

MAR 8 1999

OFFICE OF THE CLERK

No. 127, Orig. (A-736)

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,  
Ambassador of the Federal Republic of Germany  
to the United States; and WOLFGANG RUDOLPH, Consul General  
of the Federal Republic of Germany to the United States,

*Plaintiffs,*

— v. —

UNITED STATES OF AMERICA and  
JANE DEE HULL, Governor of the State of Arizona,

*Defendants.*

ORIGINAL ACTION

**MOTION FOR LEAVE TO FILE A BILL OF  
COMPLAINT AND FOR A TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY INJUNCTION, COMPLAINT,  
AND MEMORANDUM IN SUPPORT**

Peter Heidenberger  
(*Counsel of Record*)  
Thomas G. Corcoran, Jr.  
BERLINER, CORCORAN & ROWE  
1101 17th Street N.W.  
Washington D.C. 20036  
202-293-5555

Donald Francis Donovan  
Michael M. Ostrove  
Daniel C. Malone  
DEBEVOISE & PLIMPTON  
875 Third Avenue  
New York, New York 10022  
212-909-6000

*Counsel for Plaintiffs the Federal Republic of  
Germany, Ambassador Jürgen Chrobog, and  
Consul General Wolfgang Rudolph*

Dated: March 3, 1999



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

No. 127, Orig. (A-736)

---

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,  
Ambassador of the Federal Republic of Germany  
to the United States; and WOLFGANG RUDOLPH, Consul General  
of the Federal Republic of Germany to the United States,

*Plaintiffs,*

— v. —

UNITED STATES OF AMERICA and  
JANE DEE HULL, Governor of the State of Arizona,

*Defendants.*

---

ORIGINAL ACTION

---

---

**MOTION FOR LEAVE TO FILE A BILL OF  
COMPLAINT AND FOR A TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY INJUNCTION, COMPLAINT,  
AND MEMORANDUM IN SUPPORT**

---

---

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district encompassing the State of Arizona, respectfully move this Court for leave to file a bill of complaint and memorandum in support in an original action, pursuant to 28 U.S.C. § 1251(b)(1), and apply temporarily to restrain or preliminarily to enjoin defendants from executing a German national, Walter LaGrand, on March 3, 1999, or

thereafter, pending final resolution of the Federal Republic of Germany's case against the United States in the International Court of Justice.

Germany bases its motion and request for provisional relief on the order of the International Court of Justice, issued within the last hour, that the United States take all measures to ensure that Mr. LaGrand is not executed pending the disposition of Germany's application in that Court. It is of critical importance to the rule of law in the international community that the United States abide by the decision of the International Court of Justice in a case that the United States has by treaty agreed to submit to that Court. The ICJ's order is attached as Exhibit A.

At a minimum, this Court should grant Germany's application for a stay of or injunction against the execution pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion. *See Faulder v. Johnson*, 119 S. Ct. 614 (1998).

In conjunction with this Motion, plaintiffs file a complaint and a memorandum in support of this Motion.

Dated: March 3, 1999

Respectfully submitted,

	<u>/s/</u>
Donald Francis Donovan	Peter Heidenberger
Michael M. Ostrove	(Counsel of Record)
Daniel C. Malone	Thomas G. Corcoran, Jr.
DEBEVOISE & PLIMPTON	BERLINER, CORCORAN & ROWE
875 Third Avenue	1101 17th Street N.W.
New York, New York 10022	Washington D.C. 20036
212-909-6000	202-293-5555

*Counsel for Plaintiffs the Federal Republic  
of Germany, Ambassador Jürgen Chrobog,  
and Consul General Wolfgang Rudolph*

## APPENDIX A

4

### INTERNATIONAL COURT OF JUSTICE

YEAR 1999

1999  
3 March  
General List  
No. 104

3 March 1999

#### CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(GERMANY v. UNITED STATES OF AMERICA)

#### REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

#### ORDER

*Present: Vice-President Weeramantry, Acting President, President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.*

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court at 7.30 p.m. (The Hague time) on 2 March 1999, whereby the Federal Republic of Germany (hereinafter "Germany") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States.

*Makes the following Order:*

1. Whereas, in its aforementioned Application, Germany bases 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 on Consular Relations ("the Optional Protocol");
2. Whereas, in the Application, it is stated that in 1982 the authorities of the State of Arizona detained

two German nationals, Karl and Walter LaGrand; whereas it is maintained that these individuals were tried and sentenced to death without having been informed, as is required under Article 36, subparagraph 1 (b), of the Vienna Convention, of their rights under that provision; whereas it is specified that that provision requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36; whereas it is also alleged that the failure to provide the required notification precluded Germany from protecting its nationals' interests in the United States provided for by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States courts;

3. Whereas, in the Application, Germany states that it had been, until very recently, the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany; whereas it had accepted that contention as true; however, during the proceedings before the Arizona Mercy Committee on 23 February 1999, the State Attorney admitted that the authorities of the State of Arizona had indeed been aware since 1982 that the two detainees were German nationals;

4. Whereas, in the same Application, Germany further states that Karl and Walter LaGrand, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the Federal Court of First Instance; whereas that court, applying the municipal law doctrine of "procedural default", decided that, because the individuals in question had not asserted their rights under the Vienna Convention in the previous legal proceedings at State level, they could not assert them in the Federal *habeas corpus* proceedings; and whereas the intermediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed this decision;

5. Whereas, the Federal Republic of Germany asks the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the

United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;

(3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 2 March 1999, after having filed its Application, Germany also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Germany refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it affirms in particular that the United States has violated its obligations under the Vienna Convention;

8. Whereas, in its request for the indication of provisional measures of protection, Germany recalls that Karl LaGrand was executed on 24 February 1999, despite all appeals for clemency and numerous diplomatic interventions by the German Government at the highest level; whereas the date of execution of Walter LaGrand in the State of Arizona has been set for 3 March 1999; and whereas the request for the urgent indication of provisional measures is submitted in the interest of this latter individual; and whereas Germany emphasizes that:

"The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law";

and whereas Germany adds the following:

"Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the *status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand - as it did execute his brother Karl - before this Court can consider the merits of Germany's claims and Germany will be forever deprived of the opportunity to have this *status quo ante* restored in the event of a judgment in its favour";

9. Whereas, Germany asks that, pending final judgment in this case, the Court indicate that:

"The United States should take all measures at its disposal to ensure that Walter LaGrand



is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which it has taken in implementation of that Order";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat of execution of a German citizen";

10. Whereas, on 2 March 1999, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and sent it forthwith a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court;

11. Whereas, by a letter dated 2 March 1999, the Vice-President of the Court 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";

and whereas a copy of that letter was transmitted forthwith to the German Government;

12. Whereas, on 3 March 1999, at 9.00 a.m. (The Hague time), the Vice-President of the Court received the representatives of the Parties in order to obtain information from them with regard to the subsequent course of the proceedings; whereas the representative of the German Government stated that the Governor of the State of Arizona had rejected a recommendation by the Mercy Committee that the execution of Walter LaGrand should be stayed, so that the latter would in consequence be executed this same day at 3.00 p.m. (Phoenix time); whereas he emphasized the extreme urgency of this situation; and whereas, referring to the provisions of Article 75 of the Rules of Court, he asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties;

\*

\*\*

13. Whereas, on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

14. Whereas, Article I of the Optional Protocol, which Germany invokes as the basis of jurisdiction of

the Court in this case, is worded as follows:

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

15. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Germany and the United States are parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, in its Application Germany stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

17. Whereas, in the light of the requests submitted by Germany in its Application and of the submissions made therein, there exists *prima facie* a dispute with regard to the Application of the Convention within the meaning of Article I of the Optional Protocol;

18. Whereas, the Court has satisfied itself that, *prima facie*, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States.

\* \*

19. Whereas, the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time;

20. Whereas, Germany emphasizes that it did not become fully aware of the facts of the case until 24 February 1999 and that since then it has pursued its action at diplomatic level;

21. Whereas, under Article 75, paragraph 1, of the Rules of Court, the latter "may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties"; whereas a provision of this kind has substantially featured in the Rules of Court since 1936, and whereas, if the Court has not, to date, made use of the power conferred upon it by this provision, the latter appears nonetheless to be clearly established; whereas the Court may make use of this power, irrespective of whether or not it has been seized by the parties of a request for the indication of provisional measures; whereas in such a case it may, in the event of extreme urgency, proceed without holding oral hearings; and whereas it is for the Court to decide in each case if, in the light of the particular circumstances of the case, it should make use of the said power;

22. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, I.C.J. Reports 1973, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979*, I.C.J. Reports 1979, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993, p. 19, para. 34); *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Provisional Measures, Order of 9 April 1998*, p. 10, para. 36);

24. Whereas the execution of Walter LaGrand is ordered for 3 March 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case;

25. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

\*

\* \*

26. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules;

27. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudice findings the Court might make on the merits; and whereas such measures would preserve the respective rights of Germany and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

28. Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;

\*

\* \*

29. For these reasons,

THE COURT

Unanimously,

I. *Indicates* the following provisional measures:

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

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

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(Signed) Christopher G. Weeramantry,  
Vice-President.

(Signed) Eduardo Valencia-Ospina,  
Registrar.

Judge Oda appends a declaration to the Order of the Court.

President Schwebel appends a separate opinion to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E. V.O.

---

**DECLARATION OF JUDGE ODA**

1. I voted in favour of the Court's Order with great hesitation as I considered that the request for the indication of provisional measures of protection submitted by Germany to the Court should have been dismissed. However, in the limited time - only several hours - given to the Court to deal with this matter, I have regrettably found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. I can, on humanitarian grounds, understand the plight of Mr. Walter LaGrand and recognize that owing to the fact that Germany filed this request as late as yesterday evening (namely, at 7.30 p.m. on 2 March 1999), his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Walter LaGrand has been treated in all legal proceedings in accordance with the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters. Whether capital punishment would be contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights is not a matter to be determined by the International Court of Justice - at least in the present situation.

3. As I stated earlier, Germany's request was presented to the Court at 7.30 p.m. on 2 March 1999 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Mr. Walter LaGrand was brought to the domestic courts of the United States for the alleged murder which took place in 1982.

If there was any dispute between Germany and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Walter LaGrand, as the United States did not inform the German consular officials of that event. In fact, the German consular officials were not aware of the situation until 1992 and only learned of it from Mr. Walter LaGrand himself.

4. What did Germany ask the Court to decide in its request for the indication of provisional measures of protection of 2 March 1999? Germany asked mainly for a decision relating to Mr. Walter LaGrand's personal situation, namely, his pending execution by the competent authorities of the State of Arizona, which Germany did not attempt to deal with until yesterday.

Germany requested the restoration of the *status quo ante*. However, if consular contact had occurred at the time of Mr. Walter LaGrand's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different.

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve *rights of States* exposed to an imminent breach which is irreparable and these *rights of States* must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the application instituting proceedings or be *directly* related to it. In this case, however, there is no question of such *rights* (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

I would like to reiterate that the request for the indication of provisional measures must essentially be related to the application instituting proceedings presented by the State. The fact that the United States failed to notify the German consular authorities of the arrest, detention and trial of Mr. Walter LaGrand and that Germany did not until yesterday take steps before this Court, is not - however much it may appear to be - *directly* related to the imminent execution of that German national. The purpose of provisional measures is to preserve the *rights of States* exposed to an imminent breach which is irreparable.

6. If the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continues. In addition, the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.

While I consider that the International Court of Justice should be utilized more frequently in the world, I cannot condone the use of the Court for such matters as the above under the pretext of the protection of human rights.

7. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Germany's request. I reiterate and emphasize that I voted in favour of the Order solely for humanitarian reasons.

(Signed) Shigeru Oda

---

## SEPARATE OPINION OF PRESIDENT SCHWEBEL

The issuance of today's Order indicating provisional measures is unprecedented. It is to be hoped that it will not form a precedent, for it departs in critical measure from a basic rule of the judicial process. The Order has been issued on the basis of one party's views, without hearing the other. It is unprecedented in a further respect as well, for it is the first case in which the Court has issued an Order on its own motion, pursuant to Article 75, paragraph 1, of the Rules of Court providing that:

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

Whether the Court has acted in correct application of that Rule is open to question. The Rule assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's Application and its request for provisional measures. Article 74 of the Rules provides that, where a party makes such a request, the Court shall arrange "a hearing which will afford the parties an opportunity of being represented at it". No such hearings have been held, arranged or contemplated in the current case.

Under Article 75, paragraph 1, the Court may issue an order of provisional measures without giving the parties the opportunity to be heard. That is an extraordinary power, to be exercised with the utmost caution. There may be room to question whether sovereign States should be subjected to the Court's restraints *pendente lite* without giving them the opportunity to be heard. But if in extreme circumstances they are to be so subject, then the Court should act in meticulous conformity with its Rules. Its Rules do not contemplate it so acting where a party has - as Germany here - made a request for the indication of provisional measures.

Moreover, the Court has done so on the basis only of Germany's Application. It has no other pleading, no other basis for the indication of provisional measures, before it. Is proceeding in this way consistent with fundamental rules of the procedural equality of the parties?

My doubts are confirmed by a reading of the most authoritative work in the field, Jerzy Sztucki's *Interim Measures in The Hague Court* (1983). Professor Sztucki concludes that the Court may indicate provisional measures *proprio motu* "without any request for interim measures". He adds that only such a case "qualifies as an action *proprio motu* in the meaning of Article 75 (1) of the present Rules", and he reaches that conclusion after a careful examination of prior versions of the Rules of Court and the pertinent *travaux préparatoires* of all versions (at page 158.) But in this case, the Court has had such a request, and it is on the basis of the contents of Germany's accompanying Application that the Court has acted - all without affording the United States a hearing or the opportunity to present written observations.

Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the

request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*.

I do not oppose the substance of the Court's Order, and accordingly have not voted against it. I have profound reservations about the procedures followed both by the Applicant and the Court.

(Signed) Stephen M. SCHWEBEL.

---



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

**No. 127, Orig. (A-736)**

---

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,  
Ambassador of the Federal Republic of Germany  
to the United States; and WOLFGANG RUDOLPH, Consul General  
of the Federal Republic of Germany to the United States,

*Plaintiffs,*

— v. —

UNITED STATES OF AMERICA and  
JANE DEE HULL, Governor of the State of Arizona,

*Defendants.*

---

ORIGINAL ACTION

---

---

**COMPLAINT**

---

---

This action is brought by Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district embracing the State of Arizona, to enforce and give effect to a ruling issued by the Vice-President and acting President of the International Court of Justice on March 2, 1999 (the "ICJ Ruling"). The ICJ Ruling is authorized by Article 74(4) of the Rules of Court of the International Court of Justice (the "ICJ"). As authorized by that provision, the ICJ Ruling has called upon the

United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect." The ICJ Ruling will be violated if the United States does not ensure that a national of Germany, Walter LaGrand, who is scheduled to be executed today, Wednesday, March 3, 1999, at 5 p.m. eastern standard time, is not executed pending a decision by the ICJ on Germany's pending request for provisional measures of protection and, eventually, a final resolution of the case brought before the International Court of Justice by Germany against the United States. An injunction is necessary to prevent defendants from violating plaintiffs' rights under the ICJ Ruling.

### **NATURE OF THE ACTION**

1. Plaintiffs bring this action for injunctive relief preventing the Defendants from violating federal law in the form of the ICJ Ruling, the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, and the Vienna Convention on Consular Relations and its Optional Protocol, 21 U.S.T. 77, 596 U.N.T.S. 261, as well as principles of international comity arising from those instruments, by executing Mr. LaGrand on March 3, 1999.

### **JURISDICTION**

2. This is a case "affecting Ambassadors . . . and Consuls" within the original jurisdiction of the United States Supreme Court under article III, section 2 of the United States Constitution.

### **THE PARTIES**

3. Plaintiff the Federal Republic of Germany is a foreign state.

4. Plaintiff Jürgen Chrobog is the Ambassador of the Federal Republic of Germany to the United States. At all relevant times, he had supervisory authority over the consular officers of the

Federal Republic of Germany in the United States, including consular officers for the consular district encompassing the State of Arizona.

5. Plaintiff Wolfgang Rudolph is the Consul General of the Federal Republic of Germany to the United States with jurisdiction over the consular district encompassing the State of Arizona.

6. Plaintiffs Jürgen Chrobog and Wolfgang Rudolph bring this action in their capacities as diplomatic and consular officers and on behalf of the Federal Republic of Germany.

7. Defendant Jane Dee Hull is the Governor of the State of Arizona. Pursuant to article V, section 4 of the Constitution of Arizona, the Governor is responsible for “tak[ing] care that the laws be faithfully executed.” That responsibility, by virtue of the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, extends to treaties signed by the United States and ratified by the United States Senate.

### **FACTS**

#### **The Charter of the United Nations and the Statute of the International Court of Justice**

8. On October 24, 1945, the United States of America became an original member of the United Nations. The Federal Republic of Germany effectively became a member of the United Nations on September 18, 1973. On June 26, 1945, exercising the exclusive power to conduct foreign relations granted to the President of the United States, an officer of the executive branch of the United States signed the Charter of the United Nations. U.S. CONST. art. I, § 10; *id.* art. II, § 2. The Senate ratified the U.N. Charter on August 8, 1945. The U.N. Charter is part of the “supreme Law of the Land” under the United States Constitution. U.S. CONST. art. VI.

9. Under Article 93(1) of the U.N. Charter, “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of

the International Court of Justice.” As a result, the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, is also part of the “supreme Law of the Land” under the United States Constitution. U.S. CONST. art. VI.

10. Under Article 94(1) of the Charter, “[e]ach 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.”

11. Pursuant to Article 36(6) of the Statute of the International Court of Justice, “[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”

12. Pursuant to Article 41 of the Statute of the International Court of Justice, the Court may decide 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.”

#### Mr. LaGrand's Death Sentence

13. On September 1, 1982, authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand (the “LaGrands”).

14. Authorities of the State of Arizona were, at the time of the arrest, aware that Karl and Walter LaGrand were German nationals. Only on February 24, 1999, however, did authorities of the State of Arizona admit this knowledge. Because of this delay on the part of Arizona authorities, officials of the Republic of Germany refrained from filing an application and request for provisional measures in the ICJ.

15. The LaGrands were tried, convicted and sentenced to death without being advised of their rights to consular assistance, as guaranteed by Article 36(1)(b) of the Vienna Convention.

16. Had Arizona authorities notified the LaGrands of their rights pursuant to the Vienna Convention, they would have exercised those rights and requested the assistance of German consular officials. Those officials would in turn immediately have provided all possible assistance.

17. In 1992, when all legal recourse at the state level had been exhausted, German consular officers learned, without benefit of any advice from officials of Arizona, of the LaGrands' case.

18. The failure of the competent officials of the United States to provide the notification required under Vienna Convention Article 36 precluded Germany from protecting both its nationals' interests and its own sovereign interests in the United States, as provided for by Articles 5 and 36 of the Vienna Convention. Among other things, Germany was unable to provide assistance prior to trial, during trial and in any subsequent appeals, both in state and federal courts.

19. With the assistance of Germany, the LaGrands first raised the violation of the Vienna Convention rights in a *habeas corpus* petition to the federal District Court for the District of Arizona. That court rejected the assertion of this and other claims based on the domestic doctrine of procedural default. Applying this doctrine, the district court decided that, because the LaGrands had not asserted their rights under the Vienna Convention in the previous legal proceedings at the state level, they could not assert them in the federal *habeas corpus* proceedings. The district court held the procedural default doctrine to apply even though *first*, the LaGrands were unaware of their rights under the Vienna Convention at the time of the earlier state proceedings, and *second*, they were unaware precisely because the legal authorities failed to comply with their obligations under the Vienna Convention promptly to inform them of those rights. The intermediate federal court affirmed.

20. Karl LaGrand was executed on February 24, 1999, in spite of urgent appeals for clemency and numerous diplomatic

interventions at the highest level by the German Government. The President and the Chancellor of the Federal Republic of Germany appealed to the President of the United States. German Foreign Minister Fischer and Justice Minister Däubler-Gmelin raised the issue with their respected counterparts in the United States administration. Démarches were undertaken by the German Ambassador to the United States. The German Ambassador and the German Consul-General appeared before the Mercy Committee of the State of Arizona. German Foreign Minister Fischer, in a letter to the United States Secretary of State Madeleine K. Albright dated February 22, 1999, asserted a violation of Article 36 of the Vienna Convention in the case of the LaGrands. A detailed memorandum was enclosed with that letter. The United States has failed to respond to the Foreign Minister's letter.

21. Germany does not seek to bar the competent authorities of the United States from enforcing its criminal law. Germany contends, however, and has contended since it became aware of the LaGrands' case, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States pursuant to Vienna Convention.

22. Germany asks as well that the death sentence against Walter LaGrand be set aside on humanitarian grounds. Germany is motivated not only by its opposition, as a matter of principle, to the death penalty, but also by the special circumstances of the case. Karl and Walter LaGrand were only 18 and 19 years of age when they were charged with their crimes. They have spent a total of 15 years on death row.

#### Proceedings in the International Court of Justice

23. On March 2, 1999, the Federal Republic of Germany filed an application in the International Court of Justice, instituting proceedings against the United States for violations of the Vienna Convention during the arrest, trial, conviction and sentencing of the

German nationals Karl and Walter LaGrand. The Federal Republic of Germany sought the remedy of *restitutio in integrum*. Germany based jurisdiction for this action on Article 36(1) of the Statute of the International Court of Justice and the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, art. I, 21 U.S.T. 326, to which both the United States and Germany are States Parties.

24. Also on March 2, 1999, the Federal Republic of Germany filed a Request for Provisional Measures with the International Court of Justice, requesting the Court to indicate that the Government of the United States take the measures necessary to ensure that Mr. LaGrand not be executed pending the disposition of the case.

25. On the same day, the Vice-President and acting President of the ICJ issued the ICJ Ruling, calling upon the United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect." The ICJ Ruling is authorized by Article 41 of the Rules of Court of the ICJ.

#### Arizona's Denial of a Stay

26. The Arizona clemency panel recommended that Arizona Governor Jane Dee Hull stay the execution in deference to the proceeding in the ICJ. Governor Hull has declined to issue a stay.

#### Defendant's Imminent Violation of the U.N. Charter and ICJ Ruling

27. Walter LaGrand is scheduled to be executed today at 5 p.m. eastern standard time. Unless this Court stays Mr. LaGrand's execution, the Federal Republic of Germany will be denied the opportunity both to exercise its rights under the Vienna Convention and to argue the merits of its claim of right before the ICJ, a competent court that has provisionally exercised jurisdiction over the case. Such a denial would violate both the U.N. Charter and the ICJ

Ruling.

**COUNT ONE**

**(Imminent Violation of the U.N. Charter and ICJ Ruling)**

28. Plaintiffs repeat and reallege paragraphs 1 through 27.

29. Execution of Mr. LaGrand by defendant, her successors, employees, officers or agents would constitute a violation of federal law in the form of the ICJ Ruling and the U.N. Charter.

**COUNT TWO**

**(Imminent Violation of Principles of  
International Comity)**

30. Plaintiffs repeat and reallege paragraphs 1 through 29.

31. Execution of Mr. LaGrand by the defendant, her successors, employees, officers or agents would constitute a violation of principles of international comity constituting federal law and arising from the ICJ Ruling and the U.N. Charter.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the execution of Mr. LaGrand by officials subject to the authority of defendant Jane Dee Hull, Governor of the State of Arizona, prior to the resolution of the proceedings instituted by the Federal Republic of Germany against the United States in the International Court of Justice, or in contravention of any rulings of the International Court of Justice, would constitute a violation of federal law in the form of treaties of the United States.



B. Declare that the execution of Mr. LaGrand by officials subject to the authority of defendant Jane Dee Hull, Governor of the State of Arizona, prior to the resolution of the proceedings instituted by the Federal Republic of Germany against the United States in the International Court of Justice, or in contravention of any rulings of the International Court of Justice, would constitute a violation of principles of international comity that form part of federal law.

C. Enjoin defendant Jane Dee Hull, Governor of the State of Arizona, from executing, or permitting the execution of, Mr. LaGrand pending final resolution of the proceedings instituted by Germany against the United States in the International Court of Justice.

D. Grant such other and further relief as to this Court may seem just and proper.

Dated: March 3, 1999

Respectfully submitted,

	<u>/s/</u>
Donald Francis Donovan	Peter Heidenberger
Michael M. Ostrove	(Counsel of Record)
Daniel C. Malone	Thomas G. Corcoran, Jr.
DEBEVOISE & PLIMPTON	BERLINER, CORCORAN & ROWE
875 Third Avenue	1101 17th Street N.W.
New York, New York 10022	Washington D.C. 20036
212-909-6000	202-293-5555

*Counsel for Plaintiffs the Federal Republic  
of Germany, Ambassador Jürgen Chrobog,  
and Consul General Wolfgang Rudolph*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998  
**No. 127, Orig. (A-736)**

---

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,  
Ambassador of the Federal Republic of Germany  
to the United States; and WOLFGANG RUDOLPH, Consul General  
of the Federal Republic of Germany to the United States,

*Plaintiffs,*

— v. —

UNITED STATES OF AMERICA and  
JANE DEE HULL, Governor of the State of Arizona,

*Defendants.*

---

ORIGINAL ACTION

---

---

**MEMORANDUM IN SUPPORT OF MOTION FOR  
LEAVE TO FILE A BILL OF COMPLAINT  
AND MOTION FOR TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY INJUNCTION**

---

---

## TABLE OF CONTENTS

	PAGE
Table of Authorities . . . . .	27
I. This Court Should Give Effect To The Decision of the International Court of Justice Because It Is Binding Upon The United States . . . . .	36
A. Pursuant to the UN Charter and International Law, The ICJ Decision Is The Supreme Law of the Land . . . . .	36
B. As A Court Of Equity, This Court Should Give Effect To the Decision of the International Court of Justice In the Interest of International Comity and the Rule of Law . . . . .	40
II. This Court Should Enjoin Defendants From Violating The ICJ Rulings And The U.N. Charter . . . . .	44
A. <i>Ex Parte Young</i> And The Treaties Fully Authorize Germany's Suit . . . . .	44
B. Plaintiffs Are Entitled To The Relief They Seek . . . . .	46
III. This Court Should Grant Germany's Motion For Leave To File . . . . .	48
Conclusion . . . . .	50

## TABLE OF AUTHORITIES

## CASES

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) .....	42
Breard v. Greene, 118 S. Ct. 1352 (1998) .....	45
Boyle v. United Technologies Corp., 487 U.S. 500 (1988) .....	41, 42
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) .....	41
Cooper v. Aaron, 358 U.S. 1 (1958) .....	39, 43
Doran v. Salem Inn, 422 U.S. 922 (1978) .....	46
Edelman v. Jordan, 415 U.S. 651 (1974) .....	44
Electric Company of Sofia and Bulgaria, 1939 P.C.I.J. (Judgment), Ser. A/B, No. 77 .....	38, 39
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) .....	41
E-Systems, Inc. v. Islamic Republic of Iran, Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983) .....	40
First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) .....	42

Ex parte Gruber, 269 U.S. 302 (1925) .....	35
Faulder v. Johnson, 119 S. Ct. 614 (1998) .....	35
Hilton v. Guyot, 159 U.S. 113 (1894) .....	42
Hines v. Davidowitz, 312 U.S. 52 (1941) .....	42
Holmberg v. Armbrrecht, 327 U.S. 392 (1946) .....	41
Japan Line, Ltd. v. County of Los Walteres, 441 U.S. 434 (1979) .....	42
Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962) .....	41
Milliken v. Bradley, 433 U.S. 267 (1977) .....	44
Monaco v. Mississippi, 292 U.S. 313 (1934) .....	46
Morales v. Trans-World Airways, Inc., 504 U.S. 374 (1992) .....	45
Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (Interim Protection Order of Dec. 2) . . .	39, 40
Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22) . . . .	38

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) .....	48, 49
Papasan v. Allain, 478 U.S. 265 (1986) .....	44
Porter v. Warner Holding Co., 328 U.S. 395 (1946) .....	41
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) .....	41
The Chinese Exclusion Case, 130 U.S. 581 (1889) .....	42
United States v. Belmont, 301 U.S. 324 (1937) .....	42
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) .....	46, 47, 48
United States v. Pink, 315 U.S. 203 (1942) .....	46, 47
University of Texas v. Camenisch, 451 U.S. 390 (1981) .....	47
Vienna Convention on Consular Relations (Para. v. U.S.), No. 99 (Provisional Measures Order of Apr. 9, 1998) .....	43
Virginian Ry. Co. v. System Federation No. 40, et al., 300 U.S. 515 (1937) .....	41
W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400 (1990) .....	42

Wainwright v. Booker, 473 U.S. 935 (1985) .....	47
Wyoming v. Oklahoma, 502 U.S. 437 (1992) .....	48
Ex parte Young, 209 U.S. 123 (1908) .....	44, 45
Zschemig v. Miller, 389 U.S. 429 (1968) .....	47

### CONSTITUTION, STATUTES & TREATIES

U.S. Const. art. III, § 2 .....	34, 35, 50
U.S. Const. art. VI .....	34, 36
U.S. Const. art. VI, cl. 2 .....	41, 46, 47
U.S. Const. amend. XI .....	46
U.N. Charter art. 92 .....	39
U.N. Charter art. 93 .....	36
Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, 21 U.S.T. 326 .....	37
Rules of Court, International Court of Justice, art. 32(1) .....	43
Rules of Court, International Court of Justice, art. 74(4) .....	34, 38, 41
Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055 .....	36, 37, 38



Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 .....	36
---	----

Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 .....	38
---	----

### MISCELLANEOUS

Comité des juristes de l'étude du statut de la Cour Permanente de Justice Internationale (First Session, 11 March 1929) .....	39
---	----

Edvard Hambro, The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice, in <i>Rechtsfragen der Internationalen Organisation</i> 168-69 (Walter Schätzel & Hans-Jürgen Schlochauer, eds., 1956) .....	39
---	----

Henry Friendly, In Praise of Erie — And the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964) ....	41
--	----

Ian Brownlie, State Responsibility, Part 1 (1983) .....	40
---	----

Jiménez de Aréchaga, International Responsibility, in <i>Manual of Public International Law</i> , (Max Sørensen, ed., 1968) .....	48
---	----

Jordan J. Paust, Breard and Treaty-Based Rights Under the Consular Convention, 92 Am.J. Int'l L. 691 (1998) .....	45
---	----

Manley Ottmar Hudson, The Permanent Court of International Justice, 1920-1942 (1943) .....	40
---	----

Petition for Writ of <i>Certiorari</i> , <i>Breard v. Greene</i> , 118 S. Ct. 1352 (1998) (No. 97-1390) .....	49
--	----

Report of the Int'l Law Comm'n, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10/1996 (Draft Articles on State Responsibility) . . . . .	40, 48
Restatement (Third) of the Foreign Relations Law of the United States § 903 (1987) . . . . .	36, 37
Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987) . . . . .	42
The Federalist (Clinton Rossiter ed. 1961) . . . . .	35, 42

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

No. 127, Orig. (A-736)

---

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,  
Ambassador of the Federal Republic of Germany  
to the United States; and WOLFGANG RUDOLPH, Consul General  
of the Federal Republic of Germany to the United States,

*Plaintiffs,*

— v. —

UNITED STATES OF AMERICA and  
JANE DEE HULL, Governor of the State of Arizona,

*Defendants.*

---

ORIGINAL ACTION

---

---

**MEMORANDUM IN SUPPORT OF MOTION FOR  
LEAVE TO FILE A BILL OF COMPLAINT  
AND MOTION FOR TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY INJUNCTION**

---

---

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States (collectively, "Germany"), respectfully submit this memorandum in support of (1) their motion for leave to file a complaint in an original action, and (2) their motion to temporarily restrain or preliminarily enjoin

Defendants from executing Germany's national, Walter LaGrand, on March 3, 1999, or thereafter, pending this Court's disposition of the motion for leave to file the complaint, further order of this Court, or a ruling from the International Court of Justice (the "ICJ") on Germany's request to that court for an order of Provisional Measures and, eventually, on the merits of Germany's suit against the United States currently pending before that Court.

On March 2, 1999, the Vice-President and acting President of the ICJ issued a ruling pursuant to Article 74(4) of the ICJ's Rules of Court. As authorized by that provision, the ICJ ruling called upon the United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect."

Earlier today, the ICJ issued an order indicating that the United States should take all measures to ensure that Mr. LaGrand is not executed pending the disposition of Germany's application to that Court. As a matter of international law, the ICJ Order applies both to the United States and to its constituent subdivisions, such as the State of Arizona.

The actions required by the ICJ Order are binding upon the United States both pursuant to Article 94(1) of the United Nations Charter, a treaty of the United States. Because the ICJ Order carries the force of a treaty, it constitutes the supreme law of the land. U.S. CONST. art. VI. Germany's complaint seeks an order from this Court enjoining defendants from their imminent violation of that law. But even if the ICJ Order were not binding, compliance by the United States' with the Court's indication of provisional measures would plainly serve the public interest by vindicating the rule of law.

This Court has original jurisdiction to hear Germany's complaint. Article III, section 2 of the United States Constitution extends the federal judicial power to "all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases affecting Ambassadors, other Public Ministers and Consuls;" and to

"Controversies . . . between a State, or the Citizens thereof, and a foreign State . . . ." U.S. CONST. art. III, § 2; *see also Ex parte Gruber*, 269 U.S. 302, 303 (1925).<sup>1</sup> The same section provides that "[i]n all cases affecting Ambassadors, other public Ministers and Consuls," this Court shall have original jurisdiction.

At a minimum, this Court should grant Germany's application for a stay of or injunction against the execution pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion. *See Faulder v. Johnson*, 119 S. Ct. 614 (1998). Not only do Germany's case in the ICJ and its application here involve a human life, but they raise important issues of international and United States law. As this Court will appreciate, it is no small step for a sovereign state and close ally of the United States to bring proceedings against the United States both in the ICJ and this Court. Having taken that step after lengthy deliberation, Germany deserves a considered hearing of its motion. This Court can serve the cause of respect for law only if it gives — and is seen by the international community to give — careful consideration to Germany's application.

---

1. *See also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *id.* No. 81 at 487 ("Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation").

## I.

**THIS COURT SHOULD GIVE EFFECT TO  
THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE  
BECAUSE IT IS BINDING UPON THE UNITED STATES.**

**A. Pursuant to the UN Charter and International Law,  
The ICJ Decision Is The Supreme Law of the Land.**

On October 24, 1945, the United States of America became an original member of the United Nations. As a result, the United States agreed to abide by the provisions of the Charter of the United Nations. Pursuant to the mechanism by which the United States Constitution ensures that this country's local jurisdictions respect its treaty obligations, the Charter of the United Nations became part of the "supreme Law of the Land" and binding throughout the United States. U.S. CONST. art. VI. In addition, pursuant to Article 93(1) of the Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. CHARTER, art. 93; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT") § 903 cmt. c (1987). Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" under the United States Constitution.

Pursuant to Article 36(1) of the Statute of the International Court of Justice, the ICJ's jurisdiction extends to "all matters specially provided for . . . in treaties and conventions in force . . . ." Statute of the International Court of Justice, Oct. 24, 1945 ("ICJ Statute"), art. 36(1), 59 Stat. 1055.

Both Germany and the United States are parties to the Vienna Convention on Consular Relations and to its Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, 21 U.S.T. 326. Article 36 of the Vienna Convention guarantees

certain rights of consular notification and access when nationals of a sending state are detained by competent authorities of the receiving state. Article I of the Optional Protocol provides that

[d]isputes 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.

Article 36(6) of the ICJ Statute provides that “[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”

Article 41 of the ICJ Statute provides that 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.” While the ICJ has not itself ruled whether an order indicating provisional measures is binding on the parties, RESTATEMENT § 903 cmt. e (1987), there can be no serious question that it is.

*First*, pursuant to Article 94(1) of the United Nations Charter, the United States has “undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party.” In the plainest meaning of the term, an ICJ ruling rendered in a contentious proceeding between parties subject to its jurisdiction and issued to further its ability to resolve the parties’ dispute, is a “decision” of the Court.

*Second*, even if an ICJ ruling were not a “decision” in its own right, the United States would still have an obligation to comply. The ICJ ruling has been made pursuant to a provision of the ICJ Rules of Court expressly designed to preserve that court’s ability to issue an order with respect to Provisional Measures under Article 41 of the ICJ Statute. ICJ Rules of Court, art. 74(4). In a standard and oft-repeated formulation, the ICJ has explained that

the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22). In other words, the granting of such a ruling is part and parcel of the ICJ's authority to indicate provisional measures. That authority, in turn, is intended to ensure that the Court remains in a position to render a meaningful judgment. Even were a ruling under article 74(4) of the ICJ Rules of Court or an order indicating provisional measures not regarded as a "decision" requiring compliance under the Charter, an agreement to comply with the judgment of a court cannot be squared with the latitude to deprive the court of its ability to render an effective judgment by disregarding a ruling intended to preserve the rights subject to such a judgment. Hence, by agreeing to abide by the decision of the ICJ in this case, the United States has also agreed to abide by a ruling designed to ensure the effectiveness of any such decision. *E.g.*, Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

*Third*, the authority of the ICJ under Article 41 simply reflects a general principle of law that would bind the United States even in the absence of that specific treaty provision. The Permanent Court of International Justice, the predecessor to the ICJ, has held that as a general principle of law, States parties must refrain from taking action to materially alter the rights of the State litigants once international proceedings have been initiated. *See Electric Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Judgment), Ser. A/B, No. 77, p. 199. As the PCIJ explained, the ICJ's authority under Article 41 embodies



the principle universally accepted by international tribunals . . . 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.

*Id.*, p. 199. See also *Comité des juristes de l'étude du statut de la Cour Permanente de Justice Internationale* (First Session, 11 March 1929) (statement of Elihu Root) ("parties to a case, when they submitted their controversy to the Court, might be regarded as having come under an obligation not to destroy the subject matter of their controversy or in any way to anticipate the judgment of the Court by action of their own;" "[s]uch an obligation was implied in their acceptance of the jurisdiction of the Court") (unofficial translation). Thus, in exercising its authority under Article 41, the Court "give[s] life and blood to a rule that already exists in principle." Edvard Hambro, *The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice*, in *RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION* 168-69 (Walter Schätzel & Hans-Jürgen Schlochauer, eds., 1956).

Finally, the ICJ is "the principal *judicial* organ of the United Nations." U.N. CHARTER, art. 92 (emphasis added). It is intrinsic to the very definition of a court that a party subject to its jurisdiction must comply with its orders, decisions, and rulings. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). As Judge Sir Gerald Fitzmaurice stated in his separate opinion in the *Northern Cameroons Case*, explaining why provisional measures must be binding:

Although much . . . of [the ICJ's] incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court — or any court of law — being able to function at all.

(Cameroon v. U.K.) 1963 I.C.J. 15, 103 (Interim Protection Order of Dec. 2) (separate opinion of Judge Fitzmaurice). To similar effect, the Iran-United States Claims Tribunal, sitting in Full Tribunal and with the concurrence of all three United States Members, has held that it "has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." *E-Systems, Inc. v. Islamic Republic of Iran*, Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983); *see also* MANLEY OTTMAR HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942*, 426 (1943) ("a State is under an obligation to respect the Court's indication of provisional measures").

As a matter of international law, this Court, as a component of the judicial branch of the United States Government, has the capacity to engage the international responsibility of the United States and, correspondingly, the obligation to comply with the United States' international obligations. IAN BROWNLIE, *STATE RESPONSIBILITY*, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility) ("Draft Articles").

This Court should give effect to the decision of the International Court of Justice on Germany's request for provisional measures and thereby ensure the United States' compliance with the obligations it has voluntarily undertaken in the U.N. Charter, the ICJ Statute, the Vienna Convention, and the Optional Protocol to that Convention.

**B. As A Court Of Equity, This Court Should Give Effect To the Decision of the International Court of Justice In the Interest of International Comity and the Rule of Law.**

---

Regardless of the binding effect of a ruling from the ICJ pursuant to article 74(4) of its rules or of provisional measures

indicated by the ICJ on their own terms, this Court should enforce the ICJ rulings on equitable grounds. The essence of equitable discretion is flexibility, and no factor carries as much weight in the exercise of that discretion as the public interest. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). When the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation No. 40, et al.*, 300 U.S. 515, 552 (1937); *see also Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946).

International comity, and respect for the rule of law on the international plane, is a principle of federal law to which this Court should give effect. Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), in which this Court held that there is "no federal general common law," the Court has recognized that there are nonetheless areas that require the development of a "specialized" federal common law. *See* Henry Friendly, *In Praise of Erie — And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). This federal common law arises either pursuant to a congressional grant of jurisdiction, *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), or as a result of the need for national uniformity in a given area, *e.g.* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). It is binding on the states pursuant to the supremacy clause. *See, e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

The need for national uniformity and federal control is most compelling in matters touching on foreign relations. For example, the act of state doctrine precludes a court in the United States from passing on the validity of an "ac[t]" of a governmental character done

by a foreign state within its own territory and applicable there." RESTATEMENT § 443 (1987); see *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Sabbatino*, 376 U.S. at 427. The Court has held that that doctrine supplies a federal "principle of decision binding on federal and state courts alike." *Sabbatino*, 376 U.S. at 427.<sup>2</sup> So too here, the issue of whether state officials should abide by an order of the International Court of Justice rendered in a case to which the United States is a party is a matter of federal law.

Here, international comity overwhelmingly counsels in favor of showing respect for a unanimous ruling of the International Court of Justice. Cf. *Hilton v. Guyot*, 159 U.S. 113 (1894) (comity to acts of another nation). As both the major force in international affairs and a nation long committed to the rule of law, the United States would advance the public interest by respecting a ruling of the principal judicial organ of the United Nations. As Judge Schwebel, President of the ICJ, stated in explaining his vote in favor of provisional measures in a recent ICJ case presenting similar circumstances:

It is of obvious importance to the maintenance and development of a rule of law among States that the

- 
2. See also *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (international trade) (nation must "speak[] with one voice when regulating commercial relations with foreign governments") (citation omitted); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (alien registration) ("federal power in the field affecting foreign relations [must] be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (international negotiations and compacts) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (treaty law) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *The Federalist*, Nos. 3-5 (J. Jay), 42 (J. Madison), 80 (A. Hamilton).

obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998) (Declaration of President Schwebel).<sup>3</sup> As Judge Schwebel recognized, if the United States wishes to advance the rule of law, it must show respect for the rule of law even when — indeed, especially when — compliance poses “serious difficulties.” *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

In the exercise of its equitable discretion, in the interest of the rule of law, and out of comity to the principal judicial organ of the modern international legal order, this Court should give effect to the ICJ Order indicating provisional measures.

---

3. Before his election to the Court in 1981, Judge Schwebel served as, among other things, Deputy Legal Advisor to the United States Department of State and Executive Director of the American Society of International Law. Pursuant to Article 32(1) of the Rules of the Court, Judge Schwebel, as a national of the United States, does not preside in Germany’s proceeding against the United States.

## II.

**THIS COURT SHOULD ENJOIN  
DEFENDANTS FROM VIOLATING THE ICJ RULINGS  
AND THE U.N. CHARTER.**

**A. *Ex Parte Young* And The Treaties Fully  
Authorize Germany's Suit.**

In *Ex parte Young*, this Court held the Eleventh Amendment's sovereign immunity not to apply to suits against state officials acting in their official capacity, provided that the plaintiff sought only a prospective injunction to compel the state officials to comply with federal law. 209 U.S. 123, 159-160 (1908). As this Court explained, where a state official acts in a manner inconsistent with federal law, "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*; accord U.S. CONST. art. VI, cl. 2.

Under the *Ex parte Young* doctrine, the plaintiff may seek prospective injunctive relief, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), against an "ongoing" violation of federal law from which the plaintiff is currently suffering, *Papasan v. Allain*, 478 U.S. 265, 282 (1986), or from the continuing consequences of a completed violation, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977). This requirement ensures that a plaintiff cannot use *Ex parte Young* to perpetrate "a raid on the state treasury for an accrued monetary liability." *Id.* at 290 n.22. At the same time, the availability of injunctive relief under *Ex parte Young* is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Papasan*, 478 U.S. at 278 (internal quotation omitted).

Here, plaintiff seeks precisely the relief permitted under *Ex parte Young* — an injunction preventing defendants, acting in their official capacities, from executing Mr. LaGrand in violation of Germany's rights under the ICJ rulings and the U.N. Charter. The doctrine of *Ex Parte Young*, 209 U.S. 123, 156 (1908), permits a

federal court to enjoin state officers "who threaten and are about to commence" unlawful activity. *See also Morales v. Trans-World Airways, Inc.*, 504 U.S. 374, 381 (1992). As set forth above, the ICJ Order is binding on the United States through the mechanism of the United Nations Charter. No violation of that ruling has yet occurred, but the ICJ Order, and with it federal law in the form of the U.N. Charter, are in danger of imminent violation. Mr. LaGrand's execution is scheduled for today, March 3, 1999, and the Governor of Arizona has publicly made known her intention to see the execution through unless this Court orders otherwise. In these circumstances, there can be no question that plaintiffs face the threat of imminent, future violation of their federal rights by way of the intention of Arizona officials to go forward with the execution of Germany's national even in the face of the ICJ rulings calling on the United States to halt that execution. Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM.J. INT'L L. 691, 696 (1998) ("to say that a past failure to notify [the sending state's consular officials] 'has no continuing effect' seems unreal in view of the outcry from several foreign states and Paraguay's efforts within the United States and before the International Court of Justice. The failure to notify effectively precluded the foreign consul and the foreign state from meaningfully assisting their national."). There can also be no question that the relief plaintiffs seek is prospective, as the rights on which they found this complaint arose just hours ago when the ICJ issued its order and the execution they seek to halt has not yet taken place. An injunction or stay from this Court would therefore be purely prospective in nature and would prevent the defendants from their intended, imminent violation of federal law.

The Court's opinion in *Breard* is not to the contrary. *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998). *First*, because that opinion was issued in response to a petition for certiorari and motion for leave to file an original bill, which are both discretionary, it does not carry precedential force. *Second*, to the extent the Court addressed the Eleventh Amendment issue, it noted merely that in light of that Amendment, Paraguay's suit "might" not succeed. Hence, the Court itself did not regard its opinion as a holding. *Finally*, even that

prediction was based on the specific facts of Paraguay's case, as the Court explained in that case that it did not believe that the violation there could have had any continuing effect so as to fall within the *Ex parte Young* doctrine.

In any event, by its express terms, the Eleventh Amendment does not apply to this action by the Federal Republic of Germany, a foreign state, as opposed to citizens or subjects thereof. U.S. CONST. amend. XI. Nor do any underlying principles of sovereign immunity bar the action. While *Monaco v. Mississippi*, 292 U.S. 313 (1934), recognized a rule of nonconstitutional sovereign immunity in suits based on contractual obligations brought by foreign states against states of the United States, that rule should not extend to an action by a foreign state asserting treaty rights. If the Commonwealth of Arizona "does not exist" for foreign relations purposes, *United States v. Pink*, 315 U.S. 203, 234 (1942) (internal quotation omitted), neither it nor its officials should be permitted to claim immunity from suit in federal court in an action, like this one, that seeks to enforce an international obligation entered into by the United States in the exercise of its authority in foreign relations. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary). Simply put, in the area of foreign relations and the United States' international obligations, the individual states had no sovereign immunity to cede.

## **B. Plaintiffs Are Entitled To The Relief They Seek.**

The traditional standard for granting an injunction, preliminary or permanent, requires the plaintiff to show that "in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1978). The only difference between the two standards is that for a preliminary injunction a plaintiff need only show that his success on the merits is likely, whereas for a permanent injunction a plaintiff must actually succeed on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981).



Under either standard, Germany is entitled to the injunction it seeks. As an initial matter, there can be no dispute as to the relevant facts, as the only facts relevant to this request are the issuance of the ICJ rulings and the impending execution.

Further, it is plain that unless this Court enjoins Defendants from executing LaGrand today, Germany's national will be dead. In that event, the ICJ rulings could never be complied with. It goes without saying that the fact that "irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring).

Similarly, there can be no doubt of Germany's likelihood of success on the merits. The ICJ Order is clear: the United States is to ensure that Mr. LaGrand is not executed. A ruling that binds the United States also binds the state actors charged with the enforcement of that order. U.S. CONST. art. VI, cl. 2 (The United States' international obligations form part of "the supreme Law of the Land."). State interests cannot override federal authority in the area of foreign relations. *United States v. Pink*, 315 U.S. at 234 (individual states "do[] not exist" for foreign relations purposes); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 315-22 (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary); see also *Zschernig v. Miller*, 389 U.S. 429 (1968).

In addition, were the Court to find it necessary to balance the hardships, they would clearly favor Germany. If this Court gives effect to the ICJ rulings, Mr. LaGrand will still remain in custody. If the United States prevails on the merits, Arizona will be able to execute Mr. LaGrand. If the United States did not prevail, Arizona would at worst — depending upon the relief ordered by the Court — have to retry Mr. LaGrand, as Germany has sought no relief barring retrial or immunizing Mr. LaGrand from the charges Arizona has brought. The impact on Arizona of a delay in the execution of Mr. LaGrand cannot compare to the irreparable injury caused by his death — not to mention the magnitude of a decision by this Court not to give

effect to a unanimous decision of the International Court of Justice.

Finally, as discussed above in Part I.B., the injunction sought by Germany is clearly in the public interest. The United States is responsible under international law for the acts of its constituent entities. *See, e.g.,* Jiménez de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW*, 531, 557 (Max Sørensen, ed., 1968) ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); Draft Articles at 127. If this Court does not enjoin defendants from executing Mr. LaGrand, it will place the United States squarely in violation of the ICJ rulings and the U.N. Charter. This Court should not countenance such a result.

### III.

#### THIS COURT SHOULD GRANT GERMANY'S MOTION FOR LEAVE TO FILE.

Mindful of this Court's busy appellate docket and stated preference against acting as trier of fact in the first instance, Germany nevertheless respectfully submits that this is precisely the type of action in which the Court should exercise its original jurisdiction. Germany's case presents issues "of federal law and national import as to which [the Court is] the primary overseer[]." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971)

This Court makes "case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within [its] constitutional original jurisdiction . . . exercis[ing] that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (*quoting Texas v. New Mexico*, 462 U.S. 554, 570 (1983)) (internal citations omitted). In *Wyandotte*,

the Court held that it can decline to exercise its concurrent original jurisdiction

only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

401 U.S. at 499.

Applying those guidelines here, the Court should grant Germany's motion. *First*, because this motion seeks only to enforce the order issued by the ICJ enjoining the execution of Mr. LaGrand until that court arrives at a final decision on the merits, the case does not present significant difficulties of factfinding. *Id.* at 498. The only relevant facts are the terms of the ICJ rulings and the imminent execution, neither of which can be or are disputed. Hence, this complaint calls upon the Court's competence as a tribunal that decides questions of law of national importance.

*Second*, this motion, seeking to prevent the failure of state officials to respect treaty obligations owed by the United States to a foreign sovereign, falls within a category of cases that the Constitution's Framers specifically intended the federal courts in general, and this Court in particular, to decide. For the reasons set forth above, a denial of the motion in this case would clearly "disserve . . . the principal policies underlying the Article III jurisdictional grant," *id.*, over "Cases affecting . . . Consuls." U.S. CONST. art. III, § 2, cl. 2. *See also* Petition for Writ of *Certiorari* at 22-29, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390).

## CONCLUSION

For the foregoing reasons, Germany respectfully requests that this Court (a) (i) grant Germany's motion for leave to file; and (ii) issue a temporary restraining order or preliminary injunction barring defendants from executing of Germany's national, Walter LaGrand, during the pendency of this motion for leave to file, or a permanent injunction barring defendants from executing him at any time prior to the resolution of Germany's action against the United States in the International Court of Justice; or (b) in the alternative, grant such relief pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion.

Dated: March 3, 1999

Respectfully submitted,

Donald Francis Donovan  
Michael M. Ostrove  
Daniel C. Malone  
DEBEVOISE & PLIMPTON  
875 Third Avenue  
New York, New York 10022  
212-909-6000

\_\_\_\_\_  
/s/  
Peter Heidenberger  
(Counsel of Record)  
Thomas G. Corcoran, Jr.  
BERLINER, CORCORAN & ROWE  
1101 17th Street N.W.  
Washington D.C. 20036  
202-293-5555

*Counsel for Plaintiffs the Federal Republic  
of Germany, Ambassador Jürgen Chrobog,  
and Consul General Wolfgang Rudolph*

## **CERTIFICATE OF SERVICE**

I, Peter Heidenberger, Counsel of Record for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog and Consul General Wolfgang Rudolph, hereby certify under penalty of perjury that on March 3, 1999, I caused a copy of Plaintiffs' Motion for Leave to File a Bill of Complaint and for a Temporary Restraining Order or Preliminary Injunction, Complaint, and Memorandum in Support to be served by first-class mail of the United States Postal Service upon, and sent also by telecopy to, and on March 18, 1999 served in booklet form by first-class mail of the United States Postal Service upon:

The Honorable Jane Dee Hull  
Governor of the State of Arizona  
1700 West Washington Street  
Phoenix, Arizona 85007  
tel. 602-542-4331

The Honorable Janet Napolitano  
Attorney General of the State of Arizona  
1275 West Washington Street  
Phoenix, Arizona 85007  
tel. 602-542-4686

Seth P. Waxman  
Solicitor General of the United States  
Department of Justice  
Washington, D.C. 20530-0001  
tel. 202-514-2217

Dated: March 18, 1999  
Washington, D.C.

/s/  
Peter Heidenberger





