

International Court of Justice Rules in Favor of Germany and Against the United States in the LaGrand Case

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I. Introduction

[1] In its judgement from June 27, 2001, in the LaGrand Case (Germany v. United States of America), the International Court of Justice made a number of watershed rulings: (a) The Court established that Article 36(1) of the Vienna Convention on Consular Relations creates individual rights for foreign nationals abroad, and not just rights protecting the interests of states that are a party to the Convention; (b) The Court ruled that, beyond the undisputed failure on the part of the U.S. to take the measures required by the Convention, the application of an American provision of criminal procedure in the LaGrand brothers' cases (a provision that prevented the domestic courts from reviewing the implications of the Convention violation admitted by the Americans) itself constituted a violation of Article 36(2) of the Convention; (c) The Court, as a remedy in the case of future violations of the Convention, ordered the United States to provide a procedure for the review and reconsideration of convictions secured in circumstances in which the obligations of the Convention had not been observed; and (d) as a separate matter the Court ruled that its provisional orders, issued pursuant to Article 41 of the Statute of the International Court of Justice, have binding effect.

[2] This report provides a brief summary of the background of the LaGrand Case and an overview of the ICJ's judgement. It also suggests the possible meaning the Court's judgement may come to have with respect to the movement to abolish the American death penalty.

II. Background and Overview of the ICJ Judgement

A. Background to the LaGrand Case

[3] Walter and Karl LaGrand were German citizens executed by the State of Arizona (Karl on February 24, 1999, and Walter on March 3, 1999). Born in Germany, the brothers had lived the greater part of their lives in the United States. They were arrested, later convicted and then sentenced to death for perpetrating a bank robbery in Arizona in 1982, during the course of which the bank's manager was killed. In the labyrinth of criminal appeals that followed their trial, the two eventually asserted in *Habeas Corpus* petitions filed in Federal District Court that their convictions and sentences should be overturned because the United States (by way of the authorities in Arizona) had failed to abide by its obligations under Article 36 of the Vienna Convention on Consular Relations. The brothers argued that this omission, akin to a violation of a fundamental constitutional right, so prejudiced their trials and sentencing hearings that their convictions and sentences should be vacated. The brothers learned from other sources in 1992 (not public authorities), of the relevant terms of the Vienna Convention. From that time forward, staff of the Consulate-General of Germany in Los Angeles maintained regular contact with the LaGrand brothers and provided assistance in the preparation of the brothers' *Habeas Corpus* proceedings. The Federal District Court refused to consider the Vienna Convention claim in the LaGrands' *Habeas Corpus* petition (applying the *Procedural Default Rule*) and the subsequent federal courts, including the United States Supreme Court, found no grounds to disturb this decision. In the hours preceding both executions the German government pleaded the cause of the brothers at the highest diplomatic levels, including letters from the German Chancellor addressed to the President of the United States. Seeing that these efforts were of no avail in the case of Karl LaGrand, Germany also initiated proceedings against the United States in the International Court of Justice in the hours preceding Walter's execution. The application alleged violations of Article 36 of the Vienna Convention and sought remedies for these violations, including provisional measures ordering the United States to stay the execution of Walter LaGrand pending the ICJ's final decision on the substantive application. The execution proceeded as scheduled in spite of the fact that the Court issued the requested provisional order.

B. Article 36 of the Vienna Convention and The ICJ Judgement

[4] Article 36 of the Vienna Convention on Consular Relations states:

(1) *With a view to facilitating the exercise of consular functions relating to nationals of the sending state:*

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

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

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action;

(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulation of the receiving State, subject to the proviso, however, that the said laws and regulation must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

[5] In its written submissions and oral presentation to the Court, the German government asserted the following claims (considered throughout the Court's decision as four distinct claims): that the Americans failed to duly notify the LaGrands of their right to consular assistance (Article 36(1)(b)); that this deficiency prevented the Germans from providing assistance that would have prevented the brothers' executions; that rules of American criminal procedure (Procedural Default Rule) barred any review of the impact of these flaws on the LaGrand's cases; and that the United States failed to heed the binding terms of the Court's provisional order, which called for a stay of the execution of Walter LaGrand pending the resolution of Germany's substantive application to the International Court of Justice. For these failings, Germany demanded assurances that the United States would not repeat these errors (in the cases of German nationals), especially that American criminal procedure would not again constitute a bar to the effective exercise of the rights established by Article 36 of the Convention.(1)

[6] In response (both in its written submissions and oral presentation), the United States government admitted its breach of the notification requirement of Article 36(1)(b) of the Convention. The United States took the position, however, that the Convention required nothing more in response to this breach than the apology the United States had extended to the German government and the substantial measures it had undertaken to prevent the recurrence of the breach.(2)

[7] The Court resolved the procedural challenges raised by the United States in Germany's favor.(3)

[8] The Court ruled, with respect to the first of Germany's claims, that Article 36 creates an "interrelated regime designed to facilitate the implementation of the system of consular protection," (4) and that in establishing this regime the Convention extends rights to the receiving State as well as the individual nationals of the receiving State.(5) Thus, the Court agreed with Germany's argument that America's admitted breach of its obligations under Article 36(1)(b) (to notify the LaGrands in due time of their right to consular assistance) also resulted in "consequential violations" of Article 36(1)(a) and (c) (the right to consular communication and the State's right to assist in representing its nationals). What the United States had argued to be a singular right (to which it had admitted) with limited consequences, the Court found to be a spectrum of rights with potentially broad, significant consequences. The Court found it unnecessary to determine whether the violation of this spectrum of Article 36 rights had actually prejudiced the LaGrands, satisfying itself that the "Convention conferred these rights and that Germany and the LaGrands were in effect prevented by the breach of the United States [with respect to notification under Article 36(1)(b)] from exercising them, had they so chosen."(6)

[9] Having determined that Article 36(1) establishes individual rights for the nationals of a sending State, the Court upheld the second of Germany's claims (that the *Procedural Default Rule* itself constituted a breach of Article 36(2)). The Court explained that, in the context of the domestic rules of criminal procedure governing the review of convictions, Article 36(2) (which requires that the domestic laws of the receiving State permit the full enjoyment of the rights established by Article 36(1)) requires that the relevant rules of criminal procedure provide the national of a sending State the opportunity to challenge the adequacy of a conviction and sentence based on a claimed violation of Article 36(1). In short, the receiving State may not construct a system of domestic law the both allows it to breach its obligations under Article 36(1) and to prevent the national of the sending State from complaining to the courts of the receiving State about this breach. The Court found that the application of the Procedural Default Rule in the LaGrand brothers' cases had exactly this effect. The Court explained that:

As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented

them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented German, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defense as provided for by the Convention.(7)

The Court strenuously emphasized that the Procedural Default Rule, in itself, does not violate Article 36(2). The rule constitutes a violation only when, as in the LaGrand cases, it serves as the final justification for preventing any consideration by the courts of the receiving State of a claimed violation of Article 36(1).

[10] Again applying the classical means of treaty interpretation(8) (as it had with respect to the question of individual rights arising out of Article 36(1), see endnote 5), the Court granted the third of Germany's claims, finding that the United States had violated Article 41 of the Statute of the International Court of Justice when it did not heed the terms of the Court's order granting provisional measures in this case.(9) In reaching this conclusion the Court resolved the ambiguity on this point created by the deviation between the English and French versions of Article 41. The Court also determined that the language of the Court's order at issue in the case sought to assert the mandatory nature of the Article 41 provisional measures.

[11] Article 41 of the Statute of the International Court of Justice states:

(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 measures suggested shall forthwith be given to the parties and to the Security Council.(10)

The Court was not persuaded that the seemingly equivocal English terms "indicate," "ought" and "suggested" in Article 41 established a less than compulsory force for the measures ordered by the Court pursuant to Article 41, especially in light of the directive nature of the terms used in the French version of Article 41. Furthermore, the Court examined the object and purpose of Article 41, in the context of the Court's Statute,(11) and concluded that

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 . . . 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 . . . If 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, . . .(12)

[12] With respect to Germany's final claim, seeking (a) general assurances from the United States of non-repetition of Article 36 violations and (b) specific assurances that American criminal procedure would not prevent the effective enjoyment of German citizens' Article 36 rights, especially in death penalty cases. The Court found that the program implemented by the United States, to improve and ultimately assure compliance with the terms of Article 36 by all American law enforcement authorities, satisfied Germany's demand for general assurances of non-repetition.(13) The Court ordered, however, that in the event that the United States repeated its breaches of the Article 36 (particularly in cases of prolonged detention or a sentence involving severe penalties), it would be obligated to:

allow review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.(14)

III. The LaGrand Case and the Abolition of the American Death Penalty

[13] Though the Court studiously avoided any moralizing with respect to the American death penalty, Europe's burgeoning opposition to the American death penalty resonates throughout the proceedings and colors the otherwise (almost enforced) neutral tones of the Court's judgement. It was, after all, the imminent execution of Walter LaGrand that necessitated the Court's order indicating provisional measures, which in turn led to its watershed ruling on the binding nature of Article 41 orders. Judge Oda acknowledges this significant undercurrent to the case in his dissenting opinion:

I would hazard a guess that the German government was prompted to bring this case before the International Court of Justice by the outcry raised by some in Germany, by the emotional reaction on the part of some people there – where the death penalty has been abolished – to a case involving the existence and application of the death penalty in the United States . . . It appears to me the main aim was to save the life of Walter LaGrand, . . .(15)

The Court, in spite of all this, only quietly hints at the importance of the death penalty element of the case when, in

ordering a remedy, it concludes that the United States must provide some mechanism for review of alleged violations of the consular rights in cases involving "severe penalties." (16)

[14] In this respect, the LaGrand judgement is much less than opponents of the American death penalty might have hoped for. There was, though the Court's jurisdiction over the cases prohibited it, the chance that the Court might make general reference to or a passing comment on (even if only as dicta) to the illegality (under international law) or at least the impropriety (under the prevailing norms of the great majority of the world's nations, and especially the developed world) of the death penalty. Such a comment from the Court would have served as the clearest signal yet in international law of the general illegality of the death penalty. It would have been another, extremely important brick in the ever more firm foundation upon which an international customary law prohibition of the death penalty could be built.

[15] A comment of this nature, however, might have ruptured the Court's majority and it certainly would have done devastating harm to the already fragile standing of the Court and its judgements in the United States.

[16] The Court's judgement nonetheless presents some hope of making an important contribution to the struggle to abolish the American death penalty. Europe has come to play an increasingly important role in the opposition movement in America's politics of death, though to this point only a highly symbolic and generally ineffective role. (17) The LaGrand Case and the Court's judgement may come to represent a turning point in this legacy. For the first time, Europe (as represented here by Germany) demonstrated that it understands the central injustice that sustains the "machinery of death" (18) in America: that it is the poor quality of one's counsel and not the cruelty of one's crime -- or even one's guilt for that matter -- that truly determines who receives the death penalty in America. The Court clearly, even if only implicitly, affirmed the validity of this characterization of the American death penalty process, ordering a scheme in the cases of violations of the Vienna Convention on Consular Relations that is the perfect antidote to the deadly effects of the American death penalty process: the provision of effective assistance at trial and the opportunity to obtain review of proceedings when violations of fundamental rights are alleged. Viewed in this way, the significance of the LaGrand Case to the abolitionist movement depends on the use to which Europe puts this knowledge.

[17] In their landmark survey of the modern American capital appellate process entitled *A Broken System: Error Rates in Capital Cases, 1973-1995*, Professors Liebman and Fagan conclude that the most common error in death penalty proceedings is "egregiously incompetent defense lawyers who didn't even look for -- and demonstrably missed -- important evidence that the defendant was innocent or did not deserve to die; . . ." (19) The Liebman/Fagan study only added empirical support to the conclusion reached by the American Bar Association in its 1997 call for a nation-wide moratorium on executions. The ABA asserted that the American death penalty was fraught with unfairness, especially the devastating impact of

[G]rossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense [who] are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives. (20)

Few now dispute that the poor quality of the representation the vast majority of death-row inmates received is the controlling difference between a term of imprisonment and a sentence of death. (21)

[18] Germany expressed exactly these concerns, rather than general or moral objections to the death penalty, in its submissions in the case. As the Court summarized Germany's argument:

Germany further contends that there is a casual relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. . . It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a 'persuasive mitigation case' which 'likely would have saved' the lives of the brothers. Germany believes that, '[h]ad proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence.' (22)

[19] Germany then complained that the *Procedural Default Rule* prevented it and the LaGrand brothers from obtaining a hearing on these concerns: "Germany points out that the 'procedural default' rule is among the rules of United States domestic law whose application make it impossible to invoke a breach of the notification requirement [of Article 36(1)(b)]." (23)

[20] By making these arguments, Europe has demonstrated that it knows the truth about the brazen injustices that drive the American death penalty. With such knowledge, however, comes responsibility. If Europe is truly ready to

take up the challenge of the American death penalty, Germany's arguments to the International Court of Justice and the Court's affirmation of those arguments, form a blueprint for its effective engagement on the issue. Certainly, continued diplomatic pressure and general public outrage from Europe are needed, but Europe must also decide to commit its vast financial resources and significant economic clout to improving the quality of representation of those facing the possibility of a death sentence – showing concern for their own citizens as well as for the poor Americans who find themselves in that situation. There are many avenues for this effort: (a) The European Union could seek address this injustice in shaping its trade policy with the United States; (b) Europe could build on the success of the LaGrand Case to press for the establishment of international law (probably as custom as the United States likely would not join a treaty regime affecting the issue) that requires adequate representation in capital proceedings; (c) Europe could channel some part of its extensive development aid to directly addressing these inequalities and inadequacies in the American justice system; and (d) private European actors (citizens and businesses) could make contributions to the handful of meagerly endowed non-profit organizations nobly providing high-quality representation to capital defendants in spite of their meager resources.

[21] Europe cannot now plead ignorance if it chooses not to do for others what Germany was denied the opportunity to do for the LaGrand brothers.

For More Information:

Decision of the International Court of Justice and Pleadings of the Parties, on the web: www.icj-cij.org

(1) LaGrand Case (Germany v. United States of America) www.icj-cij.org 11 (Judgement of June 27, 2001).

(2) *Id.*

(3) The United States challenged the Court's jurisdiction over and the admissibility of Germany's submissions. See, LaGrand Case (Germany v. United States of America) www.icj-cij.org s 37-63 (Judgement of June 27, 2001). These procedural matters receive considerable attention, particularly the question of the Court's jurisdiction, in the concurring and dissenting opinions to the Court's majority decision. See, e.g., *Id.* (Dissenting Opinion, Oda, Judge); *Id.* (Concurring Opinion, Parra-Aranguren, Judge); *Id.* (Dissenting Opinion, Buergenthal, Judge).

(4) LaGrand Case (Germany v. United States of America) www.icj-cij.org 75 (Judgement of June 27, 2001).

(5) LaGrand Case (Germany v. United States of America) www.icj-cij.org 77 (Judgement of June 27, 2001). The Court emphasized the plain language (a rule repeatedly asserted in its jurisprudence on the interpretation of Treaties) of Article 36(1)(b) in concluding that the Convention created individual rights for the nationals of a sending State as well as rights for the sending State itself: "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)." *Id.* The Court found further support for this conclusion in language used at other points in Article 36. "The Clarity of these provisions," the Court found, "admits of no doubt." *Id.*

(6) LaGrand Case (Germany v. United States of America) www.icj-cij.org 74 (Judgement of June 27, 2001).

(7) LaGrand Case (Germany v. United States of America) www.icj-cij.org 91 (Judgement of June 27, 2001).

(8) The customary international law governing the interpretation of treaties is codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties: "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 light of the treaty's object and purpose."

(9) The Court issued an order directing the United States to prevent the execution of Walter LaGrand pending the resolution of Germany's application. LaGrand Case (Germany v. United States of America) www.icj-cij.org 32 (Judgement of June 27, 2001).

(10) Statute of the International Court of Justice, Article 41.

(11) Another of the classical rules of treaty interpretation, established in customary international law and codified in Article 33(4) of the 1969 Vienna Convention on the Law of Treaties, holds that "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

(12) LaGrand Case (Germany v. United States of America) www.icj-cij.org 102 (Judgement of June 27, 2001).

(13) The United States represented that it had undertaken a comprehensive program to inform law enforcement authorities at every level of the obligations created by Article 36 of the Vienna Convention. As part of this program the Federal Government has distributed hundreds of thousands of copies of informational brochures and pocket cards as well as conducted training programs. LaGrand Case (Germany v. United States of America) www.icj-cij.org 121 (Judgement of June 27, 2001).

(14) LaGrand Case (Germany v. United States of America) www.icj-cij.org 125 (Judgement of June 27, 2001).

(15) LaGrand Case (Germany v. United States of America) www.icj-cij.org 9 (Dissenting Opinion, Oda, Judge, June 27, 2001).

(16) LaGrand Case (Germany v. United States of America) www.icj-cij.org 125 (Judgement of June 27, 2001).

(17) European leaders and activists have generally limited their efforts to last eleventh-hour clemency campaigns and

to condemnatory conferences. Important and inspiring as they are, these measures usually amount to little more than grandstanding and have had little impact in the way of saving lives. An important exception to this trend is, of course, the jurisprudence of the European Court of Human Rights, which has established a prohibition on the extradition from Europe to the United States of any suspect likely to face the death penalty. This jurisprudence has been picked-up by other nations including Mexico, Canada and most recently South Africa.

(18) *Callins v. Collins*, cert. Denied 510 U.S. 1141, 1143 (Dissenting, Blackmun, J.) (1994).

(19) James Liebman and Jeffrey Fagan, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 <http://justice.policy.net/jpreport>.

(20) Douglass Cassel, *Judicial Remedies for Treaty Violation in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 851, 860 (1999).

(21) What would have seemed impossible only 5 years ago, Congress is considering legislation to promote fairness in the application of the death penalty and to provide procedures for reviewing claims of innocence in death penalty cases. One of the central provisions of the bill would create standards for the appointment of counsel in capital cases.

(22) *LaGrand Case (Germany v. United States of America)* www.icj-cij.org 71 (Judgement of June 27, 2001).

(23) *LaGrand Case (Germany v. United States of America)* www.icj-cij.org 81 (Judgement of June 27, 2001).