LaGrand Case

Note to Students: Please read (below) the edited text of the *LaGrand* Judgment, the Declaration by President Guillaume, and the Separate Opinion of Judge Shi, with the following issues in mind.

1) Was the ICJ correct to hold that its orders for interim measures (provisional measures) under Article 41 of the Statute of the ICJ are binding? (See paragraphs 98-109.) Was it fair to hold that the USA violated the interim measures order issued in this case?

2) The Court makes an order requiring that post-conviction review and reconsideration be available in the US legal system in future to any German national who has been sentenced to severe criminal penalties in the USA and whose Vienna Convention rights were not respected (paragraphs 125 and 128(7), which you do not have to read). This potentially applies also to nationals of other states parties to the Vienna Convention (see President Guillaume's Declaration.) How could the US, as a federal system, comply with this order? Should the US comply? Will it?

3) Compare the ICJ's interpretation of Article 36(1)(b) of the Vienna Convention on Consular Relations (paragraphs 75-77) with the approach to interpretation of the same provision taken in the Separate Opinion of Judge Shi, and with the Court's own approach to the interpretation of Article 41 of the ICJ Statute in paragraphs 98-109. Is the Court's interpretation of Article 36(1)(b) with regard to individual rights justified?

Note on treaty interpretation. The standard international law approach to treaty interpretation is set out in the Vienna Convention on the Law of Treaties 1969, which provides:

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to
article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, 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.

INTERNATIONAL COURT OF JUSTICE

YEAR 2001

2001
27 June
General List
No. 104
27 June 2001

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

JUDGMENT

...

Present: President Guillaume; *Vice-President* Shi; *Judges* Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Registrar* Couvreur....

The Court,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 2 March 1999 the Federal Republic of Germany (hereinafter referred to as "Germany") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter referred to as the "Vienna Convention").

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").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith

communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 2 March 1999, the day on which the Application was filed, the German Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By a letter dated 2 March 1999, the Vice-President of the Court, acting President in the case, addressed the Government of the United States in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the] Government [of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects."

By an Order of 3 March 1999, the Court indicated certain provisional measures (see paragraph 32 below).

.....

65. Germany's first submission requests the Court to adjudge and declare:

> "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".

...

74. Article 36, paragraph 1, establishes an interrelated régime 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. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from

exercising them, had they so chosen.

*

75. 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.

Germany maintains that the right to be informed of the rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 *(b)*, of the Vienna Convention, since the last sentence of that provision speaks of the "rights" under this subparagraph of "the person concerned", i.e., of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 *(b)*, according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the *travaux préparatoires* of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the "United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live," adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

76. 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 maintains that the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts.

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. The United States argues that the fact that Article 36 by its terms recognizes the rights of individuals does not determine the nature of those rights or the remedies required under the Vienna Convention for breaches of that Article. It points out that Article 36 begins with the words "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State," and that this wording gives no support to the notion that the rights and obligations enumerated in paragraph 1 of that Article are intended to ensure that nationals of the sending State have any particular rights or treatment in

the context of a criminal prosecution. The *travaux préparatoires* of the Vienna Convention according to the United States, do not reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States.

77. The Court notes that Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 *(c)*, the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (citations omitted).. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.

78. At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right, but has today assumed the character of a human right. In consequence, Germany added, "the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative". The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

* *

.....

92. The Court will now consider Germany's third submission, in which it asks the Court to adjudge and declare:

> "that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international 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".

.....

94. Germany claims that the United States committed a threefold violation of the Court's Order

of 3 March 1999:

> "(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the U.S. Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court's Order to the same effect. In the course of these proceedings - and in full knowledge of the Order of the International Court - the Office of the Solicitor General, a section of the U.S. Department of Justice - in a letter to the Supreme Court argued once again that: 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'.
>
> This statement of a high-ranking official of the Federal Government . . . had a direct influence on the decision of the Supreme Court.
>
> (2) In the following, the U.S. Supreme Court - an agency of the United States - refused by a majority vote to order that the execution be stayed. In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures . . .
>
> (3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency - for the first time in the history of this institution - had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case . . ."

.....

98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. As Germany's third submission refers expressly to an international legal obligation "to comply with the Order on Provisional Measures issued by the Court on 3 March 1999", and as the United States disputes the existence of such an obligation, the Court is now called upon to rule expressly on this question.

99. The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). This interpretation has been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do 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.

100. 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 due 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.)

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".

101. Finding itself faced with two texts which are not in total harmony, the Court will first of all note 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 will therefore now consider the object and purpose of the Statute together with the context of Article 41.

102. The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by

binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. 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).

Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (citations omitted).

104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force.

105. The initial preliminary draft of the Statute of the Permanent Court of International Justice, as prepared by the Committee of Jurists established by the Council of the League of Nations, made no mention of provisional measures. A provision to this effect was inserted only at a later stage in the draft prepared by the Committee, following a proposal from the Brazilian jurist Raul Fernandes.

Basing himself on the Bryan Treaty of 13 October 1914 between the United States and Sweden, Raul Fernandes had submitted the following text:

> "Dans le cas où la cause due différend consiste en actes déterminés déjà effectués ou sur le point de l'être, la Cour pourra ordonner, dans le plus bref délai, à titre provisoire, des mesures conservatoires adéquates, en attendant le jugement définitif." (Comité consultatif de juristes, *Procès-verbaux des séances due comité*,

16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 609.)

In its English translation this text read as follows:

> "In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court." (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920 (with Annexes), The Hague, 1920, p. 609.)

The Drafting Committee prepared a new version of this text, to which two main amendments were made: on the one hand, the words "la Cour pourra ordonner" ("the Court may . . . order") were replaced by "la Cour a le pouvoir d'indiquer" ("the Court shall have the power to suggest"), while, on the other, a second paragraph was added providing for notice to be given to the parties and to the Council of the "measures suggested" by the Court. The draft Article 2*bis* as submitted by the Drafting Committee thus read as follows:

> "Dans le cas où la cause due différend consiste en un acte effectué ou sur le point de l'être, la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires due droit de chacun doivent être prises à titre provisoire.
>
> "En attendant son arrêt, cette suggestion de la Cour est immédiatement transmise aux parties et au Conseil." (Comité consultatif de juristes, *Procès-verbaux des séances due comité*, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 567-568.)

The English version read:

> "If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.
>
> Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council." (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920 (with Annexes), The Hague, 1920, pp. 567-568.)

The Committee of Jurists eventually adopted a draft Article 39, which amended the former Article 2*bis* only in its French version: in the second paragraph, the words "*cette suggestion*" were replaced in French by the words "*l'indication*".

106. When the draft Article 39 was examined by the Sub-Committee of the Third Committee of the first Assembly of the League of Nations, a number of amendments were considered. Raul

Fernandes suggested again to use the word "ordonner" in the French version. The Sub-Committee decided to stay with the word "indiquer", the Chairman of the Sub-Committee observing that the Court lacked the means to execute its decisions. The language of the first paragraph of the English version was then made to conform to the French text: thus the word "suggest" was replaced by "indicate", and "should" by "ought to". However, in the second paragraph of the English version, the phrase "measures suggested" remained unchanged.

The provision thus amended in French and in English by the Sub-Committee was adopted as Article 41 of the Statute of the Permanent Court of International Justice. It passed as such into the Statute of the present Court without any discussion in 1945.

107. The preparatory work of Article 41 shows that the preference given in the French text to "*indiquer*" over "*ordonner*" was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.

108. The Court finally needs to consider 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 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. 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.

109. 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 has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

.....

INTERNATIONAL COURT OF JUSTICE COUR INTERNATIONALE DE JUSTICE

Declaration of President Guillaume

Subparagraph (7) of the operative part of the Court's Judgment envisages a situation where, despite the commitment by the United States noted by the Court in subparagraph (6), a severe penalty is imposed upon a German national without his or her rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations having been respected. The Court states that, in such a case, "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".

This subparagraph represents a response 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.

(Signed) Gilbert Guillaume.

INTERNATIONAL COURT OF JUSTICE COUR INTERNATIONALE DE JUSTICE

Separate opinion of Vice-President Shi

1. It was with a certain reluctance that I voted in favour of operative paragraph 128 (3) and (4) of the Court's Judgment. The main reason for this is my belief that the Court's findings in these two paragraphs were based on a debatable interpretation of Article 36 of the Vienna Convention on Consular Relations (hereinafter called "the Convention").

2. In operative paragraph 128 (3), the Court 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 violated its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1".

I fully agree with the Court that the United States violated its obligations to Germany under Article 36, paragraph 1, of the Convention. However, I have doubts as to the Court's finding that the United States also violated its obligations to the LaGrand brothers. The Court's decision is a consequence of its interpretation of Article 36, paragraph 1, in particular subparagraph *(b)*, of the Convention, regarding the differences between the Applicant and the Respondent as to whether that subparagraph creates individual rights in addition to the rights appertaining to the States parties.

Germany claimed that:

"the right to be informed upon arrest of the rights under Art. 36 (1) *(b)* of the Vienna Convention does not only reflect a right of the sending State (and home State of the individuals involved) towards the receiving State but also is an individual right of every national of a foreign State party to the Vienna Convention entering the territory of another State party" (Memorial of Germany, Vol. I, p. 116, para. 4.91).

Whereas the United States contended that

"rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting - not requiring - States to offer them consular assistance, but the Convention's role is not to articulate or confer individual rights" (Counter-Memorial of the United States, p. 81, para. 97).

4. In the present case, both the Applicant and the Respondent had no divergence of views as to the normal meaning of the words of Article 36, paragraph 1 *(b)*. However, the Parties reached differing conclusions on the interpretation of the subparagraph. In these circumstances I wonder whether it is proper for the Court, in approaching the issue, to place so much emphasis on the purported clarity of language of the provision, putting aside altogether the customary rules of interpretation. In my view it is not unreasonable for the United States to contend that the rights of nationals of the sending State under detention or arrest to consular notification and access under paragraph 1 *(b)* are not independent of, but rather are derived from, the right of the State party to protect and assist its nationals under the Convention, if the subparagraph is read, as the United States reads it, in context and in the light of the object and purpose of the Convention.

5. In the first place, the very title of the Convention is none other than the "Vienna Convention on Consular Relations". And the object and purpose of the conclusion of an international convention on consular relations as indicated in the preamble is to "contribute to the development of friendly relations among nations". Nowhere in the Preamble of the Convention is reference made to the creation of rights of individuals under the Convention.

6. Secondly, Article 36, which bears the title "Communications and contact with nationals of the

sending State", begins with the words: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State". This clause serves as the *chapeau* governing all the paragraphs of the Article, including paragraph 1 *(b)*, where "rights" of the concerned nationals of the sending State are provided. Clearly, the effect of this clause is to limit the scope of Article 36 to facilitation of the exercise of consular functions relating to nationals of the sending State. It is unfortunate that paragraph 77 of the Judgment made no mention of the *chapeau* of the Article, as if it were irrelevant to the context of paragraph 1 *(b)*.

7. Thirdly, according to Article 5 of the Convention, consular functions consist *inter alia* in "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law" (Art. 5 *(a)*) and "helping and assisting nationals, both individuals and bodies corporate, of the sending State" (Art. 5 *(e)*). Article 36, paragraph 1, and specifically subparagraph *(b)*, has to be read in the context of these consular functions provided for in Article 5. It is obvious that there cannot be rights to consular notification and access if consular relations do not exist between the States concerned, or if rights of the sending State to protect and assist its nationals do not exist.

8. Finally, it is clear, as the United States has contended, that the *travaux préparatoires* of the 1963 Vienna Conference on Consular Relations do not confirm that Article 36, paragraph 1 *(b)*, is intended to create individual rights (Counter-Memorial of the United States, pp. 82-84, paras. 99-100). Indeed, during the negotiating sessions of Article 36, the delegation of Venezuela objected to the opening statement of paragraph 1 *(a)* of the International Law Commission draft, concerning the right of nationals of the sending State to communicate with and to have access to the competent consulate, contending that it was inappropriate in a convention on consular relations, and that "foreign nationals in the receiving State should be under the jurisdiction of that State and should not come within the scope of a convention on consular relations" (*United Nations Conference on Consular Relations*, 1963, Vol. I, p. 331, para. 32). In the end, on the motion of Venezuela, Ecuador, Spain, Chile and Italy, the Second Committee of the Conference decided to reverse the original order of Article 36, paragraph 1 *(a)*, of the International Law Commission draft, so that the subparagraph refers first to the right of consular officers to communicate with and to have access to nationals of the sending State, and secondly to the right of nationals of the sending State to have the same freedom with respect to communication with and access to consular officers of the sending State (*ibid.*, p. 334, para. 2, and p. 336, para. 22).

9. This reversal of order in Article 36, paragraph 1 *(a)*, confirms the interpretation of that subparagraph in the context and in the light of the object and purpose of the Convention. Thus, there are good grounds for the contention by the United States in its Counter-Memorial that

"That reversal underscores the fundamental point, that the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals is inextricably linked to and derived from the right of the State." (Counter-Memorial of the United States, p. 84, para. 100.)

10. Furthermore, the original International Law Commission draft Article 36, paragraph 1 *(b)*, makes mandatory the obligation of the receiving State to inform the competent consulate of the sending State in case of detention of a national of that State. It reads:

"*(b)* The competent authorities shall, without undue delay, inform the competent consulate of the sending State, if within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay" (*Yearbook of the International Law Commission,* 1961, Vol. II, p. 112).

11. During the negotiating sessions of the Vienna Conference, a number of delegations stressed the importance of the draft subparagraph [examples omitted]

12. However, during the negotiating sessions, this draft provision mainly aroused two different reactions. Quite a number of States, though in agreement with the formulation of the principle in the draft, were much concerned about the heavy burden that the mandatory consular notification would impose on the receiving State, particularly on those States on whose territories there are a sizeable number of resident aliens and foreign tourists or other short-term visitors. There were also some delegations, at least partly motivated by the then Cold War mentality, who would have liked the subparagraph to reflect the free will of the detained or arrested person to state whether or not he or she wished to be approached by consular officials of his or her country.

15. The result of the debate was the adoption of the twenty States' amendment with the insertion of the words "if he so requests" at the beginning of the subparagraph. The last sentence of Article 36, paragraph 1 *(b)*, i.e., the provision that the competent authorities of the receiving State "shall inform the person concerned without delay of his rights" (*United Nations Conference on Consular Relations,* 1963, Vol. 1, pp. 336-343) was inserted belatedly as a compromise between the aforesaid two opposing views. Thus, 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. Moreover, 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.

17. Finally, I should like to make it clear that it was not for reasons relating to the legal consequences of the breach of Article 36, paragraph 1 *(b)*, that I voted in favour of operative paragraph 128 (7) of the Judgment. This operative paragraph is of particular significance in a case where a sentence of death is imposed, which is not only a punishment of a severe nature, but also one of an irreversible nature. Every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing. Out of this consideration, I voted in favour.

(Signed) Shi Jiuyong.

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