DISSENTING OPINION OF JUDGE ODA

Errors in the present case.

Germany — Improper basis for instituting proceedings — Absence of a "dispute" arising out of the interpretation or application of the Vienna Convention on Consular Relations — Distinction from case concerning Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland) *— Failure to raise dispute with United States prior to submitting Application — Unilateral application — Impact of imposition of United States death penalty — Potential consequence that States that have accepted the compulsory jurisdiction of the Court will withdraw their acceptance.*

United States — Failure to raise objections to the German Application prior to submission of Counter-Memorial.

International Court of Justice — Improper granting of Order indicating provisional measures — Situation entailing rights of individuals rather than rights of States.

Errors in the Judgment.

Five principal issues — United States admitted violation of Vienna Convention requirement of prompt consular notification — No relation between Convention and execution of LaGrands — No relation between Order of 3 March 1999 indicating provisional measures and present case — Illusion that Convention differentiates between rights of nationals of sending State and those of receiving State — Protection of foreign nationals.

Absence of a dispute between the Parties concerning the interpretation or application of the Vienna Convention — Failure of United States to raise preliminary objection on jurisdictional ground — Inadmissibility of German claims — Failure of United States to raise preliminary objection on this ground — Whether Vienna Convention confers rights on individuals as well as States — Application of procedural default rule — Whether orders indicating provisional measures are binding — Whether the Court should speak of measures for avoiding the reoccurrence of violations of the Vienna Convention.

I. The Accumulation of Errors in the Present Case

1. I would like to begin this dissenting opinion by stating my view of the case as a whole. This case is unique and most difficult to understand. I see it as one that has come before the Court as a result of an accumulation of errors: the first made by Germany, as the Applicant; the second made by the United States, as Respondent; and the third made by the Court itself.

1. The Error Made by Germany in Unilaterally Bringing before this Court Claims for Alleged Violations by the United States of the Convention on Consular Relations rather than the "Dispute" within the Meaning of the Optional Protocol

2. On 2 March 1999 Germany, "pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes", filed in the Registry of the Court an "Application instituting *proceedings* . . . against the United States of America *for violations of the Vienna Convention on Consular Relations*" (Application of the Federal Republic of Germany; emphasis added).

It is important to note that Germany never stated in the Application that it was instituting proceedings *in respect of a dispute arising out of the interpretation or application of the Vienna Convention*, although the Application did refer to Article I of the Optional Protocol, which reads:

> "*Disputes arising out of the interpretation or application of the Convention* shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application." (Emphasis added.)

This case stands in clear contrast to the case concerning *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, a case which Germany brought against Iceland nearly 30 years ago and in which Germany filed an "Application instituting *proceedings . . . in respect of a dispute*" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 176; emphasis added). This point is most important and should not have been overlooked in connection with the issues concerning the jurisdiction of the Court in the present case.

3. I submit, first of all, that before this case was instituted on 2 March 1999, neither the United States, the Respondent, nor even Germany, the Applicant, considered there to be a *dispute* between them which had "aris[en] out of the interpretation or application of the [Vienna] Convention". There had been no negotiation, or even discussion, over any such *dispute*.

4. The background to this case, involving Walter LaGrand, whose name is used by the Court as the title of the case, and his brother Karl LaGrand, is set out in detail in paragraphs 13 to 29 of the Judgment. The facts are: the LaGrand brothers committed crimes on 7 January 1982 and were arrested on the same day; they were convicted by the Superior Court of Pima County, Arizona, on 17 February 1984, and were sentenced to the death penalty on 14 December 1984. These facts have not been disputed. Appeals against the convictions and sentences to the Supreme Court of Arizona were rejected on 30 January 1987. Applica-

tions to the United States Supreme Court for further review of those judgments were denied on 5 October 1987.

Petitions for post-conviction relief were denied by an Arizona state court in 1989. Review of that decision was denied by the Supreme Court of Arizona in 1990 and by the United States Supreme Court in 1991. The subsequent judicial proceedings, including a request to the Supreme Court of Arizona for review of sentencing and a request for clemency, were all dismissed. The Supreme Court of Arizona decided on 15 January 1999 that Karl LaGrand and Walter LaGrand were to be executed on 24 February 1999 and on 3 March 1999 respectively. On 19 January 1999, the German Consulate learned of the Arizona Supreme Court decisions setting the dates for the executions of the LaGrand brothers.

5. At the time of their arrest, neither of the LaGrand brothers was aware that he had German nationality; nor were the competent United States authorities aware that the LaGrands were not United States nationals. The present Judgment states that the "competent authorities" of the United States became aware of the brothers' German nationality at some point between mid-1983 and late 1984. While the United States authorities failed to inform either brother of his true nationality until 1991, the LaGrands had in fact been made aware of their nationality status before that date. The case was brought to the attention of the German Consulate in June 1992 "by the LaGrands themselves, who had learnt of their rights [under Article 36, paragraph (1) *(b)*, of the Vienna Convention] from other sources, and not from the Arizona authorities" (Judgment, para. 22). The German Consulate had repeated contact with the LaGrand brothers between December 1992 and February 1999. The Court states that "[o]n 21 December 1998, the LaGrands were *formally* notified by the United States authorities of their right to consular access" (Judgment, para. 24; emphasis added). I fail to see the significance of this "formal" notification, given that "actual" notification had already occurred and that "on a number of . . . occasions . . . an official of the Consulate-General of Germany in Los Angeles [had] visited the LaGrands in prison" (Judgment, para. 22).

6. At no point in the sequence of events related above did Germany ever raise the question of the LaGrand brothers with the United States. Only in January/February 1999 did Germany approach the United States at the highest national levels requesting clemency for the LaGrand brothers (Judgment, para. 26). On 22 February 1999 — just two days before Karl LaGrand's execution — the German Foreign Minister drew the attention of the United States Secretary of State to the lack of consular notification.

It must be noted again that Germany did not institute proceedings in respect of a *dispute* with the United States regarding application of the Vienna Convention on Consular Relations. Even if Germany thought that the United States had violated the Vienna Convention on Consular Relations, it raised no such claims with the United States and the United

States was, of course, not privy to any unexpressed thoughts which Germany might have had about possible violations of the Convention by the United States. Neither State was aware before 2 March 1999 of any difference of views between them concerning the Vienna Convention. There were no negotiations between the two States on this point.

7. Suddenly, on 2 March 1999, Germany filed an "Application instituting proceedings . . . for violations of the Vienna Convention on Consular Relations" (Application, introductory paragraph) in the Registry of the Court pursuant to the Statute of the Court, Article 40, paragraph 1, and the Rules of Court, Article 38, paragraph 1.

It was at that point that the United States could have first discovered that it was involved in a "dispute" arising out of the interpretation or application of the Convention. It must have been very odd indeed for the United States to learn, only *after* proceedings had been brought against it, of the alleged existence of a "dispute".

The United States was informed by the Application filed by Germany on 2 March 1999 that Germany was claiming violations by the United States of the Vienna Convention on Consular Relations. I am surprised that Germany unilaterally brought this case under such circumstances. More than 17 years had already passed since the LaGrand brothers committed the crimes in January 1982 and were arrested on the same day. Nearly 15 years had passed since the Arizona state court sentenced them to death. During this period, Germany had done nothing to indicate that it had claims against the United States for violation of the Vienna Convention and that there was an issue giving rise to a "dispute" between the two countries.

8. Germany filed its Application instituting proceedings against the United States for an alleged violation of the Convention, but — again I wish to emphasize this point — not instituting proceedings in respect of "disputes arising out of the interpretation or application of the [Vienna] Convention on Consular Relations", which could have fallen within the compulsory jurisdiction of the Court pursuant to the Optional Protocol. A dispute arising out of the interpretation or application of the Convention either did not in fact exist between Germany and the United States or, if it did exist, had not been the subject of any diplomatic negotiations between them. All that existed at that time was Germany's potential claim, unbeknownst to the United States, of alleged violations of the Convention by the United States.

I believe that Germany erred: it presented its Application of 2 March 1999 instituting proceedings for violations of the Vienna Convention as if it were submitting a "dispute" under the Optional Clause. I maintain that this is a case of a unilateral application made in reliance upon subsequent consent to the Court's jurisdiction to be given by the respondent State. A *dispute* would then have come into existence once the Court was seised of the case after the United States consented to the Court's jurisdiction.

9. I would hazard a guess that the German Government was prompted to bring this case before the International Court of Justice by the outcry raised by some in Germany, by the emotional reaction on the part of some people there — where the death penalty has been abolished — to a case involving the existence and application of the death penalty in the United States, a reaction made even stronger by the realization that the nationality of a fellow German (Karl LaGrand) had been ignored and that he had been executed after being afforded the same treatment a United States citizen would have received and that another German national (Walter LaGrand) whose execution was imminent had been treated in the same way.

It appears to me that the main aim was to save the life of Walter LaGrand, which aim was further supported by the Request for the indication of provisional measures filed together with the Application. It is unlikely that any human rights group in Germany ever thought that this case involved the Vienna Convention on Consular Relations. This may be mere supposition, but is there any other convincing reason to explain why the German Government referred an alleged violation of the Vienna Convention on Consular Relations to the Court without ascertaining through consultation or negotiation with the United States Government whether there existed any difference of views concerning the Vienna Convention between the two countries?

I am and have always been fully aware of the humanitarian concerns raised by the fate of the LaGrand brothers. However, I also drew attention to the rights of the victims of the LaGrand brothers' crimes and stated in my declaration appended to the Order of 3 March 1999 that:

> "if Mr. Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 18, declaration of Judge Oda).

10. I very much fear that the Court's acceptance of this Application presented unilaterally pursuant to the "optional clause" will in future lead States that have accepted the compulsory jurisdiction of the Court, either under Article 36, paragraph 2, of the Statute or under the Optional Protocol concerning the Compulsory Settlement of Disputes attached to multilateral treaties, to withdraw their acceptance of the Court's jurisdiction.

2. The Error Made by the United States in Not Responding in an Appropriate Manner to Germany's Application

11. The United States, which learned of Germany's views concerning the *dispute* allegedly "arising out of the interpretation or application of

the [Vienna] Convention" only upon the filing of Germany's Application, should, in my view, have raised preliminary objections to the case. The United States could have done this immediately after the Application was filed on 2 March 1999 or shortly afterwards. In fact, the United States did not do so. Instead, on 5 March 1999, the Court ordered that, since this was a case begun by means of a unilateral application to the Court, the applicant State (Germany) and the respondent State (the United States) — both of which are parties to the Optional Protocol — should submit their written pleadings within the respective time-limits set by the Court, namely, 16 September 1999 and 27 March 2000.

The United States could still have presented an objection to the case prior to 27 March 2000, the time-limit set for the presentation of the Counter-Memorial. I found it surprising that the United States, as Respondent, raised no objection during that one-year period. One might suppose that the United States felt itself to be in a weak position in its defence against this Application. From the earliest stages, the United States knew that it had failed to give prompt notice to the German Consulate of the facts involving the two German nationals. The United States would also have been aware that by that omission it had at that time violated the Vienna Convention on Consular Relations to a certain limited extent. If Germany had raised only the matter of the failure to give timely consular notification, the United States would have been without any strong counter-argument.

12. Upon receiving Germany's Memorial on 16 September 1999, the United States must have realized that Germany was essentially attempting to change the character of the Application as it then stood. Having incorporated the issues relating to compliance or non-compliance by the United States with the Court's Order of 3 March 1999 indicating provisional measures, the submissions presented by Germany in its Memorial of 16 September 1999 appeared to me to be far different in nature and broader in scope than those in its Application of 2 March 1999.

Once again, the United States could, pursuant to Article 79 of the Rules of Court, have raised objections before 27 March 2000 (namely, the time-limit set by the Court for the submission of its Counter-Memorial), and it should have done so, especially in the light of this significant change in the issues. The United States did not do so and instead presented its Counter-Memorial on that date. It was only in its Counter-Memorial of 27 March 2000 that the United States stated that "all other claims and submissions of . . . Germany [i.e., those other than the alleged breach of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations] [should be] dismissed" (Counter-Memorial, p. 140, para. 175 (2)). It was there that the United States challenged the inclusion in the Application of 2 March 1999 of some of Germany's submissions contained in its Memorial of 16 September 1999.

13. The United States may have chosen not to raise an objection at the outset simply because it did not think that Germany would, in its subse-

quent Memorial, redefine the *dispute* referred to in its earlier Application, but the United States must have realized upon receipt of the Memorial in September 1999 that Germany had broadened and modified the definition of the "dispute". The case has been greatly complicated by the approach thus adopted by the United States.

14. In my view the improper filing of Germany's Application, as explained above, and the very indifferent reaction of the United States to Germany's Application form the essence of this case.

3. The Error Made by the International Court of Justice in Indicating Provisional Measures in its Order of 3 March 1999

15. In response to Germany's request submitted on 2 March 1999 together with its Application of the same date, the Court on 3 March 1999 issued an Order granting provisional measures. In my view, the issuing of that Order was not entirely proper. In order to maintain the solidarity of the Court and out of humanitarian concerns, I voted — albeit very reluctantly — in favour of the Order of 3 March 1999, and it was therefore adopted unanimously.

I now regret that I voted in favour of that Order, since I did so against my judicial conscience. It should, however, be clear from my declaration appended to the Court's Order of 3 March 1999 that I was, in substance, opposed to the issuance of that Order.

At that time, I held the view (which I still hold now) that:

> "as a general rule, provisional measures are granted in order to preserve *rights of States* exposed to an imminent breach which is irreparable and these *rights of States* must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the application instituting proceedings or be *directly* related to it" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 19, declaration of Judge Oda)

and that

> "the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case" *(ibid.)*.

16. Let us reflect on the circumstances surrounding the Order of 3 March 1999. Karl LaGrand had already been executed, and the request for provisional measures was submitted to the Court together with the Application instituting proceedings at 7.30 p.m. on 2 March 1999, when Walter LaGrand's execution was imminent. Only on the morning of 3 March 1999 was the request dated 2 March 1999 provided to Members of the Court. Another case had been scheduled for that day,

and all Members of the Court therefore happened to be present at The Hague.

The Court made its Order at 7.15 p.m. on 3 March 1999, that is, on the very same day on which the consideration of Germany's request had begun — the sole reason for such haste being that Walter LaGrand's execution was imminent — without having given the United States a chance to express its views in writing and without having held a court sitting for oral hearings. (The times of day are those reported in Judge Buergenthal's dissenting opinion.) This Court was clearly faced with an extraordinary situation for which there was no precedent; it was only because of the exceptional circumstances of the case that the Court was able to make such an extraordinary Order in the limited time available to it.

17. This was not, however, a situation entailing *rights of States* exposed to an imminent, irreparable breach. The *rights of States* in question must be those to be considered at the merits stage of the case and must constitute the subject-matter of the application instituting proceedings or be *directly* related to it.

I submit that the provisional measures ordered by the Court on 3 March 1999, aimed at staying the execution — and therefore preserving the life, at least temporarily — of Walter LaGrand, were not directly related to the rights of States under the Vienna Convention and that the Court made a significant error in issuing an Order indicating provisional measures in this case, since the issue for which interim relief was sought did not figure among those for which provisional measures may be properly ordered by this Court. I am confident in my view that the Court did indeed err in issuing that Order.

This error was, however, quite understandable, as a human life hung in the balance and the Court was given very little time to decide upon the request for an order. As I stated earlier, I believe that Germany is responsible for the ensuing difficulties in this case, since it chose to file its Application at the last minute before Walter LaGrand's execution, and for placing the Court in a very difficult and delicate position. Now, with the benefit of a full hearing of both Parties and exposition of all the facts, it should be clear to the Court (as it was already clear to me on 3 March 1999) that it should not have issued the Order.

II. Errors in the Court's Present Judgment

A. Introduction

18. As explained in Part I above, I believe that the Court is confronted with a situation which resulted from an accumulation of three separate errors: the first error was made by Germany in improperly bringing the case before the Court; the second by the United States in not raising

objections to Germany's Application at the proper time; and the third by the Court in handing down an order improperly granting provisional measures. The Court appears to be making an ultimate error on top of those cumulative errors. I am unable to support the Court's decision as a whole in the present Judgment.

19. Before explaining how I voted on each of the paragraphs of the operative part, I would like, in particular, to mention five principal issues involved in the present case.

First, the United States admitted its failure to give prompt consular notification and the ensuing violation of the Vienna Convention on Consular Relations in that respect. There was no dispute on this point between Germany and the United States.

Second, I see no relation between the delay in consular notification on the part of the United States authorities, on the one hand, and the handing down of the death sentence by the Arizona state court and the execution of the LaGrand brothers, on the other.

Third, the question of compliance with the Order for the indication of provisional measures of 3 March 1999 bears no relation to the present case, which was submitted by Germany in respect of alleged violations by the United States of the Vienna Convention on Consular Relations.

Fourth, the Court seems to cherish the illusion that a national of the sending State should, under the Convention, be accorded greater protection and enjoy more rights than nationals of the receiving State.

Fifth, it seems to me that the Court has confused the right, if any, of the arrested foreign national accorded under the Vienna Convention with the rights of foreign nationals to protection under general international law or other treaties or conventions, and, possibly, even with human rights.

B. Specific Critiques of the Operative Part

1. Subparagraph (1) of the operative part (Judgment, para. 128)

20. In subparagraph (1) of the operative part of the Judgment the Court states that "it has jurisdiction . . . to entertain the Application filed by [Germany] on 2 March 1999". As stated in Part I, section 1, above, there is no basis for believing that there existed a *dispute* between Germany and the United States *arising out of the interpretation or application of the Vienna Convention on Consular Relations* in respect of which an Application could have been filed. I voted in favour of the Court's determination that the Court has jurisdiction to entertain Germany's Application of 2 March 1999 *solely* for the reason that the

United States, the Respondent, raised no preliminary objection to that Application.

However, I must stress that the Court's jurisdiction is over the *Application of 2 March 1999*, as originally filed, not as subsequently qualified by Germany's submissions extensively altering and supplementing the Application so as to change the very essence of it. It is to be noted in this regard that the United States, in its Counter-Memorial and in the oral arguments heard on 17 November 2000, submitted that Germany's claims and submissions, other than those concerning the breach by the United States of Article 36, paragraph 1 *(b)*, of the Vienna Convention, should be dismissed.

21. In this respect I must refer also to Germany's third submission, regarding the Court's Order of 3 March 1999 indicating provisional measures, which, according to the present Judgment, "concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction . . . and which are thus covered by Article I of the Optional Protocol" (Judgment, para. 45). The Court goes on to state:

> "The Court reaffirms, in this connection, what it said in its Judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in all its aspects, it may also deal with a submission that 'is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction . . .' (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72)." *(Ibid.)*

From these statements the Court concludes:

> "Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with." *(Ibid.)*

I would like to point out that in the *Fisheries Jurisdiction* case, Germany referred a difference which had already ripened into a *dispute* with Iceland to the Court on the basis of, *inter alia*, an *optional clause* in the Exchange of Notes dated 19 July 1961. This differentiates it from the present case, which, as I stated in paragraphs 6 to 8 above, cannot be considered to have been brought under the Optional Protocol. In addition, in the *Fisheries Jurisdiction* case provisional measures were indicated to protect the rights of a State, Germany, from possible infringements which might arise from Iceland's exercise of its competence pursuant to its previously enacted national legislation. There is no basis

for likening the present case to the *Fisheries Jurisdiction* case as regards orders indicating provisional measures.

2. Subparagraph (2) of the operative part (Judgment, para. 128)

22. In connection with subparagraph (2) of the operative part, I believe that the Court should have decided on the admissibility of Germany's Application of 2 March 1999, *not* of Germany's submissions set out subsequently in the Memorial and repeated in its oral pleadings on 16 November 2000. For this reason, I voted against the whole of subparagraph (2), notwithstanding the fact that I note that the United States raised no preliminary objection in connection with the admissibility of the present case.

3. Subparagraph (3) of the operative part (Judgment, para. 128)

23. Subparagraph (3) appears to me to proceed from the premise that the Vienna Convention on Consular Relations placed a legal obligation on the United States not only to Germany but also to the LaGrand brothers. Let me follow the reasoning set out in the present Judgment. The Court begins by stating:

> "The Court *cannot accept* the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. *The Court has already determined* that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above)." (Judgment, para. 89; emphasis added.)

What "[t]he Court has already determined" is as follows:

> "The Court notes that Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has towards the detained person and the sending State. It provides that . . . *the receiving State must inform* the consular post of the sending State . . . It provides further that any communication by the detained person . . . *must be forwarded* to [the consular post of the sending State] by *authorities of the receiving State* . . . Significantly, this subparagraph ends with the following language: '*The said authorities shall inform* the person concerned . . . of his rights . . .'. Moreover, under Article 36, paragraph 1 *(c)*, the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposes such action'. The clarity of these provisions [Article 36, para-

> graph 1 *(b), (c)*], viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand . . . Based on the text of these provisions, *the Court concludes* that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case." (Judgment, para. 77; original emphasis by the Court deleted; emphasis is added.)

I see no convincing argument to support the determination of the Court that

> "Article 36, paragraph 1, *creates individual rights* for the detained person in addition to the rights accorded the sending State, and . . . consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual" (Judgment, para. 89).

24. I shall take the liberty of expressing my puzzlement at the reason for and relevance of the Court's reference in the Judgment to Article 36, paragraph 1 *(c)*, of the Convention in connection with the rights of a detained person. I believe that this provision was included in the Convention simply to provide for the situation in which an arrested foreign national waives consular notification in order to prevent his criminal conduct or even his presence in a foreign country from becoming known in his home country; that provision may not have any further significance.

25. Article 36, paragraphs 1 and 2, of the Vienna Convention on Consular Relations is perceptively interpreted by Vice-President Shi in his separate opinion and I fully share his views.

4. Subparagraph (4) of the operative part (Judgment, para. 128)

26. In connection with this subparagraph (4), the Court admits that "[i]n itself, the [procedural default] rule does not violate Article 36 of the Convention" but concludes that in the present case:

> "the procedural default rule does not allow the detained individual [in this case the LaGrand brothers] to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State" (Judgment, para. 90).

This conclusion may be connected with the refusal on 23 February 1999 by the Arizona Superior Court in Pima County to entertain a further petition, as noted in the Judgment (para. 28). I fail to understand the factual situation underlying the Court's assertion that "the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under [Article 36 of the Convention] are intended', and thus violated paragraph 2 of Article 36" (Judgment, para. 91).

27. I am not convinced of the correctness of the Court's holding that the Vienna Convention on Consular Relations grants to foreign individuals any rights beyond those which might necessarily be implied by the obligations imposed on States under that Convention. In addition, I cannot but think that the Court holds the view that the Vienna Convention on Consular Relations grants more extensive protection and greater or broader individual rights to *foreign* nationals (in this case, German nationals in the United States) than would be enjoyed by nationals in their home countries (in this case, Americans in the United States).

If the Vienna Convention on Consular Relations is to be interpreted as granting rights to individuals, those rights are strictly limited to those corresponding to the obligations borne by the States under the Convention and do not include substantive rights of the individual, such as the rights to life, property, etc. I find the Judgment devoid of any convincing explanation of this point.

5. Subparagraph (5) of the operative part (Judgment, para. 128)

28. As stated in paragraph 21 above, compliance or non-compliance with the Order indicating provisional measures of 3 March 1999 does not fall within the scope of the present case, brought before the Court by Germany's Application of 2 March 1999 in respect of violations of the Convention on Consular Relations. Apart from this point, it appears to me that the Court has not properly understood the meaning of the indication of provisional measures. As stated above in paragraphs 15 to 17, the Court was mistaken in March 1999 in granting provisional measures.

29. The Court appears to be mostly concerned with the question of whether or not provisional measures indicated by it are binding. In the present Judgment, the Court dedicates as many as 25 paragraphs (paras. 92-116) to this issue. After summarizing the views of Germany and the United States (paras. 92-97), the Court attempts to explain at length in 19 paragraphs (paras. 98-116) why an order indicating provisional measures has binding effect or binding force.

30. Commencing with a general discussion of the meaning of Article 41, concerning provisional measures, of the Court's Statute, the Court states that

> "in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties . . . a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose" (Judgment, para. 99).

Noting the difference between the authentic French text and the authentic English text, the Court then "consider[s] the object and purpose of the Statute together with the context of Article 41" (Judgment, para. 101). The Court goes on to state that:

> "The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved." (Judgment, para. 102.)

The Court further states that:

> "It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court." *(Ibid.)*

The Court immediately concludes that "[t]he contention that provisional measures indicated under Article 41 might *not* be binding would be *contrary* to the object and purpose of that Article" (*ibid.*; emphasis added). I fail to find any affirmative reason in the above argument to support the binding force of an order for the indication of provisional measures.

31. As "[a] related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance" (Judgment, para. 103), the Judgment refers to the jurisprudence of the Permanent Court of International Justice in the 1939 case concerning *Electricity Company of Sofia and Bulgaria* (*Electricity Company of Sofia and Bulgaria, Interim Measures of Protection, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79,* p. 194) and to many other orders of the present Court in which that case was cited (Judgment, para. 103). In my view, however, the "principle universally accepted by international tribunals and likewise laid down in many conventions" mentioned in that Order was nothing more than a general statement concerning provisional measures "to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execu-

tion of the decision to be given" (*P.C.I.J., Series A/B, No. 79*, p. 199) and cannot be interpreted as supporting the contention that an order on provisional measures has binding force.

32. The Court, though "not consider[ing] it necessary to resort to the preparatory work", "nevertheless point[s] out that the preparatory work of the Statute *does not preclude* the conclusion that orders under Article 41 have binding force" (Judgment, para. 104; emphasis added).

After stating that "the lack of means of execution and the lack of binding force are two different matters" (Judgment, para. 107) and quoting Article 94 of the United Nations Charter, which states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party" (Judgment, para. 108), the Court concludes that "Article 94 of the Charter *does not prevent* orders made under Article 41 from having a binding character" (*ibid.*; emphasis added). The present Judgment further states that

> "*none* of the sources of interpretation . . . including the preparatory work, *contradict the conclusions* drawn from the terms of Article 41 read in their context [that is, the binding character of orders] and in the light of the object and purpose of the Statute" (Judgment, para. 109; emphasis added).

33. After this extensive discussion, which seems to me a rather vain and unproductive undertaking, the Court states that "[t]hus, [it] has reached the conclusion that orders on provisional measures under Article 41 have binding effect" *(ibid.)*. I fail to understand either this roundabout method of analysis to which the Court dedicates as many as 25 paragraphs or the process by which that analysis led the Court to that conclusion.

34. In my view, addressing the general question as to whether or not an order indicating provisional measures "is binding" or "has binding force" is an empty, unnecessary exercise. I wonder what the Court really wants to say in holding that an order indicating provisional measures is binding. Is the Court trying to raise the question of responsibility of the State which allegedly has not complied with the order? This question has not arisen in the past jurisprudence of this Court. It suffices that provisional measures "ought to be taken" or, in the French, "doivent être prises" (Statute, Art. 41). Whether an order indicating provisional measures has been complied with or not is decided by the Court in its judgment on the merits.

35. In paragraph 111 of the Judgment, the Court then considers the "the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999". After a

circuitous analysis the Court concludes that "under these circumstances . . . the United States has not complied with the Order of 3 March 1999" (Judgment, para. 115), simply because Walter LaGrand was executed.

Even if I were to accept that the issuance of the Order indicating provisional measures of 3 March 1999 was a valid exercise of the Court's jurisdiction, I believe that that Order was complied with by the United States, which took all measures at its disposal in an attempt to respect the terms. At any rate, the stay of an execution, in this case of Walter LaGrand, could not be — and, in fact, was not — mandated by the Court in its Order indicating provisional measures. I reiterate: it is extraordinary that the Court, in its Order of 3 March 1999, determined not the rights and duties of a State but the rights of an individual. In any case, the question as to whether or not the Order of 3 March 1999 indicating provisional measures was complied with should never have been raised.

6. Subparagraph (6) of the operative part (Judgment, para. 128)

36. Given my opinion that there was no other violation of the Vienna Convention on Consular Relations on the part of the United States than its failure to notify the German consular officials without delay of the incident involving the LaGrand brothers and the fact that the United States did indeed take various measures to prevent the reoccurrence of that violation, I do not believe there is any more to be said on this subject in the Judgment. However, I voted in favour of this subparagraph for the *sole* reason that the statement in this subparagraph cannot cause any harm.

7. Subparagraph (7) of the operative part (Judgment, para. 128)

37. I am utterly at a loss as to what the Court intends to say in this subparagraph. My failure to understand may stem from the fact that I hold a diametrically different view on "the rights set forth in [the Vienna] Convention". However, I believe that the sole subject-matter of the Court's consideration should have been the violations of the Vienna Convention by a party to it, as explained in paragraphs 23 to 25 above.

(Signed) Shigeru ODA.