INTERNATIONAL COURT OF JUSTICE

LAGRAND CASE

(GERMANY V. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

27 MARCH 2000

_____

TABLE OF CONTENTS

PART I

INTRODUCTION AND OVERVIEW

1. Pursuant to the Court's Order of 5 March 1999, the United States of America submits its Counter-Memorial in this case.

2. The case results from the failure of competent authorities of the United States to inform Walter and Karl LaGrand without delay of their right to have a German consular post notified of their arrest and detention following their 1982 arrest for murder. The competent authorities of a State Party are required to so inform arrested nationals of another State Party by the last sentence of Article 36(1)(b) of the Vienna Convention on Consular Relations ("the Vienna Convention" or "the Convention").[1] The United States of America and the Federal Republic of Germany are, and at all relevant times have been, States Party to the Vienna Convention. Accordingly, the failure promptly to inform the LaGrands of the right of consular notification as required by Article 36(1)(b) of the Vienna Convention was in breach of the United States legal obligations to Germany.

3. As will be discussed in Part II, the murder was committed in Arizona, and Walter and Karl LaGrand were arrested, detained, tried, and sentenced under the jurisdiction and laws of Arizona. Arizona officials were the "competent authorities" for purposes of the consular notification obligations of Article 36(1)(b) of the Vienna Convention with respect to them. The United States of America recognizes that under international law, it is internationally responsible for the actions of the State of Arizona.

4. The Federal Republic of Germany began to provide consular assistance to Walter and Karl LaGrand in 1992. Insofar as we have been able to determine, the German Government did not raise the issue of consular notification with the U.S. Department of State or any other U.S. Federal authority until 22 February 1999, two days before Karl LaGrand's scheduled execution and only eight days before the filing of this case on 2 March 1999.[2]

5. In U.S. practice (and in the general practice of States Party to the Vienna Convention insofar as we can determine), when a sending State raises with the receiving State the possibility that consular notification obligations under Article 36 of the Convention have not been observed, the receiving State ordinarily investigates the allegation. If a violation is confirmed, it is appropriate to apologize for the violation and to take action as required to avoid any recurrence. Accordingly, upon learning of the German Government's concerns that led to the filing of this case, the Department of State initiated a careful inquiry into the consular notification issues related to Walter and Karl LaGrand. The process and results of that inquiry are described in the report at U.S. Exhibit 1.[3] That report has been provided to the German Government.

6. Through this inquiry, the United States confirmed that the competent authorities of the State of Arizona did not inform Walter and Karl LaGrand "without delay" that they could request that a German consular post be notified of their arrest and detention, as required by Article 31(1)(b) of the Convention. The United States of America bears responsibility for

such non-performance of U.S. obligations under the Convention by Arizona. Accordingly, the United States acknowledges that, as a result of the failure to inform Walter and Karl LaGrand of their right to consular notification, there was a breach of a legal duty owed by the United States to the Federal Republic of Germany under the Vienna Convention.

7. On 18 February 2000, the U.S. Department of State presented to the Embassy of the Federal Republic of Germany the diplomatic note at U.S. Exhibit 2. In this note, the Department conveyed the apologies and regrets of the United States for the failure to comply with the international legal obligation to inform the LaGrand brothers without delay that they could have a German consular post notified of their arrest and detention. The note also described the extensive efforts that the United States of America is making to improve understanding of and compliance with consular notification obligations throughout the United States, including in Arizona. With this note, the Department also provided a copy of the report of its investigation mentioned above.

8. The nation-wide program of actions aimed at preventing future cases of this kind involving nationals of Germany and of other States Party to the Vienna Convention is further described in Part II of this Counter-Memorial. The Department of State is engaged in an active program of outreach and education with federal, state and local law enforcement, judicial, and other authorities throughout the United States to ensure that those authorities know of and properly implement U.S. consular notification obligations under the Vienna Convention. The goal is to avoid, or in any case to reduce to the minimum, future failures to follow required consular notification procedures by authorities in any U.S. jurisdiction.

9. The United States has also invited the Government of Germany to raise with the Department of State any other cases in which it has concerns about compliance with consular notification obligations. The United States remains prepared to work with Germany to ensure that its nationals are properly informed that they may request consular assistance from Germany's consular posts in the United States.

10. Thus, the United States acknowledges and regrets that the competent authorities in the United States failed to comply with the consular notification obligations contained in Article 36(1)(b) of the Vienna Convention with respect to Walter and Karl LaGrand. The United States has officially apologized for this failure to the Government of Germany, and is taking extensive steps aimed at preventing a recurrence, both in Arizona and elsewhere in the United States. This goes to the heart of what Germany seeks through its first submission.[4]

11. Germany's Memorial and its other submissions set out several other matters on which Germany seeks the judgment of the Court. For the reasons explained in Part III, the Court should find these additional claims to be inadmissible. The remaining parts of this Counter-Memorial address the legal bases of Germany's additional claims, should the Court conclude that they are admissible. Part IV refutes Germany's claims of further violations of the Vienna Convention and of general international law. Part V answers Germany's claims regarding "procedural default" and shows that Article 36 does not require States Party to the Vienna Convention to create an individual remedy enforceable by individuals in national criminal proceedings. Part VI answers Germany's claims that the United States failed to comply with legal obligations arising from the Court's 3 March 1999 Order indicating provisional measures. Part VII addresses Germany's demand that the Court require the United States to provide a guarantee against future repetition. Part VIII summarizes the case and contains the U.S. submissions to the Court.

12. As Germany's Memorial makes clear, this case does not concern the position of capital punishment in international law:

Germany wants to emphasize that its Application is not directed against capital punishment, neither in general nor in regard to the way the death penalty is applied in any particular country.[5]

As the Court has made clear here, as with Paraguay's previous case related to consular notification under Vienna Convention:

The issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes.[6]

PART II

THE FACTS

13. The facts of this case are less complex and less contested than those in other cases now before the Court, but there are important omissions from Germany's narrative. There are also some material disagreements on factual inferences to be drawn as to certain matters. This Part seeks not to repeat information contained in the Memorial, but it will address some matters not discussed there that help to explain (if not excuse) the acknowledged failure to comply with Article 36(1)(b). This Part also addresses Germany's attempt to justify its last-minute filing of this case.

CHAPTER I

FACTS REGARDING THE LAGRAND BROTHERS

14. There is no substantial dispute regarding the fact that Walter and Karl LaGrand together attempted an armed bank robbery in Marana, Arizona, on 7 January 1982. During the attempted robbery, Ken Hartsock, the bank manager, was murdered and Dawn Lopez, a bank employee, was repeatedly stabbed and almost killed. Letters from senior German officials to their United States counterparts acknowledge both the brothers' guilt and that they were fairly tried. President Herzog wrote to President Clinton on 5 February 1999 that:

In no way do I doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts.[7]

German Minister of Justice Däubler-Gmelin wrote to U.S. Attorney General Reno on 27 January 1999 that:

It is beyond dispute that the LaGrand brothers committed a dreadful crime, marked by the fact that it was carried out with particular brutality. From my point of view as well, there are no doubts about the gravity of the guilt these sentenced offenders bear for the crime they committed, nor are there any doubts about the fact that the proceedings were conducted under the Rule of Law - ultimately leading to imposition of the death penalties with final and binding effect - before the courts of the State of Arizona and before the Federal Courts.[8]

15. There also does not appear to be dispute regarding the circumstances of the LaGrand brothers' births and their move to the United States, although there are some differences in characterization. The brothers were born out of wedlock in Germany to a mother of German nationality and fathers of U.S. nationality. Walter was born on 26 January 1962 and Karl on 10 October 1963. A third U.S. citizen serviceman stationed in Germany with the U.S. Army, Masie LaGrand, subsequently married their mother and adopted Walter, Karl, and their half-sister. Masie LaGrand brought his German wife and three adopted children to the United States in February 1967. At that time, Walter was five years old and Karl almost three-and-a-half. The brothers never returned to Germany except to live in a U.S. military housing complex associated with the U.S. Army base in Mannheim, Germany, for about five months in 1974. Thus, although the Memorial speaks broadly of "the upbringing of the boys in Germany"[9] in fact they were largely brought up in the United States after living in Germany for five and three years in their early lives.

16. By the time of the January 1982 murder, the brothers appeared in all respects to be native citizens of the United States. Their language was English, not German. Their appearance, mannerisms, and characteristics were those of citizens of the United States, not of Germany. Indeed, it appears that their adoptive father thought that they had in fact become U.S. citizens, and that the brothers at times identified themselves as U.S. citizens.[10]

17. There is also no dispute that, although they were fully American in outlook and characteristics and spoke little or no German, Walter and Karl LaGrand were in fact German citizens and not citizens of the United States. The fact that the brothers' natural fathers were both U.S. servicemen stationed in Germany was not sufficient to make the brothers United States citizens under the relevant citizenship laws of the United States.[11] In addition, the fact that the LaGrand children were adopted by a U.S. citizen father did not automatically confer U.S. citizenship upon them. Their adoptive father, Masie LaGrand, could have arranged for Walter and Karl LaGrand to be naturalized as U.S. citizens by completing the necessary application and process.[12] Masie LaGrand never did this however, apparently because he mistakenly thought that his adopted children had automatically become U.S. citizens. Had Walter and Karl LaGrand acquired U.S. citizenship, they would have lost their German citizenship under the U.S.-German Treaty Establishing Friendly Relations of 25 August 1921.[13] The United States accepts, however, that Walter and Karl LaGrand acquired German nationality through birth in Germany to a German mother and remained German nationals until their deaths in 1999.

18. There also is no substantial dispute that Walter and Karl LaGrand had difficult and deeply troubled lives. As children, they repeatedly experienced rejection by their mother and their adoptive father. During their early years in Germany, their care was at times turned over to institutions. After they moved to the United States at ages five and three, this pattern continued. Their mother took little or no interest in the brothers and welcomed their placement in foster care. Their adoptive father apparently became abusive and in any event eventually abandoned the brothers and their mother and sister. Arizona State records contain numerous details of how the brothers felt rejected by their mother, angry, and frustrated by their situation. Eventually the brothers drifted into anti-social and ultimately violent criminal behavior, culminating in the murder of 7 January 1982.

CHAPTER II

THE MULTIPLE APPELLATE PROCEEDINGS

19. Germany's Memorial lists the extensive series of appellate and other legal proceedings brought by the LaGrand brothers to challenge their convictions and sentences.[14] Because the brothers faced capital punishment, these appeals were particularly rigorous. The convictions and sentences of the Arizona trial court were first reviewed and affirmed by the Arizona Supreme Court. The United States Supreme Court then declined to exercise its discretion to grant further review.[15] As was their right, the LaGrands then sought review of their convictions and sentences by a federal district court under the habeas corpus provision of the United States Constitution. (Habeas corpus proceedings provide a vehicle for persons in detention to challenge the lawfulness of their detention in a court of law.) The federal district court upheld the convictions and sentences. Its decisions were then reviewed and affirmed by an intermediate federal court of appeals, and the United States Supreme Court then declined for a second time to exercise its discretionary jurisdiction.[16] Through these appeals, appropriate judicial authorities determined that the LaGrands' defense lawyers had provided a constitutionally sufficient level of representation and that the sentencing judge had appropriately considered the mitigation and other evidence relevant to sentencing.

CHAPTER III

EFFORTS BY THE UNITED STATES TO IMPROVE COMPLIANCE

20. The United States accepts that effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention. As described in the attached Declaration of M. Elizabeth Swope, the Department of State's Senior Coordinator for Consular Notification,[17] the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements.[18] This effort has included the January 1998 publication of a booklet entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them*,[19] and development of a small reference card designed to be carried by individual arresting officers.[20] As of March 2000, the Department had distributed approximately 44,000 booklets and over 300,000 cards to arresting officers, prosecutors, and judicial authorities in every state and in other jurisdictions such as the District of Columbia. The Department also has made the booklet available through libraries and the Internet, through which it has been accessed thousands of times.[21] The booklet is now widely available to, and used by, criminal defense lawyers, detainees, and members of the public as well as by federal, state, and local officials.

21. Consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States. Many of these events have been held in states with significant populations of foreign nationals. Department of State officials have traveled for this purpose to Arizona, California, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Texas, Virginia, and Washington State. Department officials have also spoken about consular notification and access issues at a number of regional or national events, such as special conferences of the states that border Mexico, seminars on international prisoner transfer, international and regional police chiefs and sheriffs meetings, and meetings of federal and state prosecutors.

22. Similar educational efforts in other states of the United States are continuing. In coming months, the Department of State will be conducting programs on consular notification in California, Hawaii, Nevada, Pennsylvania, Texas, and Utah.[22]

23. As part of its ongoing efforts in many states, the Department of State has worked closely with the State of Arizona, which has taken a number of specific steps to ensure that consular notification is provided when required. The Attorney General of Arizona sent all Arizona county attorneys a memorandum advising them of the requirements of the Vienna Convention and providing excerpts from and information about the Department of State's booklet, and has also written to the Chief Justice of the Arizona Supreme Court suggesting a change in the rules of the courts of Arizona that would help ensure compliance. The Arizona Department of Corrections has compiled and distributed within the Department of Corrections a list of consular offices in the United States in or nearest to Arizona, and has adopted new consular notification procedures.[23] These and other specific instructions issued by Arizona authorities have been supplemented by wide distribution within Arizona of the Department of State's booklet, and by numerous training sessions. The Arizona Attorney General's Office is continuing to work on these and other initiatives to improve understanding of and compliance with consular notification and access obligations throughout the state.

CHAPTER IV

GERMANY'S SPECULATIVE AND UNJUSTIFIED CLAIMS ABOUT THE IMPACT OF CONSULAR ASSISTANCE

Section I. Introduction

24. Although the parties seem to be in broad agreement about many of the facts, there are some significant differences. The most important relate to Germany's suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification.[24] First, the Memorial presumes that, had the brothers been told in January 1982 that a German consular post could be notified of their arrest, they would have requested such notification. (The notification would have been given to the German Consulate General in Los Angeles, approximately 700 kilometers/415 miles away from Marana, Arizona.) Second, the Memorial argues that German consular officers from Los Angeles would have given rapid and extensive assistance to the LaGrands' defense counsel before the LaGrands' December 1984 sentencing, including obtaining from Germany evidence about the LaGrands' early childhoods before they moved to the United States in February 1967. Finally, the Memorial insists that such consular assistance would have fundamentally changed the outcome of the sentencing proceedings, because consular officers would have provided important evidence not otherwise available to the judge that would have persuaded him not to sentence the brothers as he did. All three lines of argument rest on speculation about what might have happened had the LaGrand brothers been told in 1982 that they could have the German Consulate General in Los Angeles notified of their arrest and detention. None withstands analysis.

Section II. The Brothers Had No Ties with Germany

25. First, the evidence undermines rather than supports Germany's belief that the LaGrand brothers would have requested in 1982 that the German Consulate General in Los Angeles be

notified. As the Memorial recognizes, the Vienna Convention leaves it entirely to the arrested person to request consular notification.

[I]t is for him or her alone to decide whether he or she wants the consulate to be contacted or not.[25]

However, foreign nationals -- particularly those who do not have strong connections with the sending State -- do not uniformly request that their consular officials be notified after they are informed that such notification is a possibility.[26]

26. As described in the report of the Department's investigation,[27] the LaGrand brothers were thoroughly American in identity and outlook when arrested in 1982. The German Government played no role in their lives after they moved to the United States in 1967 at ages five and three. Neither brother had ever been individually documented as a German national, even when they returned to Germany for a few months in 1974, when they appear to have traveled on U.S. military travel orders. There is no indication that either brother viewed himself as German in 1982, or would have looked to the German Government as a potential protector or source of assistance. Even after German consular officials established contact with the LaGrands in 1992, Walter LaGrand at least twice refused consular visits.[28]

27. At the time of their arrests, the brothers did not identify themselves to the arresting officers as Germans. The evidence indicates that Walter identified himself to detaining authorities as a U.S. citizen; Karl either made a similar identification, refused to state his citizenship, or did not know his citizenship.[29] The family and friends that Walter and Karl identified as points of contact when arrested were all in Arizona. The brothers' cultural identity was American throughout. It is thus implausible that two young men who showed little sense of being German and who were totally disconnected from Germany would have asked the Arizona officials responsible for their arrest or detention to notify the German Consulate General in Los Angeles that they had been arrested.

Section III. The Memorial's Unjustified Claims About Consular Assistance

28. Nor does the Memorial credibly support its contention that a German consul would have immediately assisted the LaGrand brothers or significantly aided their legal defense, had the German Consulate General in Los Angeles been notified earlier.[30] Reference to present-day policies does not prove how German consuls performed their duties eighteen years ago. Part V considers the limited and discretionary nature of a consul's role when a national is detained, and shows how that role is often quite different from the idealized portrait presented in the Memorial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in a criminal proceeding is limited to assisting in obtaining legal counsel and then assisting legal counsel -- if requested -- within the limits of the consular officer's authorities and resources.

29. Germany has provided little support for its assertions that German consular officers would have retained different defense lawyers, that they would have aided the LaGrands' defense counsel in 1982-84 by seeking additional information about the brothers' early childhoods in Germany, or even that German consular officials would have responded at all. To show what a German consul might have done, the Memorial cites a 1993 memorandum of law filed by a U.S. defense lawyer in a U.S. criminal proceeding.[31] That memorandum contains several careful references to what German consuls "could have" or "may have" done, not what they

"would do" or "had done". These hedged speculations in a legal brief are not evidence. The Memorial also cites the German Federal law on Consular Assistance and a current Circular Order of the German Foreign Ministry describing the responsibilities of German consuls.[32] There is a suggestion that these current regulations continue past practices, but there is no claim that they correspond to the regulations in force in 1982 or to the practices of the German Consulate General in Los Angeles at that time. Nowhere is there any statement by any informed German official familiar with German consular practice in Los Angeles in 1982.

30. The actions of the German Consulate General in Los Angeles when it ultimately learned of the LaGrand brothers in June 1992[33] may offer a more realistic indication of consular practice. The Consulate General's response suggests that German authorities had doubts about whether the brothers were German nationals at all, or whether urgent consular assistance to them -- or perhaps any assistance -- was appropriate. Clearly, the Consulate General did not rush to assist the brothers. Apparently, two other Germans in prison with the LaGrands were receiving consular visits and prompted a contact between the brothers and the Consulate General in June 1992. The Memorial states that the German Consulate General thereafter "[i]mmediately ... engaged in a careful and comprehensive inquiry into the nationality status of the two brothers."[34] That inquiry was indeed "careful and comprehensive" -- indeed, it appears to have been slow, deliberate, and even skeptical. Not until November 1992 did a German consular officer write to the U.S. Immigration and Naturalization Service for information about the LaGrands' immigration status in the United States. Only on 8 December 1992 did a German consular officer visit the LaGrands.[35] The LaGrands' German nationality was not officially documented by Germany until 15 March 1993.[36]

31. The German Consulate General's slow and cautious response conflicts with Germany's assertions that its consuls would have sprung immediately into action in 1982, had they learned that two native English-speakers long resident in the United States, but who claimed to be German, faced charges for a murder in a small Arizona town. It seems particularly doubtful that consular officials would have responded quickly because the brothers had no documentation at hand to prove that they were German nationals. They had no German passport or identification card, having been included in their mother's long-since-expired German passport when they first came to the United States as small boys in 1967.

32. It is also important to remember that the LaGrands' defense was at all times the responsibility of their defense attorneys. Just as Germany's compilation of information from Germany about the LaGrands after 1992 was at the behest of the lawyers then assisting them, the LaGrands' defense lawyers in 1982-1984 would have decided what requests for assistance to make to a consular officer. There is no indication that Walter or Karl LaGrand's defense lawyers in 1982-1984 would have asked German consular officials to obtain additional evidence about the brothers' lives in Germany. Both defense lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there.

33. The German Memorial castigates the brothers' defense counsel, *inter alia*, because they did not "raise or investigate mitigating circumstances linked to the upbringing of the brothers in Germany under extremely difficult social conditions."[37] If the LaGrands' defense counsel warrant the criticisms directed against them, then it is hardly likely that they would have sought help from a German consular officer to obtain such evidence. However, it may well be that the LaGrands' defense counsel simply did not think such evidence would add much strength to the brothers' defense.

34. It was not unreasonable for the LaGrands' trial counsel not to seek additional information from Germany. Information about the brothers' early years was available from Walter and Karl LaGrand themselves and from their sister, and was reflected in pre-sentence materials prepared for the sentencing judge. Moreover, by 1984, when the brothers were sentenced, their early years in Germany were remote and relatively less significant than the seventeen years since they left Germany. Those seventeen troubled years were well documented. Thus, ample mitigation evidence about the LaGrands' dysfunctional childhoods, including their early years in Germany, was provided to the Court. Defense counsel did not need to reach for additional documentation from Germany relating to the time years before when the brothers were five and three years old.

35. German consular officials' actions after they finally began to assist the LaGrand brothers also conflict with Germany's claims. Germany explains its last-minute filing by arguing that German officials only learned at a clemency hearing on 23 February 1999 that Arizona authorities knew of the LaGrands' German nationality long before. We believe this stems from a reference made by an attorney for Arizona at the clemency hearing to the brothers' 1984 pre-sentence reports,[38] official court documents crucial to understanding the sentences imposed.[39] The 1984 reports were available to German officials and are the second exhibit to Germany's Memorial. If they were not reviewed by German consular officials after they learned of the case in 1992, then those officials clearly did not see their role to include evaluating the evidence considered at sentencing. This directly conflicts with Germany's claims that a German consular officer in 1982-1984 would have worked to evaluate and supplement the evidence presented to the judge regarding the LaGrands' troubled early childhoods.

36. If German consuls never requested or read the 1984 pre-sentence reports, claims of their diligence and effective assistance are unpersuasive. But if German consuls did review them, Germany knew long before the last-minute filing of this case that some Arizona officials had learned of the LaGrands' German nationality during the 1980s.

Section IV. The Memorial's Exaggerated Claims About the Potential Impact of Mitigation Evidence

37. The Court should also reject the Memorial's supposition that Germany would have located mitigation evidence that surely would have persuaded the sentencing judge to be lenient. The Memorial makes such claims many times, with varying degrees of assurance,[40] often echoing arguments made to and rejected by United States courts. Yet, as Germany's Memorial acknowledges, the brothers' lawyers did ask the sentencing judge to consider in mitigation Walter and Karl's grim and dysfunctional family background.[41] Their deprived and unsettled childhood was described in the pre-sentence reports and in testimony by the two defense expert witnesses and of the brothers' sister at the pre-sentence hearing. The pre-sentence reports included a great deal of information, and concluded that, in mitigation, the judge could consider the fact that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education."[42]

38. The reports offered significant information about the LaGrands' troubled childhoods, including the periods of their early childhood spent in Germany. For example, the pre-sentence report for Walter LaGrand attaches a more detailed earlier report dated 4 December 1980, which contains, *inter alia*, the following information:

The defendant [Walter LaGrand] was second of three illegitimate children born of different fathers while his mother lived in Augsburg, Germany. He reports that his father was Puerto Rican and had left without marrying his mother before the defendant was born. He reports that his mother placed the children in a convent when they were very young, as she was unable to take care of them because she was required to work to support the family. She eventually married a Black American soldier, who adopted her three children, at which time the defendant's mother retrieved the children from the convent to live with her and her husband."

(This attachment is contained in the Arizona court's file; we do not know if it was included with the report as obtained by German consular officials. It is reproduced at U.S. Exhibit 6.) One of the psychiatrists who testified in the sentencing phase also noted that the boys' early lives in Germany had been especially difficult.[43]

39. Thus, the sentencing judge had information about the LaGrands' first five and three-and-a-half years of life in Germany, and additional evidence about those few years in Germany would have been cumulative. Defense counsel and the judge also had available extensive information of similar character about the brothers' troubled family lives during the much longer period after they moved to the United States. No evidence about the LaGrands' early years in Germany was as significant as this chronicle of their subsequent experiences over the seventeen years between leaving Germany and being sentenced in 1984.

40. There is no doubt that the Judge Hannah considered the mitigating circumstances presented to him. He stated that:

I've also considered in mitigation their unhappy and disruptive childhoods and family lives, lack of a male role-model, their expressed remorse ... and I have considered the psychological and psychiatric evidence offered on their behalf and the other evidence that was presented at the mitigation hearing, both documentary and oral.[44]

Whatever mitigating evidence Germany might have added at the sentencing stage would not have portrayed a fundamentally different picture.

41. The Memorial correctly points out that, under Arizona law, a difficult childhood or family history can be mitigating, but it also acknowledges that Arizona law also requires a causal connection between the upbringing and the murder.[45] The Memorial offers only speculation that the LaGrands' early experiences in Germany had some special causal connection to the murder, or were more relevant to the murder than the subsequent fifteen years after they left Germany. Arizona has identified numerous cases in which such mitigation evidence was offered but was not shown to have been linked to the criminal behavior.[46]

42. More importantly, Arizona law requires that mitigation evidence be balanced by the court against evidence that the crime was "aggravated" and that the brothers would continue to be a danger to society. Such evidence included the graphic and deeply disturbing testimony of Dawn Lopez, who witnessed the murder of the bank manager and was herself stabbed repeatedly. If it chooses to review the videotapes provided to the Court by Germany, the Court will see that even seventeen years later, at the hearings of the Arizona Board of Executive Clemency, Dawn Lopez' horror at the memory of her experience was undiminished. The evidence in support of capital punishment also included evidence of prior violent behavior by both brothers. The sentencing judge also found other aggravating

circumstances, including that the murder was committed "in the expectation of the receipt of something of monetary value," and that it was committed

in an especially heinous, cruel or depraved manner, stabbing a helpless, defenseless man 26 times, inflicting gratuitous violence on that victim after threatening his life several times while he was a helpless captive and kept uncertain as to his fate.[47]

The judge concluded that "the murder was senseless and the manner of causing death was savage."[48]

43. It is extremely doubtful that any further evidence about the boys' early childhood that might have been added in 1984 would have changed the judge's finding that there were "no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors."[49] Given the information already available to the judge, and the significant aggravating circumstances he identified, the claim that some additional evidence about the brothers' early childhoods would have changed the balance is simply not persuasive.

44. Arizona officials have indicated that imposition of capital punishment was consistent with the outcome in other cases in which similar aggravating and mitigating circumstances were present, and have identified other similar murder cases in which the defendant was also sentenced to capital punishment. In the same vein, Detective Weaver Barkman, who investigated the murder and received Karl LaGrand's confession, has recently confirmed that imposition of capital punishment in this case seemed appropriate to him at the time. Germany's Memorial emphasizes Mr. Barkman's supposed doubts about the LaGrand brothers' sentences, based on the affidavit of a U.S. Federal Public Defender.[50] Mr. Barkman, however, denies the accuracy of the comments attributed to him in that affidavit. Instead, in a recent Declaration, he has stated that at the time he was not opposed to or disturbed by the sentences imposed.[51]

45. Thus, the Court should not accept the Memorial's central suppositions that the LaGrands would have requested consular assistance from a country with which they had little connection; that, if contacted, German consuls in 1982-84 would have significantly assisted their defense attorneys; and that any assistance that German consuls might have provided would have persuaded the judge not to pass sentence as he did. Germany, which has the burden of establishing the facts underlying its arguments, offers little but supposition to support these claims. Matters such as the LaGrand brothers' lack of connection with Germany, the cautious conduct of German consuls in 1992, and the extensive evidence about the brothers' past lives already available to the Arizona court when the LaGrands were sentenced, shows that Germany's suppositions are not persuasive.

PART III

ADMISSIBILITY

CHAPTER I - INTRODUCTION

46. Germany's final submissions[52] call for four forms of relief against the United States. Briefly stated, Germany asks the Court to declare or order that:

(1) the United States violated Article 36(1)(b) of the Convention and related legal obligations;

(2) certain rules of U.S. domestic law, particularly the doctrine of procedural default, violate Article 36(2) of the Convention;

(3) the United States violated international legal obligations related to the Court's Order of 3 March 1999; and

(4) the United States must provide Germany a guarantee against recurrence.

Jurisdiction as to all four claims is asserted to exist under Article I of the Optional Protocol to the Vienna Convention,[53] to which both Germany and the United States are parties.

47. The United States acknowledges that there was a breach of the U.S. obligation under Article 36(1)(b) of the Convention promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. The United States has apologized to Germany for this breach, and is taking extensive measures seeking to avoid any recurrence. In relation to Germany's first submission, the United States does not contest the Court's jurisdiction under the Optional Protocol to enter a judgment regarding this acknowledged breach of Article 36(1)(b).

48. Without prejudice to its position in any further proceedings in this case, or in any future cases where jurisdiction is claimed to exist under the Optional Protocol, the United States will not here address the Court's jurisdiction to entertain Germany's remaining claims. Instead, for the reasons set out in this Part, the United States urges that the Court hold those remaining claims to be inadmissible.

CHAPTER II

GERMANY'S OTHER CLAIMS ARE INADMISSIBLE

49. Admissibility requires the Court to weigh whether characteristics of the case before it, or special circumstances related to particular claims, may render either the entire case or particular claims inappropriate for further consideration and decision by the Court. Assessing admissibility involves careful analysis of the particular characteristics of cases and claims, the positions of the parties, the role and responsibilities of the Court in the international system, and the application of the Statute and Rules of Court. In the circumstances here, significant factors weigh against admitting the claims that underlie Germany's second, third, and fourth submissions.

Section I. The Court Need Only Address Germany's First Submission in Order to Do Justice Between the Parties

50. The United States does not contest Germany's basic claim of a breach of the notification obligation under Article 36(1)(b) of the Vienna Convention, and has expressed its regret that there was such a breach in the cases of Karl and Walter LaGrand. Extensive remedial actions are being taken in order to reduce the chances of recurrence. In these circumstances, the Court can render a judgment recording the breach of Article 36(1)(b), the apology of the United States, and noting that appropriate remedial measures are being taken. Such a judgment would resolve and do justice as to the central dispute between the Parties and affirm the importance of the Vienna Convention in international relations. The Court need not conduct the additional proceedings required to hear and decide Germany's remaining claims in order to discharge its

role appropriately. (In any case, as the following Parts show, Germany's remaining claims are deeply flawed on their merits.)

Section II. Germany's Remaining Claims Are Inadmissible Because Germany Asks the Court to Assume an Inappropriate and Unauthorized Role as the Overseer of U.S. National Courts

51. The claims underlying Germany's second, third, and fourth submissions are inadmissible because Germany seeks through those claims to have the Court play the role of ultimate court of appeal in national criminal proceedings. Many of the Memorial's arguments, particularly regarding the rule of procedural default, but as to other issues as well, ask this Court to substitute its judgment for considered decisions of national courts in criminal cases. This would improperly transform and expand the Court's role, making it the overseer of national judicial systems in criminal cases.

52. Both in its Order of 9 April 1998 in *Paraguay v. United States*, and again in its Order of 3 March 1999 in this case, the Court properly observed that:

[T]he function of this Court is to resolve international legal disputes between States, *inter alia*, when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.[54]

Germany's Memorial, however, asks the Court to address and correct not only claims under international law but asserted violations of U.S. law and errors of judgment by U.S. judges. The Memorial's lengthy discussions of U.S. domestic law are replete with invitations for the Court to take corrective action because U.S. courts have not applied U.S. law "correctly." A sample passage argues that:

[A]n analysis of United States law and jurisprudence convincingly shows that Art. 36(1) constitutes an individual right both under the domestic law of the United States and according to the interpretations of the Vienna Convention by U.S. courts. Regrettably the U.S. courts have not applied these holdings ... .[55]

In the same vein, the Memorial asks the Court in effect to overrule the judgments of U.S. courts regarding the adequacy of the LaGrand brothers' legal representation.[56]

53. Germany aims particularly harsh criticism at the decisions of United States courts to decline appellate or *habeas corpus* review of claims not initially made at trial (the doctrine of procedural default).[57] In a heated passage, the Memorial contends that U.S. courts (including the Supreme Court of the United States) acted in a "wholly inappropriate" manner when they:

chose to apply in a persistent and rigorous manner certain rules of U.S. domestic law, in particular the rule of "procedural default", whose effect was that no remedy was available to the LaGrand brothers ... . It was this deplorable attitude in disregard of the United States' obligations under the Vienna Convention, despite the obviousness of the violations committed and sustained over a long period, which eventually barred any relief and led to the execution of Walter and Karl LaGrand.[58]

54. Although the Memorial denies the intention to do so,[59] the texture of its arguments, as well as passages like those quoted above, show that the Court is being asked to sit as an

international court of criminal appeal, and to set aside both criminal court judgments and the operation of rules of criminal procedure. This is a role this Court is not empowered or constituted to perform. The Court should decline to adopt it by deciding Germany's remaining claims.

Section III. The Circumstances and Timing Chosen by Germany for Filing its Case Render Germany's Third Submission Inadmissible

55. The two previous objections to admissibility relate to the second, third, and fourth submissions in Germany's Memorial. There are further compelling reasons why the Court should find inadmissible Germany's third submission, concerning the Court's Order of 3 March 1999. These follow from the extraordinary manner in which Germany chose to bring this case. By acting as it did, Germany created a situation that was highly unreasonable and prejudicial, both to the United States and to the proper administration of justice. These circumstances render further proceedings to address Germany's claims regarding the Order of 3 March inappropriate.

56. Germany's choice of timing precluded both proper proceedings in the Court and a considered response by the United States to any order the Court might issue. The case did not have to proceed this way. The Memorial shows that German officials learned of Walter and Karl LaGrand in June 1992.[60] During the ensuing six-and-a-half years, Germany did not express concern about the brothers' cases or protest their treatment to the Department of State or other U.S. Federal authorities. The cases were first raised with the Department of State on 27 January 1999, but then in the form of an appeal to the Secretary of State against the application of capital punishment.[61] The cases' consular notification aspect was not raised with the Department of State until 22 February 1999, two days before Karl LaGrand's execution.[62]

57. Germany then chose to file its skillfully prepared Application and Request for the Indication of Provisional Measures in The Hague after normal business hours at 7:30 PM on 2 March 1999,[63] a little over 27 hours before the scheduled execution. Germany's decision to file at this extraordinarily late stage made it impossible for the Court to respond as Germany requested, except by acting *ex parte* and without allowing the Respondent State to be heard. Germany's choices thus precipitated a profound and unsettling change from the previously uniform practice of the Court. Even in cases involving the gravest allegations of ongoing genocide, armed attacks, or other matters threatening immediate and widespread loss of life, the Court has never been placed in a situation where it felt constrained to act in less than 24 hours and without hearing the Respondent.

58. Germany is correct that there is no uniform "statute of limitations" in international law, nor are there clear requirements dictating when a case must be filed with this Court. Some international controversies do linger for years before they are brought to the Court. Nevertheless, the Court should not, through continued proceedings on Germany's third submission, sanction the mode of proceedings brought about by the Applicant's choices. Those choices resulted in the Court having to act without full information, without a hearing and full deliberation, and without regard to the normal requirements to treat parties with equality and to accord each the opportunity to be heard. Finding Germany's claims involving the Court's 3 March Order admissible can only establish such last-minute filings as an acceptable pattern for proceedings in this Court.

59. Perhaps recognizing the inappropriate position in which it placed the Court, the Memorial adopts a somewhat defensive tone regarding the timing of the 2 March filing. It argues that neither international law nor good faith required Germany to consult with the United States concerning its plan to bring this case.[64] It also contends that the late filing was justified by Germany's discovery at the 23 February clemency hearing that Arizona had supposedly acted in bad faith.[65] Germany contends that Arizona authorities long knew that the LaGrand brothers were German nationals, but had wrongly concealed their knowledge until it was accidentally revealed by a prosecutor at the clemency hearing.[66]

60. As discussed in Part II, it is odd that German officials had not long before read the pre-sentence reports referred to at the 23 February hearing. They were the key documents considered at the 1984 sentencing proceedings. They were available to the LaGrands' lawyers and to German officials, and are among the exhibits to Germany's Memorial.[67] It is hard to understand how these reports were not already familiar to German consular officers, particularly in light of Germany's sweeping claims regarding the vigor and effectiveness of its consular assistance.

61. Germany's plea that it was ignorant of the facts until 23 February 1999 should not be accepted as justification for its last-minute filing for another reason as well. Although it had years to do so, Germany never raised the consular notification issue with the U.S. Department of State so that the facts could be investigated. The practice of investigating complaints of possible failures of consular notification is well established under the Vienna Convention, and is routinely followed by both Germany and the United States, as shown in Part V below. As early as 1992, German officials could have asked the Department of State to investigate the possible violation of Article 36 of the Vienna Convention, including when the LaGrands' German nationality was known to the competent authorities. Indeed, as noted above, the Department of State in 1998 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.

62. Had Germany raised its concerns in a reasonable and timely way, there would have been time for U.S. authorities to carry out a thorough investigation of the facts. Through the investigation conducted in 1999-2000, after Germany finally raised the matter, the Department of State determined that Arizona officials who were "competent authorities" for purposes of the Convention had information about the LaGrands' German nationality sometime between mid-1983 and the end of 1984. The Department regrets the evident misunderstanding between Arizona and German officials about when this information about the LaGrands' nationality was available, and to whom. Whatever the reasons for that misunderstanding, it would have been avoided had German officials brought the LaGrand case to the attention of appropriate U.S. federal officials promptly.

63. Germany's decision to file as it did resulted in the Court setting aside some fundamental aspects of judicial procedure. Previously, the Court articulated and operated on the twin principles of "equality of the Parties"[68] and of giving each party sufficient opportunity to be heard. In the circumstances following Germany's last-minute filing, neither principle could be observed.

64. In its advisory opinion concerning the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,[69] the Court identified both of these principles as necessary to avoid a "failure of justice." The Court stressed

the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. [70]

The Court continued:

[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, ... the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; [and] the right to equality in the proceedings ... .[71]

65. The Court affirmed these principles in its 1982 Advisory Opinion on *Judgement No. 273 of the United Nations Administrative Tribunal*.[72] The Court again emphasized the central importance both of treating the parties with equality and of ensuring to both the opportunity to present their views, recalling:

the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process: the principle of equality of the parties. In that Opinion the Court emphasized various applications of the principle; it referred to it first with regard to the decision by the Committee "after an examination of the opposing views of the interested parties." (footnote omitted)[73]

66. Yet, because of Germany's decision to file its case at the last minute, these basic principles of the judicial process could not be observed in relation to the Court's 3 March Order. Germany would now compound this departure from precedent and sound practice by asking the Court to address a claim against the United States wholly predicated upon that Order. It is not appropriate for the Court to continue proceedings based on such a claim. The Court should find it inadmissible.

PART IV

THE CLAIMED VIOLATIONS OF THE VIENNA CONVENTION

CHAPTER I - INTRODUCTION

67. As we have emphasized, the United States acknowledges and regrets that there was a violation of the U.S. obligation under Article 36(1)(b) promptly to inform Walter and Karl LaGrand that German consular officials could be notified of their arrest and detention. Accordingly, the United States does not contest Germany's claim that there was a breach of that provision. The United States has already extended an apology for this breach, and has taken and continues to take extensive steps to prevent any recurrence. However, the United States contests the legal validity of Germany's *other* claims related to the failure of consular notification.

CHAPTER II

GERMANY'S CLAIMS OF OTHER VIOLATIONS OF ARTICLE 36

68. Germany claims that the failure to inform the LaGrand brothers of their right to have Germany's Consulate General notified of their arrest and detention -- a failure that

unquestionably contravened Article 36(1)(b) -- also violated several other provisions of the Vienna Convention.[74] The Memorial claims that the United States violated, *inter alia*:

-- Germany's right to communicate with its nationals under Article 36 (1)(a);

-- The second sentence of Article 36(1)(a), with regard to the rights of detained persons to communicate with consular officers; and

-- Germany's right to visit and assist detained nationals under Article 36 (1)(c).

69. In each case, however, it is clear that the underlying conduct complained of is the same -- the failure to inform the LaGrand brothers as required by Article 36(1)(b). There is no other basis for contending that German consular officers could not have communicated freely with the LaGrands, that the LaGrands could not have communicated freely with those officers, or that German consular officers were not free to visit and assist the LaGrands at all times after their arrest. Germany's complaint is simply that the LaGrands were not given information that might have prompted them to take steps to initiate such communications and visits.

70. Germany's claims under Articles 36(1)(a) and (c) seem particularly misplaced, given that German consular officials and the LaGrands communicated freely after German consular officials learned of the LaGrands' case in 1992. At that time, they already were providing consular assistance to two other German nationals in the Arizona prison. Thus, it is clear that Germany's access to German nationals in Arizona's prisons, as such, was not impeded. Nor does Germany allege or offer any evidence that Arizona interfered in any way with the LaGrands' access to consular officials when they initially sought to communicate in 1992. Nor does the Memorial claim that Arizona thereafter impeded German consuls' access to the brothers after their German nationality was clarified and German consular officers began to visit them.

71. Indeed, German consular officers visited the LaGrands a number of times beginning in December 1992. Karl was visited at least eight times, and Walter somewhat less, having refused consular visits on at least two occasions.[75] There is no evidence that the frequency of German consular visits was in any way limited by Arizona. Nor is there any evidence that Arizona refused to forward correspondence between German consular officers and the LaGrand brothers. In fact, the LaGrands at all times were free to communicate with German consular officials.

72. In addition, each of these additional claims again rests upon unverifiable factual assumptions about what might have happened. Each assumes that, had the LaGrand brothers been told in 1982 that the Los Angeles German Consulate General could be notified of their arrest, they would have requested such notification and that vigorous and effective consular assistance inevitably would have followed. As discussed in Part II, this is speculation, not proof. It is an insufficient foundation for Germany's string of additional claims.

CHAPTER III

GERMANY'S CLAIM OF INTERFERENCE WITH RIGHTS OF DIPLOMATIC PROTECTION IS OUTSIDE THE COURT'S JURISDICTION AND DEFECTIVE ON THE MERITS

73. Germany also claims that, because the LaGrand brothers were not informed of the possibility of consular notification, Germany suffered additional legal injury by being denied its right to provide diplomatic protection in respect of individual legal injuries suffered by the brothers.[76] This claim is linked with an extensive legal argument to the effect that consular notification under Article 36 is an individual right that must be enforceable in the criminal justice system.[77]

74. Like Germany's "add-on" claims of consequential violations of additional parts of Article 36 stemming from the failure to inform the LaGrands as required under Article 36(1)(b), it is not apparent what this additional claim contributes to the case. The United States acknowledges and regrets that there was a failure to inform the LaGrand brothers that they could request consular notification. Germany's objective seems to be to wrap that failing in as many overlapping characterizations of consequential illegality as possible. This does not add either to the dignity or the clarity of these proceedings, and does not assist either the Parties or the Court.

75. In any case, to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction. The claim does not concern the interpretation or application of the Vienna Convention, and accordingly is not within the jurisdiction of the Court based on the Optional Protocol to the Vienna Convention.

PART V

THE ISSUE OF PROCEDURAL DEFAULT

76. Germany makes the additional argument that the United States violated the Vienna Convention by applying a rule of "procedural default" to the LaGrands' claims in U.S. criminal proceedings based on the violation of Article 31(1)(b). Procedural default rules as applied in the United States generally mean that U.S. domestic courts will not consider claims that have not been raised before the first court capable of adjudicating them. Germany argues that such rules cannot be applied to claims of violations of Article 36 of the Vienna Convention, principally on the ground that the proviso of Article 36(2) requires that violations of the consular notification requirements of Article 36(1) be remedied through the criminal justice systems of States party.[78] Germany also contends that Article 36 itself establishes an individual right, and that the existence and violation of this individual right requires a remedy in the criminal justice process.[79] The first of these arguments is plainly wrong. To the extent that the second differs from the first (which for us is a matter of some ambiguity), Germany's arguments do not in any way compel the conclusion that Article 36 requires the establishment of remedies for individual criminal defendants in the criminal justice process. In particular, they do not require the invalidation of convictions or sentences.

77. The heart of Germany's position is the belief that the Vienna Convention requires the United States and presumably all other Parties to the Convention to amend their internal law to ensure the "reversal of judgments ... infected by a lack of consular advice."[80] This sweeping argument rests on a fundamentally incorrect view of what the Vienna Convention requires. Germany's position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany's practice. The Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no

such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them.

CHAPTER I

THE PROVISO OF ARTICLE 36(2) DOES NOT REQUIRE REMEDIES IN THE CRIMINAL JUSTICE PROCESS

78. Germany's argument rests principally on a novel reading of Article 36(2), which contains a proviso that the laws and regulations of States Party must "enable full effect to be given to the purposes for which the rights accorded under this article are intended." Germany would read this proviso as a broad prohibition on any domestic law rule that prevents raising at any stage in a criminal appeal a claimed violation of the obligation to inform a foreign national defendant that his consular officials may, if he wishes, be notified of his arrest.[81] The proviso of Article 36(2) cannot be given such an artificial scope.

79. The proviso must first be read in context, in light of the immediately preceding language and of the overall structure and focus of Article 36. Article 36(2) provides as follows:

2. The rights referred to in paragraph 1 of this Article [of consular officers and their nationals to communicate, the rights of nationals to have consular officials notified of an arrest or detention, and the rights of consular officers to visit detainees and provide consular assistance] shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

In the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36(2) are those that may affect the exercise of specific rights under Article 36(1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36(2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision.

80. The *travaux* also make the narrow focus of Article 36(2) clear. The International Law Commission's ("ILC") original proposal for Article 36 included a similar provision, which the ILC explained in terms that focused on the mechanics of prison visits:

Thus, visits to persons in custody or imprisoned are permissible in conformity with provisions of the code of criminal procedure and prison regulations. As a general rule, ... codes of criminal procedure require the permission of the examining magistrate, who will decide in light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.[82]

This emphasis on prison visitation rules continued in the meetings of the Second Committee of the United Nations Conference on Consular Relations as it considered Article 36(2).[83] For example, the delegate from the United Kingdom, in arguing that the ILC's proviso gave too

much scope to national regulations, focused specifically on regulations pertaining to prison visits and the delivery of items to prisoners.[84] The concern of this and other delegates who pushed, ultimately successfully, for modification of the ILC's proviso was that restrictions on consular visits not be so severe that such visits could not be effective. There is no suggestion whatever that any State Party thought that the proviso in Article 36(2) in any way required remedies in the criminal justice process for failures to inform detained foreign nationals that they could request consular assistance, or that the proviso would prevent States Party from applying equally to foreign nationals and to their own nationals rules requiring the orderly and timely assertion of defenses in criminal cases.

81. During the plenary session, statements by other delegates directly raised the question of the relationship between State criminal laws and the proviso. The delegates from the Union of Soviet Socialist Republics and Belarus strongly preferred the ILC version of the proviso over the alternative ultimately adopted. In describing their concerns about how the proviso balanced the laws of the receiving State with the rights of consular officials, the delegate from the Union of Soviet Socialist Republics stressed that

the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law.[85]

The delegate from Belarus spoke in similar terms:

the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States.[86]

While these statements were made in support of the ILC proposal which was not adopted, they nevertheless reflect a publicly stated understanding of the negotiators with respect to the implications of the requirements they were addressing. They are perhaps the most direct references made during the negotiating session to the criminal justice systems of receiving States. Thus, it is significant that neither these statements nor any others elicited any responsive statement expressing the expectation that criminal proceedings would be held in abeyance for consular notification to be completed, or that the results of a criminal justice process would be subject to challenge if notification inadvertently was not given. Thus, the negotiating history does not support Germany's broad reading of the proviso to Article 36(2).

CHAPTER II

ARTICLE 36 AS A WHOLE ALSO DOES NOT SUPPORT GERMANY'S CLAIM

82. The text and negotiating history of Article 36(1) also do not support Germany's claim that failure of consular notification requires individual remedies in the criminal justice system. Indeed, all indications in the text and negotiating history suggest that States Party would regard such a reading as a significant alteration of what they agreed to in the Vienna Convention.

Section I. The Text of Article 36(1) Does Not Require a Remedy in the Criminal Justice Process

83. Article 36(1) has three subparts that were painstakingly negotiated by the United Nations Conference on Consular Relations in a series of difficult sessions of the Second Committee

and the Plenary Session.[87] The initial vote to adopt Article 36 in the Plenary Session failed, and the article was reconsidered and adopted only after the last-minute addition of the final sentence of Article 36(1)(b), which was proposed as a compromise by the United Kingdom.[88] As a result of this compromise, Article 36(1)(b) reflects two separate notification obligations: the obligation to notify consular officials if the detainee so requests, and the further obligation, stated in the final compromise sentence, to inform the detained foreign national of the option to have consular officials notified. As previously shown in Part IV, this case properly relates only to the obligation to inform the foreign national of the option to have consular officials notified of the detention.[89]

84. Significantly, nothing in Article 36 relates these notification obligations to the criminal justice process. Article 36 provides that both notification obligations must be carried out "without delay," but does not define this term or relate it to any particular event in the criminal justice process.[90] Nor does Article 36 specify the *manner* in which consular officials must be notified, leaving it open to States party to use a variety of methods, including ones that result in notification occurring after critical events in a criminal investigation have occurred.[91]

85. Article 36 also does not establish a role for the consular officer in the foreign national's defense in criminal proceedings. Thus, while Article 36(1)(c) establishes that consular officials must be permitted to visit detained nationals, to converse and correspond with them, and to arrange for their legal representation, detained persons need not accept such assistance. A consular officer must refrain from taking any action on behalf of a detainee that the detainee opposes.[92]

86. Moreover, neither Article 36, nor any other provision in the Vienna Convention, obligates consular officials to provide any measure of substantive consular assistance in any criminal case, whatever the charges or the potential penalty. Article 36 provides for the *notification* of consular authorities at the request of a detained person, but does not confer on the detained individual a substantive right to compel consular assistance.

87. Thus, the language and structure of Article 36(1) do not support any claim that the receiving State must hold its criminal justice process in abeyance pending the provision of consular services. Because Article 36(1) does not link the justice process to consular notification, it cannot be read to require that receiving States provide remedies in the criminal justice process if Article 36(1) is not fully observed.

Section II. The Negotiating History of Article 36(1) Contradicts Germany's Claim

88. The negotiating history also conflicts with Germany's claim that Article 36 requires the creation of remedies as part of the criminal justice process. As noted earlier, the Vienna Convention was negotiated on the basis of draft articles prepared by the International Law Commission. The relevant ILC proposals did not require authorities to inform arrested persons that their consul could be notified. This obligation was added at the Conference, where Article 36 was negotiated with great difficulty; final agreement came only two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls whenever a national was arrested. Many other States strongly opposed this. They argued, among other things, that this requirement would impose an excessive practical burden on the

receiving State, particularly a receiving state with large numbers of immigrants, and that the national might not want his government authorities to know about his arrest.[93]

89. The debate on the ILC draft, on the numerous amendments offered to it, and on the final amendments that ultimately became Article 36(1) gives no indication that the negotiating States expected or intended failures of consular notification to invalidate subsequent legal proceedings. Moreover, there was express discussion of the possibility that such failures would occur, particularly if notification was required in every case. For example, in offering an amendment to change the ILC's original proposal to state that the obligation to inform the sending State only arises *if the national so requests*, the delegate of Egypt explained his amendment as follows:

The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State*.[94]

90. These and other statements in support of requiring notification only when requested by the detainee, as was ultimately agreed, show that the Conference recognized that Article 36 presented practical problems of compliance that would be addressed through the normal processes of diplomatic adjustment.[95] Had the parties thought failures of consular notification would require or result in the invalidation of subsequent criminal proceedings, the many States that expressed fears about the burden of the notification requirement would surely have rejected the text now before the Court. Thus, the negotiating history of Article 36 does not support Germany's broad view of the consequences of non-compliance with Article 36.

CHAPTER III

STATE PRACTICE, INCLUDING GERMANY'S OWN PRACTICE, CONFLICTS WITH GERMANY'S CLAIM

91. State practice, which is particularly instructive for such a widely accepted Convention, also conflicts with Germany's claim. The U.S. Department of State has conducted an extensive survey of State practice under the Vienna Convention in response to past expressions of concern regarding U.S. consular notification practices, and has continued to monitor State practice under the Convention carefully. These efforts are described in the Declaration of a senior State Department consular official, Edward Betancourt, on State practice regarding consular notification and access at U.S. Exhibit 8. As indicated in that declaration, States Party to the Vienna Convention throughout the world operate on the understanding that a criminal proceeding against a foreign national can proceed regardless of whether consular notification or assistance is provided.[96]

92. Indeed, Germany's Memorial does not claim that German courts would invalidate a conviction or sentence when there has been a failure of consular notification. We question whether Germany (or very many other Parties to the Convention) could make such a representation. Germany's claim in this case that the Vienna Convention requires individual remedies in the criminal justice system, including the invalidation of convictions, fundamentally conflicts with the manner in which States, including Germany, actually implement the Convention.

93. As Mr. Betancourt describes, violations of Article 36 are common and States characteristically deal with violations of consular notification obligations through diplomatic means, not through judicial setting aside of convictions. When a consular officer learns of a failure of notification, a diplomatic communication often is sent to protest the failure. Most States accept responsibility to investigate alleged violations and, if necessary, to remind the appropriate "competent authorities" of their responsibilities. If notification procedures are not followed, it is also common for the host government to apologize and to undertake to ensure improved future compliance.

94. This has been precisely the practice followed by Germany. For example, less than a month after Germany commenced this suit, the German Foreign Ministry sent the United States Embassy a note responding to the Embassy's complaint about a failure of consular notification in the case of a U.S. citizen arrested in Germany on August 26, 1997, and convicted on December 16, 1997.[97] The Ministry's note is accompanied by a letter from the Senator for Justice and Constitutional Matters of Bremen, acknowledging the requirements of Article 36 and reporting the results of the official investigation into the failure to notify U.S. consular officers. The letter acknowledges that the U.S. citizen may not have been informed of his right to request notification, that the citizen apparently requested notification nonetheless, but that the competent authorities -- in this case, prison officials -- forgot to notify U.S. consular officials as requested. The letter apologizes for the error and advises of the steps taken to avoid repetition. Neither the German note nor letter suggests that the conviction would in any way be affected by the breach of Article 36. German officials similarly investigated and apologized in another case involving a protracted failure of notification in 1998.[98]

CHAPTER IV

EVEN IF ARTICLE 36 IN SOME SENSE ESTABLISHES INDIVIDUAL RIGHTS, THERE IS NO REQUIREMENT THAT THOSE RIGHTS BE JUSTICIABLE IN NATIONAL CRIMINAL JUSTICE SYSTEMS

95. Germany also argues at length that Article 36 establishes an individual right.[99] This argument serves as the predicate for Germany's claim that the failure to inform the LaGrands, as required by Article 36(1)(b), violated Germany's customary law right to exercise diplomatic protection of its nationals.[100] Germany also appears to suggest, however, that a violation of Article 36 must be remedied in national criminal justice systems because individual rights are at issue.

96. As shown above, however, the Vienna Convention does not require States Party to remedy violations of Article 36 through their criminal justice systems. This conclusion does not turn on whether Article 36 in some sense incorporates or confers individual rights.[101]

97. The rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting -- not requiring -- States to offer them consular assistance, but the Convention's role is not to articulate or confer individual rights. Rather, the Convention establishes a set of legal rules regulating consular relations between States, including such matters as the establishment of consular relations, the appointment of consular staff, and various exemptions from host State regulation. The Preamble emphasizes the inter-State character of this system.[102]

98. In the limited areas where the Convention addresses relationships between States and individuals, it does so to facilitate the performance of consular functions by States. Article 36 thus is entitled "Communication and contact with nationals of the sending State," and emphasizes the ability of consular officers to communicate with their nationals. Indeed, Article 36 is located in a section of the Convention pertaining expressly to the "Facilities, Privileges And Immunities Relating To A Consular Post".

99. In two phrases, indisputably, Article 36 does express ideas in the vocabulary of "rights". This vocabulary implements the compromise described above between those countries that advocated notification to consular officials of all detentions and those who sought notification only when specifically requested by the detainee. Had mandatory notification been adopted, Article 36 would not have referred to the situation of the individual at all, and notification to consular officials would have occurred regardless of the individual's wishes.[103]

100. There was considerable discussion among the drafters of the Vienna Convention about the appropriateness of referring at all to individual rights, focusing particularly on how Article 36(1)(a) should address the ability of the foreign national to communicate with a consular official. As Germany has reviewed in its Memorial,[104] a number of delegates expressed the view that the Convention should recognize the individual right of a foreign national to communicate with his or her consular officials, but this was a matter of great controversy and no clear consensus emerged. At a point during the negotiating sessions, when Article 36(1)(a) referred to the right of the national to communicate with a consul and to the right of a consul to communicate with a national, a delegate from Venezuela objected to any reference to an individual right. He noted that the Conference was charged with negotiating a convention on consular relations, and that it was inappropriate for the convention to speak of individual rights.[105] The subsequent discussion elicited numerous perspectives, including the observation that consular communications inherently involve the State, on the one hand, and the individual, on the other.[106] It also resulted in a reversal of the order of Article 36(1)(a), so that it came to refer first to the right of the consul to communicate with the individual, and second to the right of the individual to communication with the consul.[107] That reversal underscores the fundamental point, that the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals is inextricably linked to and derived from the right of the State. Indeed, during the negotiations, the United Kingdom argued that the burden of a provision requiring notification in all cases could be managed by States waiving their rights under the convention.[108] This proposal surely would not have been made if the delegates had thought they were creating rights of individuals independent of the rights of States.

101. While the exact nature of the position of individuals under the Convention does not lend itself to easy characterization, the relevant question here is only whether the Vienna Convention requires States party to accord individual foreign nationals judicially enforceable remedies in their criminal justice systems. The text of Article 36, its negotiating history, and the practice of other States Party to the Convention all indicate that it does not.

102. In contrast, Germany's sweeping view, if accepted, could have broad repercussions not only for this case, but also for each of the 163 parties to the Convention. To our knowledge, adoption of this expansive view is being advocated primarily, if not solely, in the United States, where two appellate courts have recently rejected it.[109] So far as we are aware, in no other country, including Germany, is serious consideration being given to providing the kind

of expansive remedy under the Vienna Convention advocated by Germany.[110] The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation unsupported by the text and far beyond the understandings and practice of the States party. There are few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. Where States have elected to create such mechanisms, they have done so expressly and with great precision.[111] They have not created such additional remedies indirectly or implicitly, as Germany wrongly suggests was done through Article 36.

103. Accordingly, the proviso to Article 36(2) does not require that States authorize individuals to attack their criminal convictions and sentences through individual criminal proceedings. Neither does the text of Article 36 overall require such remedies, regardless of whether it in some sense recognizes rights of individuals. If there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default -- requiring that claims seeking such remedies be asserted at an appropriately early stage -- cannot violate the Convention.

PART VI

THE COURT'S ORDER OF 3 MARCH 1999

104. Part III of the Counter-Memorial showed why the claims involved in Germany's second, third, and fourth submissions are inadmissible. However, should the Court find Germany's claims to be admissible, this Part shows that the United States has not violated any international legal obligations related to the Court's 3 March 1999 Order indicating provisional measures. Chapter I reviews the circumstances of the Court's Order. Chapter II shows that the United States acted in conformity with the Order. Chapter III examines the language of the Order, and shows that, by its terms, it did not create binding legal obligations. Accordingly, the Court can resolve this claim by Germany on the bases set out in these three sections, and need not confront the difficult and controversial general question of the status of its indications of provisional measures under international law. Should the Court feel it necessary to address the question, however, the fourth Chapter analyzes the effect of the Court's Order under relevant provisions of the Court's Statute and the Charter of the United Nations. It shows that the Order did not give rise to international legal obligations that were violated by the United States.

CHAPTER I

THE CIRCUMSTANCES OF THE COURT'S ORDER AND ACTIONS

TAKEN IN RESPONSE

Section I. Germany's Filing and the Court's Order

105. Germany chose to file its Application and Request for the Indication of Provisional Measures after the close of business at 19:30[112] in The Hague on the evening of 2 March, approximately 27½ hours before the time set for the execution of Walter LaGrand. The Registrar presumably informed the Members of the Court of the filing, and steps were taken by the President of the Bench to ascertain judges' views on procedure and substance.

106. Also that evening, the Registrar transmitted a copy of Germany's Application and Request for the Indication of Provisional Measures to the United States Embassy in The Hague by facsimile machine. The copy received at the Embassy is time-stamped "2 Mar. 1999 21:48 INTERNATIONAL COURT OF JUSTICE". The text was relayed to the Department of State in Washington and was received there late in the afternoon of 2 March, sometime after 22:00 The Hague time/ 16:00 Washington time. The Application and Request for Provisional Measures were then promptly transmitted by facsimile to the legal staff of the Governor of Arizona.

107. In an unprecedented move, the Court then acted without giving the United States an opportunity before the Order was issued to present its views regarding the merits of Germany's request for provisional measures. In this regard, a representative from the United States Embassy in The Hague was invited by the Vice-President to a meeting also attended by Germany's Agent on the morning of 3 March. That meeting did not provide an opportunity for substantive discussion. The views expressed by the U.S. representative were summarized in the Court's Order of 3 March:

Whereas, on 3 March 1999, at 9:00 (The Hague time), the Vice-President of the Court received the representatives of the Parties ... ; whereas ... , referring to the provisions of Article 75 of the Rules of Court, [the representative of the German Government] asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties.[113]

Under the circumstances, a hurried meeting like that described in the Court's Order simply is not an appropriate or sufficient opportunity for the United States or any other respondent in a case in this Court to present its defense.

108. In explanation of the decision to act without a hearing, paragraph 21 of the Court's Order indicates that the Court was acting -- for the first time -- pursuant to Article 75(1) of the Rules of Court. Article 75(1) provides that:

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.

However, it seems clear that the Court was not acting on its own initiative such that the authority of Article 75(1) provided an appropriate basis for action. The terms of the Court's Order quote Germany's Application, the Request for the Indication of Provisional Measures, and even Germany's oral representations at length. The terms of the Order make clear that Germany's requests, and not the Court's own initiative, were the predicate for the 3 March Order.

109. Under Article 74 of the Rules of Court, any request for the indication of provisional measures triggers the requirement that the Court arrange "a hearing which will afford the parties an opportunity of being represented at it." In an earlier case under what would seem to

be more compelling circumstances, the Court declined to exercise its authority under Article 75 following a request for provisional measures. The Court recalled this decision in its Second Order in the *Bosnia Genocide* case:

Whereas by a letter of 11 August 1993 in response to the letter of 4 August 1993 from the Agent of Bosnia-Herzegovina ..., the Registrar ... reiterated the view of the Court ... that the Court did not consider that the question arose of the exercise of its powers under Article 75, paragraph 1, of the Rules of Court

"where, as in the present case specific requests for the indication of provisional measures ... have been made by each of the Parties",

and that, in its view,

"those powers do not in any event extend to indicating measures without affording both Parties the opportunity of being heard."[114]

110. The Court's Order granting Germany's request for provisional measures was read at a sitting the following evening, 3 March, beginning at 19:15 The Hague Time/13:15 Washington time. This was less than 24 hours after Germany filed its case and just under four hours before the time set for the execution of Walter LaGrand.[115] Following the reading, a United States Embassy official in The Hague immediately telephoned the Office of the Legal Adviser at the Department of State in Washington, D.C. and reported the substance of the Order. The text was also transmitted to Washington by telefax, where it was received at about 14:30 Washington time.

111. Thus, the Court's Order arrived in Washington about two-and-a-half hours before the time set for Walter LaGrand's execution. As indicated by the Order, the Acting Legal Adviser of the Department of State promptly transmitted the Order to the Governor of the State of Arizona by facsimile. The Legal Adviser (who was traveling in Thailand with the Secretary of State) was awakened and informed of the Order's contents by telephone.

Section II. Germany's Case in the U.S. Supreme Court

112. At about the time this Court's Order was received in Washington on the afternoon of 3 March, Germany filed a separate case in the Supreme Court of the United States. Germany's filing included a motion for leave to file a bill of complaint and a motion for a preliminary injunction to prevent the execution of Walter LaGrand.[116] This filing, along with two other simultaneous actions involving Walter LaGrand which reached the Supreme Court that day,[117] brought the matter to the sole Federal organ that constitutionally might have had power to halt the execution of Mr. LaGrand. At approximately 4:25 PM,[118] the Clerk of the Supreme Court wrote the Solicitor General of the United States and urgently requested the Solicitor General's views regarding Germany's action in the Supreme Court. (The Solicitor General is the fourth-ranking official of the Department of Justice and represents the United States before the Supreme Court.)

113. The Solicitor General then had a very short time in which to answer. He responded that**,** based on a limited understanding of Germany's claim and the related circumstances, the United States did not believe that either the Vienna Convention or the Court's Order provided a sufficient basis for the United States Supreme Court to grant a stay.[119]

114. This statement of views was not intended to be disrespectful of the International Court of Justice. Rather, the Solicitor General sought to convey to the Supreme Court the United States understanding of the legal situation, which in turn reflected the reality -- previously acknowledged by Germany's President and Justice Minister[120] -- that under the United States constitutional system, the conviction and execution of Walter LaGrand was a matter within the authority of the State of Arizona.

115. The Supreme Court of the United States denied Germany's motion for leave to file the bill of complaint as well as its motion for a preliminary injunction to stay the execution of Walter LaGrand. In a short opinion, the Supreme Court cited the large number of likely jurisdictional obstacles to hearing the case, as well as the "tardiness of the pleas" put forward by Germany.[121]

CHAPTER II

THE UNITED STATES ACTED AS CALLED FOR BY THE COURT'S ORDER

116. This Chapter shows that the United States did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented circumstances in which it was forced to act. The heart of the Court's indication of provisional measures consisted of two provisions. The authoritative English text states:

(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.[122]

117. First, as noted above, the United States promptly took the action called for in second paragraph of the Court's operative statement that: "The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."

118. The United States also complied with the Court's further request that "The United States of America should take all measures *at its disposal* to ensure that Walter LaGrand is not executed pending a final decision in these proceedings."[123] By immediately transmitting the Order to the Governor of Arizona, the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution. Otherwise, the measures at the United States Government's disposal were exceedingly limited.

119. Two central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand. There was enough time to transmit the Order to Arizona, but not to identify and take any further measures, which would have required review of complex and disputed factual and legal issues, as well as involvement of numerous high officials within the federal Executive branch and judiciary. While the adjudication of important matters in this Court often quite properly takes years of careful proceedings, the Court's Order in this case allowed about two hours for response. Assessing the bases for further action -- not to mention undertaking required consultation with senior officials and effective coordination among them -- in such a short period of time simply was not possible.

120. In the *Breard* case, where the Court's Order indicating provisional measures provided somewhat more time for analysis and action, the Secretary of State wrote to the Governor of Virginia asking the Governor to stay the execution of Angel Francisco Breard.[124] Germany's Memorial suggests a similar step might have been an option in this case.[125] As explained above, however, the Court's 3 March Order did not allow time for consideration -- much less implementation -- of such an action in this case.

121. The second constraining factor was the character of the United States of America as a federal republic of divided powers. Under the constitutional order developed at a conference of state delegates in Philadelphia in 1787 and in force since 1789, the separate states of the United States retain their independence and authority except in the areas where the Federal Government has been allocated power by the Constitution of the United States. The separate states are not subsidiary bodies subordinate to the power of the Federal Government and subject to its direction. Rather, they remain sovereign and the masters of their affairs within the areas of responsibility reserved to them by the United States Constitution.[126]

122. One of the most important functions reserved to the states is criminal law enforcement, including the right to impose and administer capital punishment in serious cases prescribed by state law, provided it is done consistently with rights guaranteed by the Federal Constitution. Although Federal law establishes some Federal crimes, criminal law enforcement for crimes such as murder in the United States largely lies within the authority and responsibility of the states. Federal statutes give the Federal courts specified powers to review state criminal proceedings to ensure that those proceedings have complied with rights guaranteed by the United States Constitution. There is no general Federal power of review of state court criminal proceedings.

123. Prior to the filing of this case, senior German officials regularly recognized these characteristics of the United States Federal system. In writing to President Clinton on 5 February, President Herzog acknowledged that:

[Y]ou have no means at law to influence the decision ... of Ms. Jane Dee Hull, the Governor of Arizona.[127]

Similarly, in writing to the U.S. Attorney General, Germany's Federal Minister of Justice stated that:

I am well aware that you do not have any legal avenues for influencing the decision on whether to grant clemency, since this decision has to be taken by the Governor of Arizona, Ms. Jane Dee Hull.[128]

124. The United States does not refer to the central role of the states in matters of criminal justice in order to avoid its international legal obligations. The United States recognizes the fundamental principle that domestic law does not relieve a member of the international community of its obligations under international law. The United States also recognizes that there was a breach of an important international legal obligation when Arizona state officials failed to give consular notification as required by the Vienna Convention on Consular Relations. We explain our federal system so that the Court will understand that Federal Government officials do not have legal power to stop peremptorily the enforcement of a criminal sentence by the state of Arizona.

125. Some writers contend that United States domestic law might have offered further exceptional avenues for Federal authorities to block Arizona from acting in the hours following the Court's order. Various untried mechanisms for such urgent action have been suggested, including the suggestion of an order by the President of the United States directing a state governor to prevent the execution.[129] In a government that operates under the rule of law, the chief executive is not asked to sign orders of any kind without careful preparation and research to ensure that the order is legally authorized and sound. An Executive order to a state governor to stay an execution would have been unprecedented and fraught with legal uncertainty. Responsible Federal officials did not judge that such steps against the State of Arizona were an available legal course under the circumstances of this case, particularly in the brief time allowed by the Court's Order.

126. Accordingly, in drawing the Court's Order to the attention of the Governor of Arizona, U.S. officials took the only relevant measure at their disposal, given the few hours available. It is wholly unreasonable to suppose that any more definitive actions could have been taken under the circumstances, even if they had been theoretically feasible under the United States legal structure.[130]

127. The third element of the Court's Order indicated that the United States "should inform the Court of all the measures which it has taken in implementation of this Order." This was done via a letter from the Legal Counselor of the United States Embassy in The Hague to the Court dated 8 March 1999. The letter described the communications between the Federal Government and the state of Arizona, as well as the proceedings in the United States Supreme Court referred to above.

CHAPTER III

THE COURT'S ORDER BY ITS TERMS DID NOT CREATE BINDING LEGAL OBLIGATIONS

128. The previous section shows how the United States responded as fully as possible to the Court's Order, given the circumstances and the extraordinarily short time for response available in the circumstances. This section considers the legal ramifications of this particular Order in light of the terms used by the Court in framing it.

129. The terms of the Court's 3 March Order did not create legal obligations binding on the United States. When considering how to determine whether a resolution of the Security Council is or is not mandatory, the Court made the following observation:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25 [of the United Nations Charter], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, ...[131]

The same principles can be applied in assessing the character of the Court's Order here.

130. The language used by the Court in the key portions of its Order is not the language used to create binding legal obligations. Instead, the key passages state that the United States "should" take specified actions.[132] This is the distinctive phrasing regularly used in

international legal affairs when parties choose to signal an expectation -- even a high expectation -- that something will be done, but not an intention to create mandatory legal obligations.

131. Both this Court and the Permanent Court of International Justice have consistently used the term "should" when indicating provisional measures.[133] By contrast, this Court uses very different language when issuing final judgments intended to express or create legally binding obligations. Thus, for example, the Court in the *Fisheries (U.K. v. Iceland)* case stated that "the Government of Iceland and the Government of the United Kingdom are under mutual *obligations* to undertake negotiations ... ."[134] In the *Nicaragua* case, the Court found the United States to be in "violation" or "breach" of numerous obligations under international law.[135] Perhaps most emphatically, in its Judgment in the *Diplomatic Staff* case, the Court decided, *inter alia*, that Iran "*must* immediately take all steps to redress the situation resulting from the events of 4 November 1979 ... ."[136]

132. The Court has also explicitly declined to recognize as binding French terminology translated as "should." In the *Aegean Sea* case,[137] the Court rejected an argument by Greece that, based on the use of the word "décidé" and the words "doivent être résolus" in the original text (which the Court understood in English to refer to a "decision" regarding matters that "should be resolved"[138]) a joint communiqué issued by Greece and Turkey constituted a "definitive agreement" to submit the dispute to the Court.

133. In light of the many years of such consistent practice by the Court, the international community has come to recognize that explicit wording must be used by international tribunals where their intention is to create binding obligations. For example, the International Tribunal of the Law of the Sea, which, as discussed more fully below,[139] is empowered to "prescribe" rather than "indicate" provisional measures, uses the word "shall" in its orders prescribing such measures.[140]

134. The type of language used by international tribunals when they clearly intend to create binding obligations is further illustrated by the orders of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). For example, in its warrant for arrest and order of surrender of Slobodan Milošovic (24 May 1999), the ICTY "directed" UN Member States to "arrest, detain, and surrender" Miloševic to the tribunal.[141]

135. The use of "should" in non-binding contexts and of quite different terminology (such as "shall" or "must") where a binding legal obligation is intended is also common practice in the drafting of treaties and other international instruments. Thus, a statement adopted at the 1993 United Nations Conference on Environment and Development entitled "Non-legally binding authoritative statement of principles for a global consensus on the management of conservation and sustainable development of all types of forests" uses "should" (along with other qualified language) consistently throughout the text.[142] Academic commentators also recognize the role played by the term "should" to indicate non-binding undertakings. For example, a recent article on the draft Multilateral Agreement on Investment ("MAI") proposed revisions of the text reflecting this very terminology:

To bring the national treatment language in line with the MAI's non-binding treatment of investor obligations and environmental safeguards, "shall" should be replaced with "should" or with "shall endeavor to" in the MAI's section on national treatment.[143]

136. United States domestic courts regularly construe the term "should" in this same sense. A Florida state court has opined that

[t]he section [of the Florida Administrative Code] dealing with resignations states that an employee "should" present reasons for his resignation in writing to the agency. Use of the word "should" indicates to us that the procedure for resignations is discretionary rather than mandatory in nature.[144]

In a different context and another corner of the country, an Idaho court held that

the MUTCD [Manual of Uniform Traffic Control Devices] provides that the term "should" is "an advisory condition" and that, where it is used, the action it refers to is "recommended but not mandatory." Therefore, the traffic indications described ... are merely recommendations, not mandatory in nature.[145]

137. The word "should" is thus a term used both by the Court and in many other settings to indicate a call or an exhortation for action, but not a binding legal obligation. As such, any perceived deviation by the United States from the terms of the Court's 3 March Order would not in any sense constitute a violation of obligations under international law.

CHAPTER IV

PROVISIONAL MEASURES OF THE COURT DO NOT CREATE BINDING LEGAL OBLIGATIONS BY OPERATION OF ARTICLE 41 OF THE STATUTE OF THE COURT OR OF ARTICLE 94 (1) OF THE UNITED NATIONS CHARTER, OR BY OPERATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW

Section I. Introduction

138. As the previous discussions show, the United States did all that could plausibly be expected of it in the roughly two hours available to respond to the Court's Order, and to the other actions brought concurrently in United States courts by Germany. Further, the language employed in the Order of 3 March makes clear that this particular Order did not in any case impose binding legal obligations. Thus, the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory, not precatory, terms. This Chapter is therefore included solely to assist the Court should it nevertheless determine that it must decide this issue.

139. It must be acknowledged, as Professor Rosenne observes, that

[t]he question of whether ... an indication of provisional measures is binding on the parties to the provisional measures proceedings is controversial.[146]

However, as one contemporary commentator has concluded:

There can be little doubt ... that the preponderant view is that an indication of interim measures [by the International Court of Justice] is not binding.[147]

The United States shares this view.

140. The following discussion examines how the language and history of Article 41(1) of the Court's Statute and Article 94 of the Charter of the United Nations, the Court's and State practice under these provisions, and the weight of publicists' commentary, all show that indications of provisional measures do not have mandatory effect under international law. This section also addresses Germany's more theoretical arguments in favor of such mandatory effect and underscores that, whatever the general rule may be, the rushed *ex parte* proceedings leading to the Order in this case counsel that it should not be deemed to give rise to obligations that implicate State responsibility.

Section II. The Constitutive Instruments of the Court Do Not Confer Authority to Issue Binding Provisional Measures

141. The Court's authority to indicate provisional measures derives from Article 41 of its Statute, the text of which makes clear that indications of provisional measures do not give rise to binding legal obligations. The text of Article 41 is the foundation of the Court's authority in this area, and must be carefully examined:

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council. (Emphasis added.)

This text is in substance identical to Article 41 of the Statute of the Permanent Court of International Justice, substituting reference to the United Nations Security Council for reference to the Council of the League of Nations.

142. The language of Article 41 is not the language that lawyers employ to create legal obligations. Three aspects stand out. First, provisional measures are to be "indicated" by the Court, not "prescribed". The verb "indicate" has been defined as follows:

To point out or point to or toward with more or less exactness: show or make known with a fair degree of certainty.[148]

Thus, the key verb does not convey the notion of prescription or obligation. Rather, "to indicate" involves the idea of pointing out or identifying a course of action, and of doing so in a way that is not necessarily certain or precise in every respect.

143. The international community has recognized that "indicate" does not mean "prescribe," and has taken care to make clear when the goal is to grant compulsory power. Thus, in the 1928 General Act for the Pacific Settlement of International Disputes, Article 33(1) states:

In all cases where a dispute forms the object of arbitration or judicial proceedings ... the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute ... shall lay down within the shortest possible time the provisional measures to be adopted. *The parties to the dispute shall be bound to accept such measures*.[149]

It is very unlikely that the sentence highlighted above would have been added if the drafters of the General Act had believed that provisional measures issued under Article 41 of the Permanent Court's Statute were *per se* binding.

144. In the same vein, Article 290 of the Law of the Sea Convention empowers the International Tribunal for the Law of the Sea ("ITLOS") to "prescribe" rather than to "indicate" provisional measures.[150] The significance of this difference in terminology was explained in 1991 by the Registrar of this Court in a statement made at a meeting of the ITLOS Preparatory Commission:

On the issue of provisional measures, ... [t]he use of the term `prescribe' rather than `indicate', which was the expression employed in the Court's Statute, seemed to suggest that the [Law of the Sea] Convention's measures would be binding ... . In the case of the International Court, it could only `indicate' what measures were to be provided.[151]

145. When the language of Article 41 was originally considered in 1920 by the Advisory Committee of Jurists, a conscious decision was made to substitute the word "indiquer" for "ordonner", the word used in the initial proposal.[152] A corresponding change was made in the English from "order" to "suggest".[153] (When the text was later considered by the League of Nations Assembly, "indicate" was substituted for "suggest" in the English text in order to better conform it to the French; however, an explicit effort to restore the term "ordonner" was rejected on the basis that the "Court lacked the means of execution."[154])

146. Germany's Memorial cites Hudson's attempt to explain the use of the term "indiquer" as simply "being designed to avoid offense to the susceptibilities of states."[155] However, other prominent observers at the time took precisely the opposite view. For example, Åke Hammarskjöld, Registrar and later judge on the Permanent Court, wrote a seminal article in 1935 making and elaborating the point that to "indicate" is not to "order".[156]

147. The second key aspect of the wording of Article 41 is that the indicated measures are those which "*ought* to be taken". This is also not the language of legal obligation but of encouragement or exhortation. The same dictionary defines "ought" as "used to express moral obligation, duty".[157] This is not directive, mandatory language.

148. Once again, the drafting history supports this understanding: The original proposal considered by the Advisory Committee of Jurists used the term "must"; in later versions, it was changed to "should".[158] Ultimately, the Assembly of the League of Nations substituted the phrase "ought to".[159] While the League Assembly clearly intended to strengthen the degree of moral force behind the measures contemplated by this provision, the language used is still the language of exhortation, not of obligation. The League Assembly stopped far short of reinstating the term "must".

149. Third, Article 41(2) describes the measures as being "suggested". They are not "ordered", "required", or any of many other forms of words that normally indicate legal obligation. Provisional measures are "suggestions", albeit of a special character and entitled to special weight and consideration. Again, the drafting history bears out this interpretation. The initial English version used the phrase "notice of these measures," and this was changed by the Advisory Committee of Jurists to read "measures suggested".[160] Despite its close scrutiny of and other changes to this provision, the League Assembly opted to leave this phrase intact.

150. The legal effect of Article 41 was again addressed at length in connection with certain amendments proposed in 1931. At that time, the Court considered a proposed revision by Judge Fromageot that would have directed the Court to take note of, and report to the League's Security Council, a failure by a party to abide by a provisional "order" of the Court.[161] According to a record of the meetings to discuss the 1931 revisions, "M. Fromageot said he had used the word `order' advisedly; the word `indicate' employed in the Statute and Rules appeared to him somewhat vague."[162]

151. Other judges objected to the use of the word "order", and a substantial discussion of the character or weight of the Court's indications of provisional measures ensued. While views were expressed on both sides of the issue, in the end, Judge Fromageot's proposal was rejected by eight votes to two.[163] This discussion highlights that, under the predecessor to the Court's present Statute, indications of provisional measures did not implicate State responsibility. We know of nothing in the history of the Court's present Statute suggesting a different conclusion regarding its effect.

152. The German Memorial attaches significance to the other official languages of Article 41 of the Court's Statute and argues that at least three of those languages, the French, the Spanish, and the Chinese convey a greater degree of obligation.[164] However, these arguments are far from conclusive. For example, as Germany recognizes, the key word used in the Russian translation ("???????" or "ukazat") at least arguably conveys a degree of ambiguity on this point similar to the English term "indicate".[165] In any case, the authoritative text of the Court's 3 March 1999 Order was in English.[166] It should therefore be construed in accordance with the English text of Article 41, and in a way that does not disregard its clear language.

153. Both the language and the history of Article 41 thus confirm that it is not a source of binding legal obligations. In this connection, the United States takes note of Germany's suggestion in its Memorial that, pursuant to Article 32 of the Vienna Convention on the Law of Treaties, the *travaux prép*aratoires need not -- indeed should not -- be considered by the Court, presumably because of Germany's belief that its interpretation of Article 41 of the Court's statute leaves no room for reasonable debate.[167] As is clear from the arguments in this case, however, Article 41 is at the very least susceptible to different readings. Moreover, as one commentator on the Vienna Convention on the Law of Treaties has said:

[N]o rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by the use of the phrase `supplementary means of interpretation' in what is now Article 32 of the Vienna Convention. The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.[168]

154. Article 94 of the Charter also shows the non-binding character of indications of provisional measures. Article 94 establishes the basic obligation of States to comply with judgments of the Court. This fundamental Charter obligation of compliance relates to the definitive expressions of the Court - its judgments. It does not extend to other types of actions by the Court. Article 94 provides:

1. Each 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.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

155. Although paragraphs 1 and 2 use different language - paragraph 1 speaks of "the decision" of the Court, while paragraph 2 speaks of "a judgment" - their scope is the same. As Judge Mosler explains,

[t]he term `decision' (`*décision*') ... is tantamount to the term `judgment' (`*arrêt*'). This interpretation follows from the usage of both terms in Arts. 57-60 of the Statute and in Art. 94 of the Charter. These provisions refer, in their context, to the judgment or judgments on the merits, including judgment on the form and amount of reparation.[169]

The reference to the Court's "decision" in paragraph 1 is singular. It is the Court's final act - its ultimate decision - to which Article 94(1) applies. Moreover, "decision" is modified by the definite article "the." This shows that the paragraph relates to the single final or definitive action of the Court - its judgment.[170] In the words of a former deputy registrar of the Court:

La juxtaposition des termes, l'emploi de l'article défini et du singulier, tout concourt à montrer que "la décision" dont il s'agit est celle qui règle définitivement un litige, donc l'arrêt final ou l'ensemble des arrêts finals.[171]

156. In light of such factors, as Judge Singh concluded (reluctantly, but we believe correctly), Article 94 does not give rise to a duty of compliance corresponding to that due the final judgments of the Court:

The limitations of [Article 94(2) of the Charter] ... as a means of securing compliance with a judgment (and the fact of its virtual non-use for that purpose) are well known: it is doubtful that the `obligations incumbent ... under a judgment' extend, for example, to respect for an order indicating provisional measures. [footnote omitted][172]

157. Germany's Memorial asserts that during the December 1979 oral proceedings on the United States request for provisional measures against Iran in the *Diplomatic Staff* case, Mr. Owen, the Agent for the United States, suggested that the obligation under Article 94(1) of the Charter might extend to the Court's orders indicating provisional measures. Germany refers to the following statement by Mr. Owen:

Iran has formally undertaken pursuant to Article 94 paragraph 1 of the Charter ... to comply with the decision of this Court in any case to which Iran might be a party. Accordingly, it was the hope and expectation of [the United States Government] that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by this Court in the course of the present litigation.[173]

However, when considered in its totality, this statement does not necessarily convey the legal interpretation Germany finds in it. The first sentence is essentially a paraphrase of Article 94(1). It must be read in connection with the second sentence, which expresses the expectations of the United States in light of the broad fabric of Iran's international obligations at the time. The "formal commitments and obligations" referred to embrace the whole range of treaty and other obligations breached by Iran when it allowed the takeover of the United

States Embassy compound. The argument is broad and political in character, as shown by the use of the somewhat tentative terms "hope and expectation," rather than a more categorical expression of direct legal obligation to comply with the provisional measures ordered by the Court.

158. Accordingly, the principal texts governing the regime of provisional measures - Article 41 of the Statute and Article 94 of the Charter - both show that such measures do not impose legal obligations that bring into operation the regime of State responsibility.

Section III. The Court's Practice Confirms the Non-Binding Character of Indications of Provisional Measures

159. The Court's judgments have reflected the same understanding of these governing texts. The Court simply has not treated indications of provisional measures as giving rise to international legal obligations for States.

160. The Court considered the implications of an order indicating provisional measures most clearly with reference to those indicated in the *Nicaragua* case. The Court there described the consequences stemming from such an order in language indicating that such measures have a particular weight and authority, but at the same time making clear that they are not sources of binding legal obligations:

When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights.[174]

As Judge Shahabuddeen explained in connection with the *Bosnia Genocide* case:

That [Court's] statement [in the *Nicaragua* case] ... stopped short, in its careful formulation, of saying that provisional measures are binding. Indeed, it could bear the interpretation that the measures themselves are not binding, a party merely having a duty to take account of the Court's indication of them.[175]

161. The practice of States also shows that the Court's indications of provisional measures have not been understood to impose binding legal obligations. Indeed, for the most part, Parties have not carried the actions recommended by the Court into full effect, leading one commentator to observe, albeit reluctantly, that:

It is at least open to argument that States themselves have built up a body of practice, treating interim measures as nonbinding. In other words, it could be argued that there has been a *de facto* clarification of Article 41.[176]

162. The Court's judgments have rarely found such lack of compliance worthy even of mention. Thus, in the *Anglo-Iranian Oil Company* case, the Court stated that its order on provisional measures had ceased "to be operative," but did not comment on Iran's failure to comply with the provisional measures it had indicated.[177] In the *Fisheries Jurisdiction* cases, the judgments noted the fact that Iceland did not act consistently with the Court's indication of provisional measures, but did not ascribe legal weight to this.[178]

163. In *Nuclear Tests*, the Court noted the Government of Australia's argument that the French had committed a "deliberate breach of the Order" indicating provisional measures.[179] However, the Court did not express any view on the point or identify any consequences in its judgment. In the *Diplomatic Staff* case, the Court confined its comments regarding Iran's failure to comply with provisional measures to the following: "it is a matter of deep regret that the situation ... has not been rectified ... ."[180] Regret, perhaps, but not the breach of a legal obligation.

164. An extensive and consistent body of practice thus indicates that neither States nor the Court have understood indications of provisional measures to impose legal requirements.

Section IV. Germany's Functional Argument For A Binding Obligation To Comply With Provisional Measures Also Lacks Merit

165. Germany advances a further, more theoretical argument that provisional measures must have binding effect based not on legal texts or other positive indications of international law but on what it terms "the principle of institutional effectiveness."[181] In essence, Germany contends that for the Court to be able to issue final judgments that are binding under international law, it must have inherent authority to issue interim orders with the same effect. However, as Professor Sztucki demonstrates, whatever the symmetrical appeal and logic this argument may have, it is flawed, because "there is in international law no such peremptory correlation between the legal effects of final and interlocutory decisions."[182] In an arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court's constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures.

Section V. Whatever the General Rule May Be, This Order Should Not Be Construed to Have Binding Legal Character

166. Whatever the general rule may be, in the unique circumstances here, the Court should not construe its order as creating legal obligations that trigger the rules of State responsibility. Germany's Memorial acknowledges that the legal weight of any indication of provisional measures can be affected by the surrounding circumstances:

In principle, and subject to a careful analysis of each specific order, the breach of an order of the Court brings into operation the ordinary principles of state responsibility.[183] (Emphasis added.)

We do not agree with the asserted general proposition, even "in principle". However, there are compelling reasons for the 3 March Order not to be interpreted to be legally binding, given the extraordinary and rushed process leading to it.

167. As we have shown, Germany's decision to file this case when and as it did was unreasonable, unnecessary and placed the Court in an extremely difficult position. The Court could respond to Germany's action only through the exceptional step of an *ex parte* order, based solely on the legal claims and factual representations of one party. Then, the Party to whom the Order was directed was given only about two hours in which to respond.

168. Because of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order. Thus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous -- to say the least -- for the Court to construe this Order as a source of binding legal obligations.

Section VI. The United States Conduct Following Initiation of This Proceeding Also Has Not Violated Any Customary International Law Obligations

169. Toward the end of its discussion of the Court's 3 March Order, the Memorial adds a cursory point to the effect that:

The United States has violated the obligation to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending.[184]

Such a claim involves issues of general law, not the Vienna Convention. Hence, the Court does not have jurisdiction to consider it under the Optional Protocol. The implications of the rule as presented by Germany are potentially quite dramatic, however. Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplussage. This is not the law, and this is not how States or this Court have acted in practice.

PART VII

THE COURT CANNOT CREATE OR COMPEL A GUARANTEE REGARDING FUTURE CONDUCT

170. Germany's final submission calls for the Court to adjudge and declare:

[T]hat the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.[185]

171. Germany thus seems to request that the Court somehow require the United States to confer upon Germany new or additional rights exceeding those already existing by reason of the Convention. Such a request goes beyond any remedy that the Court can or should grant, and should be rejected. The Court's power to decide cases in its role as the principal judicial organ of the United Nations does not extend to the power to order a State to provide any "guarantee" intended to confer additional legal rights on the Applicant State.

172. As Professor Rosenne observes:

The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the *existing* law. It does not "create" new rules of law either for the parties to a given dispute or for the international community at large.[186]

173. The United States does not seek license to commit future breaches of its obligations under the Vienna Convention. The United States keenly appreciates the importance of the Vienna Convention's consular notification obligation for foreign citizens in the United States as well as for U.S. citizens traveling and living abroad. As explained in Part II, U.S. authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring. The United States would welcome the suggestions and assistance of the Government of Germany in those endeavors. Nevertheless, the relevant legal obligations are those contained in the Vienna Convention. The United States does not believe that it can be the role of the Court, in the performance of its judicial function, to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention.

PART VIII

CONCLUSION AND SUBMISSIONS

174. The United States acknowledges that there was a breach of the Vienna Convention obligation of consular notification in the cases of Karl and Walter LaGrand. The United States has apologized to Germany for that breach, and is working to prevent any recurrence. The United States disputes the admissibility of Germany's further claims. In any case, for the reasons shown in this Counter-Memorial, Germany's claims other than those directly related to the acknowledged breach of the consular notification obligation should be rejected on their merits.

175. Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the United States asks the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36 (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) That all other claims and submissions of the Federal Republic of Germany are dismissed.

27 March 2000

_____

Michael J. Matheson
Co-Agent of the United States of America

_____

Footnotes

1 Done at Vienna 24 April 1963. 21 UST 77; TIAS 6820; 596 UNTS 261. Article 36, paragraph (1) of the Vienna Convention states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested ... shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation ... .

2 The consular issue appears to have been raised for the first time in the letter from Foreign Minister Fischer to Secretary of State Albright dated 22 February 1999. Memorial of the Federal Republic of Germany dated 16 September 1999 (hereinafter "Memorial" or "German Memorial"), Annex MG 18, p. 528.

3 A small number of documentary exhibits referred to in this Counter-Memorial are reproduced in an accompanying volume of U.S. exhibits. Volumes II and III of Germany's Memorial contain much relevant documentation. Instead of reproducing that material, this Counter-Memorial refers as appropriate to documents contained in Volumes II and III of Germany's Memorial.

4 German Memorial, para.7.02(1).

5 German Memorial, para. 1.08.

6 *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 15, para. 25 (Hereinafter "Order of 3 March 1999"); *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38.

7 Memorial, Annex MG 14, p. 511.

8 Memorial, Annex MG 20, p. 541.

9 Memorial, para. 2.03.

10 *See* Walter and Karl LaGrand: Report of Investigation into Consular Notification Issues, U.S. Exhibit 1, pp. 2-3.

11 A child born out of wedlock outside the United States to a non-U.S. citizen mother and a U.S. citizen father in the years 1962 and 1963 would have acquired U.S. citizenship only if, prior to the child's birth, the U.S. citizen father had been physically present in the United States or its outlying possessions for ten years prior to the birth, at least five of which were after the age of 14, and the child's paternity had been established by legitimation before the child's 21st birthday.

12 Masie LaGrand could have applied for naturalization of his adopted children pursuant to former Section 323 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1434, until its repeal in 1978; after 1978, he could have applied pursuant to what is now Section 320, 8 U.S.C. 1433, provided the child to be naturalized was under the age of 18. (Section 323 was repealed in 1978 by Section 7 of Public Law 95-417.)

13 Signed Aug. 25, 1921; entered into force Nov. 11, 1921. 42 Stat. 1939; 8 Bevans 145; 12 LNTS 192.

14 Memorial, para. 2.04 *et seq*.

15 *Arizona v. Walter Burnhart LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987) (Memorial, Annex MG 3, p. 293), *cert. denied*, 484 U.S. 872 (1987); *Arizona v. Karl Hinze LaGrand*, 152 Ariz. 483, 733 P.2d 1066 (1987) (Memorial, Annex MG 4, p. 305), *cert. denied*, 484 U.S. 872 (1987).

16 *Karl and Walter LaGrand v. Lewis*, 883 F.Supp 451, 469 (1995), *aff'd*, 133 F.2d 1253 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 422 (1998) (Memorial, Annexes MG 8-11, pp. 453 *et seq*.)

17 Declaration of M. Elizabeth Swope of 14 March 2000, U.S. Exhibit 3.

18 *Ibid*.

19 Excerpts are reproduced at U.S. Exhibit 4. A copy of this publication is being provided to the Library of the Court. Courtesy copies were provided in 1998 to all Embassies in Washington, D.C., and later to all foreign consulates in the United States.

20 U.S. Exhibit 5.

21 The booklet is available at: http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html

22 So that the full scope of consular notification obligations will be understood and observed, the Department is also working to educate coroners and other officials responsible for reporting deaths (Vienna Convention Article 37(a)) and judges involved in the appointment of guardianships (Article 37(b)). It has also taken steps to ensure the provision of consular notification in cases of ship wrecks and air crashes (Article 37(c)).

23 Pursuant to these new procedures, Karl and Walter LaGrand were given formal notification of their right to contact their consular officials on December 21, 1998. Memorial, Annex MG 12, p. 499. Clearly this notice came too late to constitute compliance with Article 36 in this case, but it is concrete evidence that the procedures now in place in Arizona are being followed.

24 Memorial, paras. 4.53 *et seq*.

25 Memorial, para. 4.11. Germany seems to criticize Arizona authorities for not directly informing the German Consulate General of the LaGrand's arrest, Memorial para. 4.12. However, as the Memorial acknowledges, such "notification of the consulate without or against the will of the person concerned is excluded." Memorial, para. 4.11.

26 Declaration of Edward Betancourt, U.S. Exhibit 8, p. 5.

27 U.S. Exhibit 1, p. 3.

28 U.S. Exhibit 1, p. 9.

29 Indeed, Germany's Memorial implies that the brothers may have come to realize their German nationality only after their arrest. Memorial, para. 6.83. ("[A]fter the brothers had become aware of their German nationality, they raised the violation of Article 36 of the Vienna Convention ... .")

30 Perhaps recognizing the speculative character of many of its factual arguments, Germany contends that "the burden of proof for the impact of the violation is to be borne by the United States." Memorial, para. 4.52. Germany cannot so easily evade the basic principle that "[u]ltimately, ... it is the litigant seeking to establish a fact who bears the burden of proving it." *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 437, para. 101. The ambiguities and unproven assumptions throughout Germany's case involve matters that are or can be known to Germany. The Court "cannot ... apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not yet

been produced." *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgement of 11 September 1992, I.C.J. Reports 1992*, p. 399, para. 63.

31 Memorial, para. 4.53 n. 214, citing a brief of a LaGrand lawyer at Annex MG 46, p. 942.

32 Memorial, para. 4.54.

33 Memorial, paras. 2.06 and 3.73.

34 Memorial, para. 3.73.

35 Memorial, para. 2.06.

36 Memorial, para. 3.73 and Annex MG 41, p. 801.

37 Memorial, para. 2.03. *See* Memorial, paras 4.68-4.79.

38 Memorial, Annex MG 2, pp. 253-289. Walter and Karl LaGrand are identified on the first pages of their 1984 pre-sentence reports as citizens of Germany. *Ibid*., pp. 253 and 268.

39 The Memorial does not clearly describe Germany's understanding of events at the 23 February 1999 clemency hearing, although it suggests that the hearing somehow revealed that Arizona officials knew of the LaGrands' German nationality as early as 1982. Memorial, para. 1.03. Our understanding is that Counsel for the State of Arizona referred to the 1984 pre-sentence report at the 23 February hearing, in order to show that evidence about the brothers' childhoods was available at sentencing. German representatives apparently viewed this as an indication of bad faith by Arizona.

40 At para. 4.51, the Memorial is categorical: had consuls been involved, "the brothers would not have been executed." Para. 1.01 is somewhat less confident. ("There are compelling reasons to believe that the LaGrands would have escaped the death penalty ... .") Para. 4.56 seems more careful. (Assistance "likely would have saved their lives.") None of these statements is credible in light of the circumstances described here.

41 Memorial para. 4.61.

42 Memorial, Annex MG 2, p. 259.

43 Transcript of the Aggravation-Mitigation Hearing, Memorial, Annex MG 5, pp. 355 and 363.

44 Transcript of Entry of Judgment and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 440.

45 Memorial, para. 4.65.

46 *See, e.g., State v. Clabourne*, 298 Ariz. Adv. Rep. 12 (1999); *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998); *State v. Lee* (1), 189 Ariz. 590, 944 P.2d 1204 (1997); *State v. Hedlund*, 185 Ariz. 567, 917 P.2d 200 (1996); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995); *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993); *State v. White*, 168 Ariz. 500, 815 P.2d 869 (1991).

47 Transcript of Entry of Judgement and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 439.

48 *Ibid.*, p. 440.

49 *Ibid.*, pp. 440-441.

50 Memorial, para. 4.67. The Federal Public Defender's affidavit is Germany's Annex MG 53, pp. 1219-1220.

51 Weaver Barkman's Declaration of 11 February 2000 is U.S. Exhibit 7.

52 Memorial, para. 7.02.

53 Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna 24 April 1963, 21 UST 325, 596 UNTS 487.

54 *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38; Order of 3 March 1999, para. 25.

55 Memorial, para. 4.119.

56 *See, e.g.*, Memorial paras. 4.42, 4.44, 4.68, 4.70 and 4.73 *et seq*.

57 Memorial, paras. 4.26 *et seq*.

58 Memorial, para. 4.81.

59 Memorial, para. 1.09. ("Neither does Germany intend, or has ever intended, to use the International Court of Justice as a court of criminal appeals.")

60 Memorial, para. 2.06.

61 Letter of Foreign Minister Fischer to Secretary of State Albright, 27 January 1999, Memorial, Annex MG 17, p. 524.

62 Letter of Foreign Minster Fischer to Secretary of State Albright, 22 February 1999, Memorial, Annex MG 18, pp. 528-531.

63 Order of 3 March 1999, p.9.

64 Memorial, para. 3.63 *et seq*.

65 Memorial, para. 3.65. ("It was only seven days before it brought the dispute to the Court that Germany had become aware of the relevant facts underlying its claims.")

66 The German Memorial describes as "shocking" the supposed revelation by counsel for Arizona at the clemency hearing. Memorial, para. 3.65. Arizona's counsel was in fact simply arguing that the failure of consular notification was not prejudicial, since mitigation evidence of the kind Germany said it might have provided was in fact available at the time, as shown by the 1984 pre-sentence reports. Since those reports were available to all parties and are understood to be central to any sentencing procedure in the United States, counsel for Arizona had no reason to think that referring to them would be "shocking" to anyone, and certainly not to diligent German consular officials.

67 Memorial, Annex MG 2, p. 251.

68 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 337, para. 21.

69 *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166.

70 *Ibid.*, p. 209, para. 92.

71 *Ibid*.

72 *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325.

73 *Ibid.*, p. 338, para. 29.

74 Memorial, paras. 4.15, 4.16, and 7.02.

75 U.S. Exhibit 1, p. 9.

76 Memorial, paras. 4.86 et seq.

77 This issue is addressed in Part V.

78 Memorial, paras. 4.17 *et seq*.

79 Memorial, paras. 4.86 *et seq*. Germany also relies upon its argument that Article 36 creates individual rights to support its "diplomatic protection" argument. Germany appears to be saying that, to the extent that Article 36 creates individual rights as opposed to governmental rights, the LaGrand brothers satisfied the general requirement of international law that they exhaust their domestic remedies (*i.e*., the remedies available to them in the United States) and that it therefore is appropriate under international law for Germany now to espouse those claims. As we explain in Part IV, however, any claim brought under a general theory of diplomatic protection is outside the Court's jurisdiction.

80 Memorial, para. 4.18.

81 Memorial, paras. 4.17 *et seq*.

82 United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, Annexes, Doc. A/CONF.25/6, Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, p. 24. Article 36(2) as proposed by the ILC provided that the rights set forth in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights." *Ibid.*

83 Article 36(2) was discussed specifically at the 18th and 19th meetings of the Second Committee on March 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-48.

84 The representative of the United Kingdom indicated that, "It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be observed." United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-47.

85 *Ibid*., p. 40, para. 3.

86 *Ibid.*, p. 40, para. 8.

87 The Second Committee considered Article 36, focusing primarily on Article 36(1), on March 14, 15, and 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348. The Plenary Session then took up Article 36 on April 17, 1963, when a vote to adopt it failed, and again on April 20, 1963. *Ibid*, pp. 35-46 and 81-87, respectively. For a review of the negotiating history, *see* L. Lee, *Consular Law and Practice* (1991), pp. 133-151.

88 Document A/CONF.25/L/50, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 171.

89 Also as shown in Part IV, while Germany seeks to implicate other aspects of Article 36, it has not identified any failure by Arizona to honor a request from either Walter or Karl LaGrand to notify the relevant consular post, or to allow consular contact or access once requested.

90 When States have wished to define a precise time by which the consular notification procedure must be completed, they have done so by concluding agreements separate from the Vienna Convention. For example, the United States and a number of other States have negotiated bilateral consular agreements that provide enhanced consular protections beyond those contained in the Convention. In some of these agreements, the parties have allowed each other up to four days to provide consular notification following a detention or arrest. Even these agreements, however, do not tie consular notification to any particular stage of an investigation or prosecution. *See* U.S. Department of State, *Consular Notification and Access* (January 1998), pp. 47-49 (summarizing bilateral agreements between the United States and other countries).

91 The Declaration of Edward Betancourt, U.S. Exhibit 8, describes a number of the ways in which consular notification is provided.

92 A detainee may in fact reject consular assistance for a variety of reasons, including to protect his privacy, because of a general distrust of his own government, or because he considers it unnecessary (*e.g.*, in the case of a long-term, assimilated resident). *See ibid*.

93 United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348 (Second Committee sessions of March 14, 15, and 18, 1963), pp. 35-46 (Plenary Session of April 17, 1963), pp. 81-87 (Plenary Session of April 20, 1963). *See* Lee, *supra* note 87, pp. 138-139.

94 United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 82 (Plenary Session of April 20, 1963). (Emphasis added.)

95 At an earlier stage of the debate, for example, the United Kingdom suggested that concerns about compliance could be addressed through bilateral agreements to waive rights where mutually convenient. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 340, para. 21 (Second Committee session of March 15, 1963). Other delegations implied that technical violations in cases of brief arrests might be overlooked. *E.g., ibid.*, p. 338, para. 10 (delegate from Yugoslavia), p. 341, para. 37 (delegate from France).

96 Germany suggests that a different rule is emerging in the United States. (Memorial, paras. 4.116-4.119.) In fact, the current trend is the opposite. The 9th Circuit Court of Appeals decision described in paragraph 4.118 of the Memorial has been withdrawn, and both the 9th and the 1st Circuit Courts have adopted a rule that failures of consular notification are not appropriately remedied by suppressing evidence or other similar measures in the criminal process. *United States v. Nai Fook Li*, 2000 WL 217891 (1st Cir., February 29, 2000); *United States v. Lombera-Camorlinga*, 2000 WL 245374 (9th Cir., March 6, 2000). These decisions are provided to the Court as U.S. Exhibit 9.

97 U.S. Exhibit 10.

98 U.S. Exhibit 11.

99 Memorial, para. 4.86 *et seq*.

100 As noted in Part IV, this claim is outside the Court's jurisdiction under the Optional Protocol in that it is predicated upon customary law, and not the Vienna Convention.

101 The two U.S. appeals courts that have recently considered this issue (*see supra* note 96, and U.S. Exhibit 9) concluded that it is not necessary to address whether Article 36 in some sense creates individual rights, because Article 36 in any event does not require the suppression of evidence or other remedies in the criminal justice system.

102 The Preamble affirms that the Convention would "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." In the same vein, the Preamble declares that the purpose of privileges and immunities under the Convention "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States ... ."

103 The original ILC proposal read as follows: "The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner." This proposal did not reference the rights of individuals, and the commentary to it made clear that it was the ability of consular officials to perform their functions that was at issue. Document A/CONF.25/6, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 24.

104 Memorial, paras. 4.97-4.107.

105 United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 331, para. 32 (Second Committee session of March 14, 1963).

106 *Ibid.*, p. 333, para. 50 (observations of India).

107 *Ibid.*, p. 334, para. 2 (amendment offered by Venezuela and others).

108 *Ibid.*, p. 340, para. 21 (Second Committee session of March 15, 1963).

109 *See supra* notes 96 and 101 and U.S. Exhibit 9.

110 Insofar as the United States knows, this remains true with respect to those States Party to the American Convention on Human Rights ("Pact of San Jose"), 1114 UNTS 123, opened for signature November 22, 1969; entered into force July 18, 1978. (The United States is not a Party.) This is of particular interest because, in an advisory opinion released October 1, 1999, following a request by Mexico and supported by several parties to the Convention (Advisory Opinion OC-16/99), the Inter-American Court reached conclusions that could well have prompted those States to change their practices, if they agreed that consular notification is an integral part of the criminal justice process.

The Inter-American Court of Human Rights is established by the American Convention, which in Article 64 permits the Court to provide non-binding advisory opinions "regarding the interpretation of [the American Convention] or of other treaties concerning the protection of human rights in the American states." Mexico asked the Court to render an advisory opinion with respect to the nature of the obligations of Article 36 of the Vienna Convention on Consular Relations and the remedies that should be provided in the case of violations. Among the Inter-American Court's non-binding conclusions are that foreign nationals must be informed that they may request consular assistance before any statement is taken from them, and that capital punishment may not be carried out in any case where consular notification was not provided. The United States has reservations regarding these and some of the Court's other advisory conclusions, for reasons suggested by this Counter-Memorial. However, to our knowledge neither Mexico nor any other State Party to the American Convention has sought to apply the Court's advice to its procedures for interrogating defendants or has vacated or altered sentences in criminal proceedings because of failures of consular notification.

111 Examples include regional instruments and institutions such as the European Convention on Human Rights, which provides for the Strasbourg Court, and the American Convention on Human Rights, which provides for the Inter-American Court of Human Rights. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, signed November 4, 1950; entered into force September 3, 1953; *American Convention on Human Rights*, *supra* note 110.

112 At all relevant times, the local time in The Hague was six hours ahead of the time in Washington, D.C., and eight hours ahead of the time in Arizona.

113 Order of 3 March 1999, p. 13, para.12.

114 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993,* p. 334, para. 13.

115 International Court of Justice Press Communiqué 99/8. ("This evening, at 7 p.m., the International Court of Justice (ICJ) will give its decision on the request for the indication of provisional measures made by Germany ... .")

116 Memorial, Annex MG 27, p. 615.

117 *See* Memorial, para. 2.15; Memorial, Annex MG 30, p. 665; Memorial, Annex MG 31, p. 669.

118 Letter of U.S. Solicitor General to the U.S. Supreme Court (3 March 1999), Memorial, Annex MG 28, p. 655.

119 *Ibid.*

120 Memorial, Annex MG 14, p. 507 and Annex MG 20, p. 537.

121 For example, the Supreme Court expressed concern that the United States had not waived its sovereign immunity and noted that it was "doubtful" that Article III of the U.S. Constitution would provide "an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul." With respect to the action against the State of Arizona, the Court stated that "a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." *Germany v. United States*, 119 S.Ct. 1016 (1999); Memorial, Annex MG 32, p. 677. The Eleventh Amendment of the U.S. Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

122 Order of 3 March 1999, p. 16 , para. 29.

123 Emphasis added.

124 Memorial, Annex MG 37, p. 755.

125 Memorial, para. 4.169

126 *See* the Tenth Amendment of the United States Constitution, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For a general discussion of the limits on Federal power under the United States Constitution, *see* L. Tribe, *American Constitutional Law* (1988), pp. 209-399.

127 Memorial, Annex MG 14, p. 511.

128 Memorial, Annex MG 20, p. 541.

129 *See* K. Highet, "The Emperor's New Clothes; Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice," in *Essays* in Memoriam *Judge José Maria Ruda*, Memorial, Annex MG 39, p. 763; C. Vázquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures", 92 *Am. J. Int'l L.* (1998), p. 683.

130 Germany's Memorial goes so far as to suggest that the United States took "a number of active steps ... which paved the way for the execution of Walter LaGrand." (Memorial, para. 4.171) To the contrary, any ability the United States might have had to take actions -- affirmative or negative -- *vis-à-vis* the LaGrand case, beyond simply reacting to the multiple proceedings initiated by Germany, was effectively precluded by the last-minute timing chosen by Germany for its filings, both with this Court and the United States Supreme Court. When the Supreme Court requested the views of the Solicitor General, for example, he was duty-bound to reply as accurately as possible in the time allowed.

131 *Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 53, para. 114.

132 Since English is the authoritative text of the 3 March Order, there is no need for consideration of other languages in this context.

133 As to the Court's practice, s*ee, e.g., Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248; *Application of the Convention on the Prevention of the Crime of Genocide, Orders of 13 September 1993 and 16 April 1993, I.C.J. Reports 1993*, pp. 325 and 3 (respectively); *Frontier Dispute, Provisional Measures, Order of 10 Jaunary 1986, I.C.J. Reports 1986*, p. 3; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7,; *Nuclear Tests (Australia v. France and New Zealand V. France), Interim Protection, Orders of 22 June 1973, I.C.J. Reports 1973*, pp. 99 and 135 (respectively); *Fisheries Jurisdiction (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland), Interim Protection, Orders of 17 August 1972, I.C.J. Reports 1972*, pp. 12 and 30 (respectively); *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89.

134 *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 34, para. 79(3) (emphasis added).

135 *See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 123, 128, 140, 146, paras. 238, 252, 280, 292.

136 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 44, para. 95(3)(emphasis added).

137 *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 38-44, paras. 94-108.

138 *Ibid.* at p.43, para. 105

139 *See* para. 144 below.

140 *See M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998*, 37 *I.L.M* (1998) p. 1202; *Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan), Provisional Measures, Order of 27 August 1999*, 38 *I.L.M.* (1999) p. 1624 (English texts authoritative).

141 *The Prosecutor v. Slobodan Miloševic*, Warrant of Arrest and Order for Surrender, Case No. IT-99-37-1, Decision of 24 May 1999, The International Criminal Tribunal for the Former Yugolslavia, U.S. Exhibit 12.

142 Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management of Conservation and Sustainable Development of All Types of Forests, June 13, 1992, U.N. Doc A/CONF.151/6/Rev.1, 31 *I.L.M.* 881.

143 M. Vallianatos, "De-Fanging the MAI," 31 *Cornell Int'l L.J. (1998)*

p. 713, at p. 718 (footnotes omitted).

144 *University of South Florida v. Tucker*, 374 So.2d 16 (1979).

145 *Lawton v. City of Pocatello*, 886 P.2d 330; 126 Idaho 454 (1994).

146 S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd Ed. 1997), Vol. III, p. 1434. The history of the controversy has been thoroughly and thoughtfully analyzed and documented by Professor Jerzy Sztucki in his 1983 book *Interim Measures in the Hague Court*, pp. 260-302.

147 L. Collins, "Provisional and Protective Measures in International Litigation," in *Recueil des Cours/Collected Courses of the Hague Academy of International Law 1992*, III, vol. 234 (1993) p. 219.

148 *Webster's Third New International Dictionary* (1981), p. 1150. The *Oxford English Dictionary* defines "indicate" similarly to mean: "To point out, point to, make known, show (more or less distinctly)." *Oxford English Dictionary* (1989), Vol. VII, p. 860.

149 Pacific Settlement of Disputes (General Act), done at Geneva, September 26, 1928, 93 LNTS 343 (1928), p. 357 (emphasis added).

150 United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 *I.L.M.* 1261 (1982). *See* J. Noyes, "The International Tribunal for the Law of the Sea," 32 *Cornell Int'l L.J.* (1998), p. 109, in which the author states, "It is beyond cavil that [ITLOS] provisional measures are binding." *Ibid*. at 135.

151 United Nations Press Release, SEA/1284, 29 August 1991, reproduced in R. Platzöder, *The Law of the Sea: Documents 1983-1991* (1992), Vol. XIII, p. 510.

152 Sztucki, *supra* note 146, at p. 264. For the text of the original proposal, *see Permanent Court of International Justice, Advisory Committee of Jurists, Procès Verbaux of the Proceedings of the Committee* (1920) (hereinafter "ACJ I"), p. 609.

153 ACJ I, *supra* note 152, at p. 666.

154 *League of Nations. Permanent Court of International Justice. Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1920) (hereinafter "ACJ II"), p. 134.

155 Memorial, para. 4.139, citing M. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), p. 425.

156 Å. Hammarskjöld, "Quelques aspects de la question des mésures conservatoires en droit international positif" (1935), reproduced in Å. Hammarskjöld, *La juridiction internationale* (1938), p. 299. *See also* Sztucki, *supra* note 146, at p. 281, and J. Elkind, *Interim Protection: A Functional Approach* (1981), p. 155.

157 *Webster's Third New International Dictionary* (1981), p. 1599. The relevant definition for "ought" in the *Oxford English Dictionary* states:

The general verb to express duty or obligation of any kind; strictly used of moral obligation, but also with various weaker shades of meaning, expressing what is befitting, proper, correct, advisable, or naturally expected.

Oxford English Dictionary (1989), Vol. X, p. 991.

158 ACJ I, *supra* note 152, at pp. 666, 681, and 736, respectively.

159 ACJ II, *supra* note 154, at p. 134. *See also* Sztucki, *supra* note 146, at p. 264.

160 ACJ I, *supra* note 152, at pp. 609, 681, 736.

161 *Permanent Court of International Justice. Acts and Documents Concerning the Organization of the Court,* Ser. D, No. 2, Add. 2 (1931), p. 289.

162 *Ibid.* at p. 182.

163 *Ibid.* at pp. 181-99. *See also* Sztucki, *supra* note 146, at pp. 267-8.

164 Memorial, paras. 4.149, 4.150.

165 Memorial, para. 4.150. The United States would defer to those on the Court whose mother tongues are implicated by such arguments. However, a consultation of Russian dictionaries by Department of State language experts indicates that the phrase "direct, order or prescribe" was not included as one of the meanings of the verb "ukazat" in one of the most authoritative such dictionaries (?.?. ??????, ??????? ???????? ????? (1990)).

166 Order of 3 March 1999, at p. 16.

167 Memorial, at paras. 4.151-152.

168 I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), p. 116. It also bears noting that, elsewhere in its Memorial - and presumably where the history seems more in line with Germany's argument, Germany does not hesitate to discuss the relevant *travaux préparatoires* at some length. *See, e.g.,* Memorial, para. 4.97 *et seq*.

169 Mosler, "Article 94" in *The Charter of the United Nations. A Commentary* (1994), pp. 1003-4 (B. Simma, ed.). (Judge Mosler agrees with Germany's position here: that indications of provisional measures are legally binding. However, this stems from his analysis of Article 41, and does not rest on Article 94. *Id.*)

170 H. Kelsen, *The Law of the United Nations* (1951), p. 720. As Germany points out in its memorial (para. 4.132), other commentators have taken a different view of Article 94(1). However, the United States does not share the view offered by Germany that "logic as well as an analysis of the object and purpose of Article 94 must lead to" Germany's conclusions regarding Article 94. Professor Sztucki offers a thoughtful and well-reasoned discussion of this issue in his book on provisional measures and the Court. Sztucki, *supra* note 146, at 285-6, 289.

171 A. Pillepich, "Article 94," in *La Charte des Nations Unies* (1991), p. 1281 (J. Cot and A. Pellet, eds.).

172 Judge N. Singh, *The Role and Record of the International Court of Justice* (1989), p. 42.

173 Memorial, para. 4.132, citing *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Pleadings, I.C.J. Reports 1980*, p. 266 (Statement of Roberts Owen).

174 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289.

175 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 365. *See also*, H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice," in *Interim Measures Indicated by International Courts* (1994), pp. 32-3 (R. Bernhardt, ed.).

176 Elkind, *supra* note 156, at p. 164.

177 *Anglo-Iranian Oil Company (United Kingdom v. Iran), Preliminary Objection, I.C.J. Reports 1952*, p. 114.

178 *Fisheries Jurisdiction (United Kingdom v. Iceland; Germany v. Iceland) I.C.J. Reports 1974*, pp. 16-17, para. 33, and p. 188, para. 32 (respectively). ("Iceland ... notwithstanding the measures indicated by the Court, began to enforce the new Regulations ...").

179 *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 259, para. 19.

180 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. 92.

181 Memorial, paras. 4.125-7. *See also* Memorial, paras. 4.141, 4.147-8.

182 Sztucki, *supra* note 146, at p. 291. Professor Sztucki cites a number of examples to support this conclusion at p. 263, and elaborates further his argument at pp. 291-94.

183 Memorial, para. 3.32.

184 Memorial, para. 4.147.

185 Memorial, para. 7.02.

186 S. Rosenne, *The World Court. What It Is and How It Works* (1995, Fifth Revised Ed.), p. 38 (emphasis in original).

LAGRAND CASE

(GERMANY V. UNITED STATES OF AMERICA)

DOCUMENTARY EXHIBITS TO THE

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

27 MARCH 2000

EXHIBITS TO THE COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

Exhibit 1. "KARL AND WALTER LAGRAND. REPORT OF INVESTIGATION INTO CONSULAR NOTIFICATION ISSUES." U.S. Department of State, 17 February 2000.

Exhibit 2. Note of 18 February 2000, from the Department of State to the Embassy of the Federal Republic of Germany.

Exhibit 3. Declaration of M. Elizabeth Swope, 14 March 2000.

Exhibit 4. Excerpts from *Consular Notification and Access. Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.*

Exhibit 5. Consular Notification and Access Reference Card: *Instructions for Arrests and Detentions of Foreign Nationals.*

Exhibit 6. Excerpt from Walter LaGrand's Pre-sentence Report dated 20 October 1980, a document appended to Walter LaGrand's Pre-sentence Report of 2 April 1984.

Exhibit 7. Declaration of Weaver Barkman, 11 February 2000.

Exhibit 8. Declaration of Edward Betancourt, 15 March 2000.

Exhibit 9. *United States of America v. Nai Fook Li, et al,*

Nos. 97-2034, 97-2413, 98-1229, 98-1230, 98-1303, 98-1447, 98-1448, United States Court of Appeals, First Circuit, 29 February 2000.

United States of America v. Jose Lombera-Camorlinga, No. 98-50347, United States Court of Appeals, Ninth Circuit, 6 March 2000.

EXHIBIT 10. German Ministry of Foreign Affairs Note Verbale of 29 March 1999 and accompanying letter of 2 February 1999 from the Senator for Justice and Constitutional Matters of Bremen.

EXHIBIT 11. German Ministry of Foreign Affairs Note Verbale of 25 August 1998.

Exhibit 12. International Criminal Tribunal for the Former Yugoslavia, Warrant of Arrest/ Order of Surrender, 24 May 1999.