

Answers to the Questions of Judge Higgins

Answer to Question (a):

The sustained breach of Article 36 of the Vienna Convention on Consular Relations by the United States of America suffices to give rise to the international responsibility of the United States. While Germany does not need to establish the point in order for the United States' responsibility to attach, Germany emphasizes that if the LaGrand brothers had been notified in timely fashion under the Vienna Convention, assistance rendered by German consular officials would have decisively improved the chances of the LaGrand brothers to avoid the death penalty. Given the irreversible nature of the damage, Germany considers any sort of material compensation as inappropriate and meaningless. In light of the repetitive character of the U.S. authorities' breaches of Article 36 of the Vienna Convention, Germany considers that the legal consequences of the international responsibility of the United States called for under the circumstances must comprise, in addition to a judicial pronouncement of the illegality of United States conduct, appropriate assurances and guarantees of non-repetition. How to ensure in its law and practice the effective exercise of the rights under Article 36 of the Vienna Convention is for the United States to determine.

Answer to Question (b):

In situations requiring the application of Article 36 of the Vienna Convention the United States may not maintain the current state of its law and practice, which prevents the effective exercise of the rights under Article 36. Thus, Germany answers the question (b) in the affirmative.

Answer to the Question of Judge Koroma

Germany's position is not that the application by United States domestic courts of the doctrine of procedural default *in itself* constitutes a violation of the Vienna Convention on Consular Relations. In principle, States are free to determine their criminal law and criminal procedure.

However, this freedom is limited by the applicable rules of international law, such as Article 36 of the Vienna Convention. Hence, if a defendant in criminal proceedings was ignorant of his consular rights due to the failure of the receiving State to comply with its obligations under Article 36, subparagraph 1 (b), and if domestic law bars the defendant, once he has become aware of his rights under the Vienna Convention, from having the influence of the violation of these rights on his conviction or sentence reviewed, this is incompatible with the duty of the State under Article 36 paragraph 2 to give "full effect ... to the purposes for which the rights accorded under this Article [sc. Article 36] are intended".

Germany submits that it is in this very situation only that the application of the rule of procedural default to the right to information under Article 36, subparagraph 1 (b), by United States courts is in breach of Article 36, in particular in cases in which the death penalty has been imposed in spite of a violation of Article 36 during sentencing proceedings.