

THE LAGRAND CASE
(Germany v United States of America)

The following is a Summary of the Order of the International Court of Justice delivered on 5 March 1999.

HISTORY OF THE CASE¹

On 2 March 1999 Germany instituted proceedings in the International Court of Justice against the United States for alleged violations of the 1963 Vienna Convention on Consular Relations ("Vienna Convention"). Germany based the jurisdiction of the Court on Article 36(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 ("the Optional Protocol").

In the Application, Germany claimed that the United States had breached Article 36 of the Vienna Convention in the following circumstances:

1. When authorities in Arizona detained two brothers who were German nationals, Karl and Walter LaGrand ("the brothers"), in 1982, the authorities did not comply with Article 36 of the Vienna Convention.
2. Article 36(1)(b) required the authorities to advise any detainee, "without delay", of their rights on consular assistance, if the detainee was a foreign national (alien).
3. The brothers had been detained, tried and sentenced to death without them having been informed of their rights guaranteed under Article 36.
4. The failure to provide the required notification precluded Germany from protecting its nationals' interests in the United States under Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in United States courts.

In the Application, Germany alleged that it had accepted as true an earlier contention by the State of Arizona that its authorities had been unaware that the brothers were German nationals until recently. However, during

¹ The history of the case and the parties' submissions are found at paras 1-12 of the Court's Order.

the proceedings before the Arizona Mercy Committee on 23 February 1999, the State Attorney admitted that the authorities had been aware of this fact since 1982.

Germany stated that the brothers, with the help of German consular officials, finally claimed violations of the Vienna Convention before the Federal Court at first instance. The Federal Court applied the municipal law doctrine of "procedural default" and decided that, because the individuals in question had not asserted their rights under the Vienna Convention in previous legal proceedings at state level within the United States, they could not assert these rights in later federal *habeas corpus* proceedings. This decision was affirmed by the intermediate federal appellate court, the last legal recourse in the United States that was available to the brothers as of right.

As a result, Germany asked the International Court of Justice to adjudge and declare the following in relation to the international legal obligations of the United States:

- (1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand had violated its international legal obligations to Germany under Articles 5 and 36 of the Vienna Convention;
- (2) that Germany was entitled to reparation;
- (3) that the United States was 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 rights accorded under Article 36 of the Vienna Convention; and
- (4) that the United States was 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 held a superior or subordinate position in the organisation of the United States, and whether that power's functions were of an international or internal character.

Pursuant to the above, Germany asked the Court to adjudge and declare the following as well:

- (1) that the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations was void, and recognised as void by the legal authorities of the United States;
- (2) that the United States should pay reparation as compensation and satisfaction for Karl LaGrand's execution on 24 February 1999;
- (3) that owing to the United States' violation of its international legal obligation, it should restore Walter LaGrand to his *status quo ante* by re-establishing the situation that existed before his detention and subsequent proceedings that led to his conviction and sentencing; and
- (4) that the United States should provide Germany with a guarantee that the illegal acts would not be repeated.

THE SUBMISSIONS²

On 2 March 1999 Germany submitted an urgent request to the International Court of Justice for the indication of provisional measures in order to protect its rights. Germany asked the Court 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".

In its request, Germany recalled that Karl LaGrand was executed on 24 February 1999. The execution took place despite all appeals for clemency and numerous diplomatic interventions by Germany at the highest level. However, the date for the execution of Walter LaGrand had been set for 3 March 1999. Therefore, Germany requested urgent indication of provisional measures to protect his interest and emphasised as follows:

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.

Germany added 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

² Ibid.

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.

Germany asked that pending final judgment in the present case, the Court should indicate that:

[t]he 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.

By a letter dated 2 March 1999, Weeramantry V-P 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.

On 3 March 1999 at 9 am (The Hague time), Weeramantry V-P received the representatives of both states, to obtain information from them on the subsequent course of the proceedings. The German representative stated that the Governor of Arizona had rejected a recommendation by the Mercy Committee that Walter LaGrand's execution be stayed. As a consequence, Walter LaGrand was scheduled to be executed that day at 3 pm (Phoenix time). The German representative therefore emphasised the extreme urgency of the situation and referred to Article 75 of the Rules of Court. He asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*.

In reply, the United States representative pointed out that the case had been the subject of lengthy proceedings and that the request for provisional measures submitted by Germany was made at a very late date. The United States therefore strongly objected to any procedure that was proposed by the German representative that very same day. If urgent provisional measures were indicated, it meant that the Court would be making an Order *proprio motu* without having first heard the two parties.

THE REASONING OF THE INTERNATIONAL COURT OF JUSTICE³

The Court began by pointing out that in a request for the indication of provisional measures, it need not, before deciding whether or not to indicate such measures, finally satisfy itself that it had jurisdiction on the merits of the case. However, it should indicate provisional measures unless the provisions invoked by the Applicant appeared, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.

The Court noted Article I of the Optional Protocol, which Germany invoked as the basis of jurisdiction of the Court in this case, and stated:

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.

The Court noted also that both Germany and the United States were parties to the Vienna Convention and to the Optional Protocol.

The Court observed that in Germany's Application, Germany had stated that the issues in dispute concerned Articles 5 and 36 of the Vienna Convention and that they fell within the compulsory jurisdiction of the Court under Article I of the Optional Protocol.

The Court stated that *prima facie*:

- (1) there existed a dispute on the application of the Vienna Convention within the meaning of Article I of the Optional Protocol; and

³ Refer paras 13-28 of the Court's Order.

- (2) it had jurisdiction under Article I of the Optional Protocol to decide the dispute between Germany and the United States.

The Court observed that the sound administration of justice required that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time. However, the Court noted that Germany had emphasised that it was not fully aware of the facts of the case until 24 February 1999 and since then Germany had pursued its action at the diplomatic level. Consequently, under Article 75(1) of the Rules of Court, the Court could:

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...

The Court observed that a provision such as Article 75 had featured substantially in the Rules of Court since 1936. Even if the Court was yet to make use of the power conferred upon it by this provision, nonetheless the power was clearly established. As a result, the Court could make use of this power irrespective of whether it had been seised by the parties in such urgent proceedings. The Court could proceed without holding oral hearings and it could decide in each case if, in the light of the particular circumstances of the case, it should make use of this power.

In addition, the Court stated the following:

- (1) the power to indicate provisional measures under Article 41 of its Statute was intended to preserve the respective rights of the parties pending the decision of the Court;
- (2) such measures were only justified if there was urgency; and
- (3) the Court would not order interim measures in the absence of irreparable prejudice to rights that were the subject of dispute.

The Court noted that the execution of Walter LaGrand was ordered for 3 March 1999. If it occurred it would cause irreparable harm to the rights claimed by Germany in this particular case. The Court also observed that the present case was not about the right of federal states in the United States to resort to the death penalty for the most heinous of crimes. And it was not about the Court acting as a court of criminal appeal. On the other hand, the Court held that its function was to resolve international legal

disputes between nations, *inter alia*, when they arose out of the interpretation or application of international conventions.

In the light of the above considerations, the Court found that it was required to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of the Statute of the Court and Article 75(1) of the Rules of Court. The Court held also that the measures indicating stay of execution would necessarily be provisional in nature and would not in any way prejudice findings the Court might make on the merits of Germany's Application.

The Court finally held the following:

- (1) the international responsibility of a state was engaged by the action of its competent organs and authorities acting within the state;
- (2) the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision in the proceedings;
- (3) since the implementation of the measures indicated in the present Order fell within the jurisdiction of the Governor of Arizona according to information available to the Court, the United States government was consequently under the obligation to transmit the present Order to the said Governor; and
- (4) that the Governor of Arizona was under the obligation to act in conformity with the international undertakings of the United States.

For the above reasons the Court indicated unanimously the following provisional measures:⁴

- (1) 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.
- (2) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

In addition, the Court decided that until it gave its final decision, it remained seised of the matters that formed the subject matter of this Order.

⁴ For the full text of the operative part, see para 29 of the Court's Order.