

The LaGrand Brothers Case: Germany vs. the United States in the International Court of Justice.

Suggested Citation: *The LaGrand Brothers Case: Germany vs. the United States in the International Court of Justice.*, 1 German Law Journal (2000), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=25>

[1] During the week of November 14th the International Court of Justice (ICJ) heard arguments in the complaint filed by the Federal Republic of Germany against the United States of America. Germany alleges that the United States violated its obligations under Article 36 of the 1963 Vienna Convention on Consular Relations. The undisputed violation occurred when the state of Arizona arrested, tried, convicted, sentenced to death and ultimately executed the German brothers Karl and Walter LaGrand; all without (immediately) advising the German consulate and the German brothers of their right to contact and consult with one another as required by Art. 36(1)(b) of the convention (the notification claim). As long as the German consulate remained unaware that the German citizens were passing through the American criminal process it was therefore indirectly prevented from making contact with the brothers. Based on this point, the Germans also argued that the United States had failed to fulfill its obligations under Art. 36(1)(a) of the convention, which requires receiving states to facilitate contact between a consulate and its nationals (the contact claim). Because the United States does not dispute the violation, the case turned on Germany's requested reparations and compensation, which in turn led to an examination of the meaning, significance and scope of the Convention itself. Finally, Germany complained that the violation was aggravated by the procedural rules governing American death penalty appeals, which prevented the reviewing courts from granting the brothers some form of relief, and by the execution of the Germans in 1999, which made the effects of the treaty violation irreversible.

[2] An important, albeit peripheral, issue in the case involved the emergency order the Court entered in the hours before the second brother's execution (Karl LaGrand – March 3, 1999), which instructed the U.S. government to take the necessary provisional measures to stay the execution to allow the litigation before the ICJ to proceed. The Court can order such provisional measures pursuant to Art. 41 of its empowering statute. Among the provisional measures ordered by the Court was the communication of the emergency order to the highest authorities in Arizona. The execution went ahead without regard to the Court's order and the German government asked the Court to use this case to decide whether its orders of provisional measures have binding force.

[3] The United States had once before been hailed before the ICJ on the same issue in the *Breard* case in 1998. The case involved the execution of a Paraguayan in Virginia. Mr Breard was convicted for murder and attempted rape on June 24, 1993. The following August the death penalty was imposed. At no point during these proceedings had Mr Breard been informed of his rights to consular assistance. After an unsuccessful *Habeas Corpus* petition to the Federal District Court in 1996, Mr Breard finally brought his case to the U.S. Supreme Court, which rejected his request for a *writ of certiorari* on April 13, 1998, i.e. one day before his scheduled execution. As in the LaGrand case, the International Court of Justice had entered a provisional order demanding a stay of the execution (April 9, 1998). Then, in another parallel to the LaGrand case, that provisional order was ignored by the United States. The ICJ never ruled on the merits of the Breard case, however, because the Paraguayan government withdrew the case after Breard's execution. (April 14, 1998).

[4] The high dramatics of the LaGrand case derive from themes that were not formally part of the case, namely: (1) the novelty of having America hailed before the International Court of Justice by one of its most trusted and faithful allies; and (2) the subtext of the well known European disdain for America's passion for the death penalty. Both sides acknowledged the existence of these themes at various times and to various degrees during the arguments while struggling to keep the case between the four squares of Art. 36 of the Consular Convention.

[5] The German case had a two-part focus. First, the Germans sought to justify their sweeping demands for reparations and compensation for the admitted violation of the Convention by broadly defining the terms and obligations of Art. 36 of the Convention. On this point, the Germans went so far as to argue that the guarantees identified by the Consular Convention constituted international human rights norms meriting the Court's most serious response. Second, the Germans sought to highlight the special deficiencies of the American death penalty regime, which contributed to and/or aggravated the international law violation and thereby constituted the justification for sweeping reforms of the American death penalty regime as part of the reparations scheme. Regarding this second point, the Germans argued that the essence of the Convention's consular contact guarantees is to allow the consulate to assist its nationals when they face criminal proceedings abroad. This guarantee is radically more important in the American death penalty context, the German argued, which is widely regarded as producing unjust results due to the inadequacy of counsel provided to defendants and the severity of "procedural default" rules that limit the appellate courts' power to remedy any shortcomings (including international law violations like the one at issue in this case).

[6] The remedies sought by the Germans are extraordinarily broad, including assurances that the violations of Art. 36 will not be repeated and changes to the American death penalty regime (provision of better counsel and softening of procedural default rules) in order to mitigate the harm done if Art. 36 is violated again. Central to the German demand for a strong response from the Court was the revelation, during Karl LaGrand's clemency proceedings in the hours before his execution, the state of Arizona revealed that it had known since the brothers' arrest in 1982 that the brothers were German. This amounted to bad faith, the Germans argued, justifying a proportional response from the Court.

[7] The U.S. defense had several points.

First, the U.S. argued that the violation was not made in bad faith. It was noted that, although the brothers were technically German, they had been raised in the United States and were completely American in their speech, appearance and outlook. The U.S. argued that the brothers, themselves, failed to strongly assert (if they asserted it at all) their status as foreigners. Arguing part of the case for the United States, Arizona Attorney General Janet Napolitano emphasized this point by claiming that it was reasonable to assume that the brothers were American because they wore their hair in the typical "Afro-American style." To these arguments regarding the lack of bad faith, the U.S. added practical matters like the vast size of the American territory and America's immense, diverse population. Unconvincingly, the U.S. defended itself on this point by pleading its powerlessness, in the face of its complex federal structure, over law enforcement at the most local level.

[8] Regarding the technical interpretation of the Convention, the U.S. argued the strictest and most narrow possible reading of the terms of the convention. Such a reading would leave most of the German demands for reparations (sweeping changes to America's domestic criminal law) outside the Court's jurisdiction. Repeatedly, the U.S. reminded the Court that its role in interpreting and applying the Consular Convention was not to serve as another instance for an appeal from a domestic criminal conviction. The U.S. argued that the Court could easily find, from a survey of the practice of nations regarding the Consular Convention, that the U.S. had already fulfilled its obligations in case of a violation. The U.S. provided the typical, formal apology to the German government as is the international practice, including for Germany. The U.S. went further to show that it had implemented a number of nationwide programs to raise awareness among law enforcement institutions (prisons and police) of the issue. The U.S. pressed the Court to acknowledge that the numerous signatories to the Convention had not agreed to more than that, especially nothing so intrusive as the German demands.

[9] The U.S. also turned the bad faith argument back on Germany. First, the U.S. cited former German Federal President Roman Herzog and current German Federal Foreign Minister Joschka Fischer, both of whom had glowingly praised the high quality and democratic reliability of the justice afforded the LaGrand brothers in letters written to U.S. and Arizona authorities seeking relief for the Germans. How is it, the U.S. asked, that the German government could be making the opposite claims and demanding that the International Court of Justice intervene in domestic law to remedy and inherently injustice system? Second, the U.S. suggested that Germany was acting in bad faith by bringing the claim because it had waited so long (literally until the hours preceding the execution of the second brother). Finally, and most persuasively, the U.S. questioned the intention of the German government in the present case by citing the German government's meek involvement in the proceedings of the Apelt brothers, two other German citizens awaiting execution in Arizona. Germany cannot argue in the LaGrand brothers' case that it would have taken advantage of American compliance with the Convention to launch an aggressive defense for the LaGrand brothers if, when Germany was notified at an earlier stage of the proceedings in the Apelt brothers' case, Germany did not launch such an aggressive defense.

For more information:

Text of the Vienna Convention on the web at

<http://www.un.org/law/ilc/texts/consul.htm>>www.un.org/law/ilc/texts/consul.htm

The International Court of Justice Statue and Rules: <http://www.icj-cij.org/icjwww/ibasicdocuments>>www.icj-cij.org/icjwww/ibasicdocuments

Pleadings, press materials and transcripts of oral arguments on the web of the LaGrand case:

<http://www.icj-cij.org/icjwww/idocket.htm>>www.icj-cij.org/icjwww/idocket.htm

Constanze Schulte, Jurisprudence of the International Court of Justice - Current Survey: Order Issued in the Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), in: 9 European

Journal of International Law 1998:

<http://www.ejil.org/journal/Vol9/No4/sr2.html#TopOfPage>">www.ejil.org/journal/Vol9/No4/sr2