

**INTERNATIONAL COURT OF JUSTICE**

**APPLICATION**

INSTITUTING PROCEEDINGS

filed in the Registry of the Court  
on 2 March 1999

**LAGRAND CASE**

(Germany v. United States of America)

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1999  
General List  
No. 104

**I. THE AMBASSADOR OF THE FEDERAL REPUBLIC OF  
GERMANY TO THE NETHERLANDS TO THE PRESIDENT OF  
THE INTERNATIONAL COURT OF JUSTICE**

The Hague, 2 March 1999.

Upon instruction of my Government, I have the honour to submit herewith an Application of the Federal Republic of Germany as well as an urgent request for provisional measures pursuant to Articles 40 and 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court against the United States of America for violations of the Vienna Convention on Consular Relations.

The request for provisional measures is of extreme urgency. The execution of the German national Walter LaGrand, set to take place in the State of Arizona on 3 March 1999, would deprive both this Court and Germany of the opportunity to have the case decided on its merits

*(Signed)* E. VON PUTTKAMER,

Ambassador of the Federal Republic of Germany.

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**II. APPLICATION OF THE FEDERAL REPUBLIC OF GERMANY**

On behalf of the Federal Republic of Germany and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Federal Republic of Germany against the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has

jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

## I. THE VIENNA CONVENTION

1. Article 36, subparagraph 1 (*b*), of the Vienna Convention on Consular Relations (the "Vienna Convention") 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:

"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."

2. As the United States stated before the International Court of Justice in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*,

"a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations . . . Article 36 establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings*, p. 174.)

3. In the recent case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Judge Schwebel, in his declaration appended to the unanimous Order of the Court for a stay of execution of a national of Paraguay, stated:

"It is of obvious importance to the maintenance and development of a rule of law among States that the 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)." (Order of 9 April 1998, *I.C.J. Reports 1998*, p. 259.)

## II. STATEMENT OF FACTS

4. In 1982, the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand. These German nationals were tried and sentenced to death without being advised of their rights to consular assistance, as guaranteed to them by Article 36, subparagraph 1 (*b*), of the Vienna Convention.

It was only in 1992, when all legal avenues at the state level had been exhausted, that the German consular officers were made aware, not by the authorities of the State of Arizona, but by the detainees themselves, of the case in question.

5. 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.

While maintaining that under the requirement of due diligence and good faith applicable in international relations, the authorities of the State of Arizona should have established the foreign nationality of the detainees (Karl and Walter LaGrand were born in Germany. Their mother was a German national. These informations, gleaned by the authorities of the State of Arizona from the detention forms, clearly laid grounds for further investigation as to the nationality of the detained brothers, and put the onus on the authorities per Article 36, subparagraph I (b), of the Vienna Convention—to determine their nationality and to inform the German consular officers), Germany accepted as true the contention of the authorities of the State of Arizona that they had not actually been aware of the German nationality of the detainees.

However, during the proceedings before the Arizona Mercy Committee on 23 February 1999, State Attorney Peasley admitted that the authorities of the State of Arizona had indeed been aware all along, since 1982, that Karl and Walter LaGrand had been German nationals. It was thus in full knowledge of the German nationality of the detainees that the authorities of the State of Arizona held, tried and convicted Karl and Walter LaGrand without informing them of their rights under Article 36 of the Vienna Convention.

6. 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 state courts.

7. The possibility cannot be excluded that this lack of consular assistance did have an impact on the criminal proceedings. Indeed, when 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, that court rejected the assertion of this and other claims based on a municipal doctrine of procedural default. Applying this doctrine, the court decided that, because Karl and Walter LaGrand 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. This municipal law doctrine was held to bar such relief even though, first, Karl and Walter LaGrand were unaware of their rights under the Convention at the time of the earlier proceedings, and second, they were unaware of their rights 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 appellate court affirmed. Karl and Walter LaGrand's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to them as of right.

8. Karl LaGrand was executed on 24 February 1999, after last attempts had failed in front of the Arizona Mercy Committee to prevent the sentence of death being carried out.

The date of execution of Walter LaGrand has been set for 3 March 1999.

### III. GERMANY'S EFFORTS TO PREVENT THE CARRYING OUT OF THE DEATH SENTENCES

9. The Government of the Federal Republic of Germany has used every diplomatic means at its disposal in order to prevent the carrying out of the death sentences against Karl and Walter LaGrand. Numerous interventions have been made. Both the President and the Chancellor of the Federal Republic of Germany have appealed to the President of the United States. Foreign Minister Fischer and Justice Minister Däubler-Gmelin have raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. D marches have been undertaken by the German Ambassador to the United States. The German Ambassador and the German Consul-General have appeared before the Mercy Committee of the State of Arizona on the day prior to the execution of Karl LaGrand. They intend to do the same at the hearing of the Mercy Committee that is to decide on the fate of Walter LaGrand.

Germany had asked for the death sentences against Karl and Walter LaGrand to be set aside on humanitarian grounds. Germany was not only motivated by its opposition, in principle, to the death penalty, but by the special circumstances of the case. Indeed, Karl and Walter LaGrand were only 18 and 19 years of age when they committed the crimes. They have spent a total of 15 years on death row, a period which, even by United States standards, is unusually long.

Germany did also raise the issue to no avail—of a violation of the Vienna Convention. German Foreign Minister Fischer, in a letter to United States Secretary of State Albright dated 22 February 1999, did assert a violation—through negligence—of Article 36 of the Vienna Convention in the case of the two detainees. A detailed Memorandum of the German Government was enclosed in that letter. The United States of America, to this day, has failed to respond.

It was only on 24 February 1999 that the authorities of the State of Arizona did reveal that they had, since 1982, actual knowledge of the German nationality of Karl and Walter LaGrand.

10. Germany was not and is not seeking any relief barring the competent authorities of the United States from enforcing its criminal law. Germany did and does contend, however, 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 in the Vienna Convention.

### IV. THE JURISDICTION OF THE COURT

11. Under Article 36, paragraph 1, of the Statute of the Court, "the jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

12. The Federal Republic of Germany and the United States of America are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

"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."

13. Germany therefore submits that, upon the filing of the present Application, the matters in dispute between Germany and the United States concerning Germany's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

#### V. THE CLAIMS OF THE FEDERAL REPUBLIC OF GERMANY

14. The Government of the Federal Republic of Germany claims that

(a) Pursuant to Article 36, subparagraph I (b), of the Vienna Convention, the United States was and is under the international legal obligation to Germany, a State party to the Convention, to inform "without delay" any German national, such as Karl and Walter LaGrand, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(b) Pursuant to Article 36, subparagraph I (b), of the Vienna Convention, the United States was and is under the international legal obligation to an arrested national of Germany, such as Karl and Walter LaGrand, to inform him or her "without delay" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Germany can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph I (b), of the Vienna Convention, has effectively prevented Germany from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of the Convention. The United States has therefore violated the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States was and is under an international legal obligation to ensure that its national law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36 of the Vienna Convention. The United States has violated the foregoing obligation.

(e) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated the foregoing obligation.

## VI. THE JUDGMENT REQUESTED

15. Accordingly 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.

## VII. RESERVATION OF RIGHTS

16. The Federal Republic of Germany reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

## VIII. PROVISIONAL MEASURES

17. The Federal Republic of Germany requests the Court to indicate provisional measures of protection, as set forth in a separate request filed concurrently with this Application.

The Hague, 2 March 1999.

*(Signed)* E. VON PUTTKAMER,

Ambassador of the Federal Republic of Germany  
to the Kingdom of the Netherlands.