Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand *Case*

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The *LaGrand* case, currently under deliberation at the International Court of Justice, encapsulates a number of problems cutting across key areas of international law. The dispute, which arose out of the United States' failure of consular notification in violation of the 1963 Vienna Convention on Consular Relations, originated within a context that compelled Germany and the Court itself to act in an unprecedented manner. The life of a man in imminent danger prompted Germany 'to sue its close ally, the United States' and the Court to act within hours after it had been seised on 2 March 1999, issuing for the first time an Order on provisional measures *proprio motu* and without having held a hearing.[1] Indeed, although the case has at its core the interpretation and application of Article 36 of the Vienna Convention, it involves legal proceedings that led to the deprivation of life of two German nationals: Karl and Walter LaGrand. The first died executed by lethal injection and the second in the gas chamber of the state of Arizona. As a result, the parties met in relation to a dispute which, although it '[did] not concern the international legality *vel non* of the death penalty as such', was surrounded by facts that made it impossible to insulate the provision at stake from its possible bearing on individual rights: namely on the right to due process and, ultimately, on the right to life in the context of the death penalty. Two opposite views of international law appeared from the arguments of the parties. For the United States international law consists of a myriad of watertight compartments: at the level of sources, treaty law and customary international law have separate existences and thus one excludes the application of the other; at the level of rights and

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[1] While Karl LaGrand was executed in February 1999, Walter LaGrand's execution had been scheduled for 3 March 1999.

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obligations, inter-state relations can be isolated from their bearing on individual rights; in respect of the different areas of public international law, they may not converge, human rights law being like oil, never to mix with the water of consular relations or diplomatic protection. In contrast, Germany took the view that a treaty provision is not self-sufficient but may interact with other norms and sources in its application; that inter-state rights and obligations can no longer be insulated from individual rights, and that the interlocking of human rights law with other areas of public international law corresponds to the reality of contemporary international law. Moreover, while the United States advocated the view that norms can be neutrally applied regardless of context and circumstances, Germany argued that context is important. This article examines a number of closely interrelated legal problems that lie at the basis of the two propositions before the Court.

First, it is submitted that the *LaGrand* case illustrates the complexity of the interaction between custom and conventional norms under modern international law. In this author's view, such interaction goes beyond the traditional *Continental Shelf* principles and operates in a more sophisticated fashion. Germany's reliance (following the *Namibia* Advisory Opinion principle) on the entire legal framework of international law prevailing at the time of the interpretation of Article 36 of the Vienna Convention (which includes rights and obligations under customary law) sheds light on the ancillary role that customary law may play in the interpretation of treaty law. In contrast, the United States assumed that a treaty regime could exist and be interpreted secluded from the rest of the *corpus* of international law. It favoured a rather positivistic and restrictive interpretation of Article 36, almost suggesting that everything not explicitly laid down therein is outside the jurisdiction of the Court under the Optional Protocol. Professor Meron's assertion that 'this case is about a breach of State-to-State obligations and has nothing to do with human rights or with due process' epitomized the position of the United States. As noted by Jimenez de Arechaga, however, 'treaty law and customary law do not exist in sealed compartments in contemporary international law'.[2] In practice, sources often supplement each other and are applied 'side by side'. [3] To this author, the importance of the supplementary role of custom rests on an elemental observation: treaty law does not exist in a vacuum and cannot be treated as if it did.

A second issue concerns the entanglement between state-based rights and obligations, and individual rights under the Vienna Convention. Indeed, multilateral treaties today are a complex web of inter-state rights and obligations very often entangled with individual rights (and sometimes even individual obligations) under international law. The intertwining of state-based rights and duties under Article 36 of the Vienna Convention with the individual right to information on consular assistance is an example of such feature. The current work of the ILC in the area of state responsibility acknowledges that expansive reality of contemporary inter-

[2] See E. Jimenez de Arechaga's presentation on Custom in A. Cassese and J. H. H. Weiler (eds), *Change and Stability in International Law-Making* (1988) 2.

[3] P. Malanczuk, *Akehurst's Modern Introduction to International law* (7th rev. ed. 1997), at 57.

national law. The conceptual framework underlying the ILC Draft Articles goes beyond mere 'bilateralized State relations' governed by a logic of pure reciprocity and recognizes the fact that state relations take place in a world populated by individuals who are often affected by breaches of international law.[4] In the same vein, the *LaGrand* case illustrates how relations fundamentally affecting states (such as consular relations) can no longer be separated from their effects on individuals; how individual rights today 'intrude' in what Cassese calls 'the cosy bilateral relations of states'.[5] Traditionalists in the field of international law may feel uneasy with the view that individuals are *titulaires* of rights under Article 36. After all, there is a widely held view that individual rights are confined to the realm of international human rights law only and have nothing to do with other areas of public international law. This 'ghettoization' of international human rights law, however, is no longer consistent with reality. The relevance of human rights norms is evident today in areas that range from the law of immunities to the law of the sea.

An interesting turn in Germany's submissions during the oral pleadings consisted of its further development of the legal arguments connected with the issue of individual rights. It argued that the right to information on consular assistance constitutes an individual human right counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defence and receive a fair trial, the observance of which becomes imperative in cases involving the death penalty. Germany's position coincided with the view taken by all Latin American states making representations before the Inter-American Court of Human Rights during the proceedings concerning the Advisory Opinion on the 'Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'.[6] It is argued that the Inter-American Court's pronouncement, the longstanding jurisprudence of the Human Rights Committee, as well as important developments taking place in the field of international law in the last few decades support such a view. This has profound implications for the right to life in death penalty cases. As held by Germany, 'the character of Article 36 as a guarantee of due process in the sense of the Covenant on Civil and Political Rights means that, if followed by an execution, a violation of Article 36 will amount to a violation of the right to life enshrined in Article 6 of the Covenant'.

Germany's recognition of the existence of a direct injury to the individual (in addition to the direct injury inflicted on the state) gave rise to its claim to diplomatic protection, which Germany considered 'closely and insolubly linked to the dispute over the correct understanding of the convention'. This is not only consistent with its approach to the interpretation of the rights and obligations under scrutiny, but above all it shows the particular importance Germany placed in asserting the rights of their

[4] See International Law Commission Report on the work of its fifty-second session, GA No. 10 (A/55/10) paras 78 and 119. See also Special Rapporteur James Crawford, Third Report on State Responsibility, addendum 4, A/CN.4/507/Add.4, paras 373–379, in particular his comments on 'Victims other than States: peoples and populations'. Available on the ILC web site.

[5] A. Cassese, *Human Rights in a Changing World* (1990), at 162.

[6] Inter-American Court of Human Rights, Advisory Opinion OC-16/99.

citizens to a treatment in accordance with international law. The case raises important issues with respect to the contemporary role of diplomatic protection in the context of modern international law. It reflects a problem noted by the Special Rapporteur on Diplomatic Protection with respect to the limited remedies available to individuals to gain redress for violations of international law and that 'the suggestion that developments in the field of human rights law have rendered diplomatic protection obsolete' does not reflect the reality of international law.[7] In this author's view, the *LaGrand* case in that sense illustrates a point emphasized by Dugard in his report: the institution of Diplomatic Protection can play an important role in the protection of human rights under contemporary international law.[8]

Finally, it is submitted that the link between the right to information to consular access as a minimum guarantee of due process and the right to life places the issue of provisional measures in a different light. Together with its predecessor *Breard*, the *LaGrand* case not only resuscitated debate around the legal effects of provisional measures but it had the particularity of raising the question in a manner that the anonymity of the civilians affected in the *Genocide* case[9] could not achieve: the individual fate of a man with his life pending on the thread of the Court's Order shed full light on the importance and crucial legal consequences of the issue. Perhaps most importantly, though, is to note that *LaGrand* is the first case to reach the merits stage where the ICJ has been expressly requested to rule on the international responsibility incurred by a state for failure to comply with an Order for provisional measures. Germany alleges 'irreparable damage' as a consequence of Walter LaGrand's execution. But if Lauterpacht's rejection of the overriding nature of the 'irreparable damage' argument on the basis 'that the legal consequences of liability in public international law are generally limited to the obligation to pay damages, and therefore there is no such occurrence in the international sphere as irreparable damage' may have been valid before, it is no longer tenable in the current situation of international law. The impact of human rights law within public international law shows that certain damages such as those inflicted on human lives are in effect irreparable.

Germany requested the Court that 'a remedy with teeth be adopted and enforced' in light of the continuing pattern of neglect of Article 36 by US public authorities. It remains to be seen however whether the Court will seize this potentially very important opportunity to contribute to the 'process of *humanization* of international law'.[10]

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[7] See John Dugard, Special Rappoteur, First Report on Diplomatic Protection. A/CN.4/506, para. 22. See also GA No. 10 (A/55/10), para. 416.

[8] A/CN.4/506, para. 29 and GA No. 10 (A/55/10), para. 415.

[9] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*. Request for the Indication of Provisional Measures. Order of 8 April 1993, ICJ Reports 1993, at 3.

[10] See *Concurring Opinion of Judge Cancado Trindade*, Inter-American Court of Human Rights, *supra* note 6, at 82.