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the occurrence and the trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An interpreter was also appointed. The Convict chose not to engage a Civil

Defence Counsel thus a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer as well as the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. Such plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was also given to produce evidence in defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

138. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954, and even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

139. It is settled law that while exercising the power of Judicial Review in such like cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record in the instant case. The Convict pleaded guilty to the charges framed against him. This was altered to not guilty in accordance with law. The evidence, *inter alia,* includes a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same while appearing as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable or unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by the law. Hence, no case of malice in law has been made out.

140. The examination of the record reveals that the FGCM was constituted and convened in accordance with

the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

141. In short, it appears from the record that the Convict, being a subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* has been made out.

142. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the

instant case was accused is exactly the “mischief” sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

143. In this view of the matter, we are not persuaded to interfere with the impugned Order dated 09.12.2015 of the learned Peshawar High Court dismissing the Constitutional Petition i.e. Writ Petition No.3219-P of 2015, challenging the conviction and sentence of the Convict.

144. In Civil Petition for Leave to Appeal No.3777 of 2015, a Civilian Taj Muhammad alias Rizwan son of Alaf Khan, was convicted and sentenced by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, for the offences on several counts of being a Member of a known religiously motivated terrorist organization and attacking, alongwith others, the Armed Forces of

Pakistan and Law Enforcement Agencies and thereby causing death of several soldiers and officials. He was also charged of abetting an attack on an Educational Institution and separately of causing death of civilians.

145. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3) of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

146. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

147. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever filed to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

148. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings have been conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case

for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

149. The learned counsel for the Petitioner contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi (*supra*), was validly and effectively incorporated in the First Schedule of the Constitution, hence, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, in view of Article 8(3) of the Constitution, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance

with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

150. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of occurrence and the trial is of no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel thus a Defending Officer was

appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. The plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

151. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954, and furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

152. It is settled law that in exercise of the jurisdiction invoked neither the learned High Court nor

this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record in the instant case. The Convict pleaded guilty to the charges framed against him. The plea was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable and wholly unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

153. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for an offence triable by the FGCM, which was convened and constituted in accordance with the law.

No personal bias of any Member of the FGCM against the Convict has been established nor the proceedings were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn are blatantly unreasonable or improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

154. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the “mischief” sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with

mala fides of facts or law or even otherwise was without jurisdiction or *coram non judice.*

155. In this view of the matter, we are not persuaded to interfere with the impugned Order of the learned Peshawar High Court dated 09.12.2015, dismissing the Constitution Petition challenging the conviction and sentence of the Convict.

156. Civil Petition for Leave to Appeal No.06 of 2016, arises from the conviction and sentence awarded to a Civilian Qari Zubair Muhammad alias Ameer Sahib (Convict) son of Sakhi Muhammad by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Qari Zubair Muhammad was accused of the offences of being a Member of a known religiously motivated terrorist organization, who, alongwith others, attacked civilians and officials of the Law Enforcement Agencies, causing death and injuries. Qari Zubair Muhammad was also accused of using, alongwith others, Improvised Explosive Devices (IEDs), which resulted in the destruction of various shops. He was also accused of abetment in the use of explosives at a place of worship, causing the death and injuries to the Army personnel as

well as the civilians. He was also charged with the possession of arms, ammunitions and explosives.

157. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

158. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the

record is also misconceived as such access in this case was also given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever filed to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

159. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings have been conducted in bad faith for a collateral purpose. The record reveals that the Convict was afforded an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

160. The learned counsel for the Petitioner contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of

the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*), was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of the Article 8(3) of the Constitution the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another. *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM,

as has been held by this Court in the case of Mrs. Shahida Zahir Abbas and 4 others (*supra)*.

161. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of occurrence and the trial is of no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel thus a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. The plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to

cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

162. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954, and furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

163. It is now settled law that in exercise of the jurisdiction invoked neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record in the instant case. The Convict pleaded guilty to the charges framed against him. The plea was altered to not guilty in accordance with the law. The evidence, *inter alia,*

included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise wholly unreasonable and improbable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by the law. Hence, no case of malice in law has been made out.

164. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder. No violation of the law, in this behalf, was pointed out at the bar. Hence, the conviction and sentence do not appear to be *coram non judice.*

165. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law.

No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings conducted were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* has been made out.

166. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the “mischief” sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with

mala fides of facts or law or even otherwise was without jurisdiction or *coram non judice.*

167. In this view of the matter, we are not persuaded to interfere with the impugned Order dated 09.12.2015 of the learned Peshawar High Court dismissing the Constitutional Petition i.e. Writ Petition No.4019-P of 2015, challenging the conviction and sentence of the Convict.

168. The subject matter of Civil Petition for Leave to Appeal No.32 of 2016, is the conviction and sentence awarded to a Civilian namely Jameel ur Rehman (Convict) son of Sher Rehman by a FGCM, convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Jameel ur Rehman was accused of the offences of being a Member of a known religiously motivated terrorist organization and attacking the Armed Forces of Pakistan, causing death and injuries to Army personnel. He was also accused of kidnapping the officials of the Law Enforcement Agencies and further causing death and injuries to civilians and abetting in use of explosive.

169. The offences for which the Convict was charged were punishable under the ordinary law of the

land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3) of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

170. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the record is also misconceived as such access was granted to the learned counsel for the Petitioner in terms of the specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the

Pakistan Army Act Rules, was ever filed to the Competent Authority for the supply of copies of the proceedings of the FGCM 1954 at any point of time, not even when the matter was pending before the learned High Court or before this Court.

171. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

172. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were taken in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

173. The learned counsel for the Petitioner had further argued that the Convict was not defended by a Civil Defence Counsel of his own choice before the

FGCM. In this behalf, reference was made to Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*), was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of the Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(Supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict too are of little significance and do not vitiate the trial by the FGCM, as

has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

174. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to

cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

175. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954 and, furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

176. It is now settled law that in exercise of its jurisdiction in the instant case neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record of evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges framed against him, which was altered to not guilty in

accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise unreasonable and improbable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

177. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which convened and constituted in accordance with the law. No personal bias by any Member of the FGCM against the Convict has been established nor that the proceedings conducted were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence. No

illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to.

178. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

179. In this view of the matter, we are not persuaded to interfere with the impugned Order of the learned Peshawar High Court dated 09.12.2015, dismissing the Constitutional Petition i.e. Writ Petition (HCP) No.3878-P of 2015, challenging the conviction and sentence of the Convict.

180. In Civil Petition for Leave to Appeal No.211 of 2016, a Civilian Aslam Khan (Convict) son of Rozi Khan was convicted and sentenced by a FGCM convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, for the offences of being a Member of a known religiously motivated terrorist organization and attacking, alongwith others, the officials of the Law Enforcement Agencies and causing the death and injuries to them. He was separately accused of attacking and causing the death and injuries to civilians. The Convict was charged with six separate offences. He pleaded guilty to all of such charges. However, such pleas were altered to not guilty by operation of the law. After recording of evidence, the Convict was found not guilty in respect of two of such charges, both pertaining to causing the death and injuries to civilians. However, he was found guilty of the remaining four charges.

181. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3), therefore, the offences were liable to be tried by the FGCM in view of

Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged, fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

182. The contention of the learned counsel for the Petitioner regarding the alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

183. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were taken in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

184. The learned counsel for the Petitioner had argued that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, in view of the Article 8(3) of the

Constitution, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

185. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of the occurrence and the date of the trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An

interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer as well as the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. Such plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was granted to produce evidence in defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

The contentions of the learned counsel with regard to the arrest and detention of the Convict too are of little significance and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

186. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity

if any, stood cured in view of Rule 132 of the Pakistan Army Act Rules, 1954 and, even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

187. It is settled law that in exercise of the jurisdiction in the instant case neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record of the evidence and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges framed against him, which was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence nor even otherwise, improbable and unreasonable. The learned

counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

188. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

189. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

190. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

191. In this view of the matter, we are not persuaded to interfere with the impugned Order dated 23.12.2015 of the learned Peshawar High Court, dismissing the Constitutional Petition i.e. Writ Petition No.4433-P of 2015, challenging the conviction and sentence of the Convict.

192. Civil Petition for Leave to Appeal No.278 of 2016, arises from the conviction and sentence awarded to a Civilian Muhammad Ghauri (Convict) son of Javed

Iqbal by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Muhammad Ghauri was accused of the offences of being a Member of a known religiously motivated terrorist organization, who, alongwith others, abetted in the use of explosives at a place of worship, causing the death and injuries to civilians. He was also accused of possession of arms, ammunitions and explosives.

193. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of Section 8(3) of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time the offence was committed. It was also noticed

that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

194. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

195. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in the instant case too in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

196. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the

Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

197. The learned counsel for the Petitioner next contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*), was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, included

those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

198. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the occurrence and the trial has no material effect.

199. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and

preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel thus a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. Such plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

200. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan

Army Rules Act, 1954 and, even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

201. It is well settled law that while exercising the jurisdiction of Judicial Review in such like cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record in the instant case. The Convict pleaded guilty to the charges framed against him, which was altered to not guilty in accordance with law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same while appearing as witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM, yet, again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise, improbable or unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn,

conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

202. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn are blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

203. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the “mischief”

sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

204. In this view of the matter, we are not persuaded to interfere with the impugned Order of the learned Lahore High Court, Rawalpindi Bench, dated 27.01.2016, dismissing the Constitutional Petition i.e. Writ Petition No.197 of 2016, challenging the conviction and sentence of the Convict.

205. Civil Petition for Leave to Appeal No.417 of 2016, arises from the conviction and sentence awarded to a Civilian Tahir (Convict) son of Mir Shah Jahan by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. The said Tahir was accused of the offences of being a Member of a known religiously motivated terrorist organization, who, alongwith others, attacked the Frontier Constabulary, causing the death and injuries to

the personnel of the said Law Enforcement Agency. Tahir was also accused of attacking, alongwith others, the prison at Bannu. He was further charged of attacking, alongwith others, the Frontier Constabulary Fort Jani Khel.

206. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and

sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

207. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

208. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were taken in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

209. The learned counsel for the Petitioner had argued that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, in view of Article 8(3) of the Constitution, are immune from challenge on the ground of being in violation of the Fundamental Rights, included those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict too are of little significance and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

210. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge

was formally framed to which the Convict pleaded guilty. Such plea altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

211. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954, and furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

212. It is settled law that in exercise of the jurisdiction in the instant case neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the

record of evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges framed against him, which was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM, yet, again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or even otherwise improbable and unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

213. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

214. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn are blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

215. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the “mischief” sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose

of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

216. In this view of the matter, we are not persuaded to interfere with the impugned Order of the learned Peshawar High Court dated 19.01.2016, dismissing the Constitutional Petition i.e. Writ Petition No.133-P of 2016, challenging the conviction and sentence of the Convict.

217. In Civil Petition for Leave to Appeal No.1263 of 2016, a Civilian Fazal-e-Ghaffar alias Abdul Afazal Qari (Convict) son of Shehzada was convicted and sentenced by a FGCM convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, for the offences of being a Member of a known religiously motivated terrorist organization and attacking, alongwith others, the Armed Forces of Pakistan, causing the death and injuries to Army personnel. Fazal-e-Ghaffar alias Abdul Afazal Qari was also charged of planting explosive devices at the roadside to kill Army personnel and also of having been

found in possession of a suicide jacket and explosive material.

218. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict, by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of its proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

219. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the

record is also misconceived as such access was given in the instant case too, in terms of the specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time nor even when the matter was pending before the learned High Court or before this Court.

220. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fide* of fact has been made out warranting interference by the learned High Court or by this Court.

221. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to Article 10(2) of the

Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of Article 8(3) of the Constitution the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not claim to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment,

reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

222. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of the trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution

witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

223. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954 and, furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

224. It is settled law that while exercising the power of Judicial Review of this nature neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have examined the record in the instant case, the Convict pleaded guilty to the charges framed against him. This was altered to not

guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict on his own in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

225. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

226. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law.

No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn wholly unreasonable and improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to.

227. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

228. In this view of the matter, we find ourselves unable to interfere with the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, dismissing the Constitutional Petition i.e. Writ Petition No.1048-P of 2016, challenging the conviction and sentence of the Convict.

229. Civil Petition for Leave to Appeal No.1306 of 2016, arises from the conviction and sentence awarded by a FGCM, convened under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, to a Civilian Fateh Khan (Convict) son of Mukaram Khan who was charged with several counts of the commission of the offences of being a Member of a known religiously motivated terrorist organization, and attacked, alongwith others, the Armed Forces of Pakistan and thereby causing death and injuries to several Army personnel. He was also separately accused of attacking and causing the death and injuries to the officials of the Law Enforcement Agencies. He was also accused of causing death of civilians and health officials. The alleged offences were committed in the Khyber Agency.

230. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It has also been noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

231. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has

also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

232. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

233. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of

this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not seek to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra)*.

234. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all duly sworn in. The charge was formally framed to which the Convict pleaded guilty. Such plea was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was granted to produce evidence in defence, which was declined. The

Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

235. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954 and, even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

236. It is settled law that while exercising the powers of Judicial Review of this nature neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have examined the record in the instant case, the Convict pleaded guilty to the charges framed against him. This was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same

and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own in his statement before the FGCM, yet, again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

237. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

238. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the

proceedings were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn wholly unreasonable and improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

239. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

240. In this view of the matter, we find ourselves unable to interfere with the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, dismissing the Constitutional Petition i.e. Writ Petition No.1184-P of 2016, challenging the conviction and sentence of the Convict.

241. Civil Petition for Leave to Appeal No.1335 of 2016, arises out of conviction and sentence of a Civilian Taj Gul alias Javid (Convict) son of Sultan Zareen by a FGCM, convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. Taj Gul alias Javid was accused of the offences of being a Member of a known religiously motivated terrorist organization, who attacked and caused the death of the officials of the Law Enforcement Agencies and further for possession of arms and ammunitions.

242. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section

2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

243. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of the specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

244. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the

Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

245. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of the Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including

those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not claim to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

246. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to

the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

247. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan

Army Rules Act, 1954, and even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

248. It is now settled law that while exercising the powers of Judicial Review in such like cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it, in this behalf. However, we have examined the record in the instant case, the Convict pleaded guilty to the charges framed against him. This was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM, yet, again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or were otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to persuade

us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

249. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

250. In short, it appears from the record that the Convict, being subject to Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

251. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

252. In this view of the matter, we find ourselves unable to interfere with the impugned judgment dated 12.04.2015 of the learned Peshawar High Court, dismissing the Constitutional Petition i.e. Writ Petition No.1190-P of 2016, challenging the conviction and sentence of the Convict.

253. In Civil Petition for Leave to Appeal No.1353 of 2016, a Civilian Aksan Mahboob alias Khubab (Convict) son of Asghar Ali was convicted and sentenced by a

FGCM, convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, for the offences on several counts of being a Member of a known religiously motivated terrorist organization and attacking, alongwith others, the officials of the Law Enforcement Agencies, which resulted in death and injuries to the officials of the Law Enforcement Agencies and having possession of firearms, explosives and receiving funds for committing the aforesaid offences.

254. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of the law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which, he was accused that too irrespective

of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

255. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of the specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

256. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not

raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

257. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not claim to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a

course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

258. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and precluded prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to

engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the Convict pleaded guilty, which was altered to not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

259. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954 and, furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

260. It is now settled law that while exercising the powers of Judicial Review in such like cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it, in this behalf. However, we have examined the record in the instant case, the Convict pleaded guilty to the charges framed against him. This was altered to not guilty in accordance with the law. The evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM yet again admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not as countenanced by law. Hence, no case of malice in law has been made out.

261. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

262. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor that the proceedings were *mala fide* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

263. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the

offence, the commission whereof the Convict in the instant case was accused is exactly the “mischief” sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

264. In this view of the matter, we find ourselves unable to interfere with the impugned Order dated 19.01.2016 of the learned Lahore High Court, Rawalpindi Bench, dismissing the Constitutional Petition i.e. Writ Petition No.117 of 2016, challenging the conviction and sentence of the Convict.

265. Civil Petition for Leave to Appeal No.1503 of 2016, is arising from the conviction and sentence awarded to Nasir Khan (Convict) son of Khan Afsar Khan by a FGCM, convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015. The said Nasir Khan was accused for the offences of being a Member of a known

religiously motivated terrorist organization, who, alongwith others, attacked the Armed Forces of Pakistan, causing the death and injuries to Army personnel and for possession of arms and explosives.

266. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which, he was accused that too irrespective of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

267. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM at any point of time, not even when the matter was pending before the learned High Court or before this Court.

268. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

269. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In

this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of the Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict was specifically asked whether he wished to be defended by a Civil Defence Counsel but he declined, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict too are of little

significance and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

270. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel despite being given an opportunity to do so, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the

Convict pleaded not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined. The Convict was allowed to make a statement, which was so recorded and the Convict again admitted his guilt. The sentence has been confirmed in accordance with the law.

271. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954 and, even otherwise, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

272. It is now settled law that while exercising the powers of Judicial Review in such like cases neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it, in this behalf. However, we have examined the record in the instant case. The

evidence, *inter alia,* included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the FGCM, admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or are otherwise improbable or blatantly unreasonable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not countenanced by law. Hence, no case of malice in law has been made out.

273. The examination of the record also reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

274. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against

the Convict has been established nor that the proceedings were *mala fides* or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

275. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

276. In this view of the matter, we find ourselves unable to interfere with the impugned judgment dated 12.04.2016 of the learned Peshawar High Court, dismissing the Constitutional Petition i.e. Writ Petition No.1271-P of 2016, challenging the conviction and sentence of the Convict.

277. Civil Petition for Leave to Appeal No.1541 of 2016, pertains to a Civilian Muhammad Arbi alias Sher Khan (Convict) son of Hafiz Muhammad Sadiq, who was convicted and sentenced by a FGCM convened and constituted under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, for the offences of being a Member of a known religiously motivated terrorist organization and attacked, alongwith others, the Law Enforcement Agencies, causing the death and injuries to its personnel. He was also accused of preparing explosives devices and suicide jackets for terrorist activities against the Law Enforcement Agencies as well as for the abetment of the attack on Bannu Jail and providing assistance in the escape of high profile terrorists and other prisoners from the said Jail and causing injuries to the officials of the Law Enforcement Agencies.

278. The offences for which the Convict was charged were punishable under the ordinary law of the land triable by a Criminal Court, hence, constituted a "civil offence" in terms of sub-section (3) of Section 8 of the Pakistan Army Act, therefore, the offences were liable to be tried by the FGCM in view of Section 59 of the Pakistan Army Act, 1952. The offences for which the accused was charged fell within the purview of Section 2(1)(d)(iii) of the Pakistan Army Act, 1952, hence, in view of Section 2(1), the Convict by operation of law was subject to the Pakistan Army Act. In the circumstances, the FGCM had the jurisdiction to try the Convict for the offences of which he was accused that too irrespective of the point of time when the offence was committed. It was also noticed that the Convict did not object to his trial by the FGCM, as is evident from the record of the proceedings. In the circumstances, the conviction and sentence awarded by the FGCM do not suffer from want of inherent jurisdiction.

279. The contention of the learned counsel for the Petitioner regarding alleged lack of full access to the record is also misconceived as such access was given in terms of a specific Order passed by this Court. It has

also been noticed that no application in terms of Rule 130 of the Pakistan Army Act Rules, 1954, was ever made to the Competent Authority for the supply of copies of the proceedings of the FGCM, at any point of time, not even when the matter was pending before the learned High Court or before this Court.

280. The Petitioner has neither pleaded nor proved on record with the requisite particularity that the Members of the FGCM or any of them had a personal bias against the Convict or the proceedings were conducted in bad faith for a collateral purpose. The record reveals that the Convict was given an opportunity to object to the Members of the FGCM but he did not raise any such objection. In the circumstances, no case for *mala fides* of fact has been made out warranting interference by the learned High Court or by this Court.

281. The learned counsel for the Petitioner had contended that the Convict was not defended by a Civil Defence Counsel of his own choice before the FGCM. In this behalf, reference was made to the Article 10(2) of the Constitution. The Convict was tried under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, which as per the

judgment of this Court, reported as District Bar Association, Rawalpindi and others (*supra*) was validly and effectively incorporated in the First Schedule of the Constitution, hence, in view of the Article 8(3) of the Constitution, the provisions of the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are immune from challenge on the ground of being in violation of the Fundamental Rights, including those guaranteed by Articles 10 and 10-A. Furthermore, the record reveals that the Convict did not claim to be defended by a Civil Defence Counsel, therefore, a Defending Officer was appointed in accordance with Rule 81 of the Pakistan Army Act Rules, 1954. Such a course of action is in consonance with the law, as has been held by this Court in the case of Muhammad Mushtaq and another *(supra).*

The contentions of the learned counsel with regard to the arrest and detention of the Convict are of little consequence and do not vitiate the trial by the FGCM, as has been held by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (*supra*).

282. Since the Convict was accused of civil offence and tried under Section 59 of the Pakistan Army Act, 1952, as amended, therefore, Section 91 of the Pakistan Army Act, was not applicable, as a consequence whereof, the period of time between the date of occurrence and the date of trial has no material effect. The examination of the record of the FGCM reveals that all the procedural requirements, more particularly, the Rules that ensure a fair trial and preclude prejudice to the accused were complied with. Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. The nature of the charge was explained to him. An Interpreter was also appointed. The Convict chose not to engage a Civil Defence Counsel, hence, a Defending Officer was appointed. He was granted an opportunity to object to the Members of the FGCM, the Defending Officer and the Interpreter, who were all sworn in as required by the law. The charge was formally framed to which the Convict pleaded not guilty. The prosecution witnesses were examined on Oath and subjected to cross-examination and an opportunity was given to produce evidence in his defence, which was declined.

The Convict was allowed to make a statement, which was so recorded and the Convict admitted his guilt. The sentence has been confirmed in accordance with the law.

283. Though the learned counsel for the Petitioner has not been able to point out any deviation from the Pakistan Army Act or the Rules framed thereunder in the conduct of the trial, yet, even otherwise, irregularity if any, stood cured in view of Rule 132 of the Pakistan Army Rules Act, 1954, and furthermore, the matter of procedural irregularities is beyond the scope of the Constitutional jurisdiction of the High Court, as has been stated above.

284. It is settled law that neither the learned High Court nor this Court can sit in appeal over the conclusion drawn by the FGCM or analyze the evidence produced before it. However, we have scanned the record in the instant case. The evidence besides an eye witness account included a judicial confession, which was proved by the learned Judicial Magistrate, who recorded the same and appeared as a witness before the FGCM. The Convict never retracted from his confession. The Convict, on his own, in his statement before the

FGCM, admitted his guilt. In the circumstances, it cannot be said that the conclusions drawn by the FGCM are based on no evidence or insufficient evidence or otherwise improbable. The learned counsel for the Petitioner has not been able to persuade us that the conclusion drawn, conviction recorded and sentence passed are not countenanced by law. Hence, no case of malice in law has been made out.

285. The examination of the record reveals that the FGCM was constituted and convened in accordance with the provisions of the Pakistan Army Act and the Rules framed thereunder, hence, the conviction and sentence do not appear to be *coram non judice.*

286. In short, it appears from the record that the Convict, being subject to the Pakistan Army Act was tried for the offences triable by the FGCM, which was convened and constituted in accordance with the law. No personal bias of any Member of the FGCM against the Convict has been established nor was the proceedings conducted *mala fid*es or conducted in bad faith for a collateral purpose. It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn appear to be blatantly unreasonable

or wholly improbable. No illegality in the conduct of the trial exists. The Law and the Rules, more particularly, those protecting the rights of the accused were adhered to. No case of malice in law or *coram non judice* was made out.

287. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or even otherwise was without jurisdiction or *coram non judice.*

288. In this view of the matter, we are not persuaded to interfere with the impugned Order dated 12.05.2016 of the learned Lahore High Court, Bahawalpur Bench, dismissing the Constitutional

Petition i.e. Writ Petition No.3315-P of 2016, challenging the conviction and sentence of the Convict.

289. In view of the above, all the titled Civil Petitions for Leave to Appeal are dismissed and leave declined.

Chief Justice

Judge

Judge

Judge

Judge

'NOT APPROVED FOR REPORTING'

Announced on _____ at _____

Judge