

## SEPARATE OPINION OF JUDGE KOROMA

*Issue of procedural default in relation to breach — Court's findings — Misgivings — Orders for provisional measures under the Court's Statute binding — Need for caution not to cast doubt on previous orders issued.*

1. Although I support the Court's findings in this case, there are one or two conclusions about which I have some misgivings, in particular to the extent that they are also embodied in the operative paragraph of the Judgment.

2. Germany has asked the Court to adjudge and declare

“that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended”.

3. In paragraph 125 of the Judgment, the Court states that it

“can determine the existence of a violation of an international obligation. *If necessary, it can also hold that a domestic law has been the cause of this violation.* In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and second submission of Germany. *But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention.*” (Emphasis added.)

But then, the Court goes on to say that:

“*In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.*” (Emphasis added.)

Earlier in the Judgment, the Court had stated as follows:

“Under these circumstances, the procedural default rule had the

effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended’” (para. 91; emphasis added).

4. Article 36, paragraph 2, of the Vienna Convention provides that:

“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.”

The paragraph thus sets out how the rights referred to in paragraph 1 are to be exercised and the conditions for their application.

5. Among the rights set out in Article 36, paragraph 1, are the following: the right to request the competent authorities of the receiving State to inform the relevant consular post without delay of an arrest or detention; the right to have any communication addressed by a detained or arrested person forwarded to the relevant consular post by the receiving State authorities without delay; and the right of the sending State that its nationals be informed without delay of their right to consular notification. In my opinion, these rights are the rights referred to in Article 36, paragraph 2, of the Convention and they are obligations for the receiving State. For them to be violated therefore, the competent authorities of the receiving State must have failed to comply with them. Clearly, the breach of the obligation that occurred in the present case was caused neither by the procedural default rule nor by its application. It was not because of the procedural default rule that the LaGrand brothers were not informed in a timely manner of their rights to consular protection or assistance. In my view, neither the rule nor its application can be held in this regard to have violated Article 36, paragraph 2, of the Convention, as it was not the rule which prevented full effect being given to the rights under Article 36, paragraph 1. Indeed, as the Court itself has held, the doctrine of procedural default is not inherently inconsistent with the obligations assumed by the United States under the Convention. On the other hand, it is both inconsistent and unsustainable to hold that the violation of Article 36, paragraph 2, in the present case *was caused by its application, and not by the rule as such*. Having thus formulated its conclusion, the Court would appear to be saying that the rule is simultaneously both consistent and inconsistent with the United States obligations under the Convention. If, as the Court would appear to hold, the rule is a proper part of the United States criminal justice system, the Court cannot at the same time hold that its application on this occasion is the cause of the violation of the United States obligations. The point which the Court should have determined, in my view, was not whether aspects of the criminal process were the cause of the breach of the obligations, which they were not, but rather whether the obligations assumed under the Convention were breached as a result of the non-observance of the rele-

vant provisions. In other words, the breach of the relevant obligations would still have occurred to the extent that the relevant provision of the Convention had not been complied with irrespective of the criminal process.

6. But lest there be a misunderstanding of my position, I strongly subscribe to the position that everyone is entitled to benefit from judicial guarantees, including the right to appeal a conviction and sentence, and this position is universally shared by States. For me, the main issue which the Court is required to determine is whether the United States conduct, in not informing Germany and the LaGrand brothers promptly of their rights under the Convention, was inconsistent with the United States obligation to Germany under the Convention, as well as the appropriate remedies for that breach.

7. I also cannot concur entirely with the reasoning of the Court regarding its finding on Article 41 of the Statute. The real issue is whether the Order for provisional measures issued by the Court on 3 March 1999 was binding on the United States, and not the interpretation of Article 41 of the Statute which the Court decided to undertake. I do not think its jurisprudence on this matter was in doubt. Nor do I subscribe to the theory of the linguistic ambiguity of the said provision. In my view the meaning of the provision is clear and objective and there can be no fundamental misunderstanding as to its purpose and meaning. It is also part of the Statute of the Court. The object and purpose of an order for provisional measures is to preserve and protect the rights and interests of the parties in a dispute before the Court, pending the final decision of the Court. It is for the Court to grant or reject a request for an order. It follows that, when an order is granted in accordance with the Statute, it is binding. Otherwise, there would be no purpose in making an order, or the purpose would be defeated. This is how I have understood the provision and this Judgment should be seen in that light and not as casting doubt, albeit unwittingly, on previous orders for provisional measures issued by this Court.

8. Finally, with regard to operative paragraph 128 (7) of the Judgment and as I have stated above, it is my understanding that everyone, irrespective of nationality, is entitled to the benefit of fundamental judicial guarantees, including the right of appeal or review against conviction and sentence, irrespective of nationality. In other words the judicial process must be fair and regular.

*(Signed)* Abdul G. KOROMA.

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