

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

## LAGRAND CASE

(GERMANY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL  
MEASURES

**ORDER OF 3 MARCH 1999**

# 1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

## AFFAIRE LAGRAND

(ALLEMAGNE *c.* ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES  
CONSERVATOIRES

**ORDONNANCE DU 3 MARS 1999**

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ORDONNANCE

## INTERNATIONAL COURT OF JUSTICE

YEAR 1999

**3 March 1999****LAGRAND CASE**(GERMANY *v.* UNITED STATES OF AMERICA)REQUEST FOR THE INDICATION OF PROVISIONAL  
MEASURES

## ORDER

*Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLJMAN, REZEK; Registrar VALENCIA-OSPINA.*

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court at 7.30 p.m. (The Hague time) on 2 March 1999, whereby the Federal Republic of Germany (hereinafter "Germany") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

*Makes the following Order:*

1. Whereas, in its aforementioned Application, Germany bases 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 on Consular Relations (“the Optional Protocol”);

2. Whereas, in the Application, it is stated that in 1982 the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand; whereas it is maintained that these individuals were tried and sentenced to death without having been informed, as is required under Article 36, subparagraph 1 (*b*), of the Vienna Convention, of their rights under that provision; whereas it is specified that that provision 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; whereas it is also alleged that 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 United States courts;

3. Whereas, in the Application, Germany states that 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; whereas it had accepted that contention as true; however, during the proceedings before the Arizona Mercy Committee on 23 February 1999, the State Attorney admitted that the authorities of the State of Arizona had indeed been aware since 1982 that the two detainees were German nationals;

4. Whereas, in the same Application, Germany further states that 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; whereas that court, applying the municipal law doctrine of “procedural default”, decided that, because the individuals in question 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; and whereas the intermediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed this decision;

5. Whereas, 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";

6. Whereas, on 2 March 1999, after having filed its Application, Germany also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Germany refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it affirms in particular that the United States has violated its obligations under the Vienna Convention;

8. Whereas, in its request for the indication of provisional measures of protection, Germany recalls that Karl LaGrand was executed on 24 February 1999, despite all appeals for clemency and numerous diplomatic interventions by the German Government at the highest level; whereas the date of execution of Walter LaGrand in the State of Arizona has been set for 3 March 1999; and whereas the request for the urgent indication of provisional measures is submitted in the interest of this latter individual; and whereas Germany emphasizes that:

“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”;

and whereas Germany adds 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 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 the *status quo ante* restored in the event of a judgment in its favour”;

9. Whereas, Germany asks that, pending final judgment in this case, the Court indicate that:

“The 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 should inform the Court of all the measures which it has taken in implementation of that Order”;

and whereas it asks the Court moreover 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”;

10. Whereas, on 2 March 1999, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and sent it forthwith a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court;

11. Whereas, by a letter dated 2 March 1999, the Vice-President of the Court 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”;

and whereas a copy of that letter was transmitted forthwith to the German Government;

12. Whereas, on 3 March 1999, at 9.00 a.m. (The Hague time), the Vice-President of the Court received the representatives of the Parties in order to obtain information from them with regard to the subsequent course of the proceedings; whereas the representative of the German Government stated that the Governor of the State of Arizona had rejected a recommendation by the Mercy Committee that the execution of Walter LaGrand should be stayed, so that the latter would in consequence be executed this same day at 3.00 p.m. (Phoenix time); whereas he emphasized the extreme urgency of this situation; and whereas, referring to the provisions of Article 75 of the Rules of Court, he asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties;

\* \* \*

13. Whereas, on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

14. Whereas, Article I of the Optional Protocol, which Germany invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

“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”;

15. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Germany and the United States are parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, in its Application Germany stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

17. Whereas, in the light of the requests submitted by Germany in its Application and of the submissions made therein, there exists *prima facie* a dispute with regard to the application of the Convention within the meaning of Article I of the Optional Protocol;

18. Whereas, the Court has satisfied itself that, *prima facie*, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States.

\* \*

19. Whereas, the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time;

20. Whereas, Germany emphasizes that it did not become fully aware of the facts of the case until 24 February 1999 and that since then it has pursued its action at diplomatic level;

21. Whereas, under Article 75, paragraph 1, of the Rules of Court, the latter “may 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”; whereas a provision of this kind has substantially featured in the Rules of Court since 1936, and whereas, if the Court has not, to date, made use of the power conferred upon it by this provision, the latter appears nonetheless to be clearly established; whereas the Court may make use of this power, irrespective of whether or not it has been seised by the parties of a request for the indication of provisional measures; whereas in such a case it may, in the event of extreme urgency, proceed without holding oral hearings; and whereas it is for the Court to decide in each case if, in the light of the particular circumstances of the case, it should make use of the said power;

22. Whereas the power of the Court to indicate provisional measures

under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979*, *I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 19, para. 34); *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Provisional Measures, Order of 9 April 1998*, p. 257, para. 36);

24. Whereas the execution of Walter LaGrand is ordered for 3 March 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case;

25. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

\* \* \*

26. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules;

27. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudice findings the Court might make on the merits; and whereas such measures would preserve the respective rights of Germany and of the United States; and whereas it is appropriate that the Court, with the cooperation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

28. Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;

\* \* \*

29. For these reasons,

THE COURT,

Unanimously,

I. *Indicates* the following provisional measures:

- (a) 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;
- (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

II. *Decides* that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(*Signed*) Christopher G. WEERAMANTRY,  
Vice-President.

(*Signed*) Eduardo VALENCIA-OSPINA,  
Registrar.

Judge ODA appends a declaration to the Order of the Court.

President SCHWEBEL appends a separate opinion to the Order of the Court.

*(Initialed)* C.G.W.

*(Initialed)* E.V.O.

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