CR 2000/31

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Friday 17 November 2000, at 2 p.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 vendredi 17 novembre 2000, à 14 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

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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,

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

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

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

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comme conseils.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous sommes réunis aujourd'hui pour entendre le deuxième tour de plaidoiries des Etats-Unis d'Amérique, et je vais donner immédiatement la parole à M. Thessin, agent pour le Gouvernement des Etats-Unis d'Amérique.

Mr. THESSIN: Thank you, Mr. President.

1.1. Mr. President, Members of the Court, learned counsel, ladies and gentlemen.

1.2. My friend, Mr. Westdickenberg, productively recalled for us that this is the World Court, a court with the function to resolve international legal disputes between States. Yet after numerous German efforts to argue the facts and its frequent interventions to debate public policy, we often were left believing that we were before the United States Supreme Court or listening to debates before the Arizona state legislature or the United States Congress.

1.3. In our previous pleadings, the United States set forth in detail the fundamental facts and legal principles of this case. The points we make today will re-emphasize these principles and supplement these pleadings, on which we continue to stand.

1.4. This case should, indeed it must, be decided upon the principles of international law. That is the Court's mandate; that is its proper charge. Permit me again to summarize the legal principles that our previous pleadings have supported fully.

1.5. The Court's jurisdiction is founded on the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Consular Relations. The Consular Convention required the competent authorities to inform Walter and Karl LaGrand without delay that each had the right to have those authorities notify German consular officials of his arrest. The competent authorities did not inform either of the LaGrands of this right.

1.6. The Consular Convention establishes procedures for facilitating State-to-State consular relations. In this context, the Convention provides non-citizens with a right to consular notification in certain circumstances, but it does not require a State to provide any remedy in domestic courts to non-citizens whom it fails to notify of this right.

1.7. The United States therefore made appropriate satisfaction when it acknowledged this breach of Article 36, paragraph 1 *(b)*, of the Consular Convention, when it extended its deep regrets

and sincere apologies, when it assured Germany that compliance must be improved and when it made extensive efforts to prevent future occurrences.

1.8. The central facts are not in dispute. On a day in January 1982, Walter and Karl LaGrand killed a 63-year-old bank teller and left a 20-year-old woman near death. After a sentencing hearing in December 1984, an Arizona trial court condemned the LaGrands to death, weighing the aggravating factors of the crime against mitigating factors that included a troubled childhood in Germany. A lengthy process then began that involved two court systems, state and federal, and three different procedures, an appeal from the original judgment and two different collateral reviews through *habeas corpus* procedures. These extensive efforts lasted 15 years. No international law principle requires this number and variety of judicial channels or for that matter that a federal court system even exist to review state court judgments.

1.9. Germany learned of the detention of the LaGrand brothers in 1992, supported clemency in February 1999, but raised the possibility of a consular failure only two days before the execution of Karl LaGrand.

1.10. Germany's position is difficult to summarize, not least because it takes contradictory positions on several of its central tenets. Indeed, a substantial gap exists between the general assertions of Germany and the specific requests it makes to this Court. Germany cannot have it both ways.

1.11. First, Germany says that it does not ask this Court to act as a court of criminal appeals. Yet we heard again and again how it asks the Court to scrutinize — and hold unlawful — various aspects of the criminal law and procedure of both the United States and the State of Arizona and to examine critically a number of actions of courts, prosecutors and defence counsel. Over the last week, the Court has been asked to review the sufficiency of the testimony of experts during trial, the competence of the LaGrands' counsel, and the adequacy of state and federal procedures for review of convictions and sentences.

1.12. Second, Germany says that it does not ask the Court to tell the United States how to comply with the Consular Convention. Yet it asks the Court to find certain aspects of the US criminal system contrary to the Convention, such as the federal and state rules of procedural default concerning the time and manner in which defences must be raised, and to require that new

procedural rules be substituted. As we have made clear, the Consular Convention neither provides, nor requires a State to provide, remedies in domestic courts for failures of consular notification. Even if the Convention had required domestic remedies, a rule that requires timely raising of claims, such as the rule of procedural default, is common in judicial systems. Nor does the US rule stand in the way of justice. Untimely claims are still allowed if individuals can demonstrate prejudice to their case and a good reason for failing to raise the claim in a timely manner, such as because counsel was ineffective. If the United States is to have discretion on how it complies with the Consular Convention — as Germany professes is its desire — then the Court should not respond to Germany's demand that specific features of the US system are unlawful.

1.13. Third, Germany says that this case is not about the death penalty. Yet its arguments that the US violated its obligations in the *LaGrand* case are clearly and heavily based on the LaGrands' executions. Entire portions of Germany's arguments consisted of condemnations of the death penalty and the manner of its implementation. If, as Germany says, this case is not about the death penalty, then the Court should not grant remedies or make findings related specifically to the death penalty.

1.14. The United States has among the most extensive and multifaceted procedures in the world for ensuring fairness and due process for criminal defendants. This overlapping system provides several layers of procedural protections. Mr. President, in this system of checks and balances, in this system of in-depth defence against unfairness, a failure of consular notification does not equate with a fundamental failure of due process. In the case of the LaGrand brothers, no one can honestly say that it did.

1.15. Thus, this Court can comfortably decide this case by properly implementing international law, without following the German entreaties to broaden improperly the scope of the Court's jurisdiction in this matter and distort the meaning of international conventions. For a correct decision on international law will be fully consistent with the highest standards of fairness in criminal proceedings. This is the World Court.

1.16. Mr. President, Members of the Court, thank you very much for accommodating our request to begin this session at 2 p.m. rather than the usual hour. As a reciprocal gesture, we intend

to be brief and expect to finish by the tea break. We are confident of our position and do not need to repeat it at length.

1.17. I would propose that we proceed as follows. With your permission, each advocate will speak in the same order as on Tuesday. I therefore ask, Mr. President, that you begin by calling upon Attorney General Napolitano. Thank you.

The PRESIDENT: Thank you very much, Mr. Thessin. I now give the floor to Attorney General Napolitano.

Mrs. NAPOLITANO:

1. Introduction

Mr. President and Members of the Court:

2.1. As the Attorney General of Arizona, please allow me to present a brief rebuttal to the remarks yesterday that presented what can only be characterized as a distorted view of the American criminal justice system, particularly as it was embodied in the case of the LaGrands. Put simply, the State of Arizona made an error in 1983, an error for which it has apologized and for which considerable corrective actions have been taken. Germany's attempt to transform that error into the precipitating cause for the LaGrands' convictions and sentences has no support in the actual record of this case. It is revisionist history unrelated to the facts and unrelated to the 15 years and three separate court processes that, I submit, ensured the LaGrands received all the protections guaranteed to capital defendants — whether or not they are foreign nationals. Germany is unhappy with the result because Germany seeks to abolish the death penalty. Had the LaGrands received a sentence of life imprisonment, I doubt whether we would be here today. I am confident this Court will apply international law appropriately, and not make the death penalty part of its calculus notwithstanding Germany's backhanded attempt to argue otherwise.

Let me briefly address four points.

2. Mitigation evidence

2.2. First, mitigation evidence. Yesterday, Germany attempted to argue that they have established a causal relationship between the failure to notify the LaGrands of their consular rights

and actual prejudice to the conduct of the defence. Germany's contention is based on the hypothesis that, had they been notified, they would have produced mitigating evidence that would have prevented imposition of the death penalty. This hypothesis overlooks, yet again, the evidence that was presented on behalf of the LaGrands. And, contrary to Germany's assertions, what Germany is asking this Court to do would involve this Court in, to use Germany's own words, the "nitty gritty"[1] of a criminal case — a function this Court is neither designed nor equipped to perform.

2.3. Prior to the sentencing hearing, the presentence report was filed. In the report, the probation officer outlined the LaGrands' social history. The report described the LaGrands' heritage, the dysfunction of the LaGrands' household from an early age, and how the LaGrands were placed in and out of various foster-care facilities[2]. At the sentencing hearing, the LaGrands' attorneys called psychiatric experts to support the statements in the presentence report. Dr. Gurland testified that Walter came from a broken home and was placed in other foster homes[3]. The doctor recounted the interracial nature of Walter LaGrand, and how Masie LaGrand, Walter LaGrand's adoptive father, was the only stable male relationship in Walter's life[4]. The doctor reminded the court of the turmoil Walter LaGrand faced in being placed in different foster-home facilities[5]. The Court noted physical abuse, Walter's poor academic record at school, and the ostracism by his peers[6]. Walter LaGrand's attorney then called Patricia LaGrand, Walter's sister, to testify in support of the doctor's findings[7]. Karl LaGrand's attorney presented a similar case. His expert, Dr. Meshorer, testified that Karl had the same social history and childhood background as Walter LaGrand[8].

2.4. Did the State of Arizona contest these claims of mitigation? No. Arizona accepted the LaGrands' claims as true. At the sentencing hearing the prosecutor did not contest them in any

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[1]CR 2000/30 p. 40, para. 6.

[2]Ann. MG 2, pp. 283-285.

[3]Ann. MG 5, p. 317.

[4]Ann. MG 5, p. 318.

[5]Ann. MG 5, p. 319.

[6]Ann. MG 5, pp. 321–323.

[7]Ann. MG 5, pp. 334–350.

[8]Ann. MG 5, p. 354.

way[9]. So Germany postulates a very novel concept in American jurisprudence — the LaGrands were somehow prejudiced by not further establishing a mitigating circumstance that the prosecutor did not even contest.

2.5. Germany's argument that this Court must look at what was presented, how it was considered, and attempt to decide whether such evidence would have made a difference in the sentence imposed, is precisely the type of claim routinely raised in a court of criminal appeals. To find that there is prejudice based on lack of mitigation evidence, this Court would have to disagree with the Arizona Supreme Court, the United States Federal District Court for the District of Arizona, and the United States Court of Appeals for the Ninth Circuit[10]. All of these courts considered the mitigation proffered at the sentencing hearing and concluded that the trial court did not err in considering the evidence as insufficient to outweigh the horrific aggravating circumstances of the LaGrands' crimes.

3. Access to counsel

2.6. Second. access to counsel. Germany's position also overlooks a critical doctrine in American criminal law. All defendants are provided with defence counsel who are presumed to know the law and who are charged with making decisions about which defences to raise. Nothing prevented the LaGrands' lawyers from exploring the LaGrands' nationality and from raising the consular notification issue. The provision of counsel is a key safeguard against governmental misconduct, and it is an integral part of our criminal justice system.

2.7. Thus, it is disingenuous for the German Government to claim that the LaGrands were incapable of raising their rights because they did not know of their rights. American law assumes that defendants do not know of their rights. It is for that very reason — the lack of knowledge of one's rights — that in the United States a defendant is afforded an attorney, and guaranteed that the attorney will render effective assistance.

2.8. Furthermore, there is nothing remotely improper about a judicial system that insists that defence counsel raise issues of alleged misconduct early, whether they are alleged international or

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[9]Ann. MG 5, p. 417.

[10]Ann. MG 3, pp. 300-301 (Arizona Supreme Court), MG 9, p. 474 (District Court), MG 10 p. 484 (9th Circuit).

domestic law violations. That way, alleged breaches of rights can be factually explored and duly considered. The position Germany promotes provides a disincentive to defence counsel to raise issues early, and undermines the orderly administration of justice. It would give foreign nationals rights greater than American citizens charged with identical crimes. The Vienna Convention does not suggest or support such a result.

4. Germany's hypothetical assistance

2.9. Third, Germany's hypothetical assistance. Germany also argued that they would have provided considerable assistance to the LaGrands. As their sole support for this argument, Germany claimed that they have now spent DM 100,000 on the *Apelt* case. As the record before this Court demonstrates, Germany's assistance in the *Apelt* case was extremely dilatory. When the attorney for Michael Apelt contacted the German Consul in 1989, Germany did not offer to help, but merely requested to be kept informed. I direct the Court again to the affidavit of Mr. Villarreal who details the reality, not the fantasy, of how Germany really treated Michael Apelt's request for assistance. This affidavit is in Tab 6 of the United States Supplemental Submissions.

2.10. Similarly, with respect to the LaGrands, Germany did not address the fact that in 1993, when contacted by the investigator for Karl LaGrand, their response was not to offer help but to question how nationality was relevant to Karl's defence. I direct the Court to Tab 5 of the United States Supplemental Submissions. In their attempt to explain away Germany's ignorance as to the legal significance of the LaGrands' German nationality, Germany claims that the letter of 17 March 1993 was to an investigator and not to Karl LaGrand's attorney. This statement makes no sense. The investigator worked for the attorney: he is an agent of the attorney. Any information requested by the investigator is the same as if it were requested by the attorney. Accordingly, Germany's speculation that they would have leapt to the LaGrands' defence is contradicted by their action — or inaction — in the *Apelt* case and by the uncontradicted facts in the *LaGrand* matter.

5. Direction to the United States Attorney

2.11. Fourth, direction to the United States Attorney. Finally, I must respond to the suggestion Mr. Donovan made yesterday in the argument on provisional remedies, which

Mr. Matheson will address in greater detail. Among the things Mr. Donovan claims the United States Government should have done was to direct the United States Attorney, the chief federal prosecutor, to sue the Governor of Arizona in federal court for an emergency order preventing Walter LaGrand's execution. The Court may be interested in knowing that I was the United States Attorney for Arizona before I was elected Arizona's Attorney General. I know of absolutely no precedent for Mr. Donovan's suggested action, and certainly none ever in Arizona. Mr. Donovan's argument is simply not a viable alternative given the relationship between the federal government and the states. It certainly was not an option in the unique and urgent circumstances of the *LaGrand* case — an urgency created by Germany's own delay in raising the consular notification issue.

6. Conclusion

2.12. Mr. President, that concludes my remarks. It has been a great honour to appear before you and to explain the entire history of the *LaGrand* case as it actually occurred. I ask you now to call on Professor Meron.

Le PRESIDENT : Je vous remercie, Madame l'*Attorney General*. Je donne maintenant la parole au professeur Meron.

Mr. MERON: Mr. President, distinguished Court,

3.1. I thank you for this opportunity to respond to the arguments made yesterday by the distinguished counsel for Germany.

3.2. First, Mr. President, burden of proof. We appreciate the advocacy of my learned colleague Professor Simma and of Mr. Donovan. But the repeated rhetorical appeals, such as "Catch 22", will not be a substitute, I submit, for the authoritative jurisprudence of this Court. As the Court stated in the *Nicaragua* case: the " the Court cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular point of view".

3.3. Second, diplomatic protection. The learned Co-Agent of Germany stated yesterday: "the issue enters the picture only through the intermediary of the Vienna Convention . . .". But the Vienna Convention deals with consular assistance — I draw your attention to Article 5 — it does

not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its nationals through diplomatic protection. The former is within the jurisdiction of the Court under the Optional Protocol, the latter is not. In his first argument, on Tuesday, Professor Simma made it quite clear that he spoke of diplomatic protection in the classical sense. Please remember his mention of *Mavrommatis*.

3.4. In explaining the relevance of diplomatic protection, the Memorial stated: "According to the rules of international law on diplomatic protection, Germany is also entitled to protect its nationals with respect to their right to be informed . . ."[11] Thus Germany based its right of diplomatic protection on customary law. I have to recall that this case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious, Mr. President, that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?

3.5. May I draw the attention of the Court to the fact that the distinguished Co-Agent of Germany did not mention, much less dispute, the authoritative distinction this Court made in *Nicaragua* between jurisdiction over treaty and jurisdiction over custom. Let me conclude, diplomatic protection is not within the competence of the Court in this case.

3.6. Third, exhaustion of local remedies. The distinguished Co-Agent of Germany appears to make two arguments. First, that there are no available remedies. Second, that the breach of the duty to inform excuses the duty to exhaust local remedies.

3.7. As regards the first argument, let me start by agreeing with Germany's positions in its Memorial and in its arguments this week before this Court that diplomatic protection and any individual rights are indeed subject to the exhaustion of local remedies.

3.8 Germany contests, however, that remedies were available. May I invite the Court to turn its attention to paragraph 4.25 in the Memorial. Germany states that United States law "does not provide an effective remedy for the violation of the requirement of notification . . . *after* the defendant has been convicted in a jury trial" *[emphasis added]*. This implies two propositions

[11]Memorial, para. 4.87.

which I submit to this Court are self-evident. First, that Germany concedes that effective remedies did exist at the state level. Indeed, in paragraph 4.28 in the Memorial of Germany: Germany agrees that "the doctrine of procedural default consists in the requirement of exhaustion of remedies at the State level before a *habeas corpus* motion can be filed with federal courts". Second, Germany would want the United States to provide for additional remedies at the federal level. But Germany is on thin ice here. As I have explained in some detail in my argument on Tuesday, international law does not require any additional level of review whatsoever in the federal courts. If no additional level of review is required by international law, I would like to ask: how can it be that the existence of non-discriminatory review requirements would be impermissible? Germany, I submit, cannot rewrite American law or international law to provide for an obligation of such an additional review at the federal level.

3.9. As regards the second argument that the breach of the duty to inform excuses the duty to exhaust, Germany appears to want to have something that we colloquially, Mr. President, call a "double dip". First, it invokes the breach of the duty of notification as the basic breach, a *sine qua non* of these proceedings. Second, it uses this same breach to excuse non-exhaustion of local remedies for the commission of that breach. Surely, this attempt is unconvincing. Imagine for a moment that Article 10 of the European Convention on Human Rights, which concerns the right to receive information, would be interpreted by the European Court of Human Rights as implying a right to be informed about a particular matter. Imagine further that the State has violated that right in a particular case. Would Germany seriously argue that the requirements of exhaustion under the European Convention would be suspended in this case even though the "victim" had a lawyer?

3.10. I have already explained at some length that the lawyers for the defendant had the duty to raise the matter of the breach in the courts of Arizona. May I ask the Court to note that Germany did not respond to, or dispute, our detailed arguments that the duty to raise the breach of notification was the duty of the lawyers, that international jurisprudence regards the defendant and his or her lawyer as one entity in terms of legal position, and that the case-law of the European Court of Human Rights — the only international tribunal that has considered this matter — makes it clear that a State is not accountable for either the errors or for mistaken strategy by lawyers. In short, the positions taken by lawyers — wisely or unwisely — do not excuse non-exhaustion of

local remedies. Although the defendants may not be aware of the breach of the duty to inform, they had lawyers who are expected to know the law (for example, *Kaminski* v. *Austria*).

3.11. Fourth, practice. We argued that in its national practice Germany neither reviews nor annuls convictions where there has been a breach of the duty of consular notification — I am quoting from my argument here — "on the sole ground of such breach"[12]. Yesterday, the distinguished counsel for Germany told us that there is a possibility of review under German laws, but only, I repeat only, where rights may have been impaired. But where rights have in fact been impaired, concepts of prejudice operate also in the law of the United States.

3.12. But this is not the main point. The essential argument we made, and which was not answered by Germany, is that there has not been a single case, I repeat single case, in German national practice where Germany has annulled or quashed a conviction or a sentence rendered in absence of consular notification.

3.13. Germany, Mr. President, refers to the existence of general laws which could apparently cause a review of sentences in cases where rights have been impaired. But Germany has not demonstrated that its laws have actually been applied to review or to annul convictions or sentences rendered in breach of the duty of consular notification. The Court will recall that many such cases have occurred in Germany, many such cases have taken place with regard to American citizens sentenced to imprisonment in Germany in breach of the duty of consular notification. Germany suggests that the law that it cited yesterday is evidence of concordant practice by Germany. But reliance on some general laws in this context will not be more satisfactory than an invocation of the ten commandments as proof that we have stopped to sin. Of course, Mr. Kaul's attempts yesterday to introduce into the Convention concepts of punishment and the difference between capital and other punishment have no basis in the Convention. This would amount to amending the Convention.

3.14. By asking hypothetical questions about the practice of other States, Mr. Kaul has in fact conceded our argument that not a single State party follows Germany's asserted interpretation of the Consular Convention. I repeat our conclusion that the general practice of States, including

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[12]CR 2000/28, p. 48, para. 3.46.

that of Germany and of the United States, demonstrates that there has been a general rejection by States parties of the interpretation of the Consular Convention that Germany is asserting against the United States. In this case, which rests upon a certain interpretation of the Consular Convention, Germany has failed to establish that its interpretation has become international law binding on the United States.

3.15. Mr. President, distinguished Court. This is the 104th case on the General List of the Court. But in the annals of this Court, this case is quite unique. The Court is being asked to find the United States in breach of a proposition, based on an asserted interpretation of a treaty, which has neither a textual foundation in the text of the treaty, nor in the documented practice, nor in the *opinio juris* of States parties. This is quite different, I submit, from situations where a human right, for example, is recognized in the legal consciousness of States, though, alas, is often disrespected in practice. Far from even a rhetorical acceptance, State practice rejects the interpretation asserted by Germany. There is, therefore, and I come to my conclusion, in international law no norm here, there is no international norm which this Court, as a court of justice, can regard as binding on any State party; it cannot apply it against the United States.

Thank you, Mr. President. I would be grateful if you could now call on Ms Catherine Brown.

The PRESIDENT: Thank you, Professor Meron. I now give the floor to Ms Catherine Brown.

Ms BROWN: Thank you Mr. President and distinguished Members of the Court.

4.1. We reviewed the Vienna Convention at length on Tuesday and I will only do so briefly today. Nothing said yesterday refuted our basic point which is that Article 36 does not require that consular notification be incorporated into the criminal justice process of the member States or that breaches of Article 36 be remedied in that process. We ground that point in the first instance on the text of the Convention, what it says and what it does not say. Our point that States party have expressly provided for incorporation and remedies when they have wished to do so — such as in the Covenant on Civil and Political Rights — but that they did not do so in the Vienna Convention, was not addressed yesterday by our German friends.

4.2. Given the lack of an express requirement of incorporation, Germany has a particularly difficult burden; it must somehow make an intrinsic link between a breach of the last sentence of Article 36, paragraph 1 *(b)*, and the rights of the defendant in the criminal process. It failed again yesterday to do this. Instead it largely restated its erroneous assertion that the entire operation of Article 36 depends on informing the national (CR 2000/30, p. 19), and that the end result of a 17-year criminal process can be attributed directly to a failure to inform. Mr. Westdickenberg's suggestion yesterday that the United States has mixed up things that by their nature are separate (CR 2000/30, p. 9) could hardly better describe what Germany is doing, in mixing the separate spheres of consular notification and criminal prosecutions.

4.3. In the sphere of criminal prosecutions, a fair trial is, of course, essential, regardless of the defendant's nationality. It cannot depend for fairness on consular notification or on consular assistance. There is no right to or standard for consular assistance; a consular officer owes no fiduciary duty to his national, and does not have the obligations to him that a lawyer does.

4.4. By the same token, Article 36 is important within its sphere of consular relations and the performance of consular functions. It does not denigrate the importance of consular notification to keep it in proper perspective within its rightful sphere. We have always recognized that consular notification is important and that consular assistance, when requested and given, can in some instances assist in a criminal case. But this does not mean that it is so intrinsically linked to the criminal justice system that the system's results are inherently suspect if Article 36 requirement to inform is neglected. We do not parse Article 36 into what Mr. Simma called a "bag full of isolated rights with no apparent connection and no relevance whatsoever for criminal proceedings" (CR 2000/30, p. 18) when we simply suggest that what may sometimes be relevant is not essential, and is not required to be made intrinsic. We certainly are not devaluing Article 36 by pointing out that the rule of procedural default that governs collateral review by our federal courts of state court proceedings cannot possibly violate that Article; how could it, given that the collateral reviews provided to defendants by the United States are highly unusual in international practice and that relevant international standards require nothing more than a single appeal?

4.5. The mere fact that Article 36, paragraph 1 *(b)*, applies to all detentions, including those that happen to occur before trial, which was mentioned yesterday (CR 2000/30, p. 18), does not

provide the essential link — the intrinsic link — to the criminal process that Germany seeks, for all the reasons we explained on Tuesday. A foreign national may or may not be detained before trial. The more plausible link between Article 36 and legal proceedings is the provision in Article 36, paragraph 1 *(c)*, allowing consular officers to arrange legal representation for their nationals. Germany suggested yesterday that our view of this provision would allow a receiving State to circumvent Article 36 by appointing a lawyer for the defendant (CR 2000/30, p. 19), but that was a gross mischaracterization of our point. Our point is that this one textual reference is too thin a thread to bind the sphere of criminal process and the sphere of consular communications together so tightly that a criminal prosecution, no matter how far along, must be reopened simply because a consular officer did not have a chance to arrange counsel for someone who in fact was represented by counsel.

4.6. Finally, we were gratified yesterday that Germany disavowed any interest in a remedy of automatic nullity. But it said nothing in response to our suggestion that requiring a remedy based on prejudice would raise serious questions relating to the inviolability of consular archives and the privileges and immunities of consular officers which are also provided for in the Vienna Convention on Consular Relations.

4.7. Turning to State practice, yesterday for the first time we finally heard Germany try to address our long-standing observations. We especially appreciated its candid confirmation that practice is generally just as we have described it. (CR 2000/30, p. 27.) As for the rest, with all due respect it was not only belated, but also inadequate. We look to State practice as a tool of interpretation. We had already acknowledged that some States have incorporated Article 36 into domestic law or provided domestic remedies for violations. But the important fact, which Germany in no way refuted, is that, regardless of their practice with respect to the death penalty, the great majority of States have not incorporated and have not provided criminal justice remedies for violations. This is consistent with the text and the fact that the text states no requirement of incorporation. In short, State practice confirms our reading of the Convention.

4.8. Finally, on the question of State practice, given Germany's emphasis yesterday on the advisory decision of the Inter-American Court in OC-16, it was particularly noteworthy that Germany said nothing about the practice of the States of Latin America. Our State practice survey

did not find any special remedies for failures of notification in that area of the world, where failures of notification are common. Moreover, there is no evidence that any State of the Inter-American system has changed its practice as a result of OC-16. The practice in that region that we think is most relevant is that Mexico and the United States entered a prisoner transfer treaty fully aware that Americans who would be transferred to the United States would in many cases not have received timely consular assistance, and yet they would continue to serve their Mexican sentences in the United States. This is indeed how prisoner transfer treaties operate in all cases[13].

4.9. Shifting finally to the *travaux*, I do not believe that much of interest was said yesterday at all, leaving aside the confession that Germany is pushing for a "state-of-the-art interpretation" of Article 36 based in part on the inclusive nature of the *travaux* with respect to individual rights (CR 2000/30, p. 21). The Court will recall that on Tuesday I expressly noted that we accept the obvious — that Article 36 talks in terms of individual rights — but that of course is not the relevant question. The Court will also recall that I streamlined my discussion of the *travaux* in order to finish before lunch. If I had not done so, I would have noted that there were in fact a few mentions of human rights in the discussion that led to the final version of Article 36. But the mention of human rights by the Greek delegate Germany referred to yesterday (CR 2000/30, p. 22) cannot make consular notification a human right or an element in the criminal justice system[14]. The comments of the Greek delegate in any event were not made about the obligation to inform the detainee — which has never been conceived of as a human right. Rather, the statements were made in a different context before the last sentence of Article 36, paragraph 1 *(b)*, was considered[15].

4.10. In fairness, if we look at the *travaux* as a whole, we can find something for almost everyone. But we cannot find something for Germany. The *travaux* do not give Germany the link between consular notification and criminal proceedings needed to sustain its position. Nor do they reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States. Certainly the delegates' decision to allow the individual to decide whether his consular officers would be informed of his detention did not

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[13]See US Counter-Memorial, Exhibit 8, pp. 12-13.

[14]Official Records, Vol. I, p. 39, para. 33 (17 April 1963) (plenary); p. 339, para. 13 (15 March 1963) (Second Committee).

[15]*Id.*, pp. 81-87 (22 April 1963).

reflect a sense of rights belonging primarily to the individual, as Mr. Simma suggested yesterday (CR 2000/30, p. 21). If that were true, how could we explain the fact that Germany and other States felt entirely free after the Vienna Conference to negotiate consular conventions that provided notification without regard to the wishes of the individual? A particularly interesting example, although not in force, is the 1967 European Consular Convention, which in Article 6 addresses exactly the same issues that were addressed in Article 36 of the Vienna Convention, but it does so without once referring to a right of the individual[16].

4.11. Germany also made some effort to address the question of waiver (CR 2000/30, p. 19), but its comments were not particularly responsive. Our point was that the reference to the possibility of waiver in the *travaux* supports our view that, whatever the nature of individual rights in Article 36, those rights still ultimately belong to the States party. Thus, the Vienna Convention would not bar a State unable to assist its nationals from asking a receiving State to stop implementing the last sentence of Article 36, paragraph 1 *(b)*. Germany's observations that its nationals have some kind of a right under German regulations to consular assistance does not refute this point which was about the Vienna Convention. Nor does it speak to German nationals' rights in the criminal justice systems of receiving States. Clearly a judge presiding over a criminal trial in a receiving State could not direct a German consular officer to appear and to provide assistance to a German national at the national's behest. But in the United States, at least, the judge could require a lawyer to undertake the defence. That is a significant difference bearing on the relationship between consular notification and the criminal process.

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4.12. Mr. President, on Tuesday I noted that the 165-odd States party to the Vienna Convention on Consular Relations are engaged in a continual conversation about consular notification and access, and I urged the Court to respect that conversation by rejecting Germany's invitation to revision. If I may return to that theme in closing, I would ask the Court to imagine that conversation if Germany's invitation were accepted. Let me just note a few countries that have only recently acceded to the Convention: Armenia in 1993, Azerbaijan in 1992; Bahrain in 1992;

[16]E.g., European Consular Convention, Article 6, E.T.S. No. 61 (signed 11 Nov. 1967; not in force).

Barbardos in 1992; Eritrea in 1997; Libya in 1998; Mauritania just this year; Qatar in 1998; and Thailand in 1999. At least some of these countries undoubtedly joined because they were encouraged by other States to do so. It certainly has been the practice of the United States to encourage accessions, in the interests of having a uniform framework for consular relations.

4.13. In such an encouraging conversation, it is well within the realm of imagination that a State thinking of acceding will ask a few questions about Article 36, perhaps expressing concern that it will be difficult to comply, given the country's size, its infrastructure and other factors. If that State were told that this Court had said that a State party must remedy breaches of Article 36 in its criminal justice system, it might be somewhat taken aback. After reflection, it might ask, "You mean, even if we give a foreign national a full and fair trial, with all the safeguards we give to our own nationals, our criminal courts will still have to decide retroactively what would have happened if the national had been told that he could have his consular officials informed? No matter how far the process has proceeded — even if the appeal is over? Even if the person speaks our language perfectly, and has lived in our country almost all his life? Even if he hardly even knew that he was a foreign national, didn't speak his own country's language, and had had no contact with his country for many years?"

4.14. I suggest that explaining that the decision of this Court technically applied only to the *LaGrand* case between Germany and the United States would not be a satisfactory answer to these questions. In the majority of cases, the difficulties of ensuring perfect compliance with Article 36 and the importance that States attach to the integrity of their criminal justice systems would simply preclude States from agreeing. I will go further, and suggest that many of the States now party to the Convention would not have adhered to it — at least not without reservations — had they so understood it. And I again ask that the Court bear in mind that its decision in this case will inevitably have far-reaching implications, and that the Court reject Germany's invitation to give the Vienna Consular Convention a state-of-the-art meaning that the 165-odd States party to it never contemplated.

4.15. Mr. President, that concludes my presentation, and I request that you now hear from Mr. Mathias.

Le PRESIDENT : Je vous remercie, Madame Brown, et je donne maintenant la parole à M. Mathias.

Mr. MATHIAS:

5.1. Mr. President, Members of the Court. Let us take one last look at the German submissions.

5.2. With respect to the first submission, we heard nothing more about the alleged breaches of Articles 5 or the other aspects of Article 36, paragraph 1. So we urge the Court to reject the first submission to the extent that it alleged that Germany was denied the possibility of rendering consular assistance. With respect to causation, Germany has not borne its burden of proof to show that the execution of the LaGrand brothers, as it appears as a subject of each of Germany's first two submissions and as a predicate for part of the fourth submission, was caused by a breach of the Vienna Convention. Attorney General Napolitano has addressed the facts relating to this contention. On Tuesday, we quoted the Third Report of the current Special Rapporteur of the International Law Commission for State Responsibility, which stated that the causal link between the breach of Article 36, paragraph 1, and the execution of the LaGrands was "indirect and contingent". Nothing said yesterday provided the missing links. Professor Meron has discussed the Court's lack of jurisdiction under the Optional Protocol to consider Germany's claim of diplomatic protection, and the first submission's reference to Germany's right of diplomatic protection of its nationals should be rejected as well.

5.3. Turning to the second submission, which has to do with the interpretation of Article 36, paragraph 2, counsel for Germany apparently did not understand the position of the United States. Counsel observed, yesterday, that "In the view of the United States, paragraph 2 would add nothing to paragraph 1". But, this is clearly not the case. The United States believes that paragraph 2 has a very clear meaning, which is suggested not only by the text itself but by the *travaux*. Paragraph 2 means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended. So, for example, communications between the consular post and the detainees are

subject to local law, but that law must enable full effect to be given to the purposes for which the right of communication is intended. Similarly, and here we are merely taking an example from the *travaux*, laws and regulations relating to prison visits would be subject to the proviso[17]. So might laws and regulations relating to, say, mail or telephone access by detainees. So, the United States attaches a clear and distinct meaning to paragraph 2. This meaning has the added virtue of finding support in the text and the *travaux*, which is not the case for the interpretation suggested by learned counsel for Germany.

5.4. Germany's second submission should be rejected because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence. Counsel spoke a good deal about Article 36, paragraph 2, yesterday, but they did not provide a textual basis for their view that domestic law must allow for procedures to bring claims to remedy breaches of the rights in paragraph 1, as opposed to the allowing for the exercise of the rights in paragraph 1. Nor did they further develop their unsupported assertions that doctrines either of effectiveness[18] or of dynamic interpretation would support the rewriting of the text of the Convention.

5.5. Let us turn now to the fourth submission. First, I will address the jurisdictional issue that the United States has raised. The United States has argued that the Court lacks jurisdiction under the Optional Protocol to require an assurance or guarantee. Germany asserts that this position would

> "lead to absurd results. Clauses or optional protocols on dispute settlement appended to treaties could not fulfil their function because situations of breach could not be handled adequately, or not at all."

But we attempted to make it clear that our jurisdictional argument did not apply to jurisdiction to order cessation of a breach or to order reparation, but is limited to the question of assurances and guarantees. Now Professor Simma, who assured us that he was wide awake during those long meetings in Geneva, must acknowledge that the International Law Commission very clearly and deliberately considered that assurances and guarantees are conceptually distinct from reparation.

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[17]See Counter-Memorial, pp. 65-66 and No. 82.

[18]See, e.g., G. Fitzmaurice, *Law and Procedure of the International Court of Justice*, p. 357 (citing *Peace Treaties* case).

They are "future-oriented"; they relate to future conduct, they do not relate to the damage caused by the breach[19]. So Professor Simma's suggestion that, were this Court to decide that it lacked jurisdiction under the Optional Protocol to require assurances and guarantees, it could not fulfil its functions because it could not handle situations of breach "adequately or at all" is fundamentally flawed. We are confident that this Court could decide that it lacks jurisdiction over assurances and guarantees without in any way undermining its jurisdiction to order reparation or cessation. It does the Court no credit to suggest otherwise. Moreover, does Professor Simma suggest that the Court's handling of situations of breach throughout its history has been inadequate, because the Court has never found it necessary — or even concluded that it is able — to order assurances and guarantees?

5.6. My next point follows from this one. For all of counsel's insistence concerning the popularity of assurances and guarantees among the members of the International Law Commission, I believe that his discussion confirmed a number of significant points, which I will just mention quickly. First, he confirmed that there are no cases outside, perhaps, *lex specialis* in the human rights area, in which a court has ordered assurances or guarantees. Second, his silence confirmed the related point that the draft article on assurances and guarantees is an exercise in progressive development of law, and not codification of customary law. As we have seen, the first sentence of Germany's 1997 comments on the subject[20], expressing doubts about the customary law underpinnings of guarantees, is to the same effect.

5.7. Counsel observed that all secondary rules create obligations "over and above" the obligations created by primary rules. But questions arise in this context, whether assurances as provided in the quite limited diplomatic practice of States are intended to give rise to obligations of a legal nature, and whether customary international law supports the imposition of such an obligation where such imposition is not necessary in respect of the damage caused by the breach. Moreover, because the content of assurances in any given case will be derived from the content of the primary obligation, there is the possibility of a conflict where, as here, the remedy for a breach of the primary obligation may be informed by special considerations, such as the practice of States

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[19]See, e.g., A/CN.4/507/Add.1 at para. 168.

[20]A/CN.4/488 at para. 104.

party to the Consular Convention, about which Ms Brown has spoken. No similar special régime would apply to an obligation undertaken in the assurances.

5.8. I do not think counsel explained how guarantees can be both reparation and not reparation at once, but the point is, dare I say it, academic, because in any case the entitlement to assurances in this case has not been proved.

5.9. With respect to the recent comments of the United States on "State Responsibility" before the Sixth Committee, counsel attempted to derive some significance from the fact that those comments did not discuss our concerns about draft article 30. This omission has no significance. As we noted in the speech in the Sixth Committee, our speech was to focus on the two major conceptual issues that remain in the draft articles — the treatment of countermeasures and of serious breaches. These are complex and difficult subjects, and we decided to deal with them in some depth and expressly to reserve our position on the other issues in the articles for the written stage. We thought that it would be most helpful to the Commission to proceed in this manner, because it would give the Commission at the earliest possible time the benefit of our views on the most difficult conceptual issues. Assurances and guarantees, while clearly an issue in which we have a compelling interest in the present case, do not present the same large conceptual issues.

5.10. Now let me discuss, briefly, the nature of the specific assurances sought by Germany in this case. Counsel suggest that no absolute obligation was intended by the fourth submission. This is, of course, a welcome development for us. While counsel stated that the incorrectness of our reading should have been clear from the work of the Commission on the subject, the point is not so clear to us based on our own review of the "Commentary" on the article as adopted on first reading[21] and on the text of the current draft article. In any case, the submission appears to us to be stated in absolute terms, and it was not modified by Germany.

5.11. Precisely what Germany is seeking in its fourth submission, if not an absolute guarantee, was, however, not sufficiently clarified. Counsel mentioned certain preventive measures. Would the distribution of 400,000 of these wallet cards for law enforcement officers — they say "Instructions for arrests and detentions of foreign nationals", and 400,000 have been

[21] A/CN.4/SER.A/1993/Add.1. (Part 2) at p. 82.

distributed — would that constitute such a preventive measure? Would the establishment of a new senior position in the Department of State — with the direct responsibility for ensuring that information concerning the right to consular notification is provided without delay — would that be such a preventive measure? The United States has undertaken a wide-ranging, long-term programme to improve its compliance with the duty to inform. In this context, Germany's criticisms are unrepresentative and unsubstantiated.

5.12. In the view of the United States, the assurances that have already been provided to Germany obviate the need for the Court to decide whether additional appropriate assurances should be available to Germany in respect of the US breach of its duty to inform the LaGrands of their right to consular notification under Article 36, paragraph 1. Therefore, with respect to the fourth submission, we submit that it should be rejected in its entirety, in light of at least the following factors: the uncertain status of assurances under international law; the lack of clarity of the scope of the assurances sought by Germany in the submission; the absence of an underlying breach except with respect to the duty to inform; the unproven nature of the late-filed alleged instances of additional breaches of the duty to inform; the imprecision of the submission's text with respect to assurances in respect of the claimed breach of Article 36, paragraph 2; the unjustified interference in the domestic law of the United States that the submission would entail; and the absence of any basis in the Vienna Convention for an assurance relating specifically to capital punishment.

5.13. Mr. President, Members of the Court, counsel for Germany have constructed a mirage of argument and authority in support of their claim. But as the American songwriter Bob Dylan has written, "What looks large from a distance/Close up is never that big". The Court should find that the same is true with respect to the German submissions, and, dare I suggest, the German case in its entirety.

5.14. I thank the Members of the Court for their courtesy and attention. Mr. President, would you please call upon Professor Trechsel?

The PRESIDENT: Thank you, Mr. Mathias. Je donne maintenant la parole au professeur Trechsel.

M. TRECHSEL :

6.1. Merci, Monsieur le président, Madame et Messieurs les juges, en écoutant nos estimés adversaires hier matin, j'ai eu l'impression que des malentendus s'étaient produits — M. Simma a dit la même chose. Je m'efforcerai de réparer comme l'ont fait mes pré-opinants quelque peu cette impression d'un «dialogue de sourds» qui aurait pu se former.

6.2. A écouter certains discours on aurait pu croire que nous aurions rejeté entièrement les garanties de l'article 36 de la convention de Vienne. Comment expliquer autrement le fait que l'on nous a encore cité ce document de la Commission des droits de l'homme des Nations Unies n° 2000/65 sur la peine de mort ? Pour ma part, je salue vivement cette initiative. Et nous ne nous sommes pas opposés à ce que l'article 36 soit en effet appliqué.

6.3. Sur le plan personnel je tiens à répéter que je supporte toute initiative qui pourrait diminuer le nombre des exécutions et je ne serai pas satisfait tant que le chiffre sera supérieur à zéro.

6.4. Cependant, je me considère comme un juriste spécialisé quelque peu en matière des droits de l'homme et non pas comme un activiste des droits de l'homme. Nous devons, même si ce n'est pas toujours facile, nous laisser guider par la raison juridique. Par exemple, la Commission européenne des droits de l'homme a déclaré irrecevable la requête de M. Kirkwood qui allait être extradé aux Etats-Unis où il risquait la peine de mort[22]; c'était une décision très difficile, mais le droit l'exigeait. Hier, le coagent du Gouvernement allemand a cru devoir faire certains commentaires sur ma personne, commentaires que j'ai regrettés. Je tiens simplement à affirmer que je n'accepte pas les étiquettes de «fondamentaliste» où d'adhérant à une *Begriffsjurisprudenz* et je ne suis pas mû par les motivations qu'il me prête. Par ailleurs, ceci n'est pas une affaire dans laquelle votre Haute Cour est appelée à se prononcer pour ou contre les droits de l'homme. La tâche de la Cour se limite à dire quelles sont les obligations que les Etats ont assumées en ratifiant la convention de Vienne et, notamment, si cette dernière leur impose de prévoir des recours spécifiques en cas de violation.

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[22] Requête n° 10479/83, *Kirkwood c. Royaume-Uni*, décision du 12 février 1984, D.R. 37, p. 158 et suiv.

6.5. Le *chiàro scuro* que nous avons tant aimé sur les toiles de Rembrandt au Mauritshuis nous le rejetons lorsqu'il est opéré pour distinguer simplement deux espèces de droit, les droits de l'homme ou les droits de l'Etat. Il nous paraît juste et important de différencier. Je distingue, par exemple, des droits de l'homme, le droit humanitaire, mais aussi le droit des minorités, sans vouloir, évidemment, diminuer l'importance des uns ou des autres[23]. Je ne vois aucune utilité à mélanger tout dans un même pot pour bouillir un *minestrone ai dritti dell'uomo* de droits individuels internationaux. Nous entendons renforcer les droits de l'homme en leur reconnaissant leur caractère spécifique. Ce n'est pas par hasard que l'article 2, paragraphe 3 *a),* du Pacte international sur les droits civils et politiques (ainsi que les instruments régionaux analogues) donne à toute personne alléguant que ses droits ont été violés le droit à un recours effectif. Le Gouvernement allemand ne semble attacher aucune importance à cette clause puisqu'il prétend que la même règle doit s'appliquer à la convention de Vienne qui ne connaît pas une disposition analogue.

6.6. Pour les raisons avancées mardi, surtout celles associées au principe de la réciprocité, nous maintenons notre point de vue que si la convention de Vienne accorde bien des droits individuels, il ne s'agit pas là de droits de l'homme.

6.7. Le professeur Simma a dit hier son étonnement de m'avoir entendu citer beaucoup de jurisprudence de «Strasbourg». Pour ma part, son étonnement m'étonne. Il y a aujourd'hui dans le monde deux cours internationales des droits de l'homme. L'une a produit 2 jugements sur le fond et 16 opinions consultatives, l'autre quelque 1200 jugements, sans parler des quelque 35 000 décisions de la Commission européenne des droits de l'homme. Nous devons tout de même nous en tenir à la jurisprudence qui existe. Nous comprenons très bien que l'Allemagne s'appuie sur le solitaire pilier de l'opinion OC/16 pour supporter sa thèse, mais le pilier ne tient pas, pour la simple raison qu'il n'est motivé de façon insuffisante. L'intention est tout à fait louable, mais même ici le but ne peut pas sanctifier n'importe quel moyen.

6.8. Nous avons démontré, en vous citant, entre autres, un certain nombre de décisions judiciaires trouvées dans des pays divers, que la convention de Vienne n'a pas été considérée,

[23] Voir à ce sujet ma contribution à l'ouvrage dédié à la mémoire de Rolv Ryssdal.

jusqu'ici, comme une règle de procédure pénale, règle dont la violation pourrait donner lieu à cassation. Nous constatons que l'Allemagne n'a pas été en mesure de nous opposer un seul jugement qui irait dans le sens contraire.

6.9. Finalement, permettez-moi, Monsieur le président, Madame et Messieurs de la Cour, un commentaire et une mise au point sur ce qui vous a été dit au sujet des moyens de recours en droit de procédure pénale allemande. On vous a encore cité le paragraphe 337 du code de procédure pénal et la réglementation du recours en cassation appelé *Revision*, dont j'avais déjà parlé mardi. Or, Monsieur le président, Madame et Messieurs de la Cour, il s'agit là d'un recours ordinaire dans le sens qu'il doit être présenté dans un certain délai; il empêche notamment le jugement d'acquérir la force de la chose jugée. Or, dans l'affaire LaGrand, ce n'est pas au cours de l'épuisement des voies de recours interne que la règle du *procedural default* a été appliquée. Cette règle s'est appliquée lorsque le jugement était déjà définitif, depuis un certain temps, dans des procédures de *habeas corpus*. Le droit allemand ne connaît aucune procédure de ce genre. Et il n'y aurait donc eu dans une situation parallèle en droit allemand aucun recours et non seulement pas de recours qui était conditionné par une règle du *procedural default.* Il me semble que la Cour devait être informée de ce fait et que ceci eusse été plutôt le devoir de l'Allemagne.

6.10. J'ai terminé, Monsieur le président, Madame et Messieurs de la Cour, mes quelques observations, et je vous prie, Monsieur le président, de bien vouloir donner la parole maintenant au professeur Matheson.

Le PRESIDENT : Je vous remercie, Monsieur le professeur Trechsel, et je donne maintenant la parole au professeur Matheson.

Mr. MATHESON:

7.1. Mr. President and distinguished Members of the Court, I will respond briefly to Germany's argument on the question of the effect of the Court's Order indicating provisional measures. The Court will recall that on Tuesday, we made four basic points, each of which would independently lead to the conclusion that the Court should decline to grant the relief requested by Germany on this issue, without the need to resolve the general question of the Court's authority to indicate provisional measures of a binding legal character.

7.2. *First*, we argued on Tuesday that in this case the measures indicated by the Court were — by their own terms — not binding in character. In its argument on Thursday, Germany did not attempt to argue that the language in the Court's Order was binding in character. This is not surprising, since the language used in the authoritative English text of the Order was clearly non-binding.

7.3. Counsel for Germany, apart from characterizing our argument as "the title of a bad novel" — that is a good line — limited himself to suggesting that provisional measures must always be binding, whatever their language, because judicial tribunals cannot issue orders that have non-binding character. This is entirely unpersuasive. As we pointed out in detail on Tuesday, international tribunals have in fact issued provisional measures that used non-binding language and were not intended to be binding. Examples of this include the orders of the International Tribunal of the Law of the Sea on 11 March 1998 in the *Saiga No. 2* case[24] and of 27 August 1999 in the *Southern Bluefin Tuna* case[25], as well as provisional measures issued by the European Court of Human Rights in the case of *Cruz Varas* v. *Sweden*[26]. In the latter case, the European Court stated that: "the very language of the request made in the present case confirmed its non-binding character" and that and I quote: "the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists"[27].

7.4. There is no reason why the Court must give provisional measures in mandatory form. As we argued, a tribunal may well choose to express its expectations in a non-binding form, particularly where — as in the present case — the measures in question deal with matters uniquely within the core sovereign functions of States, or are given *ex parte* at the very outset of a proceeding when the facts are complex and there is very limited time to assess the situation. In

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[24] http://www.un.org/Depts/los/ITLOS/Saiga2-Order.htm. The Order contains one operative paragraph ordering one of the parties to refrain from certain action, and another operative paragraph recommending both parties to take a certain course of action. The fact that one of the measures was recommendatory was specifically noted.

[25] http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm. See CR 2000/29, para. 7.10. (14 Nov. 2000).

[26] Eur.Cit.H.R. Series A, No. 201 (20 Feb. 1991).

[27] *Id.*, paras. 92, 101.

contrast, as we pointed out in detail on Tuesday, when a tribunal recognizes that a measure handed down by it has obligatory character, it uses mandatory language[28].

7.5. Accordingly, we see no basis for concluding that the Court's Order in this case created binding obligations. This alone would dispose of Germany's request for a declaration that the United States violated legal obligations with respect to that Order.

7.6. *Second*, we argued on Tuesday that, whatever the legal character of the Court's Order, the United States in fact complied, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. On Thursday, Germany cited a list of actions that it believed could and should have been taken in the period of less than three hours between the receipt of the Court's Order and the scheduled execution. It was argued that the President might have issued an Executive Order directing Arizona not to proceed with the execution, or might have filed suit against Arizona in federal court for the same purpose.

7.7. I trust the Court will understand that actions of such constitutional importance and complexity could not possibly have been seriously considered in a period of less than three hours, let alone carried out. Germany's argument seemed to suggest that federal intervention in state criminal proceedings is fairly routine — for example, ordering a US Attorney to file an emergency action against a state governor in federal court. In fact, nothing could be further from the truth, and we know of no precedent for such an action. Certainly such an action would require a decision at the highest levels of the US Government after considerable deliberation.

7.8. Germany also argued that the US Supreme Court could and should have issued an immediate stay of execution upon receipt of the Court's Order. Germany pretends that it would have been a simple matter for the Supreme Court, which was at that moment engaged in resolving three separate suits on a variety of issues in the *LaGrand* case, to decide with virtually no time for reflection to take the extraordinary step of staying a state execution on the basis of provisional

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[28]See CR 2000/29, para. 7.6. (14 Nov. 2000). On Tuesday, we cited a number of examples of this, including certain provisional measures adopted by this Court in the case concerning *Armed Activities on the Territory of the Congo*. Germany argued that our citation of this case contradicted our position that provisional measures of the Court generally do not have binding effect, but this is not correct. As we pointed out on Tuesday, the Court stated that both Parties "must" take all measures to comply with various existing obligations of the Parties under international law; this mandatory language reflected the fact that the Parties were already bound to carry out these international obligations. In any event, whatever the authority for using mandatory language in the *Congo* case, it clearly shows that the Court uses mandatory language when it recognizes the obligatory character of the measure, in contrast to the non-obligatory language of the Order in the present case.

measures which on their face were not binding in character. Germany also seems to believe that the Court should have summarily ignored its own precedent with respect to its jurisdiction under the US Constitution and should have immediately given relief that was precluded by US law. We believe it would be unreasonable to expect the Supreme Court to have acted in this way under these extreme circumstances.

7.9. Given the Supreme Court's dismissal of the suits before it, and the fact that the US Government did not consider the Court's Order to be legally binding, it is also unreasonable to hold that the Governor of Arizona acted in violation of international legal obligations in declining to stay the execution in these same final, hectic hours[29].

7.10. *Third*, we argued on Tuesday that the unjustified delay of Germany in bringing its request for provisional measures until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to that Order. On Thursday, Germany made no reply to this point. It made no further attempt to justify the extraordinary timing of its request and its inexplicable delay in raising the issue of consular notification with the United States or in filing its case with this Court. It made no attempt to answer our contention that these actions seriously prejudiced both the United States and the Court itself, and were inconsistent with the Court's standards on procedural fairness, the equality of the parties, and the sound administration of justice.

7.11. This alone should preclude the relief sought by Germany on this point. To do otherwise would give unwarranted blessing to last-minute filings of such requests where there is no reasonable basis for a party's delay. As a precedent for such actions in the future by other applicants, it could have a significant and regrettable effect on the Court's operations and the rights of parties before it. One wonders, for example, what would happen should this occur when the full Court is not in session at the particular time.

7.12. Finally, we argued on Tuesday that the Court can fully and adequately dispose of the merits of this case without any need to resolve this issue about the effect of the provisional

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[29]In fact, for reasons indicated by Attorney General Napolitano on Tuesday, the Governor of Arizona had already denied the reprieve recommendation made by the Board of Executive Clemency on 2 March, and a new recommendation would have been required to enable the Governor to grant a reprieve in response to the Court's Order of 3 March. This would have required reassembly of the Board, and the participation of the victims. Given the time constraints, the distance involved (Arizona is a very large state), it is far from clear that this could have been done in the short time available.

measures Order. We pointed out that the Court has not found it necessary or appropriate to give such relief in previous cases where one of the parties had not carried out provisional measures orders, and there is no substantive need or utility in doing so in this case. If the Court grants any of Germany's other requests for relief it will have given ample redress for the execution of Walter LaGrand, and if it decides against Germany's other requests, it would be highly anomalous to make the asserted violation of a provisional measures order the sole result of its decision on the merits.

7.13. Germany addressed this point in its argument on Thursday, but with respect, its comments seemed to be beside the point. Its argument seemed to be that the offence to Germany from the failure of consular notification was aggravated by the execution of its national. Of course, as the Court is aware, we have agreed that the failure of consular notification was a violation of the Vienna Convention, but we disagree that the execution was a violation of the Convention or an "aggravation" of the previous breach. But, in any event, we do not see how this assertion about the merits of the case makes it necessary or appropriate for the Court to give additional relief directed at the effect of its provisional measures Order.

7.14. In short, we contend that the circumstances of this case offer a very unsuitable vehicle for the Court to attempt to resolve the long-standing and important question about the scope of its authority to issue binding provisional measures. These circumstances include: Germany's delay in bringing its request until the last possible moment — which it did not attempt to justify on Thursday; the non-binding character of the language of the Order — which Germany again did not refute on Thursday; the impossibly short period in which the United States was given to act; and the lack of any operative need to resolve this matter in the present case. We submit that, under these circumstances, there is no basis for a determination that the United States violated legal obligations with respect to the provisional measures Order.

7.15. Now, just to be clear on the matter, we reiterate that if the Court nevertheless believes that it must now decide the general question of whether its measures are binding under the Statute, the United States reaffirms the detailed arguments on this point that are contained in our Counter-Memorial. There has been no "strategic retreat" on our part on this matter, as was

suggested by Germany. However, we believe that the Court can and should dismiss the relief requested by Germany, without having to resolve this general issue.

7.16. Mr. President, this concludes my comments, I thank the Court very much for its attention. And I now suggest that the Court call on the US Agent, Mr. Thessin, to complete the rebuttal of the United States. Thank you, Sir.

The PRESIDENT: Thank you, Mr. Matheson. I now give the floor to Mr. Thessin.

Mr. THESSIN:

Mr. President, Members of the Court.

In his final remarks yesterday, Mr. Westdickenberg recalled the crimes of Karl and Walter LaGrand and the suffering of the victims and those left behind. The brutal murder committed by the LaGrands is indeed the backdrop against which this case arose.

But the case itself is neither about that brutal murder nor about the sentence imposed by the authorities of the State of Arizona. It is limited to the dispute between Germany and the United States arising out of the Vienna Convention on Consular Relations. And the Vienna Convention on Consular Relations does not provide an international legal basis on which Germany may complain about the criminal justice system in the United States as it operated in the case of the LaGrands.

The United States has accepted responsibility, however, with respect to the single breach that is before the Court, the breach of the duty owed to Germany under Article 36, paragraph 1 *(b)*, of the Consular Convention to inform Karl and Walter LaGrand of their right to consular notification. Accordingly, the final submission of the United States is as follows:

The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed.

Thank you, Mr. President and Members of the Court, for your courtesies and attentiveness. This ends the presentation of the United States side.

The PRESIDENT: Thank you very much Mr. Thessin. La Cour prend acte des conclusions finales dont vous avez ainsi donné lecture au nom des Etats-Unis d'Amérique, comme elle l'a fait hier pour les conclusions finales présentées par M. Westdickenberg, agent de l'Allemagne. Je vais maintenant donner la parole au juge Koroma qui souhaiterait poser une question.

Judge KOROMA: Thank you Mr. President. In the course of these hearings and in her submissions, Germany contends that the United States by applying the rules of domestic law, in particular the doctrine of procedural default, violated her obligations to give full effect to the purposes for which the rights accorded under Article 36 of the Consular Convention are intended. My question is this: Is it Germany's position that the application of the doctrine of procedural default in itself constitutes a violation of the Convention? Thank you, Mr. President.

Le PRESIDENT : Je vous remercie. Le texte de cette question sera bien entendu, comme d'ordinaire, communiqué par écrit aux Parties. Je rappellerai maintenant que les Etats-Unis, s'ils le désirent, pourront après la clôture de cette procédure orale, présenter des observations au sujet des documents nouveaux produits par l'Allemagne le 26 octobre 2000, et soumettre des documents à l'appui de ces observations.

La Cour a fixé au 8 décembre la date limite pour la présentation de ces observations et de ces documents. Les réponses par écrit aux questions posées par les juges Higgins et Koroma devront également être fournies à cette même date du 8 décembre.

Ceci nous amène à la fin de cette série d'audiences consacrées aux plaidoiries en l'affaire. Je tiens à adresser mes vifs remerciements et ceux de la Cour aux agents, conseils et avocats des deux Parties pour leurs interventions.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tout renseignement complémentaire dont celle-ci pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale en l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique).*

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 15 h 35.

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