

LAGRAND CASE
(Germany v United States)*

On 27 June 2001, the Court delivered its judgment in this case.¹ By a vote of 14:1 on the merits, the Court found that the United States had breached its obligations to Germany and to the LaGrand brothers under the 1963 Convention (the Convention). For the first time in its history the Court held that orders indicating provisional measures were legally binding.

At the start of the proceedings, the President of the Court, Judge Schwebel of the United States relinquished the presidency in this case pursuant to Article 32 of the Rules of Court.

I. THE FACTS²

The brothers, Karl and Walter LaGrand were German nationals residing permanently in the United States since childhood. They were arrested in 1982 in Arizona after an attempted bank robbery during which the bank manager was murdered and another bank employee seriously injured. In 1984, an Arizona court convicted both for murder in the first degree and other crimes and sentenced them to death.

The 1963 Convention applied to the LaGrands as German nationals. The Convention required the United States authorities 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 when the LaGrands themselves informed the consulate of their situation after learning of their rights from other sources. Under the doctrine of "procedural default" in United States law, the LaGrands were by this stage precluded from challenging their convictions and sentences by claiming that their rights under the Convention had been breached.

* [2001] ICJ Reports (forthcoming). For a summary of the judgment see ICJ, Press Release 2001/16, 26 June 2001 at <www.icj-cij.org/>.

¹ For more information refer to [1999] Australian International Law Journal 325-331; [2000] Australian International Law Journal 354-356.

² Judgment of the Court paras 1-12.

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. On 3 March 1999, the Court made an Order indicating provisional measures stating *inter alia* that the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed pending the Court's final decision. On that same day, Walter LaGrand was executed.

II. THE PROCEEDINGS³

(a) *Germany's Application*

In its Application, Germany alleged that its nationals, the LaGrand brothers, had been arrested, tried and sentenced to death without being advised of their rights to consular assistance, as required by the Convention. Germany based the Court's jurisdiction on Article 36(1) of the Court's Statute and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes that accompanied the Convention (the Optional Protocol). Article 36(1) 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

³ Ibid paras 37-127.

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 alleged that the United States breached 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(1) of the Convention. By applying its own domestic rules (particularly the doctrine of procedural default that barred the LaGrands from claiming rights under the Convention) and ultimately executing them, the United States breached its international legal obligation to Germany under Article 36(2) of the Convention.

Further, the United States failed to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court on the matter. As such, the United States breached 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 that might interfere with the subject of these proceedings before the Court.

Germany sought from the United States an assurance that its unlawful acts would not be repeated. In future cases of detention or criminal proceedings against German nationals, the United States would ensure in law and practice the effective exercise of the rights under Article 36. In particular, in cases involving the death penalty, the United States would provide effective review of and remedies for criminal convictions impaired by a breach of the rights under Article 36. Further, Germany filed a request for the indication of provisional measures.

(b) The United States' Reply

In its reply, the United States admitted that it had indeed breached its obligation to Germany under Article 36(1)(b) of the Convention since its competent authorities did not promptly give to the LaGrands the notification required by this provision. The United States stated that it had apologised to Germany for this breach and was taking substantial

measures to prevent any recurrence. However, the United States denied all other claims and submissions of Germany.

By an Order of 3 March 1999, the Court indicated the provisional measures sought. The case continued with the parties' pleadings and filing of documents. Public oral hearings were held from 13-17 November 2000 when the parties presented their final submissions.

III. THE JUDGMENT⁴

In allowing Germany's Application on the merits, the Court held:

1. By not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36(1)(b) of the Convention 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(1). (14:1 votes)
2. 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 above violations had been established, the United States breached its obligation to Germany and to the LaGrand brothers under Article 36(2) of the Convention. (14:1 votes)
3. By failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, the United States breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999. (13:2 votes)
4. By undertaking to ensure implementation of the specific measures adopted in the performance of its obligations under Article 36(1)(b) of the Convention, this would be regarded as a commitment by the United States to meet Germany's request for a general assurance of non-repetition. (Unanimous)
5. If German nationals are sentenced to severe penalties without their rights under Article 36(1)(b) of the Convention being respected, the United States, by means of its own choosing,

⁴ Ibid para 128.

should allow the review and reconsideration of the conviction and sentence by taking account of the breach of the rights set forth in that Convention. (14:1 votes)

The Court comprised Guillaume P; Shi V-P; Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ. Guillaume P appended a declaration to the Judgment of the Court; Shi V-P appended a separate opinion; Oda J appended a dissenting opinion; Koroma and Parra-Aranguren JJ appended separate opinions; and Buergenthal J appended a dissenting opinion.

IV. THE COURT'S REASONING

(a) Domestic Law, Doctrine of Procedural Default and Article 36

Germany submitted that the United States, by applying rules of its domestic law, especially the doctrine of "procedural default", breached Article 36(2) Convention. This provision required the United States to "enable full effect to be given to the purposes for which the rights accorded [under Article 36 were] intended".

The Court held that the rule in itself did not violate Article 36. The problem arose when the rule disallowed the detained individual to challenge a conviction and sentence by invoking the failure of the competent national authorities to comply with their obligations under Article 36(1). As a result, the Court concluded that the rule prevented Germany from assisting the LaGrands in a timely fashion under the Convention. Under these circumstances, the Court held that the procedural default rule breached Article 36(2).

(b) Breach of the Court's Order on Provisional Measures

Germany alleged that the United States had breached the Court's Order of 3 March 1999 indicating provisional measures. The Court observed that this was the first time it was called upon to determine the legal effects of Orders made under Article 41 of its Statute. After interpreting Article 41, a subject of extensive controversy, the Court held that such orders had binding effect. As a result, the Court concluded that its Order of 3 March 1999 "was not a mere exhortation" but "created a legal obligation for the United States".

On the measures the United States took to implement the Court's Order, the Court observed that the mere transmission of its Order to the Governor of Arizona without any comment was "certainly less than could have been done even in the short time available". The Court found the same to be true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures [was] not binding".

The Court noted that the Governor of Arizona decided against giving effect to the Order although Arizona's Clemency Board recommended a stay of execution for Walter LaGrand. The Court noted also that the United States Supreme Court rejected Germany's pleas for a stay of execution "[g]iven the tardiness of the pleas and the jurisdictional barriers they implicate[d]". On the other hand, it was open to the Supreme Court to grant a preliminary stay to give it "time to consider...the jurisdictional and international legal issues involved". Consequently, the Court concluded that the United States did not comply with the Order of 3 March 1999.

(c) Repetition of Unlawful Acts

During all phases of the proceedings, Germany repeatedly sought an assurance from the United States that it would not repeat its unlawful acts. In reply, the United States stated continually that it was performing a vast and detailed programme to ensure that its competent authorities complied with Article 36 of the Convention. The Court therefore found that this United States commitment to ensure that specific measures were implemented amounted to a fulfilment of Germany's requests. Nevertheless, the Court found also that notwithstanding, the United States failed to notify the Consulate of Germany of its nationals' detriment. As such, an apology was insufficient in this case where the individuals concerned were subjected to prolonged detention or convicted and sentenced to severe penalties. The reason was it was incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the breach of the rights set forth in the Convention.

V. JURISDICTION OF THE COURT⁵

Germany based the Court's jurisdiction on Article I of the Optional Protocol to the Convention concerning the Compulsory Settlement of Disputes of 24 April 1963 that reads:

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

On the other hand, the United States presented certain objections to the jurisdiction of the Court although it did not raise preliminary objections under Article 79 of the Rules of Court.

(a) *Germany's First Submission*⁶

(i) *Germany's Claim*

Germany relied on Article 36(1) of the Convention that 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;

⁵ Judgment of the Court 36-48.

⁶ *Ibid* paras 37-42.

- (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 alleged that the United States' failure to inform the LaGrands of their right to contact the German authorities prevented Germany from exercising its rights under Article 36(1)(a) and (c) of the Convention. This breached the various rights conferred upon the sending State *vis-à-vis* its nationals in prison, custody or detention found in Article 36(1)(b) of the Convention. Germany alleged further that by breaching its obligations to inform, the United States breached individual rights conferred on the detainees by Article 36(1)(a) and (b). Accordingly, Germany claimed that it "was injured in the person of its two nationals", a claim which Germany raised "as a matter of diplomatic protection on behalf of Walter and Karl LaGrand".

(ii) The United States' Reply

The United States acknowledged the breach of Article 36(1)(b) and recognised that the Court has jurisdiction under the Optional Protocol to hear this dispute in so far as it concerned Germany's own rights. On Germany's claims of breach regarding Article 36(1)(a) and (c) the United States argued that they were "particularly misplaced" on the grounds that the "underlying conduct complained of is the same" as the claim of the breach of Article 36(1)(b). It contended that "to the extent that this claim by Germany [wa]s based on the general law of diplomatic protection, it [wa]s not within the Court's jurisdiction" under the Optional Protocol because it "d[id] not concern the interpretation or application of the Convention".

(iii) The Court's Finding

The Court rejected the United States' objections. The dispute on whether Article 36(1)(a) and (c) was breached owing to the breach of Article 36(1)(b) related to the Convention's interpretation and

application. This was also true of the dispute on whether Article 36(1)(b) created individual rights and whether Germany had standing to assert those rights on behalf of its nationals. They were consequently disputes within the meaning of Article I of the Optional Protocol. The Court also rejected the United States' claim that Germany's allegation based on the LaGrands' individual rights was beyond the Court's jurisdiction. Diplomatic protection was a concept of customary international law and this did not prevent a State party to a treaty that created individual rights from taking up the case of its nationals and instituting international judicial proceedings on their behalf. As a result, the Court concluded that it had jurisdiction regarding Germany's entire first submission.

(b) *Germany's Second and Third Submissions*⁷

Although the United States did not challenge the Court's jurisdiction in regard to Germany's second and third submissions, the Court observed that the third submission concerned issues that arose directly from the dispute. In this sense, the Court had held that it had jurisdiction and thus covered by Article I of the Optional Protocol. The Court reaffirmed its judgment in *Fisheries Jurisdiction*⁸ where it declared that in order to consider the dispute in all its aspects the Court might have to deal with a submission that was:

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...

Where the Court had jurisdiction to hear a case, it also had jurisdiction to deal with submissions requesting it to determine that an order indicating measures that was to preserve the Parties' rights had not been complied with.

⁷ Ibid paras 43-45.

⁸ (Federal Republic of Germany v Iceland) (Merits) [1974] International Court of Justice Reports 203 para 72.

(c) *Germany's Fourth Submission*⁹

The United States objected to the Court's jurisdiction of the Court in so far as it concerned a request for assurances and guarantees of non-repetition of illegal acts. It argued 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 Convention.

The Court considered the dispute on the remedies for the United States' breach of the Convention was one arising from its interpretation or application and thus within the Court's jurisdiction. Relying on *Factory at Chorzów*,¹⁰ the Court held that where jurisdiction existed over a dispute in a particular matter, it did not require a separate basis for jurisdiction to consider the remedies requested by an injured party. Consequently, the Court had jurisdiction in the present case with respect to Germany's fourth submission

(d) *Admissibility of Germany's Submissions*¹¹

The United States objected to the admissibility of Germany's submissions on various grounds.

First, the United States argued that Germany's second, third and fourth submissions were inadmissible because Germany sought the Court to play "the role of ultimate court of appeal in national criminal proceedings", a role that it was not empowered to perform. It maintained that many of Germany's arguments, in particular those regarding the rule of "procedural default", asked 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.

⁹ Judgment of the Court paras 46-48.

¹⁰ [1925] Permanent Court of International Justice, Series A, No 9 at 22.

¹¹ Judgment of the Court paras 49-63.

The Court disagreed with this argument and observed:

1. In its second submission, Germany asked the Court to interpret the scope of Article 36(2) of the Convention.
2. In its third submission, Germany sought a finding that the United States had breached the Court's Order pursuant to Article 41 of its Statute.
3. In its fourth submission, Germany asked the Court to determine the applicable remedies for the alleged violations of the Convention.

Although Germany dealt extensively with the practice of American courts as it bore on the Convention's application all three submissions require the Court to do no more than apply the relevant rules of international law to the issues in dispute. The exercise of this function, expressly mandated by Article 38 of the Court's Statute, did not convert the Court into a court of appeal for national criminal proceedings.

The United States argued that Germany's third submission was inadmissible because of the manner Germany brought these proceedings before the Court. The Court noted that German consular officials became aware of the LaGrands' case in 1992 but Germany did not raise the issue of consular notification until 22 February 1999, two days before the date scheduled for Karl LaGrand's execution. Germany then filed its Application in these proceedings together with a request for provisional measures after normal business hours in the Court's Registry on 2 March 1999, some 27 hours before the execution of Walter LaGrand.

Germany acknowledged that this could render its Application inadmissible but maintained that international law did not lay down any specific time-limit in this regard. It contended that it was only seven days before it filed the Application that it became aware of all the relevant facts, in particular the fact that the authorities of Arizona knew of the LaGrands' German nationality since 1982.

The Court recognised that Germany could be criticised for the manner in which these proceedings were filed and their timing. However, the Court stated 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 considered that Germany was now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court found that Germany's third submission was admissible

The United States argued that Germany's first submission was inadmissible on the ground that the LaGrands did not exhaust local remedies, in so far as it related to the right of diplomatic protection of nationals. The United States maintained 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 if it had been raised in a timely fashion.

The Court noted that it was not disputed that the LaGrands sought to lead the Convention in the United States courts after learning of their rights under the Convention in 1992. The Court noted also that it was not disputed that by this date the procedural default rule barred the LaGrands from obtaining any remedy for the breach of their rights because their counsel delayed raising this point. Nonetheless, the Court found that the United States could not now rely on this fact in order to preclude the admissibility of Germany's first submission since it was the United States itself that failed to carry out its obligation under the Convention to inform the LaGrand brothers.

The United States also contended that Germany's submissions were inadmissible on the ground that Germany sought to have a standard applied to the United States that was different to its own practice.

The Court stated that it was not required to decide if the United States' argument, if true, would result in the inadmissibility of Germany's submissions. It found that the evidence adduced by the United States did not justify the conclusion that Germany's own practice failed to conform to the standards it demanded from the United States in this case. The precedents referred to entailed relatively light criminal penalties and did not evidence German practice where an arrested person, who had not been informed without delay of his or her rights, faced a penalty as severe as in the present case. The Court held that the remedies for a breach of Article 36 of the Convention were not

necessarily identical in all situations and an apology could be inappropriate or insufficient. The Court accordingly found that the United States' claim of inadmissibility must be rejected.

*(e) Merits of Germany's Submissions*¹²

Having determined that it had jurisdiction and Germany's four submissions were admissible, the Court considered their merits.

*(i) Germany's First Submission*¹³

The Court noted that the United States did not contest Germany's basic claim that the United States breached its obligation under Article 36(1)(b) of the Convention.

However, Germany also claimed that this breach led to consequential breaches of Article 36(1)(a) and (c). Germany argued that when the obligation to inform the arrested person without delay of their rights was disregarded, "the other rights contained in Article 36(1) become in practice irrelevant, indeed meaningless".

In reply, the United States argued that the underlying conduct complained of by Germany was one and the same, namely, the failure to inform the LaGrands as required by Article 36(1)(b). As a result, it disputed Germany's claims that other provisions, such as Article 36(1)(a) and (c) were breached also. It asserted that Germany's claims based on Article 36(1)(a) and (c) were "particularly misplaced" in that the LaGrands could and did communicate freely with consular officials after 1992.

Replying, Germany asserted that it was "commonplace that one and the same conduct may result in several violations of distinct obligations". Further, it asserted that there was a causal relationship between the breach of Article 36 and the LaGrands' ultimate execution. It claimed that had it been properly afforded its rights under the Convention it could have intervened in time and present a "persuasive mitigation case" to the United States that "likely would have saved" the LaGrands. Due to the doctrine of procedural default and the high post-conviction

¹² Ibid paras 64-127.

¹³ Ibid paras 65-78.

threshold for proving ineffective counsel under United States law, its intervention at a stage later than the trial phase could not "remedy the extreme prejudice created by the counsel appointed to represent the LaGrands".

The Court stated that although a breach of Article 36(1)(b) did not always result in a breach of the other provisions of this Article, in the present proceedings it agreed with Germany. Article 36(1) provided an interrelated regime designed to facilitate a system of consular protection. This was shown right at the start where Article 36(1)(a) provided the right of communication and access. The modalities of consular notification followed next, in Article 36(1)(b). Finally, Article 36(1)(c) set out the measures consular officers could take to render consular assistance to their nationals in the custody of the receiving State. Therefore, it followed that since Germany was unaware of the detention of its nationals because the United States failed to provide the requisite consular notification without delay, for all practical purposes Germany was prevented from exercising its rights under Article 36(1). This was what happened between 1982 and 1992.

Germany contended 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 Convention but also entailed a breach of the individual rights of the LaGrand brothers". Invoking its right of diplomatic protection, Germany sought further relief against the United States on this ground.

The United States questioned what this additional claim of diplomatic protection contributed to the case and argued that there were 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 contended further that rights of consular notification and access under the Convention were rights of States and not of individuals even though the rights could benefit individuals by permitting States to offer them consular assistance. The United States maintained that the treatment due to individuals under the Convention was inextricably linked to and derived from the right of the State acting through its consular officer to communicate with its nationals and did not constitute a fundamental right or a human right.

Based on Article 36(1), the Court concluded that this provision created individual rights that by virtue of Article I of the Optional Protocol could be invoked by the national State of the detained person. As a result, the United States had breached these rights.

(ii) Germany's Second Submission¹⁴

Germany emphasised that it was not the "procedural default" rule as such that was in issue but the manner in which it was applied. This "deprived the brothers of the possibility to raise the violations of their right to consular notification in U.S. criminal proceedings". Germany referred to Article 36(2) of the Convention and stated:

...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 breach of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury.

In reply, the United States stated:

The 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 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.

When dealing with these arguments, the Court began by quoting Article 36(2) that 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.

¹⁴ Judgment of the Court paras 79-91.

As a result, the Court rejected the United States' argument that proceeded partly on the assumption that Article 36(2) applied only to the rights of the sending State and not to those of the detained individual. The Court determined that Article 36(1) created individual rights for the detained person in addition to the rights accorded to the sending State. Consequently the reference to "rights" in paragraph 2 applied not only to the rights of the sending State but also to the rights of the detained individual.

The Court emphasised that the "procedural default" rule in itself did not breach Article 36 of the Convention. The problem arose when the procedural default rule disallowed the detained individual to challenge a conviction and sentence based on the national authorities' failure to comply with Article 36(1) "without delay". This in turn prevented the individual from seeking and obtaining consular assistance from the sending State. The Court found that under these circumstances the procedural default rule in effect prevented the "full effect" from being given to the purposes of the rights accorded by Article 36 thereby resulting in its breach.

(iii) Germany's Third Submission¹⁵

Germany argued that the provisional measures that the Court indicated were binding by virtue of the United Nations Charter and the Court's Statute. In support, Germany developed arguments ranging from the "principle of effectiveness" to "procedural prerequisites". They concerned the adoption of provisional measures, the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", Article 94(1) of the United Nations Charter, Article 41(1) of the Statute of the Court and the practice of the Court, *inter alia*.

In reply, the United States stated 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 stated:

Two central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of

¹⁵ Ibid paras 92-116.

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 alleged that the "terms of the Court's 3 March Order did not create legal obligations binding on" it. It argued that the "language used by the Court in the key portions of its Order [wa]s not the language used to create binding legal obligations". Further, the Court need not "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". Nevertheless, it maintained that the Orders could not have such effects. In support, it developed arguments based on the following:

1. The language and history of Article 41(1) of the Court's Statute and Article 94 of the Charter of the United Nations' including the practice of the Court and State practice based on these provisions.
2. The "weight of publicists' commentary".
3. Owing to "the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process" could not be observed in connection with the Court's Order of 3 March.

Consequently, the United States argued:

...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 observed that the parties' dispute on this point essentially concerned the interpretation of Article 41, the subject of extensive controversy in the literature. It therefore proceeded to interpret this provision in accordance with customary international law as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).

According to Article 31(1) of the Vienna Convention, a treaty should 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 words *indiquer* and *l'indication* in the French text of the Convention could be deemed neutral in character in relation to the mandatory nature of the measure concerned. By contrast, the expression *doivent être prises* had an imperative character. On the other hand, the English version of Article 41 read 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.

According to the United States, the use in the English version of "indicate" instead of "order", "ought" instead of "must" or "shall", and "suggested" instead of "ordered", was understood to imply that decisions under Article 41 lacked mandatory effect. However, having regard to the fact that in 1920 the French text was the original text, such terms as "indicate" and "ought" should have a meaning equivalent to "order" and "must" or "shall".

Faced with these two texts that were not in total harmony, the Court noted that according to Article 92 of the Charter, the Court's Statute was "an integral part of the present Charter". Under Article 111 of the Charter, the French and English texts were "equally authentic" and the same was equally true of the Statute. In cases of divergence between the equally authentic versions of the Statute, neither the Statute nor the Charter indicated how to proceed.

If the parties disagreed in this respect it was appropriate to refer to Article 33(4) of the Vienna Convention that reflected customary international law. This provision provided that:

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.

Next, the Court considered the object and purpose of the Statute together within the context of Article 41. It found that it was unnecessary to resort to the Statute's preparatory work that, in any case, did not preclude the conclusion that orders made under Article 41 had binding force.

The object and purpose of the Statute were to enable the Court to fulfil its functions particularly the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. If the circumstances so required, it followed from this provision (including Article 41) that the power to indicate provisional measures meant that the measures were binding. This was the case inasmuch as the power in question was based on the need to safeguard and avoid prejudice to the rights of the parties as determined by the Court's final judgment. The claim that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of this provision. A related reason for accepting the binding character of such orders and to which the Court attached importance was the existence of a principle that the Permanent Court of International Justice had recognised in *Electricity Company of Sofia and Bulgaria*¹⁶ when it referred to:

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.

The Court then considered whether Article 94 of the United Nations Charter precluded attributing binding effect to orders indicating provisional measures. This Article provided:

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

¹⁶ Order of 5 December 1939, Permanent Court of International Justice, Series A/B, No 79 at 199.

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.

On the meaning of "the decision of the International Court of Justice" in Article 94(1) of the United Nations Charter, the Court observed that the words could refer to any of its judgments or decisions including orders on provisional measures. However, it could also be interpreted to mean judgments pursuant to Article 94(2) only. In this regard, the fact that in Articles 56-60 of the Court's Statute both "decision" and "judgment" were used did little to clarify the matter. According to the first interpretation of Article 94(1), the text confirmed the binding nature of provisional measures. On the other hand, the second interpretation did not in any way preclude the words from being accorded binding force under Article 41 of the Statute.

The Court therefore concluded that Article 94 did not prevent orders made under Article 41 from having a binding character. It was clear that none of the sources of interpretation referred to in relevant Articles of the Vienna Convention, including the preparatory work, contradicted the conclusions drawn from the wording of Article 41 read in context and in the light of the Statute's object and purpose. As such, the Court held that its orders on provisional measures under Article 41 had binding effect.

When dealing with the question of the United States' compliance with its obligation under the Order of 3 March 1999, the Court began by reviewing the steps taken by the United States authorities.¹⁷ It concluded that the latter failed to take adequate steps.

Finally, the Court observed that Germany's request was for an adjudication and declaration that the United States breached its international legal obligation to comply with the Order of 3 March 1999 only. There was no other request regarding that breach. The United States was also under great time pressure owing to the circumstances surrounding Germany's original Application. The United States authorities made their decisions at a time when the question concerning the binding character of orders on provisional measures,

¹⁷ Namely, the United States State Department, United States Solicitor General, Governor of Arizona and United States Supreme Court.

albeit discussed extensively in the literature, was not yet settled by the Court's jurisprudence. The Court found that these were relevant factors when it considered Germany's submission and indemnification claim.

(iv) Germany's Fourth Submission¹⁸

Germany stated that its fourth submission was worded so "as to... leave the choice of means by which to implement the remedy [it sought] to the United States". Replying, the United States argued that:

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 breach 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.

The United States added:

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... Even 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

¹⁸ Judgment of the Court paras 117-127.

in international jurisprudence and would exceed the Court's authority and jurisdiction.

The Court observed that Germany sought a number of assurances from the United States in this fourth submission.

First, Germany sought a straightforward assurance that the United States would not repeat its unlawful acts. This request did not specify the means by which non-repetition was to be assured.

Secondly, Germany sought from the United States that "in any future cases of detention of or criminal proceedings against German nationals, the United States [would] ensure in law and practice the effective exercise of the rights under Article 36 of the Convention". The Court noted that this request went further. By referring to United States law, the request appeared to require specific measures as a means of preventing recurrence.

Finally, Germany requested that "[i]n particular in cases involving the death penalty, this require[d] the United States to provide effective review of and remedies for criminal convictions impaired by a breach of the rights under Article 36". The Court found that that this request went even further since it was directed entirely at securing specific measures in cases involving the death penalty.

In relation to the general demand for an assurance of non-repetition, the Court observed that the United States had informed it of the "substantial measures [the United States was taking] aimed at preventing any recurrence" of the breach of Article 36(1)(b) of the Convention. It noted that the United States acknowledged that, in the case of the LaGrands, the United States did not comply with its obligations to give consular notification and had apologised to Germany for this breach. However, in this case, an apology was insufficient. In this respect, the Court noted that the United States had repeated in all phases of these proceedings that the latter was carrying out a vast and detailed programme at the federal, state and local levels to ensure compliance with its obligation under Article 36.

The Court observed that although the United States provided important information on its programme, this did not amount to an assurance that

the United States would not fail to observe the obligation of notification under Article 36 again. No State could give such a guarantee and Germany did not seek it. The information concerned a commitment to follow through with the efforts in this case only, which the Court regarded as meeting Germany's request for a general assurance of non-repetition.

After examining the other assurances sought by Germany, the Court determined the existence of a breach of an international obligation. If necessary, it could find that a domestic law had caused this breach.

When dealing with Germany's first and second submissions, the Court had made findings on the breaches under Article 36. However, it did not find that a United States law, whether substantive or procedural in character, was inherently inconsistent with the obligations the United States made under the Convention. The Court found that the breach of Article 36(2) was caused by the circumstances in which the procedural default rule was applied, not by the rule itself. In this respect, if the United States, notwithstanding its commitment referred to above, failed in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned were subjected to prolonged detention or convicted and sentenced to severe penalties. In such a case, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking into account the breach of the rights set forth in the Convention. This obligation could be performed in various ways and the choice should be left to the United States.

V. THE COURT'S JUDGMENT¹⁹

In its Judgment, the Court held:

- (1) By 14:1 votes, the Court had jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Convention of 24 April 1963, to entertain Germany's Application filed on 2 March 1999 (per Guillaume P; Shi V-P; Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins,

¹⁹ For the operative paragraph see *ibid* para 128.

- Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Parra-Aranguren J dissenting).
- (2) By 13:2 votes, Germany's first was admissible (per Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda and Parra-Aranguren JJ dissenting).
 - (3) By 14:1 votes, Germany's second submission was admissible (per Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda J dissenting).
 - (4) By 12:3 votes, Germany's third submission was admissible (per Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek and Al-Khasawneh JJ; Oda, Parra-Aranguren and Buergenthal JJ dissenting).
 - (5) By 14:1 votes, Germany's fourth submission was admissible (per Guillaume P Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda J dissenting).
 - (6) By 14:1 votes, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36(1)(b) of the Convention, thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided by the Convention to the individuals concerned, the United States breached its obligations to Germany and the LaGrand brothers under Article 36(1) (per Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda J dissenting).
 - (7) By 14:1 votes, 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 the LaGrand brothers under Article 36(2) of the Convention (per Guillaume P; Shi V-P; Bedjaoui,

Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal;

- (8) By 13:2 votes, 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 in the case, the United States breached the obligation incumbent upon it under the Court's Order indicating provisional measures issued on 3 March 1999 (per Guillaume P Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda and Parra-Aranguren dissenting).
- (9) Unanimously, the Court noted the United States' commitment to ensure implementation of the specific measures adopted in performance of its obligations under Article 36(1)(b) of the Convention; and found that this commitment must be regarded as meeting Germany's request for a general assurance of non-repetition.
- (10) By 14:1 votes, should German nationals be sentenced to severe penalties without respect for their rights under Article 36(1)(b) of the Convention, the United States, by means of its own choosing, should allow the review and reconsideration of the conviction and sentence by taking into account the breach of the rights set forth in the Convention (per Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal JJ; Oda J dissenting).

(a) Declaration of Guillaume P

In a short declaration, Guillaume P recalled that paragraph (7) of the Judgment above responded to certain submissions by Germany and hence ruled only on the United States' obligations in cases of severe penalties imposed upon German nationals. Thus, paragraph (7) did not address the position of the nationals of other States or individuals sentenced to penalties that were not of a severe nature. However, in order to avoid any ambiguity, it was made clear that there was no question of applying an *a contrario* interpretation to this paragraph.

(b) *Separate Opinion of Shi V-P*

The Shi V-P stated that he voted reluctantly in favour of paragraphs (3)-(4) above (on the merits of Germany's first and second submissions respectively) as he believed that the Court's findings there were based on a debatable interpretation of Article 36 of the Convention. While he agreed that the United States breached its obligations to Germany under Article 36(1) of the Convention, he had doubts on the Court's finding in the paragraphs that the United States also breached its obligations to the LaGrand brothers.

The Court's conclusion that Article 36(1)(b) created individual rights relied on the rule that if the relevant words in their natural and ordinary meaning made sense within the context of their use, this was the end of the matter. There was no need to resort to other methods of interpretation. However, the Court had previously stated that this rule was not absolute and where such a method of interpretation resulted in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words were contained, no reliance could be validly placed on it. As stated by an author:²⁰

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 Shi V-P questioned whether it was proper for the Court to place so much emphasis on the purported clarity of the language of Article 36(1)(b). He considered the effect of the wording in the Convention's title, Preamble, *chapeau* to Article 36, and Article 5. He referred in some detail to the *travaux préparatoires* of Article 36 and found that it was impossible to conclude from the negotiating history that Article 36(1)(b) was intended by the negotiators to create individual rights. If one kept in mind that the general tone and thrust of the entire Conference concentrated on consular functions and their practicability, the better view was that the Conference did not envisage the creation of any individual rights independent of State rights.

²⁰ *Editor*: A reference for this author is not provided.

Shi V-P added that the Judgment's final operative paragraph was particularly significant in a case where a death sentence was imposed, it being a severe and irreversible punishment. Every possible measure should therefore be taken to prevent injustice or an error in a conviction or sentencing. Consequently, he voted in favour of this paragraph.

(c) Dissenting Opinion of Oda J

Oda J voted against all but two of the subparagraphs of the operative part of the Court's Judgment. He objected to the case as a whole because he felt that the Court was making an ultimate error on top of an accumulation of earlier errors: (1) by Germany as Applicant; (2) by the United States as Respondent; and (3) by the Court itself.

In its original Application, Germany based its claims on alleged violations by the United States of the Convention. Oda J considered this approach different to the one Germany adopted later based on its dispute with the United States on the interpretation or application of the Convention based on the Court's jurisdiction under the Optional Protocol accompanying the Convention. He thought that this was a unilateral application that relied on the United States' subsequent consent to the Court's jurisdiction.

Oda J found that at no time in almost twenty years did the parties consider a dispute existed between them on the interpretation or application of the Convention. This was the period between the arrest and conviction of the LaGrand brothers and the submission of Germany's original Application. He found it surprising that after such a lengthy period Germany had filed an Application unilaterally. It was only after Germany had instituted the proceedings that the United States learned that a dispute existed between them. He feared that the Court's acceptance of the Application in this case would in future lead States that had accepted the Court's compulsory jurisdiction, to withdraw their acceptance, be it under either the Court's Statute or the optional protocols of multilateral treaties.

Judge Oda stated that the United States erred by failing to respond appropriately to Germany's Application. In his view, prior to the submission of its Counter-Memorial, the United States should have objected to the Court's jurisdiction on grounds akin to those expressed

above. He noted also 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 (Walter LaGrand's execution in the United States was very imminent), it should have adhered to the principle that provisional measures were ordered to preserve States exposed to an imminent breach that was irreparable, not the rights of individuals. The Court thus erred in granting the Order indicating provisional measures.

Having identified the accumulated errors and their impact on the present case, Oda J referred to five issues that informed his view of the case and the errors in the Court's Judgment. They were:

1. The United States' admission on the breach of the Convention's requirement on prompt consular notification.
2. There was no link between this admission and the imposition of the death penalty on the LaGrands.
3. The non-compliance with the Order of 3 March 1999, if any, bore no relation to the alleged breach of the Convention.
4. Individuals from the sending and receiving States should be accorded equal rights and equal treatment under the Convention.
5. The Court confused the right, if any, found 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, with human rights.

Oda J objected to certain paragraphs of the Judgment's operative part.

On the first paragraph, Oda J voted in favour of the Court's determination that it had jurisdiction to entertain Germany's Application because the United States did not raise preliminary objections to the Application. However, he emphasised that the Court's jurisdiction did not extend to Germany's submissions subsequent to the filing of its Application.

On the second paragraph, Oda J reiterated his view that, while the Court might entertain Germany's Application, the question of the 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 this connection.

On the third paragraph, Oda J disagreed with the Court's finding that certain sections of Article 36 conferred rights on individuals as well as States. In this context, he fully agreed with Shi V-P's separate opinion.

On the fourth paragraph, Oda J asserted that the Convention did not afford greater protection or broader rights to the nationals of the sending State than those of the receiving State. As such, he disagreed with the Court's finding that the exercise of the procedural default rule by American courts was implicated in any breach of the Convention.

On the fifth paragraph, Oda J expressed the view that the Court was not required to voice an opinion on whether orders indicating provisional measures were binding as the issue was far removed from the breach of the Convention, the main issue in this case. He disagreed with the Court's finding that such orders had binding effect and that the United States did not comply with the Court's Order of 3 March 1999.

On the sixth paragraph, although Oda J believed the Court should not comment on the assurances and guarantees on the non-repetition of breaches of the Convention in its Judgment, he explained that he voted in favour of this subparagraph as it "cannot cause any harm".

Finally, Oda J noted his total disagreement with the final paragraph of the operative part of the Judgment, which went far beyond the question of the alleged breach of the Convention by the United States.

(d) *Separate Opinion of Koroma J*

Although Koroma J supported the findings in the Judgment, he had misgivings regarding certain issues particularly since they were also part of the *dispositif*. With respect to the procedural default rule and Germany's allegation that the United States had breached its international legal obligation to Germany, Koroma J found it was inconsistent and untenable for the Court to state that:

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 Convention...[I]n the present case the breach of Article 36(2) was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.

Koroma J stated that the rights referred to in Article 36(1) were the duties of the receiving State. This State had a prompt duty to inform the relevant consular post of a detention or arrest, forward communication by a detained foreign national, and provide consular assistance for a detained person. Koroma J did not agree that these rights were breached by the procedural default rule or by its application. It therefore seemed odd to hold that a breach of Article 36(2) was caused by the application of the rule and not by the rule as such.

Koroma J observed that the real issue was not whether the procedural default rule was the cause of the obligations' breach. Instead, it was 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 that the Court found to be consistent with the obligations. Notwithstanding, he subscribed strongly to the notion that everyone was entitled to the benefit obtained from judicial guarantees including the right to appeal a conviction and sentence.

On the binding nature of provisional measures, Koroma J reasoned that the Court's finding on this point should be mainly limited to the Order of 3 March 1999 since this was the issue in dispute. He felt that the binding nature of such orders in general was undoubted since their purpose and object were to protect and preserve the rights and interests of the parties in dispute before the Court pending its final decision. In other words, an order did not prejudice the issue raised in the request. Further, he stated that the Court's jurisprudence on this issue should not be considered in doubt. There should not be any linguistic ambiguity in the provision or any fundamental misunderstanding on its purpose and meaning. Consequently, doubts should not be cast on the legal value of previous orders, albeit unwittingly.

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

(e) Separate Opinion of Parra-Aranguren J

Parra-Aranguren J voted against paragraph 128(1)(2)(a) of the Judgment because there was no dispute between the parties on the United States' breach of Article 36(1)(b) of the Convention. Since an existing dispute was an "essentially preliminary" question, he stated that the Court did not have jurisdiction on this point under Article I of the Optional Protocol of the Convention. He considered that Germany's claim in its third submission did not arise from the Convention's interpretation but from Article 41 of the Court's Statute. For this reason, he concluded that the Court did not have jurisdiction to decide this matter on the basis of the Optional Protocol and voted against paragraph 128(1), (2)(a), (2)(c) and (5) of the Judgment.

(f) Dissenting Opinion of Buergenthal J

Buergenthal J dissented on the admissibility of Germany's third submission on the Order of 3 March 1999. He considered the Court should have ruled this submission inadmissible. Germany's justification for its last minute request for provisional measures that prompted the Court to issue the 3 March Order did not give the United States an opportunity to be heard and was based on Germany's factual allegations. The allegations did not withstand scrutiny in the 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 justified holding the third submission to be inadmissible. Such a decision would ensure that Germany did 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 was incompatible with the sound administration of justice.²¹

²¹ Case concerning Legality of Use of Force (Yugoslavia v Belgium) Provisional Measures, Order of 2 June 1999, [1999] International Court of Justice Reports para 44.