EXECUTIONS AND APOLOGIES:  
THE U.S., INTERNATIONAL LAW AND RIGHT TO CONSULAR NOTIFICATION

KAREN L. MCKIE*
Emory University School of Law

Abstract. Following the execution of two German nationals in the United States in 2001, the International Court of Justice (ICJ) found the U.S. in violation of international law stating that foreign nationals must be notified of their right to contact their embassy. When they learned of this right ten years after their arrest, they were barred from raising the claim; and after exhausting available avenues in American courts, the German consulate took the case to the International Court of Justice. The U.S. executed the two men while the case was still before the ICJ, in spite of its request to stay the execution and German objections that “violations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets.” This paper discusses the importance of consular notification to the fairness of prosecutions. Cases reviewed indicate the U.S. still frequently does not provide notification and is at times oblivious to the ICJ’s ruling. The paper discusses reasons the U.S. should honor notification, including reciprocity for Americans traveling abroad and the larger development of international law. A final section provides several mechanisms for bringing U.S. practices into compliance that could be easily implemented.

Karl and Walter LaGrand were German nationals living in the United States when they were arrested in connection with an attempted bank robbery. The failed attempt left the bank manager dead and another bank employee seriously injured. The brothers were convicted of murder, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping, for which they were sentenced to death two years later (Germany v. U.S. 2001: para. 14). The police are required to notify foreign citizens without delay of their right to contact their consulate, and the LaGrand brothers were not notified of this right, which arises under Article 36(b) of the Vienna Convention Relating to the Duties, Rights, Prerogatives, and Immunities of Consular Agents.1 Article 36 consular notification provides foreign nationals assistance in navigating the unfamiliar and potentially hostile legal systems of the countries they are arrested or detained in, including language barriers and cultural differences in the dealings between law enforcement and judicial

* The author thanks Professor Johan D. Van der Vyver, Emory University School of Law for serving as advisor of the writing process, and Paul S. Leighton, Eastern Michigan University for his continued encouragement and inspiration.
officers with citizens in the national’s home State. Consular notification gives foreign nationals the opportunity to understand their rights before making legal decisions, just as the safeguards in the American system, such as *Miranda* rights, do.

When the LaGrand brothers unofficially learned of their Article 36 rights some ten years after their arrest, they contacted the German consulate and sought to have their convictions reversed, or at least to have their death sentences set aside. The United States conceded that the competent authorities failed to notify the LaGrand brothers of their rights and failed to notify the German consulate of their arrest, even after becoming aware that the brothers were German nationals, thus admitting that the U.S violated its obligations under Article 36 (*Germany v. U.S.* 2001: para. 15).

In U.S. courts, the claim that authorities failed to notify the German consulate of the arrest was barred on the basis of the American doctrine of procedural default. This doctrine states that a criminal defendant in a state court cannot bring a claim for the first time in a federal court; all claims must first be raised in the state court unless the defendant can show cause (an objective external factor) and prejudice (which must be obvious on its face). The Ninth Circuit Court of Appeals upheld the decision of the District Court that the LaGrand brothers’ claim was procedurally defaulted because they had not shown any objective external factor (cause) that would have prevented them from raising the issue in the state court. Eleven months later, the LaGrand brothers were formally notified of their rights under Article 36.

Following formal setting of execution dates for the brothers, German officials wrote letters to United States officials in an effort to stay the executions, but to no avail. Karl was executed as scheduled on February 24, 1999. The day before Walter’s scheduled execution, Germany filed proceedings with the International Court of Justice (ICJ) based on the United States’ violations of Article 36, requesting 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 measures which it has taken in implementation of that Order” (*Germany v. U.S.* 2001: 25).

The Arizona Board of Clemency recommended a 60-day reprieve of Walter’s death sentence due to Germany’s application, but the Governor of Arizona, who had the final say in the matter, decided to allow the execution to go ahead as scheduled, “in the interest of justice and with the victims in mind” (*Germany v. U.S.* 2001). The International Court of Justice called for provisional measures due to the urgency of the situation, indicating that:

(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