

# UNITED STATES OF AMERICA

## A time for action - Protecting the consular rights of foreign nationals facing the death penalty

*“The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.”*

Final Judgement of the International Court of Justice in the LaGrand Case  
(*Germany v. United States of America*)<sup>1</sup>

### **Introduction: Against the law of nations**

On 3 March 1999, German national Walter LaGrand was executed in the Arizona gas chamber, in open defiance of an order by the International Court of Justice (ICJ) requiring a stay of execution.<sup>2</sup> Arizona had executed Walter’s brother, Karl LaGrand, by lethal injection a week earlier, despite appeals for clemency by the German government. Nearly seventeen years after their arrest, Arizona authorities finally notified the LaGrand brothers of their treaty-based right to consular notification and contact – a notification which is required without delay upon the detention of any foreign national.

Sentenced to death in 1984 for the murder of a bank employee during a robbery attempt in 1982, neither man was informed upon arrest of their right to contact the German consulate for assistance. German authorities were unaware of the plight of the LaGrand brothers until 10 years after their arrest, when the two men learned of their consular rights from other prisoners and contacted their consulate. By that time it was too late in the appeals process to raise the treaty violation as grounds for challenging the death sentences, under the domestic legal doctrine of “procedural default”.<sup>3</sup>

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<sup>1</sup> From paragraph 123 of the final judgement. The full text of the ICJ ruling is available at: <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>

<sup>2</sup> Established in 1945 as the judicial arm of the United Nations, the ICJ is a neutral and independent tribunal which often acts to resolve treaty, boundary and other disputes between UN member states.

<sup>3</sup> In general, when reviewing state prisoners’ *habeas corpus* appeals, federal courts in the United States may not consider issues seeking the reversal of a sentence or conviction if those issues were not first introduced in state court proceedings. The failure to introduce a claim in earlier proceedings will usually result in procedural default, whereby the merits of the issue will not be addressed at all by the appellate courts.

The day before Walter LaGrand's execution, the Federal Republic of Germany brought proceedings against the United States of America (USA) before the International Court of Justice. Germany maintained that the USA had violated its binding obligations under Article 36 of the Vienna Convention on Consular Relations (VCCR) by failing to promptly notify the LaGrand brothers of their consular rights, thus preventing Germany from providing timely assistance to its nationals.<sup>4</sup> The ICJ immediately issued a unanimous order for provisional measures, requiring the USA to "take all measures at its disposal" to halt the execution until the Court's final decision on the treaty violation. United States authorities later protested that there was insufficient time for them to act fully on that order, but nonetheless found time to oppose Germany's last-minute appeal to the US Supreme Court by arguing that such orders of the ICJ are not legally binding. The Supreme Court dismissed Germany's appeal seeking compliance with the ICJ order. Arizona Governor Jane Hull allowed the execution to proceed, overriding the unprecedented recommendation of the Arizona Board of Executive Clemency that she grant a reprieve to Walter LaGrand.<sup>5</sup>

Despite the execution of Walter LaGrand, Germany continued its efforts to obtain a binding judgement. During a five-day hearing in November 2000, both nations presented their final arguments and positions before the International Court. Germany maintained that Article 36 of the VCCR confers rights on individual nationals as well as on signatory States and that the USA had violated those rights. Germany asked the Court to rule that the US legal doctrine of "procedural default" was also in breach of the treaty, which requires that local laws and regulations must give full effect to its provisions. The Court was urged to declare that its provisional measures orders are binding under international law and must be complied with by the parties to a dispute before the ICJ. Finally, Germany asked the ICJ to determine that the USA was required to provide assurances of full compliance in the future, along with meaningful review and remedies in criminal cases where German nationals were not informed of their consular rights.<sup>6</sup>

For its part, the USA conceded that it had violated its treaty obligations to Germany, had apologized for the breach and was taking steps to improve its compliance with Article 36. However, the USA also argued that the VCCR confers no rights on individual nationals and that its domestic procedures in criminal cases thus had no bearing on its obligations under the treaty. The USA maintained that the provisional orders of the ICJ are non-binding in nature

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<sup>4</sup> The USA ratified the VCCR without reservations in 1969, at the same time ratifying its optional protocol on the compulsory settlement of disputes. Under the terms of that optional protocol, any dispute over the interpretation or application of the Vienna Convention falls under the compulsory jurisdiction of the ICJ. As a party to the VCCR and its optional protocol, Germany was entitled to seek a binding judgement from the International Court against the USA over the alleged violation of the Vienna Convention.

<sup>5</sup> The reprieve was intended to provide Germany with the time to file an orderly application with the ICJ. German authorities maintained that their late application was unavoidable because they had only recently established that Arizona officials became aware of the LaGrands' nationality shortly after their arrest in 1982.

<sup>6</sup> The transcripts of both the written and oral pleadings in the LaGrand Case are available at: <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>

and that the entire question of the prosecution and execution of the LaGrand brothers was beyond the jurisdiction of the International Court of Justice.

On 27 June 2001, the ICJ issued its historic judgement in the LaGrand Case. By 14 votes to one, the Court found that the United States had “breached its obligations to Germany and to the LaGrand brothers under the Vienna Convention on Consular Relations,”<sup>7</sup> by failing to promptly inform Karl and Walter LaGrand following their arrest of their right to communicate with their consulate. The Court noted: “It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.”<sup>8</sup>

The Court held that in such cases “it would be incumbent upon the USA to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.” The ICJ also declared that, by not allowing judicial consideration of the consular rights violation in the latter stages of their appeals, the USA had failed to give “full effect” to the rights of the LaGrand brothers, in further violation of its treaty obligations. The Court determined that “the procedural default rule had the effect of preventing Germany, in a timely fashion, from assisting the LaGrands as provided for by the Convention”.

The ICJ also strongly rejected the United States’ contention that the Court was improperly acting as an international court of appeal for domestic criminal convictions:

“Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.”<sup>9</sup>

A large section of the judgement is devoted to the question of the Court’s provisional measures orders. In a decision with profound implications for future cases before the ICJ, the Court determined that its provisional orders are fully binding in character and create legal obligations. By 13 votes to two, the ICJ found that “by failing to take all measures at its

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<sup>7</sup> Except where otherwise indicated, the quoted passages are taken from the official ICJ Summary of the Judgement of 27 June, 2001, which is available at: [http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16bis\\_20010627.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16bis_20010627.htm)

<sup>8</sup> From paragraph 74 of the Final Judgement, *supra*.

<sup>9</sup> From paragraph 52 of the Final Judgement, *supra*, footnote 1.

disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999".

The ICJ declined to dictate specific remedies to the USA for past violations of the treaty in criminal cases, finding that the United States must allow review and reconsideration of those cases "by means of its own choosing". However, the ruling clearly establishes three key points which provide authoritative guidance. The right to consular notification is a personal right conferred on individuals. Domestic procedural barriers may not be invoked to prevent judicial review and potential remedies for serious violations of these rights. Finally, the USA must provide the means by which such cases can be reviewed and reconsidered.

In a separate declaration attached to the Court's judgement, the ICJ President Gilbert Guillaume noted that "in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation" to the cases of non-German foreign nationals, in terms of the obligation to provide review and reconsideration of their sentences in such cases. In other words, while the judgement addresses submissions made by Germany regarding the cases of German citizens not informed of their consular rights, the declaration by the ICJ President clarifies that the principles in the ruling apply to all nationalities.

The judgement of the ICJ in this case is binding and without appeal.

### **Background: A growing international concern**

*A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.<sup>10</sup>*

*Article 36 of the Vienna Convention on Consular Relations requires the local authorities to promptly inform detained, arrested or imprisoned*

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<sup>10</sup> German officials maintain, for example, that they would have aided the defence by helping to gather crucial mitigating evidence about the LaGrands' childhood in Germany.

foreign nationals of their right to have their consulate notified of their detention. At the request of the detainee, the authorities must then notify the consulate of the arrest without delay and permit consular access to the detained national. Consuls have the right to visit and communicate with their nationals in all cases and may arrange for the detainee's legal representation or provide other legal and humanitarian services. It is clear from the plain language of its provisions that a primary objective of Article 36 is to safeguard the due process rights of arrested foreign nationals. Numerous international human rights instruments adopted by the United Nations also enshrine the right to consular notification and assistance, evidence of the universal significance of these rights to the international community of nations.<sup>11</sup>

The cases of Karl and Walter LaGrand are far from isolated examples. Since the reinstatement of the death penalty in the USA a quarter century ago, more than 120 foreign nationals representing nearly 40 nationalities have been sentenced to death. In virtually every case, the arresting authorities failed to inform the nationals of their consular rights, often with devastating effect on the quality of their legal representation and the outcome of their trials. Of the 15 foreign citizens executed in the USA between March 1992 and May 2001, not one was informed of their guaranteed right to consular notification and access. At least 90 reported foreign nationals await execution in 18 jurisdictions in the USA.<sup>12</sup> The total number of incarcerated foreign nationals in the

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<sup>11</sup> See e.g. Article 6(3), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (U.N.G.A. Res. 39/46, (1984)); Rule 38(1), UN Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Res. 663 (1957)); Principle 16(2), Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (U.N.G.A. Res. 43/173 (1988)); Article 10, UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (U.N.G.A. Res. 40/144, (1985)).

<sup>12</sup> A regularly updated list of death-sentenced foreign nationals and other background information is posted

USA whose VCCR rights were violated is unknown; many departments of correction do not even list inmates by nationality.<sup>13</sup>

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by the Death Penalty Information Center at: <http://www.deathpenaltyinfo.org/foreignnatl.html>

<sup>13</sup> Some states (notably Washington and Kentucky) attempt to identify all foreign prisoners, who may be eligible to serve their sentences in their country of origin under prisoner transfer programs. The Immigration and Naturalization Service also assists in the identification of incarcerated foreign nationals, many of whom are subject to deportation upon the conclusion of their sentences.

The widespread failure of authorities in the USA to comply with their VCCR obligations or to remedy violations has prompted vigorous diplomatic and legal initiatives by concerned foreign governments. Following the execution of two of its nationals in the USA in 1997, Mexico sought an advisory opinion from the Inter-American Court of Human Rights on the human rights implications of VCCR violations in death penalty cases. The Inter-American Court unanimously held that the provisions of Article 36 of the VCCR “must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.”<sup>14</sup>

By six votes to one, the Inter-American Court further ruled that failure to observe a detained foreign national’s right to consular information is “prejudicial to the guarantees of due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be ‘arbitrarily’ deprived of one’s life” under international human rights conventions. A breach of Article 36 in this context carries with it “the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations.” The Court also unanimously declared that notification of consular rights must take place immediately upon detention and before any interrogation takes place. The Inter-American Court is the judicial arm of the Organization of American States, of

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<sup>14</sup> Inter-American Court of Human Rights, Advisory Opinion OC-16/99 of October 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, para. 122. Mexico’s position was supported by submissions from six Central American nations and a number of non-governmental organizations, including Amnesty International.

which the USA is a prominent member. However, the USA does not recognize the authority of the Inter-American Court.

Taking note of the decision of the Inter-American Court, the United Nations General Assembly overwhelmingly endorsed a resolution reiterating the need for all States to protect fully the universally recognized human rights of migrants, “particularly with regard to assistance and protection, including those under the Vienna Convention on Consular Relations, regarding the right to receive consular assistance from the country of origin”.<sup>15</sup> Only one nation – the USA – voted against the adoption of the resolution. The UN Commission on Human Rights has likewise called on all UN member states which still retain the death penalty to “comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations”.<sup>16</sup> The USA also opposed the adoption of this human rights safeguard.

The General Assembly of the Organization of American States recently resolved to “reaffirm, emphatically, the duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own state in case of detention and the obligation of the

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<sup>15</sup> UN General Assembly, A/RES/54/16624, February 2000, *Protection of Migrants*, item 4.

<sup>16</sup> UN Human Rights Commission, *The Question of the Death Penalty*, E/CN.4/RES/2001/68 25 April 2001, item 4(d).



state in whose territory the detention occurs to inform the foreign national of that right'.<sup>17</sup>

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<sup>17</sup> Organization of American States, AG/RES. 1717 (XXX-O/00), *The Human Rights of All Migrant Workers and Their Families*.

The Inter-American Commission on Human Rights has on several occasions issued precautionary measures in response to the imminent executions of foreign nationals in the United States who were not notified of their consular rights.<sup>18</sup> In its official statement on the case of Mexican national Miguel Flores, the Commission pointed out that it had twice called on the United States authorities to stay the execution pending its review of Flores' petition alleging an Article 36 violation but had received no response. The Commission deplored the execution, stating that the United States "as a Member State of the Organization of American States, is subject to the Commission's jurisdiction to receive and investigate human rights complaints lodged against it".<sup>19</sup> Flores was executed in Texas on 9 November 2000, despite clemency interventions by the Mexican government, the European Union, the US Department of State, five foreign governments and human rights organizations.

This extraordinary degree of international protest and concern has not gone unnoticed within the USA. Following the execution of Thai national Jaturun Siripongs in 1999, California enacted a law requiring state and local police to inform all foreign nationals of their consular rights within two hours of arrest. The law also requires that police policy and training manuals incorporate language based on the provisions of Article 36.<sup>20</sup> No other US state has passed legislation requiring

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<sup>18</sup> In a case of a Mexican-American federal death row prisoner, the IACHR recently expressed its "deep concern" at the fact that "its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned prisoners despite the fact that those prisoners have proceedings pending before the Commission". Inter-American Commission on Human Rights, Report No 52/01, Case No. 12.243, Juan Raul Garza, United States. 4 April 2001. Juan Garza was executed on 19 June in the face of an IACHR recommendation that his death sentence be commuted.

<sup>19</sup> Inter-American Commission on Human Rights, *Press Communique No. 17/00*, Washington, D.C., November 13, 2000.

<sup>20</sup> These provisions are now codified as section 834 (c) of the California Penal Code.

compliance with the VCCR, although a similar bill was recently proposed in Texas. While Amnesty International welcomes this recognition by state authorities of their treaty obligations to foreign nationals, the organization notes that the California legislation contains no penalties or remedies for non-compliance.

Several cases of foreign nationals subsequently executed in Texas prompted widespread media attention and court challenges to state death penalty procedures.<sup>21</sup> In January 2000, the Office of the Texas Attorney General printed and distributed a manual entitled *Magistrate's Guide to Consular Notification Under the Vienna Convention*. The manual provides instructions and information to Texas judicial authorities on their obligations under the VCCR and outlines suggested notification procedures. However, the manual requires only that local magistrates ensure that notification is provided to foreign nationals at the time of their arraignment in court, rather than at the time of their detention. Despite this shortcoming, the manual represents a significant step to enhance compliance with the VCCR at state and local levels.<sup>22</sup>

Direct consular interventions have resulted in enhanced awareness of consular obligations by local police departments. Following meetings with Mexican and Polish consular representatives<sup>23</sup> the Chicago Police Department agreed to post multilingual signs in all of its precincts and detention areas advising foreign citizens of their right to consular contact.

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<sup>21</sup> See: *Adding Insult to Injury: the case of Joseph Stanley Faulder* AI Index AMR 51/86/98 and *Killing Without Mercy: Clemency Procedures in Texas*, AI Index AMR 51/85/99.

<sup>22</sup> The manual is available at: <http://www.oag.state.tx.us/newspubs/publications.html>

<sup>23</sup> Polish national Gregory Madej is on death row in Illinois. For case details, see *Worlds Apart. Violations of the Rights of Foreign Nationals on Death Row - Cases of Europeans*, AI Index AMR 51/101/00.

*The office of the State's Attorney of Cook County, Illinois, has also issued written instructions requiring foreign nationals to be informed of their right to contact their consulates at their initial court appearance.<sup>24</sup>*

*In response to diplomatic protests and interventions by many nations, the US Department of State has enhanced its program to notify and educate local authorities concerning their VCCR obligations. The USA pointed out in its ICJ submission that over 60,000 copies of the State Department's manual on consular notification have been distributed to federal, state and local law enforcement and judicial officials throughout the United States. The Department is also conducting training programmes and has distributed some 400,000 wallet-sized cards summarizing consular rights obligations, for use by law enforcement agencies. Noting these initiatives, the ICJ declared that they "must be regarded as meeting Germany's request for a general assurance of non-repetition."*

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<sup>24</sup> As reported in the Chicago Sun-Times, 27 September 2000.

All of these efforts are important and welcome developments. However, the evidence available to Amnesty International indicates that frequent violations of Article 36 rights continue across the USA. Both local and federal law enforcement agents remain largely ignorant or heedless of their binding treaty obligations.<sup>25</sup> Furthermore, federal and state authorities actively oppose all attempts by foreign nationals to obtain remedies through the domestic courts for violations of their consular rights.<sup>26</sup> So long as there are no legal consequences for breaching Article 36, compliance with the VCCR by police departments in the USA will remain haphazard and uncertain. The consistent failure of the USA to provide meaningful remedies for past violations of consular rights in death penalty cases also casts serious doubt on its assurances of future compliance.

If for no other reason, the USA must fully respect and enforce the consular rights of detained foreign nationals in order to protect those selfsame rights of its own citizens abroad. This plain truth has not eluded the editors of prominent newspapers in the USA. Writing in opposition to the scheduled execution of Canadian national Stanley Faulder in Texas, the *New York Times* declared that “For the sake of fairness and insuring respect for a principle that benefits Americans, Governor Bush should acknowledge the error and persuade the Texas pardon board to commute Mr. Faulder's sentence to life in prison.”<sup>27</sup> A *Chicago Tribune* editorial stated, “As a global power with far-flung interests, the US every day has hundreds of

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<sup>25</sup> For example, Mexican national Carlos Cortez was arrested on a murder charge in Kentucky in 1999. Press coverage of a recent pre-trial court hearing on the violation of his consular rights revealed that the local authorities are still unaware of their VCCR obligations. See *States ignore foreign detainees' rights*, Lexington Herald-Leader, July 16 2001.

<sup>26</sup> During the recent appeal of the convictions of several Chinese nationals who were detained incommunicado by federal authorities, the US Department of Justice sent a memorandum from the State Department to the US First Circuit Court of Appeals. The memorandum stressed that no remedies should be available through the domestic courts for violations of Article 36. The First Circuit later ruled that the opinions of the US government on this issue were entitled to “substantial deference” by the courts and denied the appeal of the convictions. See *United States v. Li*, 206 F.3d 882 (1<sup>st</sup> Cir. 2000).

<sup>27</sup> *Texas and International Law*, New York Times, December 9, 1998. Faulder was executed on 17 June 1999, after then-Governor George W. Bush declined to intervene in the case.

thousands of its citizens at actual or potential risk abroad – and the most to gain from strict universal compliance with the consular notification convention.”<sup>28</sup>

**The case of Gerardo Valdez Maltos: A classic example**

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<sup>28</sup> *A Golden Rule for Foreign Defendants*, Chicago Tribune, December 9, 1998.

Like the editorial writers above, Judge Charles Chapel of Oklahoma's Court of Criminal Appeals in Oklahoma has expressed his concern about the implications of violations of the consular rights of foreign nationals arrested in the United States. In an opinion in 1999 relating to such a violation in the case of Mexican national José Flores, serving a life prison sentence in Oklahoma, Judge Chapel said that the failure of the courts to remedy such violations "puts US citizens travelling abroad at risk of being detained without notice to US consular officials. Why should Mexico, or any other signatory country, honor the Treaty if the US will not enforce it? The next time we see a *60 Minutes* piece on a US citizen locked up in a Mexican jail without notice to any US governmental official we ought to remember these cases."<sup>29</sup>

Mexican national Gerardo Valdez Maltos was sentenced to death in Oklahoma in 1990. Although Oklahoma authorities were aware of his nationality from the outset, he was never informed of his consular rights. As a consequence, the Mexican consulate did not learn of the case until April 2001 – two months before his scheduled execution – and no court has ever considered the effect of the VCCR violation on his trial.

Gerardo Valdez was convicted and sentenced to death for the murder of a gay man, Juan Barron, in 1989. After meeting Barron at a bar and returning with him to the Valdez home, Gerardo Valdez began preaching that homosexuality was against Biblical teachings, threatening to castrate Juan Barron or kill him if he did not renounce his sexual orientation. In the ensuing argument, Valdez shot Barron and cut his throat, later burning his body in the back yard. When confronted by the authorities several months later, Valdez confessed to the crime after signing a form waiving both his right to have an attorney present and his right to remain silent. Gerardo Valdez clearly misunderstood his legal rights, telling the police in broken English that he had signed the waiver because "I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for, a lawyer".

Gerardo Valdez was represented by a court-appointed attorney conducting his first death penalty trial, who raised an unsuccessful defence of temporary insanity. He called one expert witness, who had evaluated the defendant for about five hours. The expert testified that, in his opinion, Valdez had been incapable of knowing right from wrong at the time of the murder, that he was operating under a religious delusion and might be suffering from schizophrenia. Two psychiatrists for the prosecution testified that Valdez knew right from wrong at the time of the crime, although one of them said he was "uncomfortable" in so testifying. Between them they had interviewed Valdez for less than an hour and a half. The jury convicted Valdez of first-degree murder.

At the sentencing phase, the defence offered an opening argument of five sentences and presented two mitigation witnesses: Gerardo Valdez's mother and wife, who testified to

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<sup>29</sup> *Flores v State*, 1999. Jose Flores, a Mexican national, convicted of first-degree murder, is serving a sentence of life imprisonment without parole. The state had pursued the death penalty, but later dropped it.

his normally non-violent character. Despite the earlier testimony that Valdez was mentally ill, his attorney called him to the stand, as he had at the guilt stage. Valdez told the jury that he was carrying out the Bible's teachings by preventing Juan Barron from sinning again. He conceded upon cross-examination that he might do the same thing if faced with similar circumstances. The closing argument from the defence lasted less than three minutes. Gerardo Valdez was quickly condemned to death.

Mexican consular officials maintain that they would have explained Valdez's legal rights to him after his arrest, assisted in obtaining competent trial counsel and ensured the collection of all available mitigating evidence. Confronted with his imminent execution, the Mexican government immediately retained a legal team to assist in preparing a clemency petition.

On 6 June 2001, the Oklahoma Pardon and Parole Board voted 3 to 1 in favour of recommending the commutation of Valdez's death sentence to life imprisonment without parole. The decision marked only the second such recommendation by the Board in the past 35 years.<sup>30</sup> The Board heard newly-discovered facts concerning Valdez's background and medical history, including evidence that he sustained brain damage from a life-threatening head injury as a teenager in Mexico and a succession of other head injuries as a child. Attorneys for Valdez also noted his exemplary conduct while on death row and his lack of any prior record of violent behaviour. Valdez testified at the clemency hearing, expressing his remorse for the crime and telling the panel that he had prayed for forgiveness.

Governor Frank Keating announced a 30-day reprieve in response to the Board's clemency recommendation on 16 June. The Governor issued the reprieve following a telephone call from President Vicente Fox of Mexico, who made a personal plea for commutation of the death sentence. Keating stated: "In light of the sensitivity and significance of this matter, I think it is appropriate for my office to continue its review of the Valdez case." He also noted that the US Department of State had "asked that I take [the treaty violation] into consideration when determining whether to grant clemency. Nevertheless, State Department officials concur that the violation should not be the sole determining factor here. I am considering the possible impact of that violation and weighing it against the brutality of Mr Valdez's admitted crime."

On 20 July, less than a month after the ICJ ruling, Governor Keating announced his decision in the Valdez case. In a letter to the President of Mexico, the governor wrote:

"As promised during our telephone conversation, I granted a thirty day stay of execution to allow for appropriate review and reconsideration of the conviction and sentence in this case. In the interim, the International Court of Justice handed down its decision in the LaGrand case (Germany v. United States of America). You should

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<sup>30</sup> In April of 2001, Governor Keating acted on a recommendation from the Board by commuting the death sentence of Phillip Dewitt Smith to life in prison without parole because of doubts about his guilt.



know that my staff and I have consulted throughout this process with the United States Department of State and the United States Department of Justice about the legal aspects of the consular notification issue. Taking the decision in LaGrand into account, I have conducted this review and reconsideration of Mr. Valdez's conviction and sentence by taking account of the admitted violation of Article 36 of the Vienna Convention regarding consular notification, as well as the information provided by, among others, representatives of your government.”

The outcome of this review and consultation with the US Department of State was Governor Keating's decision that: “No compelling reason exists to undermine the confidence and integrity of the jury and the courts in this case.” The governor described the consular rights violation as “regrettable and inexcusable” but dismissed it as resulting in “harmless errors”. He concluded that granting clemency on this basis would be an “inappropriate remedy in this case”, without saying what would be an appropriate remedy, and added that granting clemency “would presume greater rights for foreign nationals that, in my judgement, are not warranted.” He also noted that there was no doubt concerning Valdez's guilt and that he had been represented by an experienced attorney. The letter to President Fox ended by stating that the Governor had “reached the conclusion that justice has been done in this case”.

The Mexican government responded by stating that it “deeply regrets the decision, which is contrary to international law and the elemental principles of cooperation between nations. . . We consider it is an obligation of the government of the United States to assure that states comply with the Vienna Convention.”<sup>31</sup>

The Oklahoma Attorney General immediately asked the state courts to schedule the execution of Gerardo Valdez for 21 August 2001. The Mexican government responded by announcing that it “will take all available legal actions in US, as well as international tribunals ... in order to preserve the life of our fellow citizen and obtain clemency.”<sup>32</sup>

Even though establishing Valdez's mental state was pivotal to his defence, his trial attorney failed to investigate his client's background and medical history. As any experienced capital trial lawyer would know, Valdez's history of head injuries triggered the need for a neuropsychological evaluation to determine whether he might have sustained organic brain damage. Subsequent testing has confirmed that Valdez suffers from brain damage, of a kind often associated with the psychological condition of “hyperreligiosity”: an irrational belief by the patient that their aberrant behaviour is dictated by divine instructions. If just one sentencing juror had been persuaded by this readily-available evidence of diminished mental capacity, Valdez would have automatically received a life sentence.

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<sup>31</sup> *Mexican Killer Is Refused Clemency by Oklahoma*, New York Times, July 21, 2001.

<sup>32</sup> *Mexico to appeal Valdez execution*, Associated Press, July 22, 2001.

Knowing full well that Valdez was guilty of the crime, the Oklahoma pardons board nonetheless recommended clemency – based on crucial information which the jury and the appeals courts never heard. Mexican consular intervention has cast an entirely different light on the circumstances of the crime and the reliability of the jury’s sentence. No impartial review could conclude beyond a reasonable doubt that the VCCR violation in the Valdez case was “harmless”, or that the compelling new evidence produced through consular efforts would not have resulted in a lesser sentence.

On 1 August, the Oklahoma Court of Criminal Appeals scheduled Gerardo Valdez’s execution for 30 August.

**Conclusion: No more excuses**

*The US Department of State has stressed that consular notification is “in our view a universally accepted, basic obligation” under customary international law. According to the Department, the provisions of Article 36 “are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution”.<sup>33</sup>*

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<sup>33</sup> US Department of State, *Consular Notification and Access*, January 1998; Part Five. The Supremacy Clause states that a treaty ratified by the USA “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”.

Those stirring words on the binding nature of US treaty obligations ring hollow. The gulf between rhetoric and reality is clearly revealed by the halfhearted efforts of the federal government to enforce compliance with the provisions of Article 36 in the 30 years since its ratification. Three decades ago, federal regulations were amended to require agents of the Federal Bureau of Investigation and the Immigration and Naturalization Service to promptly inform detained foreign nationals of their consular rights and to facilitate consular access.<sup>34</sup> Nonetheless, three foreign citizens are currently on federal death row, each of whom was effectively deprived by federal agents of their right to seek timely consular assistance. In 1970, the Department of State sent a letter to state governors, informing them of the ratification of the VCCR. Yet, according to a statement in 1997 by the Executive Director of the National Association of Retired Police Chiefs, "In my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this".<sup>35</sup>

The US Department of State correctly views the notification of consular rights to be a matter of the highest importance. When US citizens abroad are deprived of consular notification or access, the Department takes prompt and energetic action to restore those rights. Indeed, the USA was the first nation to seek a binding judgement from the ICJ to protect consular rights, under the provisions of the VCCR Optional Protocol. Following the seizure of the US Embassy and its occupants in Tehran in 1979, the USA sought and obtained a binding judgement from the ICJ against Iran. In its submissions, the USA argued that provisional measures ordered by the International Court are legally binding. The USA also stated that:

"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".<sup>36</sup>

Twenty years later, when Germany sought to protect the identical rights of its nationals through recourse to the same international enforcement mechanism, the USA reversed its position by arguing that ICJ provisional measures are *not* binding and that the VCCR confers *no* rights on individuals.

The one consistent response which the USA has so far provided for glaring breaches of its VCCR obligations is an apology to the governments of executed foreign nationals. In

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<sup>34</sup> See Code of Federal Regulations, 28 C.F.R. §50.5(a) and 8 C.F.R. §236.1(e).

<sup>35</sup> See *Violation of the Rights of Foreign Nationals Under Sentence of Death* AI Index: AMR 51/01/98.

<sup>36</sup> From *United States Diplomatic and Consular Staff in Tehran (USA. v. Iran)*, I.C.J. Pleadings, at 174, and *Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran*.

1998, Paraguayan national Ángel Breard was executed after the US Supreme Court ruled that Virginia authorities were under no legal obligation to obey a provisional measures order issued by the ICJ to halt the execution.<sup>37</sup> Several months later, Paraguay withdrew its case against the USA after receiving a formal apology. In its statement of apology, the State Department noted that consular notification “is no less important to Paraguayan and other foreign nationals in the United States than to US nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.”<sup>38</sup>

But an apology is not a sufficient remedy under international law, as the ICJ has now declared. Moreover, it is doubtful that the USA or its citizens would view a posthumous apology as an adequate response to the execution of an US national abroad under the same circumstances. There is only one certain means by which the USA can avoid a “double standard” on the protection of consular rights. It must implement immediate measures to comply with the Vienna Convention and to remedy past violations, particularly those which may have contributed to death sentences.

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<sup>37</sup> See *The Execution of Angel Breard: Apologies Are Not Enough*, AI Index AMR 51/27/98.

<sup>38</sup> *US Department of State Press Statement*, November 4, 1998.

To date, the United States government has taken no steps to conform with the binding judgement of the International Court, failing even to issue an official response to the ruling. This inaction and silence is an intolerable affront to the authority of the world's highest court. At a time when harmonious relations between nations are increasingly dependent on compliance with international treaties and tribunals, the USA appears to be poised on the brink of repudiating its international legal obligations. The consequences of such a policy would be ominous, both for the United States' own foreign relations and for the entire international community.<sup>39</sup>

No country which claims to uphold the international rule of law may hold itself above that law. Any further failure by the United States to comply with the LaGrand decision would negate the claim it frequently makes to world leadership in the protection of human rights. The conclusion is inescapable: the United States must obey the law of nations as expressed in the ICJ judgement, or the human rights of all detained foreign nationals – including US citizens abroad – will suffer the consequences of its defiance.

### **Recommendations: A time for action**

Amnesty International believes that state and federal authorities in the United States must take immediate and meaningful steps to comply with the binding judgement of the International Court of Justice on the consular rights of detained foreign nationals. Those steps should include the following:

#### **State authorities**

- 1) Attorneys General should immediately remind all law enforcement agencies of their notification obligations under the VCCR and undertake regular reviews of the measures taken by state and local police to ensure full compliance.
- 2) Prosecutors should withdraw their objections to motions or appeals in which foreign nationals are seeking judicial hearings based on the violation of their consular rights, particularly in death penalty cases.
- 3) Authorities with the power of executive clemency should commute the death sentences of foreign nationals facing execution where no notification of consular rights took place upon arrest.

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<sup>39</sup> The USA is not the only retentionist nation with a deplorable record of consular rights violations in death penalty cases. See *Saudi Arabia. Execution of Nigerian Men and Women* AI Index MDE 23/49/00. Thousands of foreign nationals (including US citizens) reside and work in Saudi Arabia.

- 4) Police academies should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention of foreign nationals.
- 5) Legislators should draft and pass laws requiring prompt and complete compliance with the provisions of the Vienna Convention for all foreign nationals who are detained, arrested or imprisoned, including training procedures for law enforcement agencies and penalties for non-compliance.
- 6) Departments of correction should compile data on incarcerated foreign nationals, ensure that their regulations facilitate consular notification and visits and provide all incarcerated foreign nationals with information on their consular rights and how to exercise them.

#### **Federal authorities**

- 1) The Department of State should continue to enhance its consular information program by holding regular training sessions for police, judges and prosecutors in every US state and by undertaking periodic evaluations of Article 36 compliance at state and local level.
- 2) The Department of State should actively seek the commutation of death sentences in all cases where foreign nationals facing imminent execution were not informed of their consular rights without delay.
- 3) The Department of Justice should withdraw its objections to judicial review of the treaty violation in all capital cases where foreign nationals were not informed of their consular rights upon arrest.
- 4) The President should issue an Executive Order reminding all federal agencies with arrest powers of their obligation to comply fully with the Vienna Convention and declaring that further non-compliance will be grounds for disciplinary action.
- 5) The Department of Justice should compile data on the nationality of federal prisoners, ensure that prison procedures are consistent with the requirements of the Vienna Convention, and encourage state corrections agencies to submit data on prisoners' nationality for inclusion in a national data base.
- 6) The US Congress should draft and pass legislation enshrining the treaty-based right to consular information, notification and access in federal statutes, including penalties for non-compliance and provisions for meaningful judicial review and remedies.