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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

INSIGHTS ON THE CONSULAR RIGHTS OF THE COUNTRIES: LAGRAND CASE 2001

AUTHORED BY - LAKSHITA MAHAJAN

INTRODUCTION:

The LaGrand case (Germany vs United States of America¹) is one of the landmark judgments of International Court of Justice (ICJ), which discusses several crucial issues, and provide for an answer for the same. It deals with the Vienna Convention on Consular Relations, discusses its impact on the individual rights. It also discusses the long-standing question as to whether the orders passed by the ICJ are of the binding nature on the party countries or not, and it also discusses the role of guarantees and assurance as one of the kinds of remedy provided in such a case. Despite being one of the most important judgments in the international arena, this case also has its drawbacks, all of which have been largely discussed in the article.²

FACTS OF THE CASE:

Two brothers, Karl and Walter LaGrand, had been arrested on the charges of murder and attempted bank robbery along with other charges in 1982, in the US state of Arizona. These brothers were German national; however, they were not given any consular assistance as was required under Article 36 paragraph 1 of the Vienna Convention on Consular relations. Consular assistance is provided by a State's consular or diplomatic agents to its nationals, and some non-nationals, who find themselves in need of assistance.³ The LaGrand brothers were tried in the court of Arizona, and all the charges against them was proved and they were convicted for the same, and were given a death sentence. Later when the German Consulate officer came to know about this incident, attempts were made to reopen the case, however the US courts by applying 'procedure default doctrine'⁴, an American rule of procedural rule, the same were rejected.

¹ LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 466

² Pierre-Marie D and Cristina H, 'Lagrang Case (Germany v United States of America)' [2009] Max Planck Encyclopedia of Public International Law

³ 'IML Information Note on Consular Assistance' (*IML INFORMATION NOTE ON CONSULAR ASSISTANCE*, August 2021) <https://www.iom.int/sites/g/files/tmzbd12616/files/inline-files/iml_consular_assistance1.pdf> accessed 27 March 2025

⁴ Mennecke M and Tams CJ, 'LaGrand Case (Germany v United States of America)' (*JSTOR*, April 2002) <<https://www.jstor.org/stable/3663239>> accessed 27 March 2025

Germany also tried several other diplomatic means to stop the execution and have the case properly tried once again since the brothers were protected under Article 36(1) of the Vienna Convention, and were entitled to receive such consular assistance which they didn't. However, all of these was to no avail as well. Consequently, due to this, Karl LaGrand was executed on 24th February 1999 following the Arizona court's order. Walter LaGrand's execution was scheduled on 3rd March 1999, and that all attempts were made to stay this execution. Germany approached the ICJ to stay this execution, and in the most unprecedented way, ICJ passed an interim order without even any oral hearing, that the execution needed to be stayed until the final judgment is given by this court. However, US did not comply with the same, and Walter LaGrand too was executed. \

ISSUES RAISED:

- a) Whether there was a breach of Article 36 paragraph 1 (b) and paragraph 2 of the Vienna Convention on Consular relations or not by the US?
- b) Do the concerned articles of the Vienna Convention on Consular Relations read with Article 41 protects individual as well, or is it just restricted to states?
- c) Are the orders passed by ICJ binding in nature on the countries, or these could be overridden by domestic rules?

LAWS APPLICABLE:

The laws applicable in the case, and referred to by the Judges to arrive at the decision for the case at hand includes the following:

Article 36 Paragraph 1 (a), (b), and (c) of Vienna Convention on Consular Relation, quoted as under:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) 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. Any

communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.⁵

Article 36 Paragraph 2 of the Vienna Convention on Consular Relations:

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.⁶

Article 41 of the Statute of International Court of Justice:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.⁷

Article 31 Paragraph 1 of the Vienna Convention on Law of treaties, 1969

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁸

⁵ Article 36 Paragraph 1 (a), (b), (c), Vienna Convention on Consular Relations (1963)

⁶ Article 36 Paragraph 2, Vienna Convention on Consular Relations (1963)

⁷ Chapter III, Article 41, Statute of International Court of Justice (1945)

⁸ Part II, Section 3, Article 31 Paragraph 1, Vienna Convention on Law of Treaties (1969)

Article 33 Paragraph 4 of the Vienna Convention on Law of treaties, 1969

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.⁹

ARGUMENTS:

Germany:

Germany after proving on the jurisdictional issue at the onset of the case, presented four submissions at the International Court of Justice against the actions of US in their dealing with the case of the LaGrand brothers, and how US has not complied with the Vienna Convention on Consular Relations, to which it is a party, and has gone to the extent to even dismiss the order passed by the ICJ on the stay of the execution order of Walter LaGrand. Along with the issue on procedure, Germany has also raised certain issues on the substantial matter in relation to the binding nature of the orders passed by the ICJ.

a) Violation of Article 36 paragraph 1 (b) of the Vienna Convention on Consular Relations

Germany contended that on the arrest of Karl and Walter LaGrand, who were German nationals, it was their right to be informed about Article 36 of the Convention, which provide them with the Consular assistance. US has not fulfilled this obligation, thus depriving the brothers of their rights protected under this convention. Moreso, the US has also categorically deprived Germany to provide any consular assistance upon realising the matter, which ultimately resulted in the execution of the brothers. By doing this, US has failed to fulfil its international obligation towards Germany and have violated the concerned article of the Vienna Convention.

b) Violation of Article 36 of the Vienna Convention on Consular Relations by the US was not only infringement upon the State right, but it was also a violation of individual rights of the LaGrand brothers.

By restricting the LaGrand brothers to raise their claims under the Vienna Convention and not given them an opportunity to seek any such consular assistance, Germany

⁹ Part II, Section 3, Article 33 Paragraph 4, Vienna Convention on Law of Treaties (1969)

claimed, was not only a breach committed against Germany as a state party to the Convention, but it was also a breach of the LaGrand brothers' individual rights. It maintained that right to be informed conferred to be an individual right that was guaranteed under Article 36 of the Convention.

c) US failed to take all measures in ensuring that Walter LaGrand's execution was stayed and did not comply with the order passed by ICJ dated 3rd March 1999.

Germany approached the ICJ as the final recourse after having exhausted all its remedy and deploying all the diplomatic measures, to get the stay order on the execution of Walter LaGrand. ICJ for the first time did pass an interim order stay the execution as asked by Germany, till the pending of the matter with it. However, US dismissed this order on the ground of it being non-binding and did not comply with the Order on provincial measures passed on 3rd March 1999. Germany claimed that the order passed by ICJ are binding in nature and hence need to be complied with. Germany claimed that such violation of the order was threefold:

- Provincial institutions are not bound to follow this order by ICJ: by the Solicitor Officer, which Germany claimed certainly had an impact on the decision of the US Supreme Court.
- The US Supreme Court ruled in majority in this case, and dismissed Germany's claim and the order passed by the ICJ.
- Governor of Arizona did not order a stay even though she was vested with this power, and could have done the same under the laws of State of Arizona.

d) United States shall provide guarantee and assurance to Germany that it will not repeat such actions in the future.

At last, Germany also made the submission that in future, such unlawful acts will not be committed again by the United States and that all measures will be taken care of. The US will provide assurance to Germany that such kind of violations shall not be repeated again in future, and will comply to Article 36 of Vienna Convention on Consular Relations in its dealings.¹⁰

United States:

On the submissions made by Germany, United States had a rather simple arguments, comprising of only 2 submissions as follows:

¹⁰ Robert Jennings, 'The Lagrand Case' (2002) 1 Law & Prac Int'l Cts & Tribunals 13

a) United States accepts that there was a breach of its international obligation to Germany and that it had issued an apology for the same.

The US accepted that there was a breach of Vienna Convention on Consular Relations on its part and that it had owed this international obligation to Germany which it had failed to fulfil. In furtherance, it had issued an apology to Germany for not acting promptly in providing the consular assistance that the LaGrand brothers deserved and also said that preventive measures will be taken in order to make sure that such actions shall not be repeated.

b) Dismissing all other claims made by Germany.

In its second submission, the US has simply stated that all other claims made by Germany does not stand and hence should be dismissed.¹¹

JUDGMENT AND ANALYSIS

The court discussed all the submission made by Germany, and the majority ruled in affirmative. All the four submissions were discussed chronologically as follows:

- a) The first submission by Germany that there was a violation of Article 36 (b) of the Vienna Convention on Consular Relations, where the United States being the party to the same have failed to comply with the international obligation, when in the inception of the case, Karl and Walter LaGrand were not given Consular Assistance as was mandated under this article. The court here discussed Article 36 paragraph 1, (a), (b), and (c) and that how these casted the obligation on the receiving state to provide a consular notification, who did not inform the sending states of any such detention for the period from 1982 to 1992, due to which, the sending state was prevented from exercising all its rights to provide assistance under Article 36 Paragraph 1. Hence, this constitutes to be the violation of Article 36 Paragraph 1 and that due to this action by the US, Germany and LaGrand brothers were deprived of their rights guaranteed under this convention.¹²

The interpretation put forth by the court is appropriate and that even United States in its submission have accepted that it has breached Article 36 of the Convention by not informing the LaGrand brothers about their consular rights, and also that it has restricted even Germany to provide such assistance by not informing them through proper consular notification has

¹¹ Zsuzsanna Deen-Racsmány, 'Diplomatic Protection and the LaGrand Case' (2002) 15 LJIL 87

¹² LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 492 [74]

sought by the Article without any delay. Therefore, this very part of the judgment is something which is agreed upon by both the parties that indeed there have been a breach of Article 36 of the Convention.

- b) The second submission by Germany was with regard to extending these consular rights even to the individuals, hence claiming that not just Germany as a state party, even there was a breach of individual rights of the LaGrand brothers. This was contended by the US on the grounds that even though it may happen that this might benefit an individual, however they said that any individual receives this right exclusively from the state itself and that it does not constitute to be an individual or a human right. The Court agreed with Germany, and noted that Article 36 (b) mentions which establishes an obligation on the sending state that they should inform the detained person “without delay”, and the sub-paragraph ends with that the concerned authorities shall inform the detained person his rights. The court also referred to Article 36 (c) that sending states shall not exercise this right to the detained person if “he expressly opposed such actions”. Therefore, the court held in this issue that Article 36 does creates individual rights.¹³ This issue has also been discussed by Vice-President Shi in his separate opinion when he agreed with the majority opinion, however wrote about this issue while discussing the preamble of the Convention, and referring to Article 5 where no where it is mentioned that the act aims to protect the rights of the individual. All these mentions including the title of the Convention is that how this Convention includes and confers consular rights only to the state, and individuals and body corporates derive these rights out from the state itself. He had also analysed the history of Article 36 paragraph 1 (b), and came to the conclusion that by keeping in mind the object and purpose of the Article and also looking at the intent of the negotiator in making of this provision, it can be said that it was a t no point of time did they meant to include individual rights in its ambit.¹⁴ In the drastically changing arena of International Law, it has become of utmost importance to include different actors in the exercise of the convention, when the main purpose and object of such convention is to have a just procedure established. Since, the LaGrand brothers were detained for so long without any consular support, and even when efforts were made, all of it was of no avail. Hence, when the majority opinion is of the view that the words of the Article does include individual rights, they are having

¹³ LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 492-494 [75-78]

¹⁴ LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 518

a broader interpretation of the same in order to suit the changing arena and nature of international rights.

- c) The third submission was with respect to a long-standing question that have existed since time immemorial that whether the orders passed by International Court of Justice are of binding nature or not. Here the court referred to a number of articles of different statutes, including the Vienna Convention on Law of treaties, the UN Charter, the Vienna Convention on Consular Relations.¹⁵ Germany submitted how there was a threefold violation of the order passed by ICJ on 3rd March 1999. Here the court referred to Article 41 of the Statute of International Court of Justice, both the French as well the English version. Upon reading both the versions there exist a divergence in the interpretation of the both, where the original French text of 1920 uses the words like “must”, “order”, while the English text mentions words like “shall”, “indicate”, and “suggest”. Therefore, the court referred to Article 33 paragraph 4 of the Vienna Convention on the Law of Treaties, wherein if there occurs such divergence in the comparison of the authentic texts, the court should consider the object and purpose of such Statute in question. The court hence interpreted that the contention that provincial measures shall not be binding on the parties concerned, would be against the object and purpose of that Article, and therefore held that such orders on provincial measures as concerned in the case at hand, according to Article 41 of the Statute, would have a binding nature.¹⁶

What makes this case a landmark judgment is the third contention raised by Germany with regard to the question that whether the State parties are bound to comply with the orders passed by the ICJ. When the majority opinion held that it is of binding nature, this has translated that ICJ is not merely suggestions, however these are binding in nature on the concerned parties. On the merits of the case, the court was correct in interpreting various articles from different provisions, and coming to the conclusion that ICJ’s order does have a binding effect on the provincial measures.

- d) The fourth submission was with regard to furnishing guarantee and assurance from the United States, ensuring that the same shall not be repeated again. The US contented stating that they have furnished an apology and that there was no need for issuing a guarantee and assurance for the same. However, the court dismissed this submission by

¹⁵ Tim Stephens, 'The LaGrand Case (Federal Republic of Germany v. United States of America)' (2002) 3 Melb J Int'l L 143

¹⁶ LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 498-506 [92-109]

the United States stating that when there is the case of prolonged detention, and that there is are frequent risks in the repetition of the same violation, then in such cases the State is under the duty to furnish a guarantee as well as an assurance in order to make sure that such actions shall not be repeated. The court held that in such a serious punishment as death penalty is awarded to the German nationals, it was the duty of the US under Article 36 of the Convention to inform them about their consular right. Provided that despite multiple attempts made by Germany to provide consular assistance to the LaGrand brothers and to have a stay on the execution of the sentence, and also despite bring the order passed by the ICJ with this regard, the US did not consider any of these actions and acted in its own discretion.¹⁷

This was for the first time when this concept of providing guarantee and assurance for not repeating the violation was sought, and the court stated that it was valid to have these in such cases when there have been recurrent violations, and to ensure that future violations does not occur, the same was deemed necessary.¹⁸

CONCLUSION:

Therefore, the court ruled in the favour of Germany upholding the importance on Consular relations and how United States in its dealings have violated this convention. Moreover, it is a landmark judgment on the issue of Consular Relations, and it also deals with several other important issues which make this case even more crucial in understanding the International Laws. The case highlights the importance of International Court of Justice, establishing that it is not an institution whose role is mere advisory, but it has the authority to decide on the contentious matters and also issue orders making it binding on the concerned state parties. It also underlines the importance of Conventions, and also establishes that the international obligations on the state parties are to be recognised and fulfilled with sincerity by them. The case also brings forth the idea of providing guarantees and assurances to countries to make sure that such violations does not take place in the future.

¹⁷ LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 510-514 [120-127]

¹⁸ Aceves WJ, 'LaGrand' (2002) 96 American Journal of International Law 210