DISSENTING OPINION OF JUDGE BUERGENTHAL

Inadmissibility of Germany's third submission — Late filing of request for provisional measures unjustified — Denial of hearing due to Germany's negligence — Holding third submission admissible incompatible with procedural fairness and sound administration of justice — Court's admissibility decision not properly motivated — Order requested by Germany identical to Breard *Order — German knowledge that* Breard *Order deemed non-binding by United States — German litigation strategy — Procedural misconduct prejudicial to United States.*

1. Since I find myself in disagreement with the Court's ruling that Germany's third submission is admissible, I regret that I must dissent from that part of the Court's Judgment.

2. In the submission, which I consider to be inadmissible, Germany requests the Court to adjudge and declare:

> "that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending".

3. Germany filed its Application in this case, together with its request for provisional measures, at 7.30 p.m. The Hague time on 2 March 1999, some 27 hours before the scheduled execution of Walter LaGrand. On 3 March 1999, at 9.00 a.m. The Hague time, the Vice-President of the Court[1] met with the representatives of Germany and the United States to discuss the subsequent course of the proceedings. At this meeting Germany's representative asked the Court to indicate the requested provisional measures *proprio motu* pursuant to Article 75 of the Rules of Court and without holding any hearing on the subject. Responding to this request, the representative of the United States explained, *inter alia*:

> "that the United States would have strong objections to any procedure such as that proposed only that very morning by the repre-

[1] The President of the Court, Judge S. Schwebel of the United States, relinquished the presidency in this case pursuant to Article 32 of the Rules of Court.

sentative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties"[2].

4. Article 74, paragraph 1, of the Rules of Court specifies that "[a] request for the indication of provisional measures shall have priority over all other cases", and paragraph 3 of that Article provides in part that "[t]he Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it".

Under Article 75, paragraph 1, of the Rules:

> "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties."

5. On 3 March 1999, at 7.15 p.m. The Hague time, the Court issued the Order for provisional measures requested by Germany. It did so without the prior hearing provided for in Article 74, paragraph 3, of the Rules, without an exchange of pleadings, and having before it only Germany's Application and request for provisional measures, which set out Germany's allegations in justification of its request.

6. In issuing the requested Order, the Court explained its decision to proceed in this *ex parte* fashion in the following terms:

> "Whereas, the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73[3] of the Rules of Court be submitted in good time;
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> Whereas, Germany emphasizes that it did not become fully aware of the facts of the case until 24 February 1999 and that since then it has pursued its action at diplomatic level;
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> Whereas, under Article 75, paragraph 1, of the Rules of Court, the latter 'may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties'; whereas a provision of this kind has substantially

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[2] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 13, para. 12.

[3] Article 73 of the Rules of Court, which Germany had also invoked, reads as follows:

> "1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.
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> 2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party."

featured in the Rules of Court since 1936, and whereas, if the Court has not, to date, made use of the power conferred upon it by this provision, the latter appears nonetheless to be clearly established; whereas the Court may make use of this power, irrespective of whether or not it has been seised by the parties of a request for the indication of provisional measures; whereas in such a case it may, in the event of extreme urgency, proceed without holding oral hearings; and whereas it is for the Court to decide in each case if, in the light of the particular circumstances of the case, it should make use of the said power"[4].

7. The Court issued its Order only four hours before the scheduled execution of Walter LaGrand, which was to take place in the State of Arizona. The United States authorities were thus left with very little time to assess and act upon the Order with the deliberateness its gravity required under American law and constitutional practice applicable to federal-state relations as well as under international law. It is to be observed, however, that the Court was presented by Germany with claims regarding a set of facts that called for immediate action to save the life of a human being who had allegedly been deprived of his rights under international law. In light of these circumstances, it is difficult to fault the Court for issuing the Order in the manner it did. But there is no excuse for Germany's conduct in waiting until the last minute to seek the Order. This is so particularly since it is now clear that the grounds Germany alleged in justification of its late filing do not withstand scrutiny. The late filing, as will be shown below, had serious negative consequences for the position of the United States in defending its rights before this Court. In my opinion, these circumstances now require the Court to hold the third submission inadmissible.

8. Germany sought to excuse its last minute request for provisional measures on the ground that it did not know until 23 or 24 February 1999 that the authorities of the State of Arizona had been aware at least as far back as 1982 or 1984 that the LaGrand brothers were German nationals. In issuing its Order, the Court attached considerable importance to this claim. This is readily apparent from the specific reference the Court makes to Germany's claim in setting out the reasons motivating its decision and from the context within which the reference appears in its Order (see paragraph 6, above).

9. Even assuming that Germany's late filing could be justified on the ground advanced by it — something that is open to some doubt — the record now before the Court indicates that the information Germany

[4] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 14, paras. 19-21.

claimed it did not have was in fact available to Germany at least since 1993.

10. Germany learned in 1992 that the LaGrands had been arrested in 1982 and that they had been tried and convicted in Arizona in 1984. According to Germany, its involvement in this case begins with a prison visit to the brothers on 8 December 1992. It explained this involvement to the Court in the following words:

> "In the following [after December 1992], Germany helped the brothers' attorneys to investigate the brothers' childhood in Germany, both by financial and logistical support, and to raise this issue and the *omission of consular advice in Court proceedings*."[5] (Emphasis added.)

Among the court proceedings instituted by the LaGrands' lawyers in coordination with German consular officials was an appeal to the United States District Court for the District of Arizona, filed on 8 March 1993. "In these proceedings", according to Germany, "the attorneys raised for the first time the lack of consular advice and the violation of Art. 36 of the Vienna Convention on Consular Relations."[6] In support of their claim, the attorneys provided the United States District Court on the same date with the presentence reports prepared in 1984 by the probation officials of Pima County, Arizona, in connection with the sentencing of the LaGrand brothers[7]. Each of these presentence reports stated very clearly that the LaGrands were German citizens[8]. The reports had been provided to the defence attorneys of the LaGrands a decade before and they formally acknowledged receipt of these reports in open court on 12 December 1984[9].

11. In other words, the information contained in the presentence reports, including the fact that the Arizona authorities knew as far back as the early 1980s that the LaGrands were German nationals, was known to the attorneys of the LaGrands by 1984, if not earlier. These attorneys filed the presentence reports with the United States District Court for Arizona in March 1993 in connection with their *habeas corpus* motion on behalf of the LaGrands. As of that date, these reports were available to Germany which, as we have seen, emphasized to this Court that it "helped the brothers' attorneys . . . to raise . . . the omission of consular advice" and "the violation of Art. 36 of the Vienna Convention on Con-

[5] Memorial of Germany, Vol. I, p. 11, para. 2.06.
[6] *Ibid.*, p. 12, para. 2.07.
[7] See Memorial of Germany, Vol. III, Ann. 46, p. 853, at p. 1009.
[8] See Presentence Reports on Karl and Walter LaGrand, dated 2 April 1984, Memorial of Germany, Vol. II, Ann. 2, pp. 261 and 276.
[9] See Memorial of Germany, Vol. II, Ann. 8, pp. 461-462.

sular Relations" in the proceedings they instituted in 1993 (see paragraph 10 above).

12. The foregoing facts raise serious doubts about the legitimacy of Germany's contention in this Court that the late filing (on 2 March 1999) of its request for provisional measures was attributable to the fact that it discovered only on 23 February 1999 that the Arizona authorities knew as far back as 1984 that the LaGrands were German nationals. Even assuming that Germany did not actually know these facts, it certainly had no excuse for not knowing them, given its insistent claim in this Court of its close involvement in the LaGrand case after 1992 and its collaboration with the LaGrands' attorneys after that date, particularly in assisting them in raising issues relating to the Vienna Convention.

13. In its oral argument, Germany responded in the following terms to the contention of the United States that the 1984 presentence reports provided the answer to the question concerning the date when the Arizona authorities learned that the LaGrands were German citizens:

> "the only question that makes sense at all in this context is whether German officials did or did not have easy access to the Presentence Reports in 1992 or thereafter. Although we do not attribute any conclusive weight to this issue, we can provide you with a clear answer. We have filed with the Court a Memorandum regarding the Presentence Reports issue in the LaGrand matter, drafted by the Federal Public Defender for the District of Arizona at the request of the German Consulate General in Los Angeles. Let me summarize what this Memorandum says: According to a local rule of the Pima County Superior Court, the Presentence Reports concerning Karl and Walter LaGrand were filed under seal and kept confidential even after sentencing. When the Federal Public Defender tried to locate this report in June of this year [2000], they could not be found. In the words of the Public Defender:
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> > 'The exhibits clerk at the superior court advised that the clerk did not have pre-sentence reports information on either LaGrand, and they had no idea where the pre-sentence reports were filed. It appears that the pre-sentence reports are not even in the superior court file.'
>
> Mr. President, if not even the competent US authority managed to retrieve the reports, does it make sense to say, as the Counter-Memorial [of the United States] does, that it is 'hard to understand how these reports were not already familiar to German consular officers'? Can one really accuse a foreign consulate of negligence

when it failed to get hold of documents which could not even be traced by the competent local authorities?" [10]

14. The answer to the question counsel for Germany asked in the last sentence of the preceding paragraph is a resounding "yes". As we have seen, the presentence reports were in the possession of the LaGrands' attorneys and transmitted by them to the United States District Court in 1993. Moreover, even assuming that these reports were confidential or under seal after the conviction in 1984 of the LaGrands, they became a matter of public record when provided to the United States District Court. Since the reports were thus available to Germany by 1993, it is quite irrelevant that the Public Defender, quoted above by Germany, was unable allegedly to find them in the year 2000.

15. It is noteworthy, too, that between 1992, when Germany learned of the detention, trial and sentencing of the LaGrands, and the beginning of 1999, when Germany claimed that it found out for the first time that the Arizona authorities had known since the early 1980s that the LaGrands were German citizens, Germany never asked the United States Department of State to investigate the case of the LaGrands. Moreover, in 1998 the Department of State expressly invited all embassies in Washington "to bring possible failures of consular notification to its attention, so that it could investigate and take any appropriate action" [11]. Such an investigation, had it been requested by Germany consistent with the practice routinely followed in these types of cases, would have determined the date as of which the LaGrands' German nationality was known to the Arizona authorities. This information was in fact contained in the report prepared by the State Department following its own investigation of the case in 1999-2000 [12].

16. Germany's lack of diligence in ascertaining the facts it advanced to justify its late filing deprived the United States of an opportunity to be heard on Germany's request for provisional measures. What is more, it left the Court little choice but to accept on face value Germany's claim of its lack of knowledge, since the absence of a hearing prevented the United States from rebutting Germany's contention in this regard. Germany's conduct raises issues analogous to those the Court addressed in the case concerning *Legality of Use of Force* (*Yugoslavia* v. *Belgium*),

[10] CR 2000/26, p. 38.

[11] Counter-Memorial of the United States, p. 51, para. 61.

[12] "Karl and Walter LaGrand. Report of Investigation into Consular Notification Issues", United States Department of State, 17 February 2000, Counter-Memorial of the United States, Exhibit 1, pp. 7-8.

where Yugoslavia attempted to invoke a new basis of jurisdiction at a very late stage of the proceedings. In that case, the Court ruled as follows:

> "Whereas the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never before occurred in the Court's practice; whereas such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice; and whereas in consequence the Court cannot, for the purpose of deciding whether it may or may not indicate provisional measures in the present case, take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999."[13]

17. Germany's justification for its late filing, which the information now before the Court has shown to have been based on spurious claims, had the effect of obtaining a ruling from the Court that "seriously jeopardize[d] the principle of procedural fairness and the sound administration of justice". This result, as we have seen, was brought about because of Germany's lack of diligence. It alone justifies holding the submission inadmissible on the grounds invoked by the Court in *Yugoslavia* v. *Belgium*, above.

18. In addressing the issue of the admissibility of Germany's third submission, the Court makes the following finding (para. 57):

> "The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany's filing at such a late date, it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany's third submission is admissible."

19. I have no disagreement with the Court's view that given the imminence of "an irreparable harm" in the instant case it was "appropriate" to enter the Order of 3 March 1999 on the facts then known to the Court. But it does not follow therefrom, contrary to what the Court says, that "in view of these considerations, the Court considers that Germany is

[13] *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 139, para. 44.

now entitled to challenge the alleged failure of the United States to comply with the Order". The fact that it was appropriate for the Court to issue the Order does not compel the admissibility of Germany's third submission once it is apparent that Germany's justification for its late filing is shown not to withstand scrutiny. It is to be regretted that the Court fails to address this issue since it bears directly on the admissibility of Germany's third submission.

20. Germany's negligence had other detrimental consequences for the United States, as far as concerns the Order of 3 March 1999. In its request for provisional measures, Germany asked the Court for an Order that tracked verbatim the language of the Court's Order of 9 April 1998 in the *Breard* case[14]. When the *Breard* Order was before the United States Supreme Court, the Solicitor General of the United States explained why the Government believed that the Order was not binding. He made three points in this regard. He submitted, first, that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See *Restatement (Third) of Foreign Relations Law of the United States*, Sec. 903, Reporter's Note 6, at pp. 369-370 (1986). The better reasoned position is that such an order is not binding"[15] The Solicitor General then attempted to show, by analysing Article 41 of the Statute of the Court, why that was the better reasoned view. The Solicitor General's second argument in support of the non-binding character of the Court's Article 41 orders was that:

> "the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent."[16]

Finally, the Solicitor General argued that, even assuming that "parties to a case before the ICJ are required to heed an order of that court indicating provisional measures", the Order in the *Breard* case was not worded in mandatory terms[17]. Consistent with the view of the Solicitor General, the Supreme Court of the United States denied the stay of execution in

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[14] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 258, para. 41 (I).

[15] Brief for the United States as Amicus Curiae, *Republic of Paraguay* v. *Gilmore*, Memorial of Germany, Vol. II, Ann. 34, p. 737.

[16] *Ibid.*, p. 738.

[17] *Ibid.*, p. 739.

the *Breard* case called for by the Order of the International Court of Justice in that case[18].

21. Germany was aware of the position of the United States Government regarding the non-binding character of orders of this Court indicating provisional measures in general and with its interpretation of the Order in the *Breard* case in particular. Nevertheless, Germany asked the Court less than a year later for an Order worded in precisely the same language, instead of seeking an order that provided the authorities of the United States with some legal basis for reassessing their position on the binding nature of these orders. This failure by Germany would have been less serious an omission had there been a hearing in the instant case in which the United States could have explained its position to the Court. But because of Germany's late filing, as we have seen, no hearing could be held.

22. It is difficult to understand, therefore, what Germany sought to achieve with its 2 March 1999 request for provisional measures. It certainly could not have been surprised that the United States would adopt the same position with regard to the requested order as it did in relation to the *Breard* Order of 9 April 1998. There was nothing in the order Germany requested on 2 March 1999 that would have provided the authorities of the United States with a legal basis justifying the Solicitor General to reverse his official position adopted less than a year earlier. In the absence of such a justification, it would have been unprecedented for him not to adhere to his earlier view. Moreover, and that is even more important, the Court itself had not in the meantime clarified its position on the subject. Consequently, when Germany asked the Court to proceed *proprio motu* and without a hearing, and sought an order identical to that the Court issued in the *Breard* case, Germany breached an obligation of elementary fairness it owed the United States in the circumstances of this case. It is true, of course, that a party in proceedings before this Court, as before any other court, must bear the consequences of having assumed, erroneously in retrospect, that a given order is non-binding and being held responsible for the resulting violation. But this fact does not relieve Germany of responsibility for having engaged in a litigation strategy prejudicial to the United States.

23. To summarize, the claim advanced by Germany to justify its late filing has been shown to be without merit. In fact, it is now clear that Germany had no good reason for not bringing its request for provisional measures to the Court at least a year or two earlier, if not much earlier. Its late filing did nevertheless have the consequence of preventing the

[18] *Breard* v. *Greene, Republic of Paraguay* v. *Gilmore*, 118 S. Ct. 1352 (1998), 37 *International Legal Materials* (1998), p. 829.

United States from being heard in a timely fashion on the German request for provisional measures. The absence of a hearing also deprived the United States of the opportunity to address the question of the binding character of the Court's orders and their effect on the laws of the United States. What is more, Germany sought an order from this Court that it had every reason to anticipate the United States would consider to be non-binding and hence not requiring enforcement — a litigation strategy that is very difficult to understand unless that was its very purpose.

24. Accordingly, I consider that the manner in which Germany proceeded in obtaining the Court's Order of 3 March 1999 amounted to procedural misconduct prejudicial to the interests of the United States as a party to the instant proceedings. Such misconduct provides the requisite justification — it compels it, in my opinion — for declaring Germany's third submission inadmissible.

(Signed) Thomas BUERGENTHAL.