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International Court
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THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2000

Public sitting

held on Monday 13 November 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

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

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le lundi 13 novembre 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

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

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

as Agents;

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

as Co-Agent and Counsel;

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

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

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

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

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

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

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

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

as Agent;

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

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

M. Gerhard Westdickenberg, directeur général des affaires juridiques et conseiller juridique du ministère fédéral des affaires étrangères,

S. Exc. M. Eberhard U. B. von Puttkamer, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas,

comme agents;

M. Bruno Simma, professeur de droit international public à l'Université de Munich,

comme coagent et conseil;

M. Pierre-Marie Dupuy, professeur de droit international public à l'Université de Paris (Panthéon-Assas) et à l'Institut universitaire européen, Florence,

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

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

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

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

comme conseils;

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

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

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

comme conseillers;

Mme Fiona Sneddon,

comme assistante.

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

M. James H. Thessin, conseiller juridique par intérim du département d'Etat des Etats-Unis d'Amérique,

comme agent;

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

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

as Deputy Agents;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

as Counsel.

M. D. Stephen Mathias, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis d'Amérique,

comme agents adjoints;

L'honorable Janet Napolitano, *Attorney-General* de l'Etat de l'Arizona,

M. Michael J. Matheson, professeur de droit international à la *School of Advanced International Studies* de la *Johns Hopkins University*, ancien conseiller juridique par intérim du département d'Etat des Etats-Unis d'Amérique,

M. Theodor Meron, conseiller chargé des questions de droit international au département d'Etat des Etats-Unis d'Amérique, titulaire de la chaire Charles L. Denison de droit international à la *New York University*, membre associé de l'Institut de droit international,

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

comme conseils et avocats;

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

Mme Norma B. Martens, *Attorney-General* adjoint de l'Etat de l'Arizona,

M. Paul J. McMurdie, *Attorney-General* adjoint de l'Etat de l'Arizona,

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

M. Allen S. Weiner, conseiller aux affaires juridiques à l'ambassade des Etats-Unis aux Pays-Bas,

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

comme conseils.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte.

La Cour se réunit aujourd'hui en application des articles 43 à 47 de son Statut pour entendre les Parties en leurs plaidoiries dans l'affaire *LaGrand (République fédérale d'Allemagne c. Etats-Unis d'Amérique)*.

La République fédérale d'Allemagne a porté la présente affaire devant la Cour par une requête introductive d'instance contre le Gouvernement des Etats-Unis d'Amérique déposée au Greffe le 2 mars 1999, en raison de violations alléguées de la convention de Vienne sur les relations consulaires du 24 avril 1963. Dans cette requête, l'Allemagne fait valoir que deux de ses ressortissants, M. Karl LaGrand et M. Walter LaGrand, ont été déclarés coupables de certains crimes et condamnés à mort dans l'Etat de l'Arizona aux Etats-Unis d'Amérique sans avoir été informés des droits à l'assistance consulaire que leur garantissait l'alinéa *b)* du paragraphe premier de l'article 36 de la convention de Vienne sur les relations consulaires. La République fédérale d'Allemagne soutenait que les Etats-Unis d'Amérique avaient par là même violé plusieurs obligations découlant du droit international.

Pour fonder la compétence de la Cour, l'Allemagne invoquait, dans sa requête, l'article premier du protocole de signature facultative concernant le règlement obligatoire des différends, qui accompagne la convention de Vienne sur les relations consulaires. Cet article est ainsi libellé : «Les différends relatifs à l'interprétation ou à l'application de la convention relèvent de la compétence obligatoire de la Cour internationale de Justice, qui, à ce titre, pourra être saisie par une requête de toute partie au différend qui sera elle-même partie au présent protocole.» Et l'Allemagne de préciser que tant les Etats-Unis qu'elle-même étaient parties à la convention de Vienne et audit protocole de signature facultative.

Le jour même du dépôt de sa requête introductive d'instance, l'Allemagne a également déposé une demande en indication de mesures conservatoires au titre de l'article 41 du Statut de la Cour. Dans sa demande, elle indiquait que Karl LaGrand avait été exécuté le 24 février 1999 et que la date de l'exécution de Walter LaGrand avait été fixée au lendemain de la demande, à savoir le 3 mars 1999. Compte tenu de l'extrême urgence et du fait que l'exécution de Walter LaGrand aurait porté un préjudice irréparable aux droits revendiqués par l'Allemagne au cas particulier, la

Cour a rendu le 3 mars 1999 une ordonnance indiquant des mesures conservatoires conformément à l'article 41 de son Statut et au paragraphe premier de l'article 75 de son Règlement. Aux termes de cette ordonnance, les Etats-Unis d'Amérique devaient prendre toutes les mesures dont ils disposaient pour que M. Walter LaGrand ne soit pas exécuté tant que la décision définitive en la présente instance n'aurait pas été rendue, et devaient porter à la connaissance de la Cour toutes les mesures qui auraient été prises en application de ladite ordonnance.

Par lettre du 8 mars 1999, l'ambassade des Etats-Unis d'Amérique a informé la Cour des mesures prises relativement à cette ordonnance. La lettre précisait, entre autre, qu'une copie de l'ordonnance de la Cour avait été transmise par le département d'Etat au gouverneur de l'Arizona le jour même où celle-ci l'avait rendue; que, compte tenu de l'heure extrêmement tardive à laquelle l'ordonnance de la Cour avait été reçue, aucune autre démarche n'avait pu être entreprise; et que, dans la soirée du 3 mars 1999, M. Walter LaGrand avait été exécuté.

Par ordonnance du 5 mars 1999, des délais pour le dépôt d'un mémoire de la République fédérale d'Allemagne et d'un contre-mémoire des Etats-Unis d'Amérique ont été fixés; ces documents ont été dûment déposés dans les délais prescrits. A la suite du dépôt de ces pièces, le président de la Cour a rencontré les agents des Parties en application de l'article 31 du Règlement de la Cour, afin de s'informer de leurs vues concernant les questions de procédure en l'espèce; l'Allemagne a indiqué, au cours de cette réunion, qu'elle ne souhaitait pas produire de pièce de procédure additionnelle et les Etats-Unis ont ajouté qu'il en était dès lors de même en ce qui les concerne. L'affaire s'est donc trouvée en état et les dates de la procédure orale ont été fixées, la Cour ayant consulté les Parties sur l'organisation de cette procédure.

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Par lettre reçue au Greffe le 26 octobre 2000, l'agent de l'Allemagne a exprimé le vœu de son gouvernement de produire cinq documents nouveaux conformément aux dispositions de l'article 56 du Règlement de la Cour. Copie de cette lettre et des documents qui y étaient joints a été communiquée à l'autre Partie, pour lui permettre de formuler toutes observations qu'elle eût souhaité faire en vertu du paragraphe premier de l'article 56 du Règlement de la Cour. Par lettre

du 6 novembre 2000, l'agent des Etats-Unis d'Amérique a fait savoir à la Cour que les Etats-Unis acceptaient la production des premier et deuxième documents, mais non celle des troisième, quatrième et cinquième documents; dans cette lettre les Etats-Unis d'Amérique ont réservé leur droit à soumettre un ou plusieurs documents en rapport avec les documents nouveaux produits par l'Allemagne, conformément au paragraphe 3 de l'article 56 du Règlement de la Cour. Dans une lettre datée du 7 novembre 2000, l'agent de l'Allemagne a formulé des observations sur cette lettre de l'agent des Etats-Unis d'Amérique, auxquelles celui-ci a réagi dans une nouvelle lettre également datée du 7 novembre 2000.

En l'absence d'objection de la part des Etats-Unis d'Amérique, la Cour n'avait pas, conformément au paragraphe 1 de l'article 56 du Règlement, à autoriser formellement la production des premier et deuxième documents. En ce qui concerne les troisième, quatrième et cinquième documents, la Cour a décidé, en application du paragraphe 2 de l'article 56 de son Règlement, d'autoriser leur production par l'Allemagne, étant entendu que les Etats-Unis d'Amérique auraient, conformément au paragraphe 3 de l'article 56 du Règlement, la possibilité de présenter ultérieurement des observations à ce sujet et de soumettre des documents à l'appui de ces observations. Cette décision a été dûment communiquée aux Parties par lettres du Greffier en date du 9 novembre 2000. En outre, je souhaiterais à présent préciser que, l'Allemagne n'ayant fait connaître que très tard son souhait de produire des documents nouveaux, les Etats-Unis d'Amérique pourront, s'ils le désirent, soumettre leurs nouveaux documents ainsi que leurs observations à cet égard non seulement lors de la procédure orale mais encore après la clôture de celle-ci, par écrit.

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Après s'être renseignée auprès des Parties, la Cour a enfin décidé, conformément aux dispositions du paragraphe 2 de l'article 53 de son Règlement, que des exemplaires des pièces de procédure et des documents annexés seront rendus accessibles au public à compter de ce jour. En outre, conformément à la pratique de la Cour, les pièces de procédure sans leurs annexes figureront

dès aujourd'hui sur le site Internet de la Cour et seront ultérieurement publiées dans la *Série Mémoires, plaidoiries et documents* de la Cour.

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Je constate la présence dans la salle des agents et des conseils des Parties. Conformément à l'usage, la République fédérale d'Allemagne, en sa qualité de demandeur, sera entendue la première. Je vais donc maintenant donner la parole à M. Westdickenberg, agent de l'Allemagne.

Monsieur l'agent vous avez la parole.

Mr. WESTDICKENBERG:

I. INTRODUCTORY STATEMENT

1. Mr. President, distinguished Members of the Court, as Legal Adviser of the German Federal Foreign Office it is an honour for me to appear before you once again. Please permit me to introduce my colleagues who will argue this case together with me:

— Prof. Bruno Simma of the University of Munich as Co-Agent, and — as counsel —

— Prof. Pierre-Marie Dupuy of the University of Paris-Assas,

— Donald Donovan, from the law firm Debevoise and Plimpton,

— Hans-Peter Kaul, Head of the Division for Public International Law at the German Foreign Office,

— Dr. Daniel Khan and Dr. Andreas Paulus, assistants to Prof. Simma at the University of Munich.

2. The case before us today is special in many ways:

— First, it has arisen between two States which are close allies and partners; their peoples are bound in friendship; their peoples and governments share mutual values.

— Second, it deals with legal proceedings that led to the death of two men, the German nationals Karl and Walter LaGrand, the first executed by way of lethal injection, the second in the gas chamber in the State of Arizona. However, it is not the fact of their death — as sad and

regrettable as this is and as much as it is today on the mind of my colleagues and myself — that is at the centre of this law suit. Nor is our Application directed against the practice of capital punishment as such, even though its consequences clearly have a significant impact on the legal matters we are dealing with today.

— Third, this case is the first case in which this Court has issued an Order on its own motion, pursuant to Article 75, paragraph 1, of its Rules. Acting literally within hours after it had been seised by Germany on 2 March 1999, the Court decided on provisional measures, without having held a hearing, for one essential reason: the life of a man was in imminent danger.

3. All this demonstrates that this case concerns high principles: why else should Germany feel forced to sue its close ally, the United States? Why else should the Court feel the necessity to act in such an unprecedented manner? We are here today to obtain the decision of the World Court on legal issues of great significance. No longer of great significance, unfortunately, for the LaGrand brothers, but of great significance for consular relations and thus for individuals but also States worldwide — not just Germany. We are dealing with questions of international law: nothing more, but also nothing less! I am emphasizing this because some observers might be tempted to neglect precisely this point. This is not a criminal trial. Germany is not accusing anyone, least of all the US Administration. As Applicants we are seeking a judgment of the International Court of Justice on matters concerning the Vienna Convention on Consular Relations and the United States is the Respondent. Stressing the international legal aspects — as Germany does — should not be mistaken for a lack of empathy either with the victims of the crimes committed by Karl and Walter LaGrand or with the destiny of the two brothers. This emphasis is rather based on respect for the high principles and tasks guiding this Court, which is not an appellate criminal court, but, as follows from the Optional Protocol to the Vienna Convention, the guardian of the latter's observation and practice.

4. Let me make it perfectly clear: Germany does not want to do harm in any way to its relations with the United States; these relations are excellent and shall stay that way. The very fact that the United States and Germany can litigate before the International Court of Justice without prejudice to their relations is evidence of how good and close those relations are and of the existence of a highly developed legal culture in both countries. Both are committed to the rule of

law, domestically and internationally. Let me add that the Court has decided in a good dozen cases between allied nations.

5. On the international plane, the Vienna Convention is an important pillar for the protection of each country's nationals and their rights abroad. We would like to emphasize here, as we already did in our Memorial[1], that it is not just Germany but also the United States, with more than 4 million of its nationals abroad all around the world, which has a vital interest in this Court being given the opportunity to pronounce itself on the interpretation of one of the key norms of the Vienna Convention. This will increase certainty in the law and is in the interest of both States, because a judgment of the Court will enhance the application of the Vienna Convention and contribute to the protection of our citizens. This view seems to be shared by the United States. To quote the US State Department: "We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard . . . It is entirely appropriate to raise [such cases] with us."[2]

6. As I have already said and as we have emphasized in our Memorial[3], the present case is not about the death penalty in general or its application in any particular country. However, Germany's stance on capital punishment is clear: together with its EU partners, Germany has for many years been working towards its abolition worldwide. The Federal Government and the German Bundestag both view the death penalty as an infringement of the fundamental human right to life. We are of the opinion that this form of punishment cannot be justified, neither ethically nor legally. Nor do we believe that it has proven to be a viable method of crime control.

7. Nonetheless, it is up to the States in their sovereign capacity to decide whether to permit or abolish the death penalty within their jurisdiction. Under international law there is no obligation to abolish the death penalty. What we do see, however, is a global trend towards its abolition. More than half of all States in the world have abolished capital punishment either *de facto* or *de jure*. Germany played a major role in initiating the Second Optional Protocol to the International

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[1]Memorial, para. 1.07.

[2]New York Times, 30 October 2000, page A 20.

[3]Memorial, para. 1.08.

Covenant on Civil and Political Rights on the abolition of the death penalty, which has now entered into force in 42 States. As I said, the death penalty as such may not be contrary to international law. But the limits codified in Article 6 of the Covenant must be respected.

8. In the 41 member States of the Council of Europe the death penalty has *de facto* been abolished, and, following Protocol No. 6 to the European Convention on Human Rights, almost all of them have now also abolished it *de jure*. Countries wishing to accede to the Council of Europe, in which the United States has observer status, are obliged to ratify Protocol No. 6.

9. Mr. President, distinguished Members of the Court, at this point I would like to emphasize again that we do not question the crimes committed by the LaGrand brothers. We deeply deplore the great suffering they inflicted on the victims and those left behind. However, we are also aware of the importance of consular protection for the rights of German and American citizens abroad, especially when irreversible decisions such as the imposition and execution of the death penalty are at stance. This is why we are seeking clarification of the obligations of States parties arising under Article 36 of the Vienna Convention. We are doing so not only for the sake of the citizens of our two countries, but for the benefit of human beings worldwide.

10. It has been no easy decision for us to take the case of the LaGrand brothers to the International Court of Justice. For us, it was a means of last resort after all other avenues had been tried in vain. After the German authorities had been informed of the case in 1992 by the brothers themselves, our efforts to come to their assistance first focused on the ongoing domestic judicial proceedings out of respect for the independence of the judiciary. In the course of these proceedings, Karl and Walter LaGrand addressed the violation of the Vienna Convention, but to no avail. Only after all domestic legal remedies had been exhausted at the end of 1998, after the US Supreme Court had denied *certiorari*, and the dates of execution had been fixed by the Arizona Supreme Court on 12 January 1999, only then did Germany ask for clemency. Diplomatic steps were pursued at all political levels and included letters from the Federal Minister for Foreign Affairs and the Minister of Justice to their US counterparts, various approaches made to the Governor of the State of Arizona, and even letters from the Federal President and the Federal Chancellor to President Clinton. At first, all these diplomatic efforts relied on political and moral appeals to obtain clemency. The granting of such clemency would have distinctly diminished the

consequences of the violations of the Vienna Convention by the United States. It would have prevented the first execution of a German citizen in the United States since the founding of the Federal Republic of Germany, back in 1949.

11. We initially limited ourselves to these diplomatic appeals and did not bring the case to the International Court of Justice for two main reasons: firstly, we trusted that the US courts would remedy the violations of the Vienna Convention raised by the LaGrand brothers, and secondly, we expected clemency to be granted.

12. When the Arizona Board of Executive Clemency, in its hearing on 23 February 1999, rejected the petitions of Karl LaGrand, it became clear, however, that clemency could not be expected. During that hearing the German Government learned for the first time that the authorities of the State of Arizona had been aware of the German nationality of the LaGrand brothers from the very beginning and had thus grossly neglected their duty to inform the brothers about their rights under the Vienna Convention. It was then that Germany decided to bring the case before the International Court of Justice.

13. We acknowledge that the Court acted so speedily and indicated in its Order on Provisional Measures of 3 March 1999 that the execution of Walter LaGrand should be stayed until the Court reached its final decision. Regrettably, Walter LaGrand was executed in spite of this Order.

14. Germany has a further reason to appear before this Court. We hope that its judgment will also confirm what in our view is of the greatest importance to the dealings of this Court, namely that an Order for Provisional Measures issued under these circumstances is binding. Only when this principle is upheld is it possible to prevent that decisions of the Court on substance are rendered meaningless by the intervening action of a party prior to the final decision. We also feel the necessity to continue with the case because, following the execution of the LaGrand brothers, we believe that there is ample proof of continued and widespread failure by the United States authorities to live up to the international obligations under Article 36 of the Vienna Convention. Despite all efforts by the US authorities — efforts which we expressly acknowledge — to improve the observance of the obligation to notification pursuant to Article 36 of the Vienna Convention, right while I speak, German nationals who have been deprived of their consular rights are held in

US jails. We know of at least 24 cases in which German nationals have been arrested without being informed of their rights under Article 36 which occurred in 1998 or thereafter, that is, since the United States began to take steps to improve observance of Article 36. Thus, a case like that of the LaGrands could happen any time again.

15. This state of affairs is of great significance not just for Germans, but for all foreign nationals arrested in the United States, and could have particularly tragic consequences in cases in which, like in ours, the death penalty may be imposed. According to *Amnesty International*, in June 2000 there were no less than 87 foreign nationals condemned to death in US prisons. Since 1993, 14 foreign nationals have been executed in the United States: in no less than 11 of these cases violations of Article 36 of the Vienna Convention were asserted[4]. I would like to mention in this context the names of Francisco Angel Breard, the Paraguayan citizen executed in April 1998, whose case was heard by this Court, and the Canadian citizen Joseph Stanley Faulder executed in June of last year and the Mexican Miguel Angel Flores who was put to death in Texas four days ago.

We hope that these proceedings will lead to important clarifications and will strengthen the role of the Vienna Convention on Consular Relations and thus the protection of people worldwide.

16. Monsieur le président, Madame et Messieurs les juges, permettez-moi de vous indiquer comment et dans quel ordre la délégation allemande abordera les différentes questions débattues à la présente audience.

17. Le professeur Bruno Simma commencera par exposer les éléments fondamentaux de l'affaire avant de commenter certaines divergences dans l'interprétation de ces faits par les Parties.

Viendra ensuite M. Daniel Khan qui traitera des questions de compétence et de recevabilité soulevées dans le contre-mémoire des Etats-Unis.

Il sera suivi de M. Hans-Peter Kaul qui analysera les violations aux termes du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires, commises dans l'affaire *LaGrand.*

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[4]Amnesty International, Key Topics, Execution of Foreign Nationals by the USA as of 23 June 2000, available at http://www.amnestyusa.org/abolition/fnnat.html.

Puis M. Andreas Paulus fera valoir qu'en appliquant leur loi nationale les Etats-Unis ont également violé le paragraphe 2 de l'article 36 de la convention de Vienne.

Le professeur Simma reprendra la parole pour démontrer que le droit à l'information prévu par l'article 36 de la convention de Vienne constitue un droit individuel et que ce droit a caractère de droit de la personne humaine en tant que garantie de procédure spécifique impérative dans les affaires de peine de mort.

L'après-midi, M. Donovan commencera par répondre à l'allégation du défendeur selon laquelle l'Allemagne n'est pas parvenue à démontrer que les violations reconnues de la convention de Vienne dans l'affaire *LaGrand* ont eu des conséquences négatives.

Le professeur Simma reviendra ensuite sur la question de la responsabilité des Etats-Unis concernant les violations de la convention de Vienne, faisant valoir en particulier que cela donne à l'Allemagne non seulement le droit à une déclaration de la Cour relative à ces violations mais aussi le droit d'obtenir des assurances et des garanties de non-répétition.

Pour finir, le professeur Pierre-Marie Dupuy traitera de manière exhaustive de toutes les questions intéressant l'ordonnance de la Cour en date du 3 mars 1999 et sa non-observation par les Etats-Unis.

18. Compte tenu de la complexité de cette affaire et du peu de temps qui nous est imparti aujourd'hui, l'Allemagne invite la Cour à se reporter aux pièces de procédure écrites pour toute question qui pourrait ne pas être traitée à la présente audience.

19. Avec l'autorisation de la Cour, nous éviterons durant cette procédure orale de donner les références des citations auxquelles nous recourrons. Ces références sont indiquées dans les copies communiquées au Greffe.

20. Nous avons également remis à la Cour les dossiers des juges contenant certaines pièces fondamentales parmi lesquelles se trouvent les conclusions soumises à la Cour dont le texte a subi certains aménagements.

21. Monsieur le président, Madame et Messieurs les juges, je vous remercie pour votre attention durant mon introduction et je vous prie de bien vouloir donner la parole au professeur Bruno Simma pour qu'il poursuive l'exposé de l'Allemagne. Merci beaucoup.

Le PRESIDENT : Je vous remercie Monsieur Westdickenberg et je donne maintenant la parole au professeur M. Bruno Simma.

M. SIMMA: Merci, Monsieur le président.

II. THE FACTS OF THE CASE

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you again, this time representing my own country in a case which is of utmost importance to Germany. My first task today is to review the facts of the case. Germany notes with satisfaction that most of these facts are virtually undisputed. I will start my presentation by briefly recalling this common ground.

2. In January 1982 the two German nationals Karl and Walter LaGrand attempted an armed bank robbery in Marana/Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. Upon the arrest of the brothers, the Arizona authorities did not inform them about their rights under Article 36 of the Vienna Convention on Consular Relations. Neither did the authorities notify the arrest and detention of the LaGrands to the German Consulate. The LaGrands themselves were not aware of their rights to consular advice. In Annex 2 to our Memorial you will find the Presentence Reports which prove that Arizona authorities had known of the German citizenship of the two brothers since April 1982 at the latest. Ten years later, in June 1992, German consular officers were made aware of the case by the LaGrand brothers themselves. They had learnt of their rights from two other German prison inmates, and not from the Arizona authorities. At that time Karl and Walter LaGrand had already been tried and sentenced to death. In the criminal proceedings leading to these sentences the lack of consular advice had not been raised by the brothers' attorneys or anybody else. When finally put forward much later in the *habeas corpus* proceedings, their claim of violation of Article 36 was considered to be procedurally defaulted. Claims regarding the inadequate performance of earlier counsel, especially in the case of Karl LaGrand, and other shortcomings of the proceedings at the State level met a similar fate. Thus, due to the lack of timely consular notification and the subsequent application of the doctrine of procedural default, Germany was unable to assist the brothers in their legal efforts effectively. Despite all imaginable efforts made on the judicial as

well as at the consular, diplomatic, and finally, the political plane, Karl and Walter LaGrand were executed in February and March 1999. Walter LaGrand's execution took place after this Court had issued an Order on 3 March indicating, *inter alia*, that "[t]he 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"[5]. What US authorities did immediately after the issuance of this Order was the following: first, the State Department transmitted the Order to the Governor of Arizona without any comment; second, the Solicitor General argued before the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding"[6]; third, the US Supreme Court delivered the judgment which adopted this view[7]; fourth, the Governor of Arizona decided not to use her discretionary power to stay the execution in spite of a recommendation to this effect by the Arizona Board of Executive Clemency; and finally, Arizona officials executed Walter LaGrand in disregard of the Order of the Court. Mr. President, Members of the Court, these are the essential facts of the case.

3. Although — as the Respondent rightly points out — "the facts of this case are less complex and less contested than those in other cases now before the Court"[8], Part II of the United States Counter-Memorial shows that certain differences do exist. Let me begin with some minor points.

4. The Respondent concludes from letters of the German President and the German Minister of Justice to their United States counterparts written in the weeks before the executions[9] that Germany had acknowledged that the brothers had received a fair trial. It is true that President Herzog's letter of 5 February 1999 did not express doubts as to "the legitimacy of the conviction nor the fairness of the procedure"[10]. But, Mr. President, Members of the Court, President Herzog's letter was clearly a plea for clemency and not a legal brief. It served a purpose different from that of taking a position on a complex legal issue, and it was certainly not aimed at

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[5]Order of 3 March 1999, *I.C.J. Reports 1999*, p. 16.

[6]See Memorial, Ann. 28.

[7]See Memorial, Ann. 32.

[8]Counter-Memorial, para. 13.

[9]See Memorial, Anns. 14 and 20.

[10]Counter-Memorial, para. 14.

evaluating the lawfulness of the conduct of the United States under international law. This issue was raised in a letter written by German Foreign Minister Fischer on 22 February 1999[11] — a fact not mentioned by the Respondent. Let me add that Germany does not intend, within the present proceedings, to raise any questions concerning the legitimacy of the convictions or the fairness of the procedure under the law of the United States. We are before the highest international court and our claims relate exclusively to international law. What Germany requests is a judgment of this Court declaring that actions and omissions of organs of the United States violated certain rules of international law and specifying appropriate international legal remedies.

5. The Parties further agree on the circumstances of the LaGrands' birth, their extremely difficult childhood, partly spent in foster care both in Germany and the United States, and their difficult and troubled lives as teenagers. Finally, there is no disagreement that Karl and Walter LaGrand were German nationals from birth to death and never acquired any other nationality. However, what the United States does attempt is to minimize the relevance of nationality for the present case. The Counter-Memorial says that at the time of the murder in early 1982:

> "the brothers appeared in all respects to be native citizens of the United States . . . [by] their appearance, mannerisms, and characteristics . . . [and] were fully American in outlook"[12].

We ask ourselves what the United States wants to demonstrate with this description. It certainly cannot call into question the fundamental principle of international law, confirmed by a settled practice of this Court, according to which nationality is a legal bond based on certain social factors. The Respondent does not contest that descent from a German mother constitutes such a legitimate link. Neither can the so-called American "appearance" and "characteristics" serve as an excuse for US non-compliance with the obligation to inform the brothers of their rights to contact the German Consulate. Upon their detention, Karl and Walter LaGrand had filled in an Arrest Information Sheet indicating that their place of birth had been Germany. You will find the relevant form for Karl LaGrand in Annex 1 of the German Memorial. It is therefore surprising, to put it mildly, that the responsible officials, in a country whose nationality laws are based on the principle

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[11] See Memorial, Ann. 18.

[12] Counter-Memorial, paras. 16, 17.

of *ius soli*, might have mistaken the LaGrand brothers as "native citizens of the United States"[13]. I have also mentioned already that the Presentence Reports stated explicitly that Karl and Walter LaGrand were German nationals. Finally, before the Board of Executive Clemency on 23 February 1999, Arizona State Attorney Peasley admitted in no uncertain terms that the Arizona authorities had been aware of the German nationality of the brothers from the very beginning.

6. The United States further emphasizes the multiplicity of appellate proceedings in the case of the brothers. Again, we wonder what the intention behind this might be. Is such a reference aimed at convincing the Court that, due to the quality and quantity of the proceedings within the judicial system of the United States, justice had been done and that therefore no interference by this Court is necessary? This would totally distort the purpose of the German Application: Germany does not in the least intend to place the International Court in a line with the numerous US courts that dealt with this case. Germany brings before the Court nothing but questions related, and confined, to the interpretation and application of certain rules of international law in a specific case. Both Parties have accepted as binding the Optional Protocol to the Vienna Convention, according to Article I of which: "[d]isputes arising out of the interpretation and application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice". Further, it is of no relevance in our context that, to quote the Counter-Memorial, "appropriate judicial authorities determined that the LaGrands' defence lawyers had provided a constitutionally sufficient level of representation"[14]. This is simply not at issue here. What we claim is that, due to the omission of notification, Germany was deprived of its right under the Vienna Convention to assist the brothers in obtaining adequate legal assistance. That the so-called "constitutionally sufficient level of representation" was far from adequate is an entirely different problem.

7. Let me now make a few observations relating to Chapter III of Part II of the Counter-Memorial entitled "Efforts by the United States to improve compliance"[15]. In this chapter, the United States gives an account of various steps undertaken in order to improve domestic compliance with the notification requirements of the Vienna Convention. I regret to say that this is

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[13]Counter-Memorial, para. 16.

[14]Counter-Memorial, para. 19.

[15]Counter-Memorial, paras. 20 *et seq.*

not the first time that counsel for the United States reports about such efforts to this Court. More than two and a half years ago, in her oral statement on 7 April 7 1998 in the *Breard* case, Ms Brown, counsel for the United States, said among other things:

> "[T]he United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years."[16]

And after listing and specifying recent efforts in this regard, Ms Brown concluded:

> "Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. Nothing more is required."[17]

I repeat, "Nothing more is required."

8. Mr. President, Members of the Court, it is impossible not to see the parallel between this statement and that in the Counter-Memorial in the present case. I am sure that tomorrow our American colleagues will once again describe these various efforts. Of course Germany welcomes each and every measure taken in this regard. However, what ultimately counts are positive results, in other words, compliance. And here I am sorry to say that we are still very far away from satisfactory results. If one looks at the list of cases involving German citizens most recently detained in violation of Article 36 — a list that you will find in your folder — one must conclude that the efforts mentioned by the Respondent have not achieved anything resembling regular observance. What we do see is a continuing pattern of neglect of Article 36 by US law enforcement authorities. Our list is, by the way, far from comprehensive. First, it only includes cases of persons arrested after 1 January 1998, that is since the United States, according to its own testimony, stepped up its efforts to comply with the notification requirements. And second, our list can, of course, only cover those cases in which German officials somehow received notice of the arrest and detention. In other words, we can be sure that there is a considerable number of cases yet unknown. A rough estimate by our Consulates in the United States led to the conclusion that at present, despite the efforts described by the Respondent, less than 25 per cent of all German

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[16] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures,* Pleadings, CR 98/7, 7 April 1998, para. 2.27.

[17] *Ibid.*

citizens arrested in the United States have been duly informed of their rights under the Vienna Convention. And, as I said, this estimate cannot take into account the undetected breaches. Still concerning the list before you, I would like to draw your attention to three specific points.

9. First, as evidenced by case No. 1 on that list, even in potential capital cases law enforcement authorities still appear insufficiently sensitized to the notification requirement under the Vienna Convention.

10. Second, if we concentrate for a moment on the examples from California, we consider it alarming that not even repeated protests on behalf of Germany have succeeded in changing the practice of disregard for Article 36. In a letter of 7 July 1999 to the Governor of California, Germany protested against non-notification in the case of Katharina Grant (this was case No. 14). This letter remained without response. Nor did the Governor appear to take any steps to improve compliance by the California authorities with the notification obligation. If he had done so, it would not have been necessary for Germany to protest time and again in similar instances. Let me just mention our letters dated 2 March, 23 June, 27 July and 29 August of this year (I refer to cases Nos. 7, 9, 2 and 10 in the list). The Californian response in the case of Nils Himmelsbacher (case No. 7) openly admits that the reason for the failure to notify Mr. Himmelsbacher was probably that the authorities were simply ignorant of the rights and duties arising under the Consular Convention. A pattern of neglect for Article 36 such as that appearing in California is less surprising, of course, if one reads the communication of the Californian Attorney-General in the case of the German national Udo Mardis dated 13 September of this year (case No. 2 on the list). A copy of this letter has been submitted to the Court. The letter says among other things:

> "California Penal Code section 834c which implements the Vienna Convention in California, did not take effect until January 1, 2000. Therefore, that provision of law and its mandate to California law enforcement officials did not apply in January 1999 when you suggest Mr. Mardis was arrested."

In fact, of course, the Vienna Convention has been in force, and has thus to be applied between the United States and Germany, since 1971. And the Californian authorities were bound by its obligations not only as a matter of international law but also pursuant to the US Constitution. Now, Mr. President, if, after more than two and a half years of an allegedly intensive campaign for the promotion of compliance with the Vienna Convention, not even the Chief Law Officer of the

State of California is familiar with the state of the law, how can the Respondent seriously maintain before this Court that "nothing more is required"?

11. With this I arrive at the third and last point concerning our list: it mentions a whole series of letters in which US authorities responsible for the breaches of Article 36 express their apologies. You will understand, Mr. President, that Germany can no longer be expected to be satisfied with such attempts to take an easy way out of international responsibility. The rules of international law are there to be respected, and not simply to form the basis for apologies following their breach. An apology may constitute an adequate remedy in isolated cases, but it is neither sufficient nor appropriate if illegal conduct has become a consistent pattern as is unfortunately the case here.

12. Finally, let me turn to Chapter IV of Part II of the US Counter-Memorial, which accuses Germany of making "speculative and unjustified claims about the impact of consular assistance"[18].

13. The first US argument in support of this allegation is an expression of doubt whether the LaGrand brothers would have contacted the German Consulate at all if they had been properly informed of their right to do so. In Germany's view this is an entirely irrelevant point. Besides, we can no longer unfortunately ask Karl and Walter LaGrand what they would have done, and it is — I am sorry to say — rather cynical on the part of the Respondent, after having removed, as it were, the only reliable source of evidence, now to maintain that Germany is to carry the burden of establishing the relevant facts. Germany considers itself under no legal obligation whatsoever to enter into a macabre discussion on the hypothetical conduct of its two nationals. But let me just remind you that as soon as Karl and Walter LaGrand had finally found out about their rights in 1992, they immediately got in touch with the German Consulate. Why, then, should it be "implausible", as the US Counter-Memorial says[19], that they would have acted in the same way immediately after their arrest some ten years earlier?

14. The United States further calls the German claim that early consular assistance would have made a decisive difference "speculative and unjustified". The Counter-Memorial considers that the role of a consul in a case like ours is

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[18]Counter-Memorial, paras. 24 *et seq.*

[19]Counter-Memorial, para. 27.

> "often quite different from the idealized portrait presented in the Memorial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in criminal proceedings is limited to assisting in obtaining legal counsel and then assisting legal counsel."[20]

Mr. President, if you read the German Memorial you will see that nowhere do we describe the role of our consular officers in as exaggerated a way as the Counter-Memorial wants you to believe. Of course, consular officers cannot act as lawyers. But they can and will assist their fellow citizens in obtaining adequate legal counsel. This is certainly one of the rights conferred on consular officers under the Vienna Convention. It is precisely the denial of these rights which is at stake here.

15. Further, the doubts of the United States as to whether the German regulations in force at the time of the arrest of the LaGrand brothers corresponded to today's situation, is unfounded. The Circular Order of the German Foreign Ministry in force at the time of the arrest did not merely authorize German consular officials to provide the kind of legal assistance just mentioned. The Order expressly required that in circumstances like ours "a suitable and reliable lawyer should be appointed"[21]. Further, Article 7 of the German Consular Law in conjunction with the Circular Order made it "the duty of missions abroad to assist German nationals held on remand or serving a prison sentence". The respective Order in force since 1998 explains the *raison d'être* of this duty as follows: "[a]rrest represents a particularly severe encroachment on a person's individual freedom, . . . It is therefore extremely important that Germans under arrest abroad are provided with fast, professional all-round support by German diplomatic missions abroad"[22] and as I have indicated, we have provided the Court with English translations of both of these documents. You will notice that the relevant provisions of the two Orders are virtually identical.

16. When German consular officials finally became aware of the detention of the LaGrand brothers in 1992, the trial and sentencing phase of their criminal proceedings had already been completed. At that stage, due to certain features of US law — to which we will turn later — it was neither possible nor necessary for the German consulate to undertake any immediate urgent action. However, Germany did take all the measures that one could reasonably expect of it. Unfortunately,

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[20]Counter-Memorial, para. 28.

[21]Para. 4 of the 1975 Circular Order.

[22]Para. I of the Circular Order on assistance for Germans detained abroad (Ann. 47 to the German Memorial).

in 1992, eight years after Karl and Walter LaGrand had been sentenced to death, there was not much left to do. Mr. President, this brings us right back to the decisive point: it was the US failure to inform the LaGrands which deprived Germany of its right and of the ability to render more effective and timely assistance to the two brothers, in particular by helping them to obtain adequate legal representation in the decisive phases of their trial. Mr. President, it really turns the facts upside down when the United States argues that: "[i]t is also important to remember that the LaGrands' defence was at all times the responsibility of their defence attorneys", and "[b]oth defence lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there"[23]. We do not question the primary responsibility of defence counsel for handling the case. But what we do complain about is that Germany was deprived of its right to help its citizens choose adequate legal representation and then assist them during their trial.

17. In this context, the Respondent rightly emphasizes the extremely important role which defence lawyers play in American criminal procedure — a role which goes far beyond that attributed to defence lawyers in most other legal systems of the world. A recent editorial in the renowned British weekly, *The Economist*, focusing on death penalty cases in the United States, commented as follows:

> "America has had hundreds of thousands of murder trials since 1976. Most of them were potentially capital cases. In practice, the public prosecutors sought the death penalty in fewer than 5% of the cases. Facing experienced and diligent defence lawyers, prosecutors rarely seek the ultimate punishment. But when they do so, it tends to be not because of the severity of the crimes committed, but because the defence lawyer looks easy game."[24]

Mr. President, the LaGrands' defence lawyers were precisely such "easy game". The Arizona Supreme Court attested Karl's attorney "exceedingly low profile", although the Supreme Court could not say "that his performance was so deficient as to compromise the adversarial nature of the trial"[25]. The attorney himself later acknowledged his inadequacy for handling the complex issues involved in a capital case, and he expressly admitted that he should have done a lot of things

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[23]Counter-Memorial, para. 32.

[24]10 June 2000, at p. 16.

[25]See Memorial, Ann. 4.

differently. I invite the Court to examine with me the affidavit of Karl LaGrand's trial lawyer, to be found in Annex 46 to the German Memorial, that is on pages 1013 *et seq.* The lawyer stated upon oath, among other things:

— that when he was appointed to defend Karl LaGrand it was the first time that he represented a defendant in a capital murder case;

— that he had no special CLE, that is Continuing Legal Education, training in handling a capital case;

— that he was uninformed of the level of experience, tasks, tactics and strategies which capital cases required;

— that he initially approached the Karl LaGrand murder case as he had his previous cases: like a "normal felony", just as a "drug case or a robbery";

— that in hindsight, he realized that he was neither prepared nor informed as to what would be involved and that he was overwhelmed both by the high profile nature of the case and by his lack of experience;

— that he had never had an investigator working on the case;

— that he never spoke to family members;

— that he never comprehensively researched, investigated or developed any evidence regarding the petitioner's mental state; and finally

— that he never considered impulsivity or temporary insanity as a viable defence.

Mr. President, Members of the Court, I do not want to comment upon the view of the Arizona Supreme Court, shared by the US Counter-Memorial[26] according to which this kind of defence is still to be regarded as "a constitutionally sufficient level of representation". The only remark I want to make is that it is beyond reasonable doubt that the poor quality of the defence contributed, to say the least, to the brothers LaGrand finding themselves among the less than 5 per cent of potential capital cases in which American public prosecutors sought the death penalty: and this afternoon, Mr. Donovan is going to take up this point in more depth.

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[26]Counter-Memorial, para. 19.

18. Does the United States really want this Court to believe that it is mere speculation that Germany — if it had been informed of the arrest of the LaGrand brothers in time — would have assisted its citizens to obtain better legal counsel, and thus have decisively increased their chance of belonging to the 95 per cent of defendants not sentenced to death after having committed similar crimes? Or, putting it the other way round, does the United States really want to say that Germany — a country particularly committed to achieving the worldwide abolition of capital punishment — would have allowed its citizens to be represented by a lawyer with such a low and inadequate profile in criminal proceedings where their life was at stake?

19. Mr. President, Members of the Court, thus are the facts upon which Germany respectfully asks the Court to base its decision, and a few comments on the differences of interpretation of these facts between the Parties. May I now ask you to call upon my colleague Mr. Daniel Khan to develop our arguments on jurisdiction and admissibility.

LE PRESIDENT : Je vous remercie, professeur Simma. Je donne maintenant la parole à M. Daniel Khan.

Mr. KHAN:

III. JURISDICTION AND ADMISSIBILITY

1. Merci, M. le président. Mr. President, distinguished Members of the Court, it is a great honour and pleasure for me to address you for the first time. My task is to deal with questions of jurisdiction and admissibility. Germany has treated these issues comprehensively in its Memorial. To avoid repetition, my following presentation will therefore be limited to a critical assessment of issues and problems raised in this regard in the US Counter-Memorial.

2. Before entering into the subject-matter, Germany would like to state its satisfaction with the decision of the United States not to raise any preliminary objections. This fact demonstrates that both Parties do concur in the objective of having the present dispute settled as expeditiously as possible.

3. Unfortunately, however, such common ground does not reach very far. When it comes to the scope and nature of the envisaged judicial settlement, what we see is that Germany aspires to a

comprehensive solution of all the substantive legal issues involved. The United States on the contrary is only willing to submit a small proportion of these questions to judicial scrutiny. As to the wide range of further issues raised in our case, the United States tries to hide behind a broad smoke-screen of what it calls "inadmissibility". However, all the questions Germany has raised are not only of importance with regard to the fate of the LaGrand brothers but are, unfortunately enough, of continuing relevance. The scenario that has led to the present litigation has repeatedly occurred in the past and will also haunt us in the future if this Court does not stop it. Just consider the *Breard* case, the recent proceedings before the Inter-American Court of Human Rights, the case of the Canadian citizen Stanley Faulder or that of the Mexican Miguel Angel Flores executed just four days ago, the enormous echo which these cases have produced in the international community, and finally, and most importantly, the deplorable situation in which hundreds of foreign nationals on death row in the United States and elsewhere find themselves. In light of the facts that became apparent in the cases and proceedings mentioned, it is safe to assume that the great majority of these individuals had no chance to enjoy the procedural safeguards provided in the Vienna Convention on Consular Relations. Hence, the time is ripe for a clear and unequivocal pronouncement by the world's highest judicial authority.

I. Jurisdiction

4. Mr. President, of course the desirability, indeed urgency, of a comprehensive settlement cannot replace the jurisdictional basis for a pronouncement of the Court. We all know that "the Court's jurisdiction is always a limited one" — as the Permanent Court observed back in the *Chorzów Factory* case[27]. In the Memorial we demonstrated that Article I of the Optional Protocol to the Vienna Convention establishes the Court's jurisdiction for all the claims which Germany has raised. We note with satisfaction that the US Counter-Memorial expressly shares our view, at least with regard to the German claims concerning Article 36, subparagraph 1 *(b)*, of the Consular Convention[28]. However, the United States does challenge jurisdiction as regards diplomatic protection[29]. Germany, on the other hand, takes the view that "application of the Convention" in

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[27] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, at p. 32.

[28] Counter-Memorial, para. 47.

[29] Counter-Memorial, paras. 73 *et seq.*

the sense of the Optional Protocol very well encompasses the consequences of a violation of individual rights under the Convention, including the espousal of respective claims by the State of nationality. Besides, according to Article 5 of the Consular Convention, the protection of the interests of nationals of the sending State takes a prominent place among consular functions. As to Germany's remaining claims, the United States chooses not to address the issue of jurisdiction at all, followed, however, by a warning in the Counter-Memorial that this silence is to be "without prejudice to its position in any further proceedings in this case"[30]. Now, we hope that the Respondent is aware of the principle, emphasized by Professor Rosenne, according to which objections preliminary in character should always be raised before the interested party joins issue on the merits or, at the latest, simultaneously with the filing of the Counter-Memorial[31]. Thus Germany is confident that the United States will refrain from taking the unusual, indeed highly questionable, step of challenging the Court's jurisdiction at this final stage of the proceedings — a step which would be doomed to failure anyway.

II. Admissibility

5. We observe also that the restraint which the Respondent exercises with regard to the Court's jurisdiction *strictu sensu* does not extend to the question of admissibility. The United States attempts to use this notion to rid itself of all responsibility for what it has done wrong, with the only exception of its breach of Article 36, subparagraph 1 *(b)*, of the Convention. Thus, the United States tries to convince you that it would be inappropriate for the Court to decide upon the following three claims made by Germany: *(a)* the claim that the way US law was applied in the case of the brothers LaGrand violated Germany's rights under Article 36, paragraph 2, of the Vienna Convention; *(b)* the claim that the United States violated its international legal obligation to abide by the Order on Provisional Measures issued by the Court on 3 March 1999, and finally; *(c)* the German request for the granting of judicial relief going beyond the mere proclamation by the Court of the illegality of the breach by the United States of Article 36, subparagraph 1 *(b)*, of the Consular Convention.

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[30]Counter-Memorial, para. 48.

[31]S. Rosenne, *The Law and Practice of the International Court*, Vol. II, Jurisdiction (1997), at p. 864.

6. With regard to all of this, the United States maintains that "significant factors weigh against admitting the claims that underlie Germany's second, third, and fourth submissions"[32]. Frankly, I find the "significant factors" invoked by the United States to support its request for such a sweeping dismissal of most of Germany's claims anything but convincing.

7. Let me start with an assessment of the truly exorbitant concept of "admissibility" which lies at the basis of the Respondent's argumentation. Following this I will proceed to an examination of the three "significant factors". It will certainly not surprise you that Germany will arrive at the conclusion that all three objections to the admissibility of our case are legally untenable and that, therefore, each and every claim Germany raises in the present proceedings is admissible.

8. "Admissibility", according to the Counter-Memorial, "requires the Court to weigh whether characteristics of the case before it, or special circumstances related to particular claims, may render either the entire case or particular claims inappropriate for further consideration and decision by the Court"[33]. The rather authoritative tone of this statement stands in marked contrast to the total lack of reference to the jurisprudence of this Court or any other source in its support. Thus, we may be allowed to ask whether such a sweeping understanding of "admissibility" reflects the true state of the law.

9. Mr. President, Members of the Court, a careful analysis of the jurisprudence of this Court and its predecessor on the matter of admissibility has led us to conclude that the picture drawn by the United States does not correspond to the Court's own perception of this issue. It is certainly true that, as the Court emphasized in the *Northern Cameroons* case[34], the judicial function is circumscribed by inherent limitations which may be difficult to catalogue. However, we discern from the jurisprudence of the Court at least two essential features which throw light on the way in which this Court and its predecessor have handled issues of admissibility throughout.

10. First of all, the Court has accepted a plea of inadmissibility only if based on special and peculiar circumstances. Therefore, the concept of "admissibility" introduced by the United States

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[32]Counter-Memorial, para. 49.

[33]*Ibid.*

[34]*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at p. 30.

is mistaken in its implication that all there is to do in order to determine whether a case is appropriate for further consideration and decision by the Court is a simple weighing of characteristics. Rather the rule seems to be in the nature of a presumption according to which the existence of a jurisdictional bond between the parties in a given case implies the admissibility of the claims raised therein. This presumption can be rebutted only under very specific circumstances. Indeed, this Court has never claimed discretion whether to entertain a contentious case or not. The Court has refused to do so only in very particular circumstances and after "mature consideration", to use the words of the Permanent Court in the Judgment in the *Free Zones* case[35].

11. Second, a concept of "admissibility" as vague and broad as that put forward by the United States could lead one to assume that the grounds for admissibility or inadmissibility of a case or of certain claims cannot be concretized in any foreseeable way. This is simply not true. A closer look at the jurisprudence of the Court reveals that it has always, and in very explicit terms, treated the safeguarding of its judicial integrity as a crucial benchmark for the evaluation of admissibility. In the *Northern Cameroons* case, the Court described itself as "the guardian of [its own] judicial integrity"[36]. In the *Nottebohm* case, the Court confined its role to the "administration of justice"[37], as the Permanent Court had already done in the *Free Zones* case where it had stressed its position as a court of justice — a qualification which made the Court somewhat reluctant to act "outside the sphere in which a court of justice, concerned with the application of the rules of law, can help in the solution of disputes between two States"[38]. Finally, in the *Haya de la Torre* case, this Court refused to make a choice between several alternatives based on considerations of practicability or of political expediency, because it felt that "it is not part of the judicial function to make such a choice"[39]. This clear line of reasoning goes hand in hand with a justified reluctance of the Court to enter into the merits of a case if it foresees that its judgment would remain ineffective. Let me refer, for instance, to the Court's decision in the *Monetary Gold* case[40], where the absence

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[35] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, at p. 161.

[36] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at p. 29.

[37] *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, at p. 122.

[38] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, at p. 162.

[39] *Haya de la Torre, Judgment, I.C.J. Reports 1951*, at p. 79.

[40] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, at pp. 19 *et seq.*

from proceedings of Albania, whose legal position constituted the very subject-matter of the case, made it foreseeable that nothing would come of any possible judgment by the Court. In the *Northern Cameroons* case the Court declined to decide merely hypothetical questions lacking any real purpose[41]. Finally, in the *Nuclear Tests* cases, the Court held that "[i]t does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*"[42].

12. If we translate the case-law thus described into more abstract terms, we could say that in the practice of this Court, admissibility is concerned with the question whether in all the circumstances it is compatible with the Court's status as the principal judicial organ of the United Nations, with its judicial function or with the judicial character of its decisions, to enter into or pursue proceedings on the merits in a given case[43].

13. In light of this, and turning to our present case, I must confess that I am really at a loss to see how the present affair or any of the claims Germany raises in its context could possibly fit into the jigsaw of precedents on inadmissibility. All Germany is doing is to raise in an ongoing legal dispute a number of claims based on purely legal arguments. First, Germany requests the Court to find the United States in breach of certain rules of the Vienna Convention on Consular Relations. Second, Germany asks the Court to find that the United States violated the Order of the Court of 3 March 1999. In both instances, what Germany seeks is a declaration of this Court as the most appropriate remedy for the wrong it had suffered. Third, Germany demands, as a further, separate legal remedy, safeguards against repetition in order to prevent future violations of its own rights and the rights of its nationals.

14. Mr. President, Members of the Court, can our raising these purely legal questions affect the judicial integrity of this Court in any conceivable way? Certainly not! On the contrary, Germany would submit that there have been few instances in which the Court was called upon to settle a dispute so free of political implications as is the case here, instances in which clearly-defined international legal issues were at stake, allowing this Court to act strictly within the sphere

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[41] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at pp. 33 *et seq.*

[42] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, at p. 272, para. 59; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, at p. 477, para. 62.

[43] *Cf.* S. Rosenne, *The Law and Practice of the International Court*, Vol. II, Jurisdiction (3d. ed. 1997), at p. 546.

of its judicial function, that is, deciding upon concrete rather than abstract, actual rather than hypothetical legal questions, and thereby settling an ongoing legal dispute.

15. To conclude my general remarks on the question of admissibility, none of the legal issues dividing the Parties have yet been settled: Germany has not received declaratory relief by way of a pronouncement of this Court; it has not received the assurances and guarantees which it had asked for; and finally the written pleadings reveal a considerable number of legal and factual issues that are still in dispute between the Parties.

16. Let me now turn to the three specific objections which the Respondent has raised against the admissibility of certain of Germany's claims.

17. In the first of these objections, the United States argues that "[t]he Court need only address Germany's first submission in order to do justice between the Parties", and that a judgment on Germany's first submission would "resolve and do justice as to the *central* dispute between the Parties and affirm the importance of the Vienna Convention in international relations"[44]. Mr. President, distinguished Members of the Court, this is indeed a surprising and — as far as we can see — unprecedented assertion. When a State submits to the Court, as we do, four distinct claims, it is certainly not for the Respondent to decide which of these claims are "central" and which are not. The simple fact is that the present dispute encompasses more than the subject-matter covered by Germany's first submission. Germany for its part is not primarily interested in a general statement of this Court affirming the importance of the Vienna Convention in international relations. Rather, our prime objective is to seek justice in our specific case — a case which happens to raise questions of the interpretation and application of a variety of international norms. In Germany's view, a comprehensive judicial settlement of the present dispute can only be reached if the Court addresses the merits of all of Germany's claims. And to reach such a comprehensive judicial settlement is precisely what the Court itself has always considered to be its very function.

18. This leads me to the second objection, according to which the Court should declare certain claims of Germany inadmissible because, in the view of the United States, they would result

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[44]Counter-Memorial, para. 50 (emphasis added).

in the Court having "to assume an inappropriate and unauthorized role as the overseer of US national courts"[45].

19. Mr. President, distinguished Members of the Court, be assured that Germany is well aware that the function of this Court is not to act as a court of criminal appeal. You have emphasized this yourself in your Orders on Provisional Measures both in the *Breard* case and in our present case. At the risk of spinning the prayer wheel once again, let me emphasize that the claims which Germany has brought before you aim at nothing but the settlement of an international legal dispute arising out of the interpretation and application of the Vienna Convention. What we respectfully ask this Court to do is: *(a)* to follow our interpretation of certain rules of international law; *(b)* to adjudge and declare that the conduct of the Respondent, that is, in the words of the Optional Protocol, the "application" of the Consular Convention by the United States, was inconsistent with its international legal obligations towards Germany; and *(c)* to draw from this failure certain legal consequences provided for in the international law of State responsibility. Hence, the present proceedings are in no way aimed at interfering with the administration of justice within the United States judicial system. Nor does Germany request that this Court overrule any of the US domestic judgments delivered in the case of the LaGrand brothers.

20. Mr. President, we consider it self-evident and a matter of simple logic that the legal operation which we ask the Court to undertake must necessarily include a critical assessment of the conduct of organs of the United States, including its judicial and legislative branches. The only reason why Germany addresses questions of the internal law of the United States — criticized by the Counter-Memorial as "lengthy discussions of US domestic law"[46] — is to demonstrate that certain features of US law and its application in the present case, in particular the doctrine of "procedural default", have led to violations by the United States of legal obligations arising under the Vienna Convention. There is nothing special or problematic in attributing breaches of international law to a State's judiciary. A statement by the International Court according to which US domestic courts participated in, or contributed to, such breaches is neither inappropriate nor unauthorized — on the contrary.

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[45]Counter-Memorial, paras. 51 *et seq.*

[46]Counter-Memorial, para. 52.

21. Mr. President, in its third objection the United States challenges the admissibility of our submission relating to the Order of 3 March 1999[47]. Let me recall what Germany requests there: we ask the Court to adjudge and declare that the United States violated its international legal obligation to comply with this Order.

22. Now, if we regard the arguments of the United States on this point, we find that the American criticism is directed against the Court rather than against Germany. The United States complains that "Germany's decision to file as it did resulted *in the Court setting aside some fundamental aspects of judicial procedure*"[48]. The Respondent further deplores "a failure of justice" in the procedure followed by the Court, and finally accuses the Court of not having observed "basic principles of the judicial process"[49].

23. Mr. President, distinguished Members of the Court, we cannot let these accusations pass unchallenged. We realize that it must have been a difficult step for the Court to issue an Order on Provisional Measures in such a procedurally unprecedented manner. You have certainly done so only after assessing the situation as one of "incontestable urgency", as the former President of this Court, Judge Schwebel, recognized in the *Breard* case[50]; and after admitting the presence of cogent "humanitarian reasons", to use the words of Judge Oda[51]. Germany very much appreciates this decision with which you brought your judicial authority to bear for the protection of a human life which was virtually in your hands. We can only regret that the United States did not honour this difficult and responsible decision by giving effect to the Order. We simply cannot exclude that in the future the Court may again be confronted with exceptional situations which leave it no choice but to vary established patterns of procedure, if this is the only way to do justice in cases of extreme urgency. Germany is convinced that the Court has kept within the limits of a correct

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[47]Counter-Memorial, paras. 55 *et seq.*

[48]Counter-Memorial, para. 63 (emphasis added).

[49]Counter-Memorial, paras. 64 and 66.

[50]*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.

[51]*Ibid.*, declaration of Judge Oda, *I.C.J. Reports 1998*, p. 260, para. 8; and *LaGrand Case (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999*, declaration of Judge Oda, *I.C.J. Reports 1999*, p. 20, para. 7.

application of the rules in question. This decision deserves the highest respect of the international community.

24. In view of what I have said, it is difficult to grasp the object and purpose of the United States objection. Does the Respondent want the Court to invalidate its own Order on account of alleged procedural deficiencies, or is the Court to treat the Order as somehow defective, and therefore of diminished legal relevance?

25. Mr. President, it was this Court which decided autonomously to proceed as it did and to issue that Order. A discussion of the scope and legal relevance of this Order certainly does not fall under the topic of admissibility. We should not at this point take up any questions which belong to the merits of our case, and should avoid a Shakespearean "play within a play", to quote our late colleague and friend Keith Highet[52].

26. In conclusion of my treatment of the question of admissibility, let me say a word about what the Respondent calls "Germany's choice of timing". As we explain in our Memorial, Germany had good reasons to act in the way it did. Besides, as the United States rightly remarks, "there is no uniform 'statute of limitations' in international law, nor are there clear requirements dictating when a case must be filed with this Court"[53]. Thus, both Parties agree that lateness as such does not constitute a bar to admissibility.

27. What the United States apparently does consider to be such a bar is that Germany could have been aware of all relevant facts of the case, among them the fact that the Arizona authorities knew from the very beginning that the LaGrand brothers were German nationals, if only Germany had paid due attention to the so-called Presentence Reports of 1984. But may I respectfully remind you that it was only in 1992 that German consular officials first became aware of the arrest of the LaGrand brothers? This was no less than eight years after the sentencing proceedings had taken place and the Presentence Reports had been produced. It is true that, as far as the LaGrands' defence lawyers were concerned, they did not pay attention to the indication of the brothers' nationality in these reports. This casts indeed a negative light on the quality of their defence at the

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[52] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures*, Pleadings, CR 98/4, 6 March 1998, p. 62, para. 28.

[53] Counter-Memorial, para. 58.

time. But, Mr. President, Germany's point is precisely that the defence of Karl and Walter LaGrand would have been much more effective if a German consulate had had the opportunity to see to it.

28. In light of the foregoing, the only question that makes sense at all in this context is whether German officials did or did not have easy access to the Presentence Reports in 1992 or thereafter. Although we do not attribute any conclusive weight to this issue, we can provide you with a clear answer. We have filed with the Court a Memorandum regarding the Presentence Reports issue in the LaGrand matter, drafted by the Federal Public Defender for the District of Arizona at the request of the German Consulate General in Los Angeles. Let me summarize what this Memorandum says: According to a local rule of the Pima County Superior Court, the Presentence Reports concerning Karl and Walter LaGrand were filed under seal and kept confidential even after sentencing. When the Federal Public Defender tried to locate this report in June of this year, they could not be found. In the words of the Public Defender:

> "The exhibits clerk at the superior court advised that the clerk did not have pre-sentence reports information on either LaGrand, and they had no idea where the pre-sentence reports were filed. It appears that the pre-sentence reports are not even in the superior court file."

Mr. President, if not even the competent US authority managed to retrieve the reports, does it make sense to say, as the Counter-Memorial does, that it is "hard to understand how these reports were not already familiar to German consular officers"[54]? Can one really accuse a foreign consulate of negligence when it failed to get hold of documents which could not even be traced by the competent local authorities?

29. In view of the foregoing and with reference to the further explanations in our Memorial, Germany therefore 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.

Monsieur le Président, Madame et Messieurs de la Cour, je vous remercie de votre attention. Mr. President, I thank you and the Members of the Court for your attention. May I now invite you to call upon my colleague Mr. Kaul to address the Court on the US breaches of Article 36, paragraph 1, of the Consular Convention.

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[54]Counter-Memorial, para. 60.

Le PRESIDENT : Je vous remercie beaucoup. La Cour va tout d'abord suspendre pour dix minutes.

L'audience est suspendue de 11 h 40 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne maintenant la parole pour l'Allemagne à M. Kaul.

Mr. KAUL: Merci, M. le Président.

IV. ARTICLE 36, PARAGRAPH 1, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

1. Mr. President, distinguished Members of the Court, it is my honour and privilege to appear before you on behalf of Germany. My task is to assess the violations of paragraph 1 of Article 36 of the Vienna Convention committed by the United States. In doing so, I will, first, briefly recall the rights embodied in Article 36 and the content and structure of this crucial provision. Second, I will set out why the acknowledgment of the violation of the Convention by the United States is insufficient to meet its obligations towards Germany and that it is based on a restrictive and very problematic interpretation of Article 36. In conclusion, I will show that Article 36, paragraph 1, has been violated by the United States not only with regard to subparagraph 1 *(b)*, but also with regard to subparagraphs 1 *(a)* and *(c)*.

2. Mr. President, the dispute between the United States and Germany turns around one central problem: the United States reads Article 36 of the Vienna Convention in a very narrow and restrictive way. As the case of the LaGrand brothers clearly demonstrates, this can deprive the right of foreign nationals to be informed of their right to consular communication of most of its practical meaning.

In contrast, Germany maintains that Article 36 provides a régime that guarantees foreigners effective access to consular advice, and second, that this régime also includes a minimum standard for national laws and regulations to render the right to consular communication meaningful and effective.

I. Article 36 of the Vienna Convention on Consular Relations

3. Mr. President, what are the rights embodied in Article 36, what is the content and structural build-up of this provision?

As you are aware Article 36, paragraph 1, contains several rights of foreign nationals to ensure communication and contact with their consulate, this in three subparagraphs, namely Article 36, subparagraphs 1 *(a)*, 1 *(b)* and 1 *(c)*.

As the distinguished Members of the Court have the exact wording of Article 36 of the Vienna Convention before them, it is not necessary to read out again the full text of this important provision. Instead, let me briefly recall

— subparagraph 1 *(a)* contains the right of consular officers to communicate and to have access to their nationals and vice versa;

— subparagraph 1 *(b)* establishes the specific rights of the sending State and of a national of this State so that in case of an arrest these rights to communicate and to have access to each other can be used effectively. This it does by ensuring

  — that the arrested person is informed without delay about his right to communicate with the consulate;

  — if he so wishes, the competent authorities of the receiving State must then, again without delay, inform the consulate, which in turn can now make use of its right of communication and access to its nationals as set out in

— subparagraph 1 *(c)*: the consulate can use its right to visit the detained national, to correspond with him, and — most importantly — to arrange for his legal representation.

Now, when we regard the content and structure of Article 36, paragraph 1, in our examination of the case of the LaGrand brothers, what is the decisive point?

Mr. President, the decisive point, indeed, the absolutely crucial test is whether the authorities inform the arrested person without delay of his right to contact the consulate.

Why is this so decisive?

Because — and I cannot stress this point too much — when this obligation of the receiving State is violated, the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless.

It is decisive that the foreigner be informed about his right to establish contact with his consulate. It is essentially through this provision that the Convention ensures that the *other* rights contained in Article 36, paragraph 1, can be implemented effectively. This concerns both the right to communication with the consulate under subparagraph 1 *(a)* and the right of the consulate to visit the detained national, to correspond with him, and, most importantly, to arrange for his legal representation under Article 36, subparagraph 1 *(c)*.

To sum up: respect for the obligation to inform the foreigner about his right to establish contact with his consulate is *a prerequisite* for the effective use of the other rights embodied in Article 36, paragraph 1. Without the fulfilment of this *conditio sine qua non*, consular assistance as foreseen in Article 36, subparagraphs 1 *(a)* and *(c)*, becomes an abstract principle, dead letter, without any practical meaning. As we see, this can have the most deplorable, fatal consequences as in the case of the LaGrand brothers, especially in a country in which the death penalty is frequently applied. In such a case, a restrictive and incorrect interpretation of Article 36 can, as our case demonstrates, literally tip the balance in a matter of life and death.

4. Mr. President, I now turn to Article 36, paragraph 2. Article 36, paragraph 2, deals with the important question of the implementation of the rights just set out in the internal law of the receiving State. The paragraph reads:

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

It is clear that Article 36, paragraph 2, in no way limits or reduces the obligations of the receiving State under Article 36, paragraph 1. It only deals with the modalities of their exercise. On the one hand, paragraph 2 makes it plain that Article 36 does not affect the validity of national laws and regulations. On the other hand, and this is absolutely central to Germany's case, Mr. President, Article 36, paragraph 2, puts the receiving State under a specific obligation. This State must enact laws and regulations that do render effective the exercise of the rights under Article 36. Paragraph 2 requires that the purpose of Article 36 be fulfilled, namely that foreigners actually do have access to the services of their consulate if they so wish. Therefore, the receiving State must shape its domestic law in a way that renders the actual exercise of the rights of

Article 36 effective, meaningful and practicable. We will show, Mr. President, that US law fails to do so by virtue of the existence and application of rules such as the rule of "procedural default" and the *Anti-Terrorism and Effective Death Penalty Act.*

5. Mr. President, Germany notes with satisfaction, limited satisfaction, that the United States has acknowledged that it failed to inform the LaGrand brothers in 1982, upon their arrest and detention, of their right to contact their consulate, as required by Article 36, paragraph 1. But, of course, faced with clear and unequivocal evidence contained in the Presentence Reports that the Arizona authorities were aware of the German nationality of the brothers all along, the United States acknowledgment only admits the obvious: that the LaGrand brothers were of German nationality; that the Arizona authorities, in full knowledge of that fact, failed to inform the German authorities; that therefore the United States is responsible for this failure of the Arizona authorities to live up to Article 36.

II. The interpretation of Article 36, paragraph 1

6. Mr. President, I now turn to my second question:

How can the United States affirm such a narrow and restrictive interpretation of Article 36 as it has done in the Counter-Memorial?

We are concerned, Mr. President, that certain remarks in the Counter-Memorial on, first, the "without delay" requirement, then, on the drafting history and finally on State practice concerning Article 36 cast serious doubt on the unequivocal commitment of the United States to acknowledge that violation. Therefore, in spite of the US admission of a breach of Article 36, subparagraph 1 *(b)*, Germany finds it necessary to clarify the interpretation of Article 36, paragraph 1.

1. The requirement to inform "without delay"

7. Mr. President, the restrictive and incorrect US interpretation of the "without delay" requirement in Article 36 is particularly obvious.

Referring to the wording of Article 36, subparagraph 1 *(b)*, requiring notification "without delay", the United States quite surprisingly takes the view that such notification may also be postponed, resulting in "notification occurring after critical events in a criminal investigation have

occurred"[55]. The United States even argues that Article 36 and other consular agreements "do not tie consular notification to any particular stage of an investigation or prosecution"[56]. Mr. President, is "without delay" — in the US view — something else than "without delay"? Does this approach not fly in the face of the effective implementation of Article 36, subparagraph 1 *(b)*, as required by the Vienna Convention? If it were correct, one could regard a notification just before the execution of the convicted as sufficient! The LaGrand case shows that such a strange, indeed almost cynical, view of "compliance" is not merely theoretical: the brothers were informed of their right to consular notification briefly after the end of the *habeas corpus* proceedings in which their last appeal was denied by Supreme Court on 21 December 1998 — more than 16 years after their arrest and less than three months before they were executed.

8. The United States is correct to state in paragraph 86 of the Counter-Memorial that the Vienna Convention does not "obligate consular officials to grant any measure of substantive consular assistance". But this observation, again, is beside the point. What is decisive is that the Convention accords the right to provide such support. Article 36, subparagraph 1 *(c)*, provides consular officers "to arrange for [the] legal representation" of a detainee and to correspond with him, including giving advice on his conduct during the trial and the assistance by counsel. To effectively exercise this right, the notification must be "without delay", that is, timely enough to allow for effective legal representation to be arranged from the very beginning of the criminal process. Again: informing detainees later than that does not conform to the requirement that notification shall happen "without delay", that is, immediately after the arrest. By informing the LaGrand brothers of their right to inform the consulate more than 16 years after their arrest, the United States has therefore clearly failed to meet the standard of Article 36.

2. The abuse of the *travaux* by the United States

9. Then, Mr. President, the United States tries to limit the scope of Article 36 by referring to the drafting history of the provision and State practice. As we have shown and will continue to

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[55]Counter-Memorial, para. 84.

[56]*Ibid.*, note 90.

show, the United States has badly misinterpreted the *travaux* by relying on proposals flatly rejected by the Conference. At this point I will limit myself to just one example, a telling example indeed.

10. The drafting history of the provision on the right to be informed of one's right of contact with the consulate was difficult. Nevertheless, as far as the prohibition of delay is concerned, it is quite clear. The requirement to notify the consulate of the receiving State without delay was first proposed by the ILC. But the ILC still demanded information of the consulate "without *undue* delay"[57]. Following a proposal of the United Kingdom, the Second Committee of the Diplomatic Conference removed the word "undue". It thus strengthened the obligation of prompt notification[58], and the result is that Article 36, paragraph 1 *(b)*, does not allow for any delay in informing the detainee of his rights. It was a common opinion *opinio juris* that a foreigner has an individual right to receive without delay the assistance of his consulate, the idea was that the notification of the detainee of his rights should be mandatory, that it should be effective and that it must not be discretionary.

3. State practice

11. Mr. President, why can State practice neither support nor justify the restrictive and incorrect interpretation of Article 36 by the United States?

— First, State practice is scarce and inconclusive.

— Second, none of the existing cases, none deals, as our case does, with the specific question, whether imposition of the death penalty impaired by a violation of the right to consular assistance should be open to review or not (the only exception being the *Breard* case well-known to this Court).

— Third, most violations of Article 36 happen in minor cases, and are then resolved in the course of criminal proceedings, as in the two German cases cited in the United States Counter-Memorial.

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[57]United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at p. 24, draft Article 36, paragraph (1) *(b)*.

[58]*Ibid.*, Vol. II, at 85 (amendment proposed by the UK, United Nations Doc. A/CONF.25/C.2/L.107 (1963); *ibid.*, paragraph 106 *(c)*, at p. 131.

Most of the few cases referred to by the United States deal with the specific question whether evidence obtained by without information on consular assistance can be used in the criminal proceedings for a conviction or not. This has of course very little to do with the fundamentally different question whether imposition of the death penalty impaired by a grave and sustained violation of the right to consular assistance should be open to review or not.

With regard to the impact of a violation of Article 36 on criminal proceedings, US Judge Boochever, in his vigorous dissent in the *Lombera-Camorlinga* case, stated:

> "I agree with the majority's conclusion that 'a foreign national's post arrest statements should not be excluded solely because he made them before being told of his right to consular notification'. . . . But when the foreign national can show that he or she has been prejudiced by the failure to advise him or her of such a right, that prejudice should be rectified . . ."[59]

If this is correct, Mr. President, is it not even more necessary to rectify the prejudice in question if it concerns circumstances leading to the pronouncement of the death penalty?

To be very clear, Germany has not demanded automatic reversal of all convictions impaired by a violation of Article 36 and it does not intend to do so now. What Germany does request, and what we will set out in detail later, is that a conviction or sentence impaired by a violation of the right of a foreign national to notification can be reviewed in the course of later proceedings, in particular in cases involving the pronouncement of the death penalty.

III. The violation of Article 36, paragraph 1, by the United States

12. Mr. President, I now turn to my third and last question.

Why is the limited acknowledgment by the United States of a violation of Article 36 not sufficient to do justice between the parties?

The answer is: first, the United States fails to admit the violations of Article 36, subparagraphs 1 *(a)* and *(c)*, that go along with the violation of Article 36, subparagraph 1 *(b)*; second, the United States does not admit that its laws and regulations do not live up to the standards required by Article 36, paragraph 2, of the Vienna Convention because they do not enable full effect to be given to the purposes for which the rights in Article 36, paragraph 1, are established; third, the United States does not recognize that Article 36 creates individual rights,

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[59]Counter-Memorial, Ann. 9, p. 5.

that their violation also infringes upon Germany's right of diplomatic protection, and that these factors aggravate the original violation.

13. As to the violations of Article 36, subparagraphs 1 *(a)* and *(c)*, subsequent to the lack of consular information, really what shall one think of the US objections to the effect that Germany's respective claims are to be regarded as mere "add-on" claims and thus "misplaced"?

It is commonplace that one and the same conduct may result in several violations of distinct obligations. If the obligation to inform the detainee of his rights and to help him establish contact with his consulate is violated, the detainee cannot establish contact with his consulate, he cannot communicate with the consulate, he cannot receive visits from consular officers, he cannot be supported by adequate counsel, because he is not aware of his right. Therefore, violation of this right is bound to imply violation of the other rights. As became obvious in the LaGrand trial, the brothers were only able to contact the consulate in 1992, when it was too late. After conviction and sentencing, German consular support could no longer have any effect, especially not with regard to the imposition of the death penalty. Hence, later observance of the rights of Article 36, subparagraphs 1 *(a)* and *(c)*, could not remedy the previous violation of those provisions.

Mr. President, eventually the result was the death of the LaGrand brothers. In the case of Walter LeGrand, these serious violations of the Vienna Convention were then further aggravated by a deliberate violation of the binding Order of this Court of 3 March 1999.

14. Mr. President, distinguished Members of the Court, I would now kindly ask you to call upon my colleague, Mr. Paulus, to show that the United States has also violated Article 36, paragraph 2. I thank you.

Le PRESIDENT : Je vous remercie, M. Kaul. Je donne maintenant la parole à M. Andreas Paulus.

Mr. PAULUS:

V. ARTICLE 36, PARAGRAPH 2, OF THE VIENNA CONVENTION

1. Mr. President, distinguished Members of the Court, it is a great honour for me to represent Germany before this Court. I will argue that, in the case of the LaGrand brothers, the United States

has violated Article 36 of the Vienna Convention, especially paragraph 2 thereof, by the application of its domestic law. In its Memorial, Germany has set out in great detail the reasons why it regards the application of the principle of procedural default and of the Antiterrorism and Effective Death Penalty Act as a violation of Article 36, paragraph 2, of the Vienna Convention. In the present pleadings, Mr. President, I will not go too deeply into the details of US domestic law. In fact, our analysis of US law has remained largely undisputed in the Counter-Memorial. What the Parties are in disagreement about is the conformity *vel non* of US law with the rights of foreigners under Article 36, subparagraph 1 *(b)* and paragraph 2, of the Vienna Convention. That issue is one of international law, and, Mr. President, that is precisely the issue which is before you today.

2. I shall develop the German argument concerning the violation of Article 36, paragraph 2, in three stages:

— My first argument will be that the interpretation of Article 36, paragraph 2, its object and purpose as well as its drafting history, demonstrate that the provision was intended to ensure the primacy of the international obligations flowing from Article 36 over internal laws and regulations which do not give full effect to the purposes for which the rights accorded under Article 36 are intended;

— second, I will argue that US law and practice do not give full effect to these rights and are therefore in violation of Article 36, paragraphs 1 and 2; and,

— third, I will argue that there are no exceptions as to the primacy of Article 36 over national law and that therefore the United States needs to change either its laws or the application of its laws in a way that ensures that, in the future, Article 36 will be respected in domestic proceedings.

The PRESIDENT: May I interrupt you for one second to ask you to speak a little more slowly, because the interpreters have some problem with your speed.

Mr. PAULUS: Excuse me, Mr. President.

I. Interpretation and drafting history

3. Mr. President, the wording of paragraph 2 of Article 36 leaves no doubt concerning its meaning: on the one hand, the provision demands that "[t]he rights referred to in paragraph 1 of

this article shall be exercised in conformity with the laws and regulations of the receiving State". That is stating the obvious: Article 36, paragraph 1, does not permit disregard of domestic law. For instance, taking up an example used by the International Law Commission[60], domestic rules on prison visits have to be followed.

4. On the other hand, however, those laws and regulations must not impede the effective exercise of the rights under paragraph 1. This is the "proviso" contained in the second half-sentence of paragraph 2: the domestic laws and regulations in question are "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended". In this way, the primacy of international law over domestic law is confirmed and maintained. In addition, what is required here is a purposive reading of paragraph 1, that is, the rights accorded under paragraph 1 must effectively achieve their purpose, in other words, ensure effective communication and support from the consulate to the detained national. Hence, we are faced here with a provision that makes the effectiveness of international law the yardstick for its implementation by domestic law. As Germany will show, US law does not meet that requirement.

II. The misreading of the *travaux* by the United States

5. Mr. President, before I go into the details of the failure of US law to live up to the standard of Article 36, paragraph 2, let me briefly react to the analysis of the drafting history of the provision in the Counter-Memorial. A look at the *travaux* will reveal that the reading suggested by the United States is contradicted by the drafting history.

6. The Counter-Memorial refers to the Commentary of the ILC on its draft of Article 36, paragraph 2, and argues that the ILC intended to limit the proviso to "the mechanics of prison visits"[61]. But this conclusion is based on a plainly incomplete reading of the ILC Commentary. Actually, paragraph (5) of the Commentary to draft Article 36 refers to prison visits as an example of circumstances which should be subject to internal laws and regulations. However, paragraph (7)

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[60]ILC Commentary to draft article 36, in: United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at 24, para. (5).

[61]Counter-Memorial, para. 80.

of the Commentary refers to all rights contained in draft Article 36. Therefore, the proviso was to concern all the rights enumerated in Article 36, paragraph 1[62].

7. Besides, the Commentary of the Commission referred to its own draft, not to Article 36, paragraph 2, of the Convention as it now stands. The ILC draft only demanded that internal laws and regulations "must not nullify" the rights under Article 36[63]. Obviously, the ILC proposal was weaker than the final text of the Convention, which requires not only the non-nullification of the rights of foreign nationals, but that "full effect ... be given to the purposes for which the rights accorded under this article are intended". The UK delegate, Mr. Evans, explained the UK amendment[64] which was later adopted by the Conference as follows:

> "It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be preserved."[65]

Thus, contrary to what the United States maintains in paragraph 80 of its Counter-Memorial, what is decisive is not whether an impermissible law concerns prison visits or other matters but whether it would hamper the exercise of the rights under Article 36, paragraph 1. As Germany will demonstrate, Mr. President, that is exactly what US law does.

8. In his defence of the proposal which was to become Article 36, paragraph 2, of the Vienna Convention, the UK delegate added:

> "The Ukrainian delegation had implied that municipal law should prevail over international law; but that objection could not apply to the rights recognized in paragraph 1 of article 36."[66]

Thus, the wording of Article 36, paragraph 2, requires an analysis of national law in the light of the object and purpose of Article 36, not merely an analysis whether the *wording* of the rights is expressly counteracted by national law. It is thus far too narrow when the Counter-Memorial contends that

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[62]United Nations Conference on Consular Relations, Official Records, Vol. II, United Nations Doc. A/CONF.25/16/Add.1 (1963), at p. 24.

[63]*Ibid.*, at p. 24.

[64]United Nations Doc. A/CONF.25/C.2/L.107 (1963), in United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at p. 85.

[65]United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 347, para. 47.

[66]United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 348, para. 10.

> "[t]here is no suggestion in the text . . . that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision"[67].

Rather, the "purposes" phrase is sufficiently broad to include all domestic provisions which could hamper the exercise of the rights under Article 36. Indeed, given the different legal systems of the world, an enumeration of matters of domestic law to which Article 36, paragraph 2, refers is neither necessary nor possible.

9. Mr. President, in its Counter-Memorial the United States makes a great deal of the Soviet and Byelorussian opposition to the wording of Article 36, paragraph 2. It thus relies on the position of States that voted against this provision and did not ratify the Convention until 1989 precisely because they — correctly — believed that Article 36, paragraph 2, would require considerable changes of their laws and practices — steps they were not ready to take. As the Ukrainian delegate to the 1963 Conference put it: "The words in question entailed a serious danger of pressure by international rules on national legislation . . ."[68]

How such objections by opponents of a provision could "reflect a publicly stated understanding of the negotiators", as the Counter-Memorial asserts[69], is difficult to see. If the position of the opponents of Article 36 proves anything, it is that those States, when they realized the far-reaching implications of this provision, opposed it and, ultimately, remained outside the treaty. It was only after a fundamental change of political circumstances that the Soviet Union, Belarus and Ukraine acceded to the Convention more than 25 years later[70].

10. To repeat, Mr. President, the United States reading of Article 36, paragraph 2, is so narrow as to render Article 36 ineffective as against domestic laws, whereas the interpretation advanced by Germany ensures the effectiveness of the provision. Under the correct reading, Article 36, paragraph 2, makes all domestic laws and regulations subject to the effective exercise of the international rights and duties under Article 36, paragraph 1. That is exactly why this proviso

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[67]Counter-Memorial, para. 79.

[68]United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 42, para. 47.

[69]Counter-Memorial, para. 81.

[70]Multilateral Treaties Deposited with the Secretary-General, United Nations Doc. ST/LEG/SER.E/18 (Vol. 1) (2000), Ch. III 6.

was proposed by the ILC, and was then even strengthened in the deliberations of the future States parties at the Vienna Conference.

III. The effects of US domestic law on the rights under Article 36

11. Mr. President, let me now turn to the question of whether United States laws and regulations as applied by United States courts in the LaGrand case live up to the standards of Article 36. In its Memorial, Germany has set out in detail the impact of the municipal law doctrine of procedural default and the Antiterrorism and Effective Death Penalty Act. As far as we can see, the United States has by and large accepted our description of its domestic law and jurisprudence — indeed, its only criticism was that we had depicted recent developments in too positive a light[71]. Indeed, if we review US jurisprudence, including judgments rendered after Germany's Memorial was deposited, we cannot exclude the possibility that effective implementation of Article 36 may require some legislative changes and not only an altered application of the laws currently in force. But this is nothing exceptional. As the Permanent Court of International Justice stated in its Advisory Opinion on the *Exchange of Greek and Turkish Populations*, in interpreting a treaty clause expressly prescribing the adaptation of domestic law to international obligations:

> "This clause ... merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[72]

And as Judge Hersch Lauterpacht explained in his separate opinion in the *Norwegian Loans* case:

> "National legislation ... may be contrary, in its intentions or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law."[73]

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[71] Counter-Memorial, paras. 76 *et seq.* and para. 91, footnote 96.

[72] *Exchange of Greek and Turkish Populations, Advisory Opinion, P.C.I.J., Series. B, No. 10,* at p. 20. Official translation. The authentic French text reads: *"Mais cette clause ne fait que mettre en relief un principe allant de soi, d'après lequel un Etat qui a valablement contracté des obligations internationales est tenu d'apporter à sa législation les modifications nécessaires pour assurer l'exécution des engagements pris."*

[73] Case of *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957,* p. 9, separate opinion, Lauterpacht, at p. 37.

12. The present case, Mr. President, is not about US law as such. Domestic law constitutes for international law nothing but facts. In the famous wording of the judgment of the Permanent Court of International Justice on *Certain German Interests in Polish Upper Silesia*:

> "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such, but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany . . ."[74]

That is exactly what Germany requests the Court to do, Mr. President. We do not ask the Court to interpret US law as such, but we invite the Court to give a judgment on the question of whether, in applying its own law, the United States acted in conformity with its obligations towards Germany under Article 36 of the Vienna Convention on Consular Relations. Germany submits that it did not.

13. To put it briefly, Mr. President, US law prevents raising the violation of the notification requirement in appellate proceedings after a conviction. That is the heart of the matter: once a violation of Article 36 has occurred, and the defendant has not raised the violation of his rights before the trial court, there is no opportunity to review the impact of the violation on the judgment handed down while the defendant did not know of his rights. Thus, US law creates a vicious circle: the defendant cannot raise the violation of his rights under Article 36, because he does not know of this right, but the failure of the authorities to inform the detainee of his rights cannot be remedied in later proceedings, because US domestic law will prevent its courts from even looking at this matter.

14. Two institutions of US law — established for entirely different purposes — lead to this result: first, the doctrine of procedural default which applies in many state and in all federal appeals and *habeas corpus* proceedings, and, second, the Antiterrorism and Effective Death Penalty Act of 1996. Under the doctrine of procedural default, a defendant cannot raise any mistake made in the trial proceedings on appeal if he did not do so already in the jury trial. While

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[74] *P.C.I.J., Series A, No. 7*, at p. 19. In the authentic French text: *"Au regard du droit international et de la Cour qui en est l'organe, les lois nationales sont de simples faits, manifestations de la volonté et de l'activité des États, au même titre que les décisions judiciaires ou les mesures administratives. La Cour n'est certainement pas appelée à interpréter la loi polonaise comme telle; mais rien ne s'oppose à ce qu'elle se prononce sur la question de savoir si, en appliquant ladite loi, la Pologne agit ou non en conformité avec les obligations que la Convention de Genève lui impose envers l'Allemagne."*

this rule does make sense where it concerns rights of which the defendant or his attorney were aware, it has perverse consequences when applied to a right to be informed of another right. A right to information, like that contained in Article 36, subparagraph 1 *(b)*, of the Vienna Convention, serves to remedy the ignorance of a detainee. If this obligation to inform is not met, the detainee will not know of this right, neither will he be able to raise this failure before the trial court. In this case, in contrast to other procedural rights, the right to information can only be properly enforced if it can still be raised after the end of the first trial. A measure or rule entirely justified in cases where his rights are known to the defendant amounts to an impermissible denial of rights in cases of a right to information. Germany does not claim that US courts contemplated such a result when they introduced the doctrine of procedural default. But this does not remedy the catastrophic consequences of the doctrine for the right to information. As Douglass Cassel has put it:

> "To bar a late claim under the Convention as procedurally defaulted, when consular rights could have been timely asserted, had the state complied with its duty to advise the foreign national of his consular rights 'without delay', is to penalize the foreign national for the state's breach. It is no answer to blame the defense counsel. If the state had complied with its duty to advise, the defense counsel's oversight would not have mattered."

And further:

> "If the US had done its duty . . . [the foreign national] would have been in a position to assert his consular rights at the right time and place. By allowing . . . restrictions on *habeas corpus* or considerations of domestic federalism to thwart Convention claims, the US fails to give 'full effect' to the purposes of consular rights."[75]

15. In addition, instead of creating incentives for the State authorities to meet their obligations under Article 36, the doctrine of procedural default provides a shield for State authorities. When the authorities meet their obligation to inform the detainees of their rights, they could face a much better informed defendant and might lose a case they might otherwise have won. On the other hand, if they fail to meet their obligation, they do not even risk condemnation by a higher court. Mr. President, distinguished Members of the Court, this state of affairs cannot be regarded as effective implementation of Article 36.

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[75]D. Cassel, Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases, 12 *LJIL* (1999) 851, at p. 885.

16. The adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[76], has made it even more difficult to challenge a State conviction. A *habeas* petitioner alleging that he is held in violation of treaty law will not even be granted an evidentiary hearing to establish prejudice[77]. Thus, in the *Breard* case, the US Supreme Court referred to the first phrase of Article 36, paragraph 2, only — 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 Article 36[78].

17. In the case of the LaGrand brothers, both the procedural default rule and the application of the said act prevented federal courts, indeed, any court, from actually dealing with the question of whether lack of consular notification had vitiated the pronouncement of the death penalty. The jurisprudence described earlier 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 US Court of Appeals for the 9th Circuit held that the claim of violation of the Vienna Convention was procedurally defaulted, even though the violation itself was not in dispute[79]. The court did not even discuss the substantive argument to the effect that additional mitigation might have prevented the pronouncement of the death penalty.

18. Mr. President, the application of the procedural default rule in the *LaGrand* case constitutes no exception but rather confirms the rule of the non-enforcement of Article 36, by US courts. Regrettably, the US Counter-Memorial is correct in stating that the trend visible in the first *Lombera-Camorlinga* decision of the 9th Circuit Court at the time when the German Memorial was written has not been continued. Recent judgments and scholarly analysis show that there is unlikely to be a change of the jurisprudence on the matter without a change in US federal law[80],

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[76]Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[77]28 U.S.C., paras. 2254 *(a)*, *(e)* (2) (ii) (Supp. 1998); for the text see Memorial, footnote 188 to para. 4.34.

[78]*Breard*, 37 *International Legal Materials* 826, 828 (1998).

[79]*LaGrand* v. *Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998), Memorial, Ann. 10.

[80]See, e.g., E. Luna/D. Sylvester, Beyond Breard, 17 Berkeley Journal of International Law (1999) 147; H. Schiffman, Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention, 8 Cardozo J. Int'l & Comp. L. (2000) 27.

even though some commentators maintain that such a change might still come about[81]. However, in the present context what counts is not whether the US court decisions are or are not correct from the standpoint of domestic US law. And so far it is for the United States to decide how to implement Article 36. But such implementation must meet the minimum standard of effectiveness required by Article 36, paragraph 2. As Germany has shown, these requirements are not met by the way in which the US legal system currently deals with violations of Article 36. In the words of Judge Boochever's vigorous dissent to the decision of the full 9th Circuit Court in *Lombera-Camorlinga*, the interpretation of the Vienna Convention by the majority of US courts

> "is equivalent to securing enforcement by a toothless, clawless lion. Defendants who actually have been prejudiced by the failure to be notified of their Article 36 rights may suffer imprisonment and other punishments to which they would not have been subjected had their rights been observed. Such an interpretation of the treaty hardly conforms to the due process principles embodied in the United States Constitution.[82]"

Neither, one might add, do they conform to the Convention itself. However, regrettably, Judge Boochever's is not the dominant position of the US judiciary. A violation of Article 36, especially the failure of US authorities to inform the foreign national of his rights, cannot be effectively remedied before US courts — or, indeed, anywhere else. This is — as our case shows — bound to lead to fatal consequences when the death penalty is imposed.

19. Mr. President, we will later set out the safeguards Germany seeks in order to remedy that situation. In addition, Mr. Donovan will explain to you how informing the consulate earlier would have affected the judgment, especially the pronouncement of the death penalty. However, one thing is crystal clear already at this point: the purpose of Article 36, that is, to inform the foreign detainee of his rights under the Convention, cannot be fulfilled if the possibility of raising the lack of notification is limited to the original trial. That is where US law is defective from the standpoint of Article 36, especially regarding the requirement of paragraph 2. Thus, Germany agrees with the opinion of Keith Highet, who wrote shortly before his death:

> "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

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[81]Schiffman, *ibid.*, at pp. 58 *et seq.*; D. Cassel, Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nations in United States Death Penalty Cases, 12 *Leiden JIL* (1999) 851, at pp. 884 *et seq.*

[82]United States Counter-Memorial, Ann. 9, p. 5.

> 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'."[83]

The case before you provides a unique opportunity to ensure the effective performance of that duty by the United States in the future.

20. Mr. President, distinguished Members of the Court, I would now kindly ask you to call upon Professor Simma to demonstrate that Article 36 contains individual rights. Thank you for your attention.

Le PRESIDENT : Je vous remercie, M. Paulus. Je donne maintenant la parole au professeur Bruno Simma.

M. SIMMA : Merci M. le président. Monsieur le président, j'aimerais commencer avec une remarque de nature procédurale. Nous sommes un peu en retard et je vous demande de bien vouloir m'interrompre quand vous souhaiterez que la Cour suspende la procédure jusqu'à la séance de l'après-midi. Merci, Monsieur le président.

VI. ARTICLE 36 OF THE VIENNA CONVENTION AS AN INDIVIDUAL AND HUMAN RIGHT

1. Mr. President, Members of the Court, in the following, I will demonstrate that the right to information under Article 36 of the Vienna Convention constitutes an individual, indeed, a human right, and explain why this is not only a factor aggravating the violations which have occurred, but also brings into play specific procedural safeguards in death penalty cases. Further, I will deal with the relevance of other human rights for the right to consular assistance: and in concluding this part, I will show the impact of the character of Article 36 as a human right on the present case.

I. Article 36 contains individual rights

2. In paragraph 97 of its Counter-Memorial, the United States argues that Article 36 does not confer rights on individual foreign nationals but only on their home State. Germany will argue that the right to information contained in Article 36, subparagraph 1 *(b)*, constitutes an individual right of foreign nationals. But, of course, Germany agrees with the United States, that, regardless of the

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[83]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, German Memorial, Ann. 39.

status of Article 36, paragraph 1, as an individual right of foreigners, it also establishes a right for a State party to the Convention to see this provision respected. Consequently, all the conclusions Germany has drawn, and will draw, from the violation of Article 36 are valid independently of the question whether Article 36 provides individual rights to foreign nationals in addition to rights for States parties.

3. Mr. President, the understanding of the rights under Article 36 as individual rights is confirmed by all the rules on interpretation of international treaties that we find in Article 31 of the Vienna Convention on the Law of Treaties. First, it should be clear enough that the "ordinary meaning" of the words "his rights" used in Article 36, subparagraph 1 *(b)*, refers to an individual person. Second, the context of Article 36 relates to both the concerns of sending and receiving States and those of individuals. It is individuals who are accorded freedom with respect to communication in subparagraph 1 *(a)*, it is individuals who have the right to request or not request the notification of the consulate pursuant to subparagraph 1 *(b)*, it is individuals who are to be informed of that right and, lastly, it is individuals who have the right to oppose a prison visit according to subparagraph 1 *(c)*. The *chapeau* of Article 36 which links those rights to the consular function does not change this picture. Nor does the paragraph in the Preamble to the Convention which provides that

> "the purpose of [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".

What this paragraph clearly deals with, Mr. President, is "privileges and immunities" of consular personnel, a matter wholly unrelated to Article 36. It was intended to ensure that consular personnel would observe its obligations towards the receiving State and that, if necessary, consular privileges could be waived by the sending State. This has nothing to do with Article 36. Third, the purpose of Article 36, paragraph 1, is to give individuals the right to inform their consulate or to abstain from so doing. Can there be a clearer indication of an individual right than the placing of its exercise squarely into the hands of the individual? To conclude our textual analysis, it is difficult to see, Mr. President, why something which looks like an individual right, feels like an individual right and smells like an individual right should be anything else but an individual right. As this Court has explained in its Advisory Opinions first in the *Arbitral Award of 31 July 1989*

case and on the *Competence of the General Assembly for the Admission of a State to the United Nations* case: "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[84]

4. But there is still more evidence. An analysis of the drafting history of our provision reveals that it was not introduced through some sleight of hand. On the contrary, it embodies the carefully considered solution to a problem which had occupied the participants of the Vienna Conference for a long time. On the one hand, they intended to do everything to render Article 36 effective. On the other, they did not want to have the consulate informed if a foreigner did not wish so: and the solution to this problem was the individual right to information on the right to notification. In our Memorial, we quote several State representatives who shared that view[85], and the one or two sources which the US Counter-Memorial adduces against this interpretation[86] are either not to the point or not representative.

5. Thus, the receiving State is under an obligation to inform the detainee, without delay, of his right — a genuine right — to have the authorities or himself inform the consulate of his arrest or detention. At a previous occasion before this Court, the Respondent had no doubt about this. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States pleaded that Article 36 contained an individual right, and let me quote from the Memorial in this case:

> "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."[87]

The US Foreign Affairs Manual also speaks "of the arrestee's right to communicate with the American consul"[88]. Germany agrees, Mr. President. Language, context and purpose of Article 36 make this conclusion imperative.

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[84] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at 8. The authentic French text reads: *"Si les mots pertinents, lorsqu'on leur attribue leur signification naturelle et ordinaire, ont un sens dans leur contexte, l'examen doit s'arrêter là."* Confirmed in the case concerning the *Arbitral Award of 31 July 1989, I.C.J. Reports 1991*, p. 53, at p. 72.

[85] Memorial, paras. 4.101 *et seq.*

[86] Counter-Memorial, para. 100.

[87] *I.C.J. Reports 1980*, p. 174.

[88] Section 7 FAM 411.1, Ann. MG 59, at p. 1284.

6. Now, in the opinion of the United States, 20 years after the *Tehran* Judgment, "even if Article 36 in some sense establishes individual rights, there is no requirement that those rights be justiciable in national criminal justice systems": thus the Counter-Memorial. But Article 36, paragraph 2, clearly requires domestic law to protect the individual right of foreigners to be informed on their right to consular notification in an effective manner. It is difficult to imagine, Mr. President, how this task could be achieved otherwise than by providing a right the violation of which entails legal consequences in domestic law. Hence, Germany takes the view that Article 36, paragraph 2, requires the recognition of the right of an individual to seek remedies for the violations of the Vienna Convention. And in light of what Mr. Paulus just said, Article 36, paragraph 2, further obliges States to refrain from imposing any procedural bar or penalty for the failure to assert such a right prior to the time they provided the required notification.

II. Article 36 as a human right

7. Mr. President, Germany further submits that, in the light of the development of international human rights law subsequent to the conclusion of the Vienna Convention in 1963, Article 36 has assumed the character of a human right pertaining to foreigners. As a preliminary point in this regard, I will recall the principle of dynamic treaty interpretation. And secondly, I will turn to the substance of my argument.

1. The principle of dynamic treaty interpretation

8. Mr. President, the Vienna Convention on the Law of Treaties provides in Article 31, subparagraph 3 *(c)*, that, together with the context of a treaty provision, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. Regarding human rights of foreigners, both Germany and the United States are parties to the International Covenant on Civil and Political Rights which prescribes due process of the law, in particular in connection with the application of the death penalty. In addition, numerous documents on the individual rights of foreigners, which expressly include the right under Article 36 of the Consular Convention, have been agreed upon in the United Nations. I will return to these texts in a moment, or maybe in the afternoon.

9. Further, Mr. President, the Consular Convention is a living instrument, which must be interpreted in the light of subsequent developments of international law. As this Court pronounced in its *Namibia* Advisory Opinion, referring to a League of Nations Mandate,

> "the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[89]

More recently, this Court has confirmed this view in its Judgment in the *Gabčíkovo-Nagymaros* case, regarding the impact of the development of international environmental law on the interpretation of a bilateral treaty[90]. There can be no doubt in my view, that such necessity of dynamic interpretation also applies to the field of human rights.

10. Indeed, where human rights are at stake, these considerations are even more imperative. Both the European Court of Human Rights and the Inter-American Court of Human Rights have interpreted human rights treaties in a dynamic fashion. In the words of the Advisory Opinion of the Inter-American Court of Human Rights of 1 October of last year, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the guidance of the *Namibia* Opinion is:

> "particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court . . . [that is the Inter-American Court] and the European Court of Human Rights . . ., among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[91]

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[89] *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. 16, at p. 31, para. 53.

[90] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paras. 139 f.

[91] Inter-American Court of Human Rights, Advisory Opinion OC-16/1999, para. 114, as submitted by Germany to the Court; citing IACHR, *Interpretation of the American Declaration of the Rights and Duties of Man*, Advisory Opinion OC-10/89 of 14 July 1989, Series A No. 10, para. 43; Cour Européenne, *Tyrer* v. *UK*, Judgment of 25 April 1978, Series A No. 26, pp. 15-16, para. 31; *Marckx*, Judgment of 13 June 1979, Series A No. 31, p. 19, para. 41; *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A No. 310, p. 26, para. 71.

In the context of the interpretation of the obligation to inform a detainee "without delay", the Inter-American Court has also emphasized the role of the principle to give *"effet utile"*, "appropriate effect", to the provisions of a treaty to ensure that it is implemented effectively[92].

11. And this is even more appropriate in the case now before you, Mr. President, because, as far as Article 36 of the Consular Convention is concerned, the subsequent developments that I have described do not change an established interpretation. Rather they confirm the textual understanding of our provision. Mr. President, Germany will now show that the subsequent development of international human rights law further strengthens the character of Article 36 as establishing an individual right.

2. Further development of the human rights of foreigners

12. First, in 1985, a "Declaration on the human rights of individuals who are not nationals of the country in which they live"[93] was adopted by the United Nations General Assembly by consensus. Among the rights mentioned therein, one can find, in Article 10, the provision that

> "[a]ny 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 a human right of "any individual who is not a national of the State in which he or she is present"[94].

13. There exist several other declarations and documents which also recognize the right to consular assistance as a human right. These documents include Paragraph 16.2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment approved by the General Assembly in 1988, Rule 65 of the Rules of Detention of the International Criminal Tribunal for the Former Yugoslavia — contained by the way in a chapter on "individual

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[92]Advisory Opinion OC-16/99, para. 104.

[93]Annex to resolution 40/144.

[94]*Ibid.*, Art. 1.

rights of detainees"[95] — and, most recently, Paragraph 3 of Resolution 2000/65 of the United Nations Commission on Human Rights of 27 April of this year on the question of the death penalty[96].

14. Finally, a year ago, the Inter-American Court of Human Rights has expressed the view that

> "[t]he bearer of the right mentioned . . . is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are 'accorded' to the interested person."[97]

All American States appearing before the Court in this instance — El Salvador, Mexico, Guatemala, the Dominican Republic, Paraguay, and Costa Rica — shared this interpretation with the lone exception of the United States, which was, at the time, already a party to the present proceedings[98]. And, as the Counter-Memorial has to admit, even the jurisprudence of US courts does not explicitly deny that Article 36 embodies an individual right. Hence, Mr. President, Germany considers that there is overwhelming evidence that Article 36 constitutes an individual right of foreign nationals and is to be regarded as a human right of aliens.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je crois que nous allons nous arrêter là pour ce matin. La Cour reprendra ses travaux cet après-midi à 15 heures.

L'audience est levée à 13 heures.

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[95]Complete name *Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, as amended on 17 Nov. 1997, IT/38/REV.7, Rule 65.

[96]United Nations Doc. E/CN.4/RES/2000/65, para. 3 *(d)*: The Commission on Human Rights urges "all States that still maintain the death penalty: . . . *(d)* to observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations".

[97]Advisory Opinion OC-16/1999, para. 82.

[98]*Ibid.*, paras. 26 *et seq.*