

## LAGRAND CASE (GERMANY v. UNITED STATES OF AMERICA) (MERITS)

### Judgment of 27 June 2001

In its Judgment in the LaGrand Case (Germany v. United States of America), the Court:

- found by fourteen votes to one that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, and by thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States breached its obligations to Germany and to the LaGrand brothers under Article 36, paragraph 1, of the Convention;
- found by fourteen votes to one that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States breached its obligation to Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;
- found by thirteen votes to two that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;
- took note unanimously of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and finds that this commitment must be regarded as meeting Germany's request for a general assurance of non-repetition;

- found by fourteen votes to one that should nationals of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Registrar Couvreur.

\*  
\*   \*  
\*   \*

President Guillaume appended a declaration to the Judgment of the Court; Vice-President Shi appends a separate opinion to the Judgment of the Court; Judge Oda appended a dissenting opinion to the Judgment of the Court; Judges Koroma and Parra-Aranguren appended separate opinions to the Judgment of the Court; Judge Buergenthal appended a dissenting opinion to the Judgment of the Court.

\*  
\*   \*

The full text of the operative paragraph of the Judgment reads as follows:

“128. For these reasons,

THE COURT,

(1) By fourteen votes to one,

*Finds* that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory

---

Continued on next page

Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999:

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Parra-Aranguren;

(2) (a) By thirteen votes to two,

*Finds* that the first submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judges Oda, Parra-Aranguren;

(b) By fourteen votes to one,

*Finds* that the second submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(c) By twelve votes to three,

*Finds* that the third submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

AGAINST: Judges Oda, Parra-Aranguren, Buergenthal;

(d) By fourteen votes to one,

*Finds* that the fourth submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(3) By fourteen votes to one,

*Finds* that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (b), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer,

Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(4) By fourteen votes to one,

*Finds* that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(5) By thirteen votes to two,

*Finds* that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judges Oda, Parra-Aranguren;

(6) Unanimously,

*Takes note* of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and *finds* that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

*Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda."

\*

\* \*

*History of the proceedings and submissions of the Parties*  
(paras. 1-12)

The Court recalls that on 2 March 1999 Germany filed in the Registry of the Court an Application instituting proceedings against the United States of America for “violations of the Vienna Convention on Consular Relations [of 24 April 1963] (hereinafter referred to as the “Vienna Convention”); and that, in its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the “Optional Protocol”). It further recalls that on the same day the German Government also filed a request for the indication of provisional measures, and that, by an Order of 3 March 1999, the Court indicated certain provisional measures. After pleadings and certain documents had been duly filed, public hearings were held from 13 to 17 November 2000.

At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Germany,*

“The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 (b), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

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

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.”

*On behalf of the Government of the United States,*

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

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

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

*History of the dispute*  
(paras. 13-34)

In its Judgment, the Court begins by outlining the history of the dispute. It recalls that the brothers Karl and Walter LaGrand — German nationals who had been permanently residing in the United States since childhood—were arrested in 1982 in Arizona for their involvement in an attempted bank robbery, in the course of which the bank manager was murdered and another bank employee seriously injured. In 1984, an Arizona court convicted both of murder in the first degree and other crimes, and sentenced them to death. The LaGrands being German nationals, the Vienna Convention on Consular Relations required the competent authorities of the United States to inform them without delay of their right to communicate with the consulate of Germany. The United States acknowledged that this did not occur. In fact, the consulate was only made aware of the case in 1992 by the LaGrands themselves, who had learnt of their rights from other sources. By that stage, the LaGrands were precluded because of the doctrine of “procedural default” in United States law from challenging their convictions and sentences by claiming that their rights under the Vienna Convention had been violated.

Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, Germany brought the case to the International Court of Justice. On 3 March 1999, the Court made an Order indicating provisional measures (a kind of interim injunction), stating inter alia that the United States should take all measures at its disposal to ensure that Walter

LaGrand was not executed pending a final decision of the Court. On that same day, Walter LaGrand was executed.

*Jurisdiction of the Court*  
(paras. 36-48)

The Court observes that the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections to the jurisdiction of the Court. Germany based the jurisdiction of the Court on Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963, which reads as follows:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”

*With regard to Germany's first submission*  
(paras. 37-42)

The Court first examines the question of its jurisdiction with respect to the first submission of Germany. Germany relies on paragraph 1 of Article 36 of the Vienna Convention, which provides:

“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, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(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. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

Germany alleges that the failure of the United States to inform the LaGrand brothers of their right to contact the

German authorities “prevented Germany from exercising its rights under Art. 36 (1) (a) and (c) of the Convention” and violated “the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in Art. 36 (1) (b) of the Convention”. Germany further alleges that by breaching its obligations to inform, the United States also violated individual rights conferred on the detainees by Article 36, paragraph 1 (a), second sentence, and by Article 36, paragraph 1 (b). Germany accordingly claims that it “was injured in the person of its two nationals”, a claim which Germany raises “as a matter of diplomatic protection on behalf of Walter and Karl LaGrand”. The United States acknowledges that violation of Article 36, paragraph 1 (b), has given rise to a dispute between the two States and recognizes that the Court has jurisdiction under the Optional Protocol to hear this dispute insofar as it concerns Germany’s own rights. Concerning Germany’s claims of violation of Article 36, paragraph 1 (a) and (c), the United States however calls these claims “particularly misplaced” on the grounds that the “underlying conduct complained of is the same” as the claim of the violation of Article 36, paragraph 1 (b). It contends, moreover, that “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” under the Optional Protocol because it “does not concern the interpretation or application of the Vienna Convention”.

The Court does not accept the United States objections. The dispute between the Parties as to whether Article 36, paragraph 1 (a) and (c), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (b) does relate to the interpretation and application of the Convention. This is also true of the dispute as to whether paragraph 1 (b) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals. These are consequently disputes within the meaning of Article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany’s claim based on the individual rights of the LaGrand brothers is beyond the Court’s jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany’s first submission.

*With regard to Germany's second and third submissions*  
(paras. 43-45)

Although the United States does not challenge the Court’s jurisdiction in regard to Germany’s second and third submissions, the Court observes that the third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction, and which are

thus covered by Article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in all its aspects, it may also deal with a submission that “is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject matter of that Application. As such it falls within the scope of the Court’s jurisdiction ...” (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72*). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

*With regard to Germany’s fourth submission*  
(paras. 46-48)

The United States objects to the jurisdiction of the Court over the fourth submission insofar as it concerns a request for assurances and guarantees of non-repetition. It contends that Germany’s fourth submission “goes beyond any remedy that the Court can or should grant, and should be rejected. The Court’s power to decide cases ... does not extend to the power to order a State to provide any ‘guarantee’ intended to confer additional legal rights on the Applicant State ... The United States does not believe that it can be the role of the Court ... 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”. The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court’s jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9, p. 22*). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

*Admissibility of Germany’s submissions*  
(paras. 49-63)

The United States objects to the admissibility of Germany’s submissions on various grounds. First, the United States argues that Germany’s second, third and fourth submissions are inadmissible because Germany seeks to have the Court “play the role of ultimate court of appeal in national criminal proceedings”, a role which it is not empowered to perform. The United States maintains that many of Germany’s arguments, in particular those regarding the rule of “procedural default”, ask the Court “to address and correct ... asserted violations of U.S. law and errors of judgment by U.S. judges” in criminal proceedings in national courts.

The Court does not agree with this argument. It observes that, in the second submission, Germany asks the Court to interpret the scope of Article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 41 of its Statute; and in Germany’s fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert the Court into a court of appeal of national criminal proceedings.

The United States also argues that Germany’s third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands’ case in 1992, but that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand’s execution. Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982.

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

The United States argues further that Germany’s first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion.

The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a timely fashion. However, the Court finds that the United States may not now rely on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers.

The United States also contends that Germany's submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice.

The Court considers that it does not need to decide whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions. It finds that the evidence adduced by the United States does not justify the conclusion that Germany's own practice fails to conform to the standards it demands from the United States in this litigation. The cases referred to entailed relatively light criminal penalties and are not evidence as to German practice where an arrested person, who has not been informed without delay of his or her rights, is facing a severe penalty as in the present case. The Court considers that the remedies for a violation of Article 36 of the Vienna Convention are not necessarily identical in all situations. While an apology may be an appropriate remedy in some cases, it may in others be insufficient. The Court accordingly finds that this claim of inadmissibility must be rejected.

#### *Merits of Germany's submissions* (paras. 64-127)

Having determined that it has jurisdiction, and that the submissions of Germany are admissible, the Court then turns to the merits of each of these four submissions.

#### *Germany's first submission* (paras. 65-78)

The Court begins by quoting Germany's first submission and observes that the United States acknowledges, and does not contest Germany's basic claim, that there was a breach of its obligation under Article 36, paragraph 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".

Germany also claims that the violation by the United States of Article 36, paragraph 1 (b), led to consequential violations of Article 36, paragraph 1 (a) and (c). It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, "the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed

meaningless". The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by Article 36, paragraph 1 (b). Therefore, it disputes any other basis for Germany's claims that other provisions, such as subparagraphs (a) and (c) of Article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany's claims regarding Article 36, paragraph 1 (a) and (c), are "particularly misplaced" in that the LaGrands were able to and did communicate freely with consular officials after 1992. In response, Germany asserts that it is "commonplace that one and the same conduct may result in several violations of distinct obligations". Germany further contends that there is a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a "persuasive mitigation case" which "likely would have saved" the lives of the brothers.

Moreover, Germany argues that, due to the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany's intervention at a stage later than the trial phase could not "remedy the extreme prejudice created by the counsel appointed to represent the LaGrands". According to the United States, these German arguments "rest on speculation" and do not withstand analysis.

The Court observes that the violation of paragraph 1 (b) of Article 36 will not necessarily always result in the breach of the other provisions of this Article, but that the circumstances of this case compel the opposite conclusion, for the reasons indicated below. Article 36, paragraph 1, the Court notes, establishes an interrelated regime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1.

Germany further contends that "the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers". Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the

present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right.

On the basis of the text of the provisions of Article 36, paragraph 1, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in the Court by the national State of the detained person. These rights were violated in the present case.

*Germany's second submission*  
(paras. 79-91)

The Court then quotes the second of Germany's submissions.

Germany argues that, under Article 36, paragraph 2, of the Vienna Convention "the United States is under an obligation to ensure that its municipal 'laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this article are intended' [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury". Germany emphasizes that it is not the "procedural default" rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it "deprived the brothers of the possibility to raise the violations of their right to consular notification in U.S. criminal proceedings". In the view of the United States: "[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings"; and "[i]f 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".

The Court quotes Article 36, paragraph 2, of the Vienna Convention which reads as follows: "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded to under this article are intended." It finds that it cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court determines that Article 36,

paragraph 1, creates individual rights for the detained person in addition to the rights accorded to the sending State, and consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual. The Court emphasizes that, in itself, the "procedural default" rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State. The Court finds that under the circumstances of the present case the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.

*Germany's third submission*  
(paras. 92-116)

The Court then quotes the third of Germany's submissions, and observes that, in its Memorial, Germany contended that "[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court". It observes that in support of its position, Germany developed a number of arguments in which it referred to the "principle of effectiveness", to the "procedural prerequisites" for the adoption of provisional measures, to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", to "Article 94 (1), of the United Nations Charter", to "Article 41 (1), of the Statute of the Court" and to the "practice of the Court". The United States argues that it "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". It further states that "[t]wo 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 ... The second constraining factor was the character of the United States of America as a federal republic of divided powers." The United States also alleges that the "terms of the Court's 3 March Order did not create legal obligations binding on [it]". It argues in this respect that "[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations" and that "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 ... terms". It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning "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”. Lastly, the United States states that in any case, “[b]ecause 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” and that “[t]hus, 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”.

The Court observes that the dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which has been the subject of extensive controversy in the literature. It therefore proceeds to the interpretation of that Article. It does so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose.

The French text of Article 41 reads as follows:

“1. La Cour a le pouvoir *d’indiquer*, si elle estime que les circonstances l’exigent, quelles mesures conservatoires du droit de chacun *doivent* être prises à titre provisoire.

2. En attendant l’arrêt définitif, *l’indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.” (Emphasis added.)

The Court notes that in this text, the terms “indiquer” and “l’indication” may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words “doivent être prises” have an imperative character.

For its part, the English version of Article 41 reads as follows:

“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.)

According to the United States, the use in the English version of “indicate” instead of “order”, of “ought” instead of “must” or “shall”, and of “suggested” instead of “ordered”, is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920 the French text was the original version, that such terms as “indicate” and “ought” have a meaning equivalent to “order” and “must” or “shall”.

Finding itself faced with two texts which are not in total harmony, the Court first of all notes that according to Article 92 of the Charter, the Statute “forms an integral part of the present Charter”. Under Article 111 of the Charter,

the French and English texts of the latter are “equally authentic”. The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”. The Court therefore goes on to consider the object and purpose of the Statute together with the context of Article 41.

The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of “the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute” (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199*). The Court does not consider it necessary to resort to the preparatory work of the Statute which, as it nevertheless points out, does not preclude the conclusion that orders under Article 41 have binding force.

The Court finally considers whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

“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.”

The Court notes that the question arises as to the meaning to be attributed to the words “the decision of the International Court of Justice” in paragraph 1 of this Article; it observes that this wording could be understood as referring not merely to the Court’s judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court’s Statute, both the word “decision” and the word “judgment” are used does little to clarify the matter. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court reaches the conclusion that orders on provisional measures under Article 41 have binding effect.

The Court then considers the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999.

After reviewing the steps taken by the authorities of the United States (the State Department, the United States Solicitor General, the Governor of Arizona, and the United States Supreme Court) with regard to the Order of 3 March 1999, the Court concludes that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Order.

The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany’s submission included a claim for indemnification.

*Germany’s fourth submission*  
(paras. 117-127)

Finally, the Court considers the fourth of Germany’s submissions and observes that Germany points out that its

fourth submission has been so worded “as to ... leave the choice of means by which to implement the remedy [it seeks] to the United States”.

In reply, the United States argues as follows: “Germany’s fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court’s function, as an aspect of reparation. In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court’s jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case.” It points out that “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 further observes that: “[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would ... be unprecedented in international jurisprudence and would exceed the Court’s authority and jurisdiction.”

The Court observes that in its fourth submission Germany seeks several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured. Additionally, Germany seeks from the United States that “in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations”. The Court notes that this request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrence. Germany finally requests that “[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36”. The Court observes that this request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

In relation to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the “substantial measures [which it

is taking] aimed at preventing any recurrence” of the breach of Article 36, paragraph 1 (b).

The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties. In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers as did the United States to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.

The Court then examines the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such. However, the Court considers in this respect that if the United States, notwithstanding its commitment referred to above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence

by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

#### *Declaration of President Guillaume*

In a short declaration, the President recalls that subparagraph (7) of the operative part of the Judgment responds to certain submissions by Germany and hence rules only on the obligations of the United States in cases of severe penalties imposed upon German nationals. Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph.

#### *Separate opinion of Vice-President Shi*

Vice-President Shi states that he voted with reluctance in favour of paragraphs (3) and (4) of the operative part of the Judgment (dealing with the merits of Germany’s first and second submissions respectively), as he believes that the Court’s findings in these two paragraphs were based on a debatable interpretation of Article 36 of the Vienna Convention. While he agrees with the Court that the United States violated its obligations to Germany under Article 36, paragraph 1, of the Convention, he has doubts as to the Court’s finding in these paragraphs that the United States also violated its obligations to the LaGrand brothers.

The Court’s conclusion that Article 36, paragraph 1 (b), of the Vienna Convention creates individual rights relies on the rule that if the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter and there is no need to resort to other methods of interpretation. However, the Court has previously stated that this rule is not an absolute one, and that where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it. One author has also stated that “It is not clarity in the abstract which is to be ascertained, but clarity in relation to particular circumstances and there are few treaty provisions for which circumstances cannot be envisaged in which their clarity could be put in question”.

The Vice-President questions whether it is proper for the Court to place so much emphasis on the purported clarity of language of Article 36, paragraph 1 (b). He considers the effect of wording in the title to the Vienna Convention, and in the Preamble, the *chapeau* to Article 36, and Article 5. He then refers in some detail to the *travaux préparatoires* relating to Article 36 of the Convention, and finds that it is not possible to conclude from the negotiating history that Article 36, paragraph 1 (b), was intended by the negotiators to create individual rights. He considers that if one keeps in mind that the general tone and thrust of the debate of the entire Conference concentrated on the consular functions

and their practicability, the better view would be that no creation of any individual rights independent of rights of States was envisaged by the Conference.

The Vice-President adds that the final operative paragraph of the Judgment is of particular significance in a case where a sentence of death is imposed, which is a punishment of a severe and irreversible nature. He states that every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing, and that out of this consideration, he voted in favour of this paragraph.

#### *Dissenting opinion of Judge Oda*

Judge Oda voted against all but two of the subparagraphs of the operative part of the Court's Judgment in this case, as he objects to the case as a whole. He thinks that the Court is making an ultimate error on top of an accumulation of earlier errors: first by Germany, as Applicant; second by the United States, as Respondent; and third by the Court itself.

Judge Oda states that Germany, in its Application instituting proceedings, based its claims on alleged violations by the United States of the Vienna Convention on Consular Relations. In his opinion, that approach is different from the one later adopted by Germany, based on claims of a *dispute* between it and the United States arising out of the interpretation or application of the said Convention, over which claims the Court would have jurisdiction under the Optional Protocol accompanying the Convention. He thinks that this is, in fact, a case of unilateral application made in reliance upon subsequent consent to the Court's jurisdiction by the respondent State.

Judge Oda submits that at no time in the almost two decades between the arrest and conviction of the LaGrand brothers and the submission of an Application to this Court did Germany or the United States consider there to be a dispute in existence between them concerning the interpretation or application of the Vienna Convention. Judge Oda finds it surprising that, after such a lengthy period of time, Germany would file its Application unilaterally, as it did. As a consequence, it was only after Germany instituted the proceedings that the United States learned that a dispute existed between the two countries. Judge Oda expresses the fear that the Court's acceptance of the Application in this case will in future lead States that have accepted the compulsory jurisdiction of the Court, either under the Court's Statute or the optional protocols attached to multilateral treaties, to withdraw their acceptance.

Judge Oda further states that the United States erred by failing to respond appropriately to Germany's Application. In his view the United States prior to the submission of its Counter-Memorial should have lodged objections to the Court's jurisdiction in the present case on grounds akin to those expressed above.

Judge Oda also notes that the Court erred in acceding to Germany's request for provisional measures, submitted on 2

March 1999 together with the Application instituting proceedings. Notwithstanding the delicate position the Court was in (as Walter LaGrand's execution in the United States was imminent), the Court should have adhered to the principle that provisional measures are ordered to preserve rights of States, and not *individuals*, exposed to an imminent breach which is irreparable. The Court thus erred in granting the Order indicating provisional measures.

Having identified the accumulated errors and their impact on the present case, Judge Oda then mentions five issues that inform his view of the case and notes the errors in the Court's Judgment. *First*, he observes that the United States has already admitted its violation of the Vienna Convention's requirement of prompt consular notification. *Second*, he sees no link between this admitted violation of the Convention and the imposition of the death penalty in the case of the LaGrands. *Third*, he considers that the non-compliance, if any, with the Order of 3 March 1999 bears no relation to the alleged violation of the Convention. *Fourth*, he notes that individuals of the sending and receiving States should be accorded equal rights and equal treatment under the Convention. *Finally*, he believes that the Court has confused the right, if any, accorded under the Convention to arrested foreign nationals with the rights of foreign nationals to protection under general international law or other treaties or conventions, and, possibly, even with human rights.

Judge Oda notes his objection to five of the seven subparagraphs of the operative part of the Judgment. *First*, Judge Oda states that he voted in favour of the Court's determination that it has jurisdiction to entertain Germany's Application, only because the United States did not raise preliminary objections to the Application. He emphasizes, however, that the Court's jurisdiction does not extend to Germany's submissions subsequent to the filing of its Application.

With regard to the *second* subparagraph, Judge Oda reiterates his view that, while the Court might entertain Germany's Application, the question of admissibility of each submission presented subsequently to the Application should not have been raised, even though the United States did not raise preliminary objections in connection with admissibility.

*Third*, Judge Oda disagrees with the Court's finding that certain sections of Article 36 of the Vienna Convention confer rights on individuals as well as States. In this context, he points the reader to the separate opinion of Vice-President Shi, with whose views he fully agrees.

*Fourth*, Judge Oda asserts that the Vienna Convention does not afford greater protection or broader rights to nationals of the sending State than to those of the receiving State and, accordingly, he disagrees with the Court's holding that the exercise of the procedural default rule by American courts was implicated in any violation of the Vienna Convention.

*Fifth*, Judge Oda expresses the view that the Court should not need to voice an opinion as to whether orders indicating provisional measures are binding, as the issue is

far removed from the violation of the Vienna Convention, the main issue of the present case. He further disagrees with the Court's finding that such orders do have binding effect and also that the United States did not comply with the Court's Order of 3 March 1999.

*Sixth*, while Judge Oda believes the Court should say nothing in its Judgment pertaining to assurances and guarantees of non-repetition of violations of the Vienna Convention, he explains that he voted in favour of this subparagraph as it "cannot cause any harm".

*Finally*, Judge Oda notes his total disagreement with the final subparagraph of the operative part of the Judgment, which goes far beyond the question of the alleged violation of the Vienna Convention by the United States.

#### *Separate opinion of Judge Koroma*

1. In his separate opinion, Judge Koroma stated that although he supported the findings of the Judgment, he has misgivings with regard to certain issues, particularly since they also form part of the *dispositif*.

2. With respect to the procedural default rule, which, according to Germany, by its Application violated the international legal obligation to Germany borne by the United States, Judge Koroma finds it inconsistent and untenable for the Court to hold that "it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention", but that "[I]n the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such".

3. In Judge Koroma's view, the rights referred to in Article 36, paragraph 1, of the Convention are the duties of the receiving State to inform promptly the relevant consular post of a detention or arrest, the duty to forward communication by a detained foreign national promptly, and the duty of prompt consular assistance for a detained person. In his view, none of these rights were violated by the procedural default rule or by its application. It therefore seems odd to hold that a violation of Article 36, paragraph 2, was caused by the application of the rule and not by the rule as such.

4. In his view, the real issue which the Court should have determined was not whether the procedural default rule was the cause of the breach of the obligations, but rather whether the obligations owed to Germany were breached as a result of the non-performance of the relevant obligations under the Convention, irrespective of a law, which, in any case, the Court had found not to be inconsistent with the obligations.

5. This position notwithstanding, he emphasized that he strongly subscribes to the notion that everyone is entitled to benefit from judicial guarantees, including the right to appeal a conviction and sentence.

6. On the issue of the binding nature of provisional measures, Judge Koroma reasoned that the finding of the Court on this should have been mainly limited to the Order made on 3 March 1999 as that was the issue in dispute. For him, the binding nature of such Orders in general cannot be in doubt, given their purpose and object to protect and preserve the rights and interests of the parties in a dispute before the Court, pending the Court's final decision. In other words, an order does not prejudge the issue raised in the request. Nor, in his view, should the Court's jurisprudence on this issue be considered in doubt. As far as he is concerned, there should not be any linguistic ambiguity in the provision, nor any fundamental misunderstanding as to its purpose and meaning. Doubts should therefore not be cast on the legal value of previous orders, albeit unwittingly.

7. Finally, Judge Koroma pointed out that with respect to operative paragraph 128 (7) of the Judgment, everyone, irrespective of nationality, is entitled to the benefit of fundamental judicial guarantees including the right to appeal against or obtain review of a conviction and sentence.

#### *Separate opinion of Judge Parra-Aranguren*

Judge Parra-Aranguren voted against paragraph 128 (1), (2) (a) of the Judgment because there is no dispute between the Parties as to the breach by the United States of Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations. Since the existence of a dispute is an "essentially preliminary" question, in his opinion the Court does not have jurisdiction on this point under Article I of the Optional Protocol of the said Vienna Convention. Furthermore Judge Parra-Aranguren considers that the claim made by Germany in its third submission does not arise out of the interpretation of the Vienna Convention but of Article 41 of the Statute of the Court. For this reason he concludes that the Court does not have jurisdiction to decide this matter on the basis of the Optional Protocol. Consequently Judge Parra-Aranguren voted against paragraph 128 (1), (2) (a), (2) (c) and (5) of the Judgment.

#### *Dissenting opinion of Judge Buergenthal*

Judge Buergenthal dissents with regard to the admissibility of Germany's third submission relating to the Order of 3 March 1999. He considers that the Court should have ruled that submission inadmissible.

In Judge Buergenthal's view, Germany's justification for its last-minute request seeking provisional measures, which prompted the Court to issue the 3 March Order without

giving the United States an opportunity to be heard, was based on factual allegations by Germany that do not withstand scrutiny in light of the information now before the Court.

Although the Court had no way of knowing this to be so at the time it issued the Order, this information justifies holding the third submission to be inadmissible. Such a decision would ensure that Germany not benefit from a

litigation strategy amounting to procedural misconduct highly prejudicial to the rights of the United States as a party to this case. Germany's strategy deprived the United States of procedural fairness and is incompatible with the sound administration of justice. See case concerning *Legality of Use of Force (Yugoslavia v. Belgium) Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, para. 44.