



INTERNATIONAL COURT OF JUSTICE

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Summary

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Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)

Request for the indication of provisional measures

Summary of the Order

The Court begins by recalling that, on 9 January 2003, the United Mexican States (hereinafter “Mexico”) instituted proceedings against the United States of America (hereinafter the “United States”) for “violations of the Vienna Convention on Consular Relations (done on 24 April 1963)” (hereinafter the “Vienna Convention”) allegedly committed by the United States. The Court notes that, in its Application, Mexico bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the “Optional Protocol”).

The Court notes further that in its Application Mexico asks the Court to adjudge and declare:

- “(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;
- (2) that Mexico is therefore entitled to restitutio in integrum;
- (3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;
- (4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power’s functions are international or internal in character;

- (5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

- (1) the United States must restore the status quo ante, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;
- (2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;
- (3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and
- (4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

The Court further recalls that on 9 January 2003 Mexico also submitted a request for the indication of provisional measures in order to protect its rights, asking that, pending final judgment in this case, the Court indicate:

- (a) That the Government of the United States take all measures necessary to ensure that no Mexican national be executed;
- (b) That the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national;
- (c) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraphs (a) and (b); and
- (d) That the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case."

The Court finally notes that, by a letter of 20 January 2003, Mexico informed the Court that, further to the decision of the Governor of the State of Illinois to commute the death sentences of all convicted individuals awaiting execution in that State, it was withdrawing its request for provisional measures on behalf of three of the 54 Mexican nationals referred to in the Application: Messrs. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero. In that letter, Mexico further stated that its request for provisional measures would stand for the other 51 Mexican nationals imprisoned in the United States and that "[t]he application stands, on its merits, for the fifty-four cases".

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 21 January 2003.

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The Court begins its reasoning by observing that, on a request for the indication of provisional measures, it need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.

The Court goes on to note that Mexico has argued that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol, and that Mexico has accordingly concluded that the Court has the jurisdiction necessary to indicate the provisional measures requested. The Court notes that the United States has said that it “does not propose to make an issue now of whether the Court possesses *prima facie* jurisdiction, although this is without prejudice to its right to contest the Court’s jurisdiction at the appropriate stage later in the case”. In view of the foregoing, the Court accordingly considers that, *prima facie*, it has jurisdiction under Article I of the aforesaid Optional Protocol to hear the case.

The Court then recalls that in its Application Mexico asked the Court to adjudge and declare that the United States “violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention”; that Mexico is seeking various measures aimed at remedying these breaches and avoiding any repetition thereof; and that Mexico contends that the Court should preserve the right to such remedies by calling upon the United States to take all necessary steps to ensure that no Mexican national be executed and that no execution date be set in respect of any such national.

The Court further recalls that the United States has acknowledged that, in certain cases, Mexican nationals have been prosecuted and sentenced without being informed of their rights pursuant to Article 36, paragraph 1 (b), of the Vienna Convention, but that it argues, however, that in such cases, in accordance with the Court’s Judgment in the LaGrand case, it has the obligation “by means of its own choosing, [to] allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention”, and that it submits that, in the specific cases identified by Mexico, the evidence indicates the commitment of the United States to providing such review and reconsideration. According to the United States, such review and reconsideration can occur through the process of executive clemency — an institution “deeply rooted in the Anglo-American system of justice” — which may be initiated by the individuals concerned after the judicial process has been completed. It contends that such review and reconsideration has already occurred in several cases during the last two years; that none of the Mexicans “currently under sentence of death will be executed unless there has been a review and reconsideration of the conviction and sentence that takes into account any failure to carry out the obligations of Article 36 of the Vienna Convention”; that, under the terms of the Court’s decision in the LaGrand case, this is a sufficient remedy for its breaches, and that there is accordingly no need to indicate provisional measures intended to preserve the rights to such remedies.

The Court also notes that, according to Mexico, the position of the United States amounts to maintaining that “the Vienna Convention entitles Mexico only to review and reconsideration, and that review and reconsideration equals only the ability to request clemency”; and that, in Mexico’s

view, “the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court’s mandate [in the LaGrand case]”.

The Court concludes that there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; that this dispute belongs to the merits and cannot be settled at this stage of the proceedings; and that the Court must accordingly address the issue of whether it should indicate provisional measures to preserve any rights that may subsequently be adjudged on the merits to be those of the Applicant.

The Court notes, however, that the United States argues that it is incumbent upon the Court, pursuant to Article 41 of its Statute, to indicate provisional measures “not to preserve only rights claimed by the Applicant, but ‘to preserve the respective rights of either party’”; that, “[a]fter balancing the rights of both Parties, the scales tip decidedly against Mexico’s request in this case”; that the measures sought by Mexico to be implemented immediately amount to “a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law”, which “would drastically interfere with United States sovereign rights and implicate important federalism interests”; that this would, moreover, transform the Court into a “general criminal court of appeal”, which the Court has already indicated in the past is not its function; and that the measures requested by Mexico should accordingly be refused.

The Court points out that, when considering a request for the indication of provisional measures, it “must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent”, without being obliged at that stage of the proceedings to rule on those rights; that the issues brought before the Court in this case “do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes”; that “the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal”; that the Court may indicate provisional measures without infringing these principles; and that the argument put forward on these specific points by the United States accordingly cannot be accepted.

The Court goes on to state that “provisional measures are indicated ‘pending the final decision’ of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given”. It further points out that the jurisdiction of the Court is limited in the present case to the dispute between the Parties concerning the interpretation and application of the Vienna Convention with regard to the individuals which Mexico identified as being victims of a violation of the Convention. Accordingly, the Court observes, it cannot rule on the rights of Mexican nationals who are not alleged to have been victims of a violation of that Convention.

The Court further states that “the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time”; it recalls in this respect that the Supreme Court of the United States, when considering a petition seeking the enforcement of an Order of this Court, observed that: “It is unfortunate that this matter came before us while proceedings are pending before the ICJ that might have been brought to that court earlier”. The Court further observes that, in view of the rules and time-limits governing the granting of clemency and the fixing of execution dates in a number of the states of the United States, the fact that no such dates have been fixed in any of the cases before the Court is not per se a circumstance that should preclude the Court from indicating provisional measures.

The Court finds that it is apparent from the information before it in this case that three Mexican nationals, Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, are at risk of execution in the coming months, or possibly even weeks;

that their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico. The Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides.

The Court points out that the other individuals listed in Mexico's Application, although currently on death row, are not in the same position as the three persons identified in the preceding paragraph and that the Court may, if appropriate, indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgment in this case.

The Court finally observes that it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; and that it is therefore appropriate that the Court, with the co-operation of the Parties, ensure that a final judgment be reached with all possible expedition.

The Court concludes by pointing out that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and that it leaves unaffected the right of the Governments of Mexico and the United States to submit arguments in respect of those questions.

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The full text of the operative paragraph (para. 59) reads as follows:

“For these reasons,

THE COURT,

Unanimously,

I. Indicates the following provisional measures:

- (a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
- (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

II. Decides that, until the Court has rendered its final judgment, it shall remain seised of the matters which form the subject of this Order.”

Declaration of Judge Oda

While Judge Oda voted in favour of the present Order, in his declaration he states his doubts concerning the Court's definition of "disputes arising out of the interpretation or application" of the Vienna Convention, doubts previously expressed in connection with the Breard and LaGrand cases.

In Judge Oda's view, the present case is essentially an attempt by Mexico to save the lives of its nationals sentenced to death by domestic courts in the United States. As the United States has admitted its failure to provide consular notification, there is no dispute about the interpretation or application of the Vienna Convention. Judge Oda believes that Mexico has seized upon the Vienna Convention and the admitted violation as a means to subject the United States to the compulsory jurisdiction of the Court.

Judge Oda notes that the Mexican nationals were in most cases given consular assistance in the judicial processes that followed their initial sentencing. He stresses that this case cannot be about domestic legal procedure in the United States because that lies within the sovereign discretion of that country. Nor can it be about the interpretation or application of the Vienna Convention because the United States admits its violation. Nor can the case be about the appropriate remedy for the violation of the Convention because that is a matter of general international law, not the interpretation or application of the Convention. Judge Oda concludes that this case is really about abhorrence of capital punishment.

Judge Oda states that if the International Court of Justice interferes in a State's criminal law system, it fails to respect the sovereignty of the State and places itself on a par with the supreme court of the State. He recalls his observation from the LaGrand case that the International Court of Justice cannot act as a court of criminal appeal and cannot be petitioned for writs of habeas corpus. Further, the present case, having been brought under the Vienna Convention, is not the appropriate context to determine whether or not capital punishment would be contrary to Article 6 of the International Covenant on Civil and Political Rights.

Appreciating the significant issues raised by the death penalty from the perspective of the individuals condemned to die, Judge Oda reiterates his previous statement that if the rights of those accused of violent crimes are to be respected, then the rights of the victims should also be taken into consideration.
