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Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ's Judgment in the LaGrand Case

Christian J. Tams*

The International Court of Justice, in a landmark ruling in the *LaGrand* case,¹ held that interim orders under Article 41 of its Statute impose binding legal obligations upon the parties to the dispute. Quite apart from this controversial conclusion, the judgment is remarkable in a number of other respects. In the circumstances of the case, Germany had asked the Court to declare that the United States' treatment of two German nationals, Karl and Walter LaGrand, was in violation of the 1963 Vienna Convention on Consular Relations (VCCR). The two brothers had been arrested in 1982 for various crimes, including murder, and were subsequently tried and sentenced to death by US courts. In the course of the proceedings, they had not been informed of their right, as guaranteed by Article 36 of the VCCR, to seek consular assistance.

In its first claim (see paras 65–78), Germany contended that this omission not only violated its own rights as a state party to the Convention — a violation that the US conceded — but also the individual rights of the two brothers. The Court granted this claim, thereby recognizing that Article 36 of the Convention protects individual rights. Its decision affirms the view that under modern international law, individual rights need not necessarily derive from classical human rights treaties, but are a pervasive phenomenon — a view that was recently also held by the Inter-American Court of Human Rights (IACHR).² While the IACHR however went on to discuss the relation between individual rights to consular assistance and procedural human rights, the ICJ stopped short of recognizing that Article 36 of the VCCR was a human right, thereby prudently avoiding a politicization of the dispute.

In its second claim (paras 79–91), Germany alleged that the United States had violated its duty to effectively implement the right to consular assistance. Under the

* Gonville & Caius College, Cambridge. The author would like to thank Professor James Crawford and Ben Olbourne for comments on earlier versions of this note.

¹ Judgment of 27 June 2001, available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

² Advisory Opinion OC-16/99, 21 *Human Rights Law Journal* (2000), 24.

relevant procedural rules of US domestic law, the LaGrand brothers had been barred from raising the violation of the VCCR once they had learnt of their right. Instead, US federal courts held their claims based on Article 36 of the Convention to be procedurally defaulted, since they had not been raised before state courts — i.e. at a time when neither of the two brothers even knew of the existence of Article 36 of the VCCR. In the view of Germany, this showed that US domestic laws undermined rather than effectively implemented the right to consular assistance.

In its decision, the Court sensibly drew a distinction between the procedural default doctrine as a general concept of United States domestic law, and its application in the cases of the two LaGrand brothers. While not pronouncing on the concept as such, it found that the United States would have been obliged to provide the LaGrand brothers with an opportunity to raise violations of the right to consular assistance. Where national courts were prevented from attaching any legal significance to the violation of Article 36 of the VCCR, the requirement of effective implementation was not met. Conversely, it did not follow that defendants whose right to consular assistance had been infringed had an absolute right to have their judgments reversed. All that the Court affirmed was that national courts had to *consider* violations of the right to consular assistance. On the whole, this is a convincing and well-balanced interpretation. Application of the procedural default doctrine in the present case had *de facto* reversed the intended effects of Article 36 of the VCCR: although that provision obliged the arresting authorities to inform detainees about their rights, the US domestic rules effectively punished these detainees for not knowing the law. The Court's finding that this did not amount to an effective implementation is therefore convincing. On the other hand, the Court sensibly refrained from claiming that a violation of Article 36 necessarily invalidated all subsequent judgments rendered by national courts. This, in turn, means that the question of remedies will depend on the circumstances of the concrete case, in particular the establishment that the violation has negatively influenced the position of the applicant. Any other interpretation would have overstated the importance of consular assistance in proceedings before national courts.

In its final claim (paras 117–127), Germany asked the Court to oblige the US to provide guarantees and assurances against future violations of Article 36 of the VCCR. Given the frequency and seriousness of the violations, Germany argued that this was the only way to remedy the negative consequences that it had suffered. In contrast, the United States denied that guarantees and assurances were an accepted remedy under international law; in its view, all that Germany could claim was an apology. Rejecting the United States' arguments, the Court held that in cases involving frequent violations and the risk of repetition, a state could be under a duty to provide guarantees and assurances of non-repetition. More specifically, where foreign nationals, whose right to consular assistance had been disregarded, had been sentenced to severe penalties, an apology was not a sufficient remedy. In these cases, the United States had to provide guarantees and assurances, which meant that it had to 'allow review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention' (para. 125). While again —

just as with regard to Germany's second claim — this did *not* mean that defendants had an absolute right to have judgments reversed, it seems clear that national courts enjoy less discretion and are obliged to provide for effective review of criminal convictions.

This ruling significantly strengthens the role of guarantees and assurances as a distinct consequence of international wrongs. Viewed from a broader perspective, it could mark a step away from a largely remedial understanding of international responsibility, whose main focus is the reparation of *past* wrongs. By recognizing and strengthening a future-looking remedy such as guarantees and assurances of non-repetition, the judgment thus seems to adopt a broader understanding of international responsibility.

On the whole, the Court's decision in *LaGrand* is well balanced and convincingly argued. While it came too late to save the lives of the two brothers, it provides a basis for solving future disputes regarding consular notification in a less confrontational manner. By affirming the importance of the right and the need for its effective implementation in domestic legal systems, the Court made it clear that international law is not neutral on the issues. This may well be the most important message of the *LaGrand* proceedings.

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