

Consular relations — Vienna Convention on Consular Relations, 1963, Article 36 — Requirement that consulate be informed of detention of one of its nationals — Whether conferring rights upon individuals — Consequences of non-compliance — Whether evidence obtained during detention not notified to consulate must be suppressed — Extent to which complaint of non-compliance may be excluded because not raised at earlier point in proceedings — Relationship between Articles 36(1) and (2) — Remedies for non-compliance — Optional Protocol — Extent of jurisdiction

International Court of Justice — Jurisdiction — Optional Protocol to the Vienna Convention on Consular Relations, 1963 — Extent of jurisdiction conferred by Optional Protocol — Whether extending to claim for breach of provisional measures — Whether extending to claim based on customary law concept of diplomatic protection — Admissibility of claims

International Court of Justice — Provisional measures of protection — Statute of the International Court of Justice, Article 41 — Whether order indicating provisional measures legally binding — Differences between English and French texts of Article 41 — Object and purpose of the Statute and of Article 41 — Court ordering stay of execution — State carrying out execution

Treaties — Interpretation — Treaty authentic in more than one language — Differences between authentic texts — Means of resolution — Vienna Convention on the Law of Treaties, 1969, Articles 31-3

LAGRAND CASE

(GERMANY *v.* UNITED STATES OF AMERICA)¹

International Court of Justice

¹ The Federal Republic of Germany was represented by Mr Gerhard Westdickenberg and HE Mr Eberhard U. B. von Puttkamer as Agents; Mr Bruno Simma as Co-Agent and Counsel; Mr Pierre-Marie Dupuy, Mr Donald Francis Donovan, Mr Hans-Peter Kaul, Mr Daniel Khan and Mr Andreas Paulus as Counsel. The United States was represented by Mr James H. Thessin as Agent; Ms Catherine W. Brown and Mr D. Stephen Mathias as Deputy Agents; the Honourable Janet Napolitano, Mr Michael J. Matheson, Mr Theodor Meron and Mr Stefan Trechsel as Counsel and Advocates; Mr Shabtai Rosenne, Ms Norma B. Martens, Mr Paul J. McMurdie, Mr Robert J. Erickson, Mr Allen S. Weiner and Ms Jessica R. Holmes as Counsel.

Judgment. 27 June 2001

(Guillaume, *President*; Shi, *Vice-President*; Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buerghenthal, *Judges*)

SUMMARY: *The facts:*—On 2 March 1999, Germany instituted proceedings against the United States before the International Court of Justice for violations of the Vienna Convention on Consular Relations, 1963 (“the Vienna Convention”)² with respect to the treatment of Karl and Walter LaGrand (“the LaGrand brothers”), who had been arrested, convicted and sentenced to death in the State of Arizona for armed robbery, murder and attempted murder.³ The LaGrand brothers had been born in Germany and were German nationals. They were brought up in the United States but never acquired United States nationality.

Article 36 of the Vienna Convention provided that—

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 to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this 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 judgment. Nevertheless, consular officers shall refrain from taking action on behalf

² 596 UNTS 261.

³ The LaGrand brothers were arrested on 7 January 1982, convicted by the Supreme Court of Pima County, Arizona, on 17 February 1984 and were sentenced to death on 14 December 1984. Appeals against the convictions and sentences to the Supreme Court of Arizona were rejected on 30 January 1987. Applications to the United States Supreme Court for further review of those judgments were denied on 5 October 1987.

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)LAGRAND CASE (GERMANY *v.* UNITED STATES)

3

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 regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

At all material times both Germany and the United States were parties to the Vienna Convention.

Although there was disagreement between the Parties as to the time at which the competent authorities of the United States had become aware of the German nationality of the LaGrand brothers, the United States conceded that the competent authorities had failed to provide the LaGrand brothers with the required information even after becoming aware that they were German nationals. As a consequence, the LaGrand brothers did not raise the issue of Article 36(1) at their trial.

It was not until June 1992 that the LaGrand brothers became aware of the rights accorded under the Vienna Convention and informed the German Consulate of their circumstances. Proceedings in habeas corpus were then commenced before the federal courts to have the convictions and death sentences set aside based on a number of grounds, including the failure of the United States authorities to notify the German consulate of the arrest of the LaGrand brothers. This claim was rejected following the application of the “procedural default” rule, under which a defendant in state criminal proceedings was debarred from presenting an issue in federal habeas corpus proceedings which had not first been presented to the relevant state court unless he could show cause why that had not been done and prejudice. After further rounds of proceedings, the Supreme Court of Arizona set dates of execution for the LaGrand brothers. On 24 February 1999, Karl LaGrand was executed. On 2 March 1999, the day before the scheduled execution of Walter LaGrand, Germany instituted proceedings before the International Court of Justice. The application was accompanied by a request for provisional measures of protection, including a stay of the execution of Walter LaGrand pending the decision on the merits of the case. Germany based the jurisdiction of the Court on Article 36, paragraph 1 of the Vienna Convention and also on Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes⁴ that accompanies the Vienna Convention and which had been accepted by both countries. The Court ordered provisional measures of protection on 3 March 1999 without holding a hearing.⁵ The Governor of Arizona and the Supreme Court refused to stay the execution of Walter LaGrand, which was carried out later on 3 March 1999.

⁴ Article 1 of the Optional Protocol is set out at para. 36 of the Judgment.

⁵ 118 *ILR* 37.

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

Germany contended that:—

- (1) the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1(b), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;
- (2) the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;
- (3) the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

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

The United States acknowledged that it had violated Article 36(1)(b) and accepted that this had given rise to a dispute between the two States, which the Court had jurisdiction to hear under the Optional Protocol in so far as it concerned Germany's own rights. The United States nevertheless raised a number of objections to the jurisdiction of the Court with regard to aspects of Germany's claims as well as raising a number of arguments concerning their admissibility.

Held:—(1) (by fourteen votes to one, Judge Parra-Aranguren dissenting) The Court had jurisdiction to entertain Germany's claims. The disputes concerning whether, in violating Article 36(1)(b) of the Vienna Convention, the

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

United States had also violated Germany's rights under Article 36(1)(a) and (c) and whether Article 36(1)(b) conferred rights upon individuals were disputes concerning the interpretation and application of the Convention and thus fell within the jurisdiction of the Court under the Optional Protocol. The fact that the right of diplomatic protection was a concept of customary international law did not prevent a State party to a treaty, which conferred individual rights, from taking up the case of one of its nationals and instituting judicial proceedings on behalf of that national on the basis of a general jurisdictional clause in that treaty. Moreover, where the Court had jurisdiction to decide a case, it also had jurisdiction to deal with submissions that an order indicating provisional measures had not been complied with. Similarly, the Court had jurisdiction over Germany's claims for specific remedies. Where jurisdiction existed over a dispute, no separate basis for jurisdiction was required by the Court to consider the remedies requested by a party to that dispute (paras. 36-49 and 128(1)).

(2) Germany's submissions were admissible (para. 128(2)).⁶

(a) Germany's second, third and fourth submissions did not require the Court to play the role of a court of appeal in criminal proceedings. The examination of the practice of American courts, in so far as it related to the application of the Convention, was consistent with the functions of the Court to apply the relevant rules of international law to the issues in dispute and did not convert the Court into a court of appeal in national criminal proceedings (paras. 50-2).

(b) The United States' objections to the third submission of Germany on account of the manner in which the proceedings were brought before the Court were rejected. The timing and manner of the filing of the proceedings by Germany, while open to criticism, did not render the claim inadmissible (paras. 53-7).

(c) The local remedies rule did not render Germany's first submission inadmissible. It had not been disputed that the LaGrand brothers had sought to plead the Vienna Convention in the Arizona and United States courts once they learned of their rights under the Convention but that, by that date, the procedural default rule barred the LaGrand brothers from obtaining any remedy. Since it was the failure of the United States to inform the brothers of their rights under Article 36 which led to this result, the United States could not rely upon it to bar the admissibility of the submission (paras. 58-60).

(d) It was unnecessary for the Court to decide whether the United States' argument that Germany had not shown that its own criminal justice system required the annulment of convictions in comparable cases went to the issue of admissibility. The evidence did not justify the conclusion that Germany's own practice failed to conform to the standards it demanded of the United States (paras. 61-3).

⁶ The admissibility of the four submissions was upheld as follows: first submission, by thirteen votes to two (Judges Oda and Parra-Aranguren dissenting); second submission, by fourteen votes to one (Judge Oda dissenting); third submission, by twelve votes to three (Judges Oda, Parra-Aranguren and Buergenthal dissenting); fourth submission, by fourteen votes to one (Judge Oda dissenting).

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

(3) (by fourteen votes to one, Judge Oda dissenting) By not informing the LaGrand brothers without delay following their arrest of their rights under Article 36(1)(b), and by thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States had breached its obligations to Germany and to the LaGrand brothers under Article 36(1). Article 36(1) of the Convention established an interrelated regime designed to facilitate the implementation of the system of consular protection. The breach by the United States of Article 36(1)(b) deprived Germany of the rights accorded to it under paragraphs (a) and (c). It was immaterial whether the LaGrand brothers would have sought consular assistance, or whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. In addition to the rights which it conferred upon States, Article 36(1) conferred rights upon individuals. The national State of an individual was entitled to assert those rights on his behalf (paras. 65-78 and 128(3)).

(4) (by fourteen votes to one, Judge Oda dissenting) By not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations of those rights had been established, the United States had breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36(2) of the Vienna Convention. That provision applied to the rights of the individual as well as those of the State. While the procedural default rule was not, in itself, contrary to Article 36(2), its application in the present case was incompatible with that provision. The application of the procedural default rule had prevented the LaGrand brothers from effectively challenging their convictions and sentences, which in turn prevented full effect from being given to the purposes for which rights had been accorded under Article 36(1) of the Convention (paras. 79-91 and 128(4)).

(5) (by thirteen votes to two, Judges Oda and Parra-Aranguren dissenting) By failing to take all the measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, the United States had breached the obligation incumbent upon it under the Order indicating provisional measures. The English and French texts of Article 41 of the Court's Statute were not in total harmony.⁷ The Court had therefore to find the meaning which best reconciled the texts having regard to the object and purpose of the Statute. It followed from the object and purpose of the Statute, as well as from the terms of Article 41, that orders of the Court indicating provisional measures should be regarded as binding on the parties to which they were addressed. The Order of 3 March 1999 was binding in character and had created a legal obligation for the United States. While the extremely late presentation of the request for provisional measures and the fact that the binding character of orders for provisional measures had not then been established had to be taken into account in examining the conduct of the United States authorities, it was clear that those authorities had not taken all the measures at their disposal to give effect to that Order (paras. 92-116 and 128(5)).

⁷ Both texts are set out in para. 100 of the Judgment.

(6) (unanimously) The commitment undertaken by the United States to ensure the implementation of the specific measures adopted in performance of its obligations under Article 36(1)(b) of the Vienna Convention had to be regarded as meeting the request by Germany for a general assurance of non-repetition. An apology was not sufficient in the present case. However, the efforts made by the United States to ensure compliance by competent authorities at the federal, state and local levels with the obligation under Article 36 were noted and had to be regarded as meeting Germany's request (paras. 117-27 and 128(6)).

(7) (by fourteen votes to one, Judge Oda dissenting) Should German nationals nonetheless be sentenced to severe penalties, without their rights under Article 36(1)(b) having been respected, the United States, by means of its own choosing, should allow the review and reconsideration of the conviction and sentence by taking account of the violation of those rights (para. 128(7)).

Declaration of President Guillaume: The requirement that the United States allow review and reconsideration was intended to apply only to cases in which severe penalties had been imposed on German nationals by the Courts of the United States (p. 55).

Separate Opinion of Vice-President Shi: There was no doubt that the United States had violated its obligations towards Germany under Article 36, paragraph (1) of the Convention, but it was debatable whether the United States had also violated obligations to the LaGrand brothers. The drafting history of the Convention meant that it was questionable whether Article 36 was intended to create individual rights additional to the rights accorded to the sending State under those paragraphs (pp. 55-62).

Dissenting Opinion of Judge Oda: (1) Germany had erred in instituting proceedings before the Court pursuant to the Optional Protocol in respect of alleged violations of the Convention by the United States, rather than in respect of a dispute concerning the interpretation or application of the Convention. Either such a dispute did not exist or it had not been the subject of diplomatic negotiations as required by the Protocol (pp. 63-7).

(2) The United States had erred by not responding in an appropriate manner to the Application (pp. 67-9).

(3) The Court had been placed in a very difficult and delicate position, but had erred in issuing the Order of 3 March 1999 since the issue for which interim relief had been sought—temporarily preserving the life of Walter LaGrand—was not one for which provisional measures could properly be ordered by the Court (pp. 69-70).

(4) The Court had erred in its present judgment. The Court's jurisdiction was over the Application not Germany's subsequent submissions. Similarly the Court should have considered admissibility by reference to the Application (pp. 70-3).

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

(5) There was no convincing basis for the conclusion that Article 36(1)(b) conferred rights on individuals (pp. 73-4).

(6) If the Convention was to be interpreted as conferring rights upon individuals, those rights were strictly limited to what was correlative to the obligations of the State under the Convention (pp. 74-5).

(7) The analysis of whether orders indicating provisional measures were legally binding was an empty exercise. Whether such an order had been complied with was a question to be decided in the judgment on the merits. In the present case, the United States had taken the measures at its disposal to comply with an order which the Court should not have made in any event (pp. 75-8).

Separate Opinion of Judge Koroma: The question was not whether aspects of the criminal process in the United States were the cause of the breach of the obligations under Article 36(1) but whether the obligations assumed under the Convention were breached as a result of the non-observance of the relevant provisions of the Convention. It had not been necessary for the Court to engage in the interpretation of Article 41 of the Statute when it considered the Order of 3 March 1999, since it was clear that orders issued by the Court in accordance with Article 41 of the Statute were binding (pp. 79-81).

Separate Opinion of Judge Parra-Aranguren: The Court did not have to decide whether the United States had breached Article 36, paragraph (1) of the Vienna Convention since it could not be shown objectively that there was a dispute in existence between the parties based on the criteria elaborated by the Court for establishing the existence of a dispute (pp. 81-5).

Dissenting Opinion of Judge Buergenthal: The Court should have held inadmissible the third submission made by Germany concerning the Order of 3 March 1999, since it was clear that the late filing of the application by Germany had serious negative consequences for the position of the United States in defending its rights before the Court (pp. 85-94).

The Judgment of the Court and the Declaration and Separate and Dissenting Opinions of the Judges are set out as follows:

Judgment	<i>page</i> 9
Declaration of President Guillaume	55
Separate Opinion of Vice-President Shi	55
Dissenting Opinion of Judge Oda	62

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

LAGRAND CASE (GERMANY <i>v.</i> UNITED STATES)	9
Separate Opinion of Judge Koroma	79
Separate Opinion of Judge Parra-Aranguren	81
Dissenting Opinion of Judge Buergenthal	85

The following is the text of the Judgment of the Court:

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

In its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the “Optional Protocol”).

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

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

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

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

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

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

Cambridge University Press

978-0-521-87923-1 - International Law Reports, Volume 134

Edited by Elihu Lauterpacht and C. J. Greenwood

Excerpt

[More information](#)

5. By an Order of 5 March 1999, the Court, taking account of the views of the Parties, fixed 16 September 1999 and 27 March 2000, respectively, as the time-limits for the filing of a Memorial by Germany and of a Counter-Memorial by the United States.

The Memorial and Counter-Memorial were duly filed within the time-limits so prescribed.

6. By letter of 26 October 2000, the Agent of Germany expressed his Government's desire to produce five new documents in accordance with Article 56 of the Rules.

By letter of 6 November 2000, the Agent of the United States informed the Court that his Government consented to the production of the first and second documents, but not to that of the third, fourth and fifth documents.

[471] The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of the latter group of documents by Germany, it being understood that the United States would have the opportunity, in accordance with paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was duly communicated to the Parties by letters from the Registrar dated 9 November 2000.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 13 to 17 November 2000, at which the Court heard the oral arguments and replies of:

For Germany:

Mr Gerhard Westdickenberg,
Mr Bruno Simma,
Mr Daniel Khan,
Mr Hans-Peter Kaul,
Mr Andreas Paulus,
Mr Donald Francis Donovan,
Mr Pierre-Marie Dupuy.

For the United States:

Mr James H. Thessin,
The Honourable Janet Napolitano,
Mr Theodor Meron,
Ms Catherine W. Brown,
Mr D. Stephen Mathias,
Mr Stefan Trechsel,
Mr Michael J. Matheson.