

AVENA AND OTHER MEXICAN NATIONALS  
Mexico v United States  
(PROVISIONAL MEASURES)\*

I. INTRODUCTION<sup>1</sup>

According to the facts, 54 Mexican nationals ended on death row in the United States following their arrest, detention, trial, conviction and sentencing. The United States acknowledged that some of them had been prosecuted and sentenced without being informed of their rights under Article 36(1)(b) of the Vienna Convention. Mexico claimed that this was a United States violation of international legal obligations to Mexico in Mexico's own right and in Mexico's consular right to protect its nationals under Articles 5 and 36 of the Vienna Convention.

On 9 January 2003, Mexico instituted proceedings against the United States for "systematically"<sup>2</sup> violating the 1963 Vienna Convention on Consular Relations. Mexico based the Court's jurisdiction on Article 36(1) of the Court's Statute and Article I of the 1961 Optional Protocol concerning the Compulsory Settlement of Disputes.

At the same time, Mexico requested the Court to indicate provisional measures under Article 41 of the Court's Statute and Articles 73-75 of the Rules of Court to protect its rights pending final judgment in the case. Mexico alleged that three Mexican nationals (Reyna,<sup>3</sup> Ramos and Aguilera) on death row risked execution within the next six months while the others faced execution possibly before the end of 2003. Mexico claimed that this created the urgency required to protect its

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\* On 5 February 2003 the Court delivered its Order on provisional measures. For more information see International Court of Justice, General List No 128, 5 February 2003 at <[http://212.153.43.18/icjwww/idocket/imus/imusorder/imus\\_iorder\\_20030205.PDF](http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF)> (visited December 2003) (Order of Court); International Court of Justice, Press Release 2003/9, 5 February 2003. *Editor*: the Court delivered its judgment on the merits on 31 March 2004 finding that the United States had violated the 1963 Vienna Convention on Consular Relations: International Court of Justice, Press Release 2004/16, 31 March 2004.

<sup>1</sup> See generally Order of Court paras 1-11.

<sup>2</sup> *Ibid* para 10.

<sup>3</sup> Mexico claimed that Reyna could even be executed as early as 14 February 2003: *ibid* para 11.

“paramount interest in the life and liberty of its nationals and to ensure the Court’s ability to order the relief” it sought.<sup>4</sup>

## II. MEXICO’S ARGUMENTS

Mexico requested the Court to require the United States to take all necessary steps to ensure that no Mexican national would be executed and no execution date set for them. Mexico stated that its request for provisional measures was to “unquestionably” preserve Mexico’s rights under the Vienna Convention. The fact that its nationals were on death row and some at imminent risk of execution was the basis for the urgency required for such a request including the “likely” threat of irreparable prejudice.<sup>5</sup>

To support its request, Mexico presented the arguments below.

1. United States municipal law, specifically the “rule of procedural default, the need to show prejudice and the interpretation of the Eleventh Amendment of the United States Constitution followed by United States tribunals” had made ineffective all of Mexico’s actions seeking relief for United States violations of the Convention brought in United States courts (state and federal) by Mexican nationals or Mexico itself.<sup>6</sup> Mexico argued that the rights conferred by Article 36 were not rights without remedies as shown in *LaGrand*<sup>7</sup> where the Court had held:<sup>8</sup>

If the receiving State fails to comply with Article 36, and the sending State’s national has been subjected to ‘prolonged detention or convicted and sentenced to severe penalties’,...the

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<sup>4</sup> Ibid para 13. Meanwhile on 20 January 2003 Mexico withdrew its request for provisional measures on behalf of three Mexicans (Hernández, Urbán and Romero) because the death sentences of all convicted individuals awaiting execution in the State of Illinois had been commuted. However, Mexico’s request would continue for the other 51 nationals and the application would stand on its merits for all 54 cases.

<sup>5</sup> Ibid paras 33-34.

<sup>6</sup> Ibid para 4.

<sup>7</sup> (*Germany v United States*) (Provisional Measures) [1999] 1 International Court of Justice Reports at <<http://212.153.43.18/icjwww/idocket/igus/igusframe.htm>> (visited December 2003).

<sup>8</sup> Order of Court para 3.

receiving State must allow the review and consideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.

Further, the Court had held that “[t]here was no question of the importance of the interests at stake”<sup>9</sup> since foreign nationals could be executed. This was because:<sup>10</sup>

[i]nternational law recognizes the sanctity of human life [and] Article 6 of the International Covenant on Civil and Political Rights, to which the United States is a State party, establishes that every human being has an inherent right to life and mandates that States protect that right by law.

2. Mexico had made many *démarches* to competent United States authorities to vindicate its rights and those of its nationals but the authorities had consistently failed to provide adequate relief or ensure that the Convention would not be violated further. Mexico had also made diplomatic *démarches* to the United States Executive over the past six years but they had been ineffective. Instead of preventing the violations the only United States’ response was formal apologies after Mexican nationals were executed.<sup>11</sup>
3. The apologies and review by a United States executive official were merely “a matter of grace and not a legal right” amounting to a sufficient remedy for violation of the Convention. According to *LaGrand* a meaningful review and reconsideration of the claims required the provision of “a remedy *at law*”, namely, the restoration of the *status quo ante*.<sup>12</sup>
4. The United States position on review and reconsideration gave Mexico an ability to seek clemency only. This was unacceptable because clemency was a “standardless, secretive and unreviewable process that...cannot and does not satisfy this Court’s mandate” as required by the Court in *LaGrand*.

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<sup>9</sup> Ibid para 12.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid para 27.

<sup>12</sup> Ibid.

In addition, Mexico had argued that the Court had jurisdiction based on Article 36(1) of the Court's Statute and Article I of the 1961 Optional Protocol concerning the Compulsory Settlement of Disputes.

### III. THE UNITED STATES REPLY

The United States had contended that Mexico's request for provisional measures had no legal foundation in fact or in law and the conditions for provisional measures had not been met.<sup>13</sup> As a result Mexico's application should be denied for the reasons shown below.

1. There was no urgency as "imminent serious harm" had not been shown: the proceedings in the 51 cases were continuing and the Mexican nationals covered by the application for provisional measures were not due for execution.<sup>14</sup>
2. In the specific cases identified, the United States had agreed to review and reconsider them, which could only occur through executive clemency, an institution "deeply rooted in the Anglo-American system of justice" that any individual could initiate after the judicial process ended.<sup>15</sup>
3. Such review and reconsideration had occurred in several cases during the past two years and no Mexican national on death row would be executed unless the conviction and sentence were reviewed, reconsidered and complied with Article 36. Under the terms of *LaGrand*, this was a sufficient remedy for United States violations. As a result, since there was no risk of irreparable prejudice and no existing rights, Mexico could not request that such rights be preserved.<sup>16</sup>
4. Although the Court had a duty to indicate provisional measures to preserve rights claimed by the applicant and preserve the parties' respective rights,<sup>17</sup> the scales tipped decidedly against Mexico after the parties' respective rights were balanced.<sup>18</sup>

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<sup>13</sup> Ibid para 29.

<sup>14</sup> Ibid para 31.

<sup>15</sup> Ibid para 44.

<sup>16</sup> Ibid para 36.

<sup>17</sup> Land and Maritime Boundary (Cameroon v Nigeria) (Provisional Measures) [1996]

1 International Court of Justice Reports 22 para 35.

<sup>18</sup> Order of Court para 47.

5. The provisional measures that Mexico sought were a sweeping prohibition on capital punishment for Mexican nationals in the United States regardless of United States domestic law. This interfered substantially with United States sovereign rights and implicated its important federalism interests. It also transformed the Court into a general criminal court of appeal, which the Court had indicated in *LaGrand* was not its function. On the contrary, its function was to resolve international disputes between states.<sup>19</sup>

#### IV. THE COURT

After considering the arguments of both parties, the Court unanimously granted Mexico's request for provisional measures under Article 41 of the Court's Statute in relation to three Mexican nationals, Reyna, Ramos and Aguilera. The reasons appear below.

1. There was a dispute between the parties in relation to the United States violation of the Convention. Since the dispute on the merits of the case could not be settled at this stage of the proceedings, the Court would entertain Mexico's request for provisional measures to preserve any rights Mexico might have.
2. In proceedings for provisional measures the Court should preserve any rights the parties might have as subsequently adjudged in proceedings on the merits.<sup>20</sup>
3. Similarly, the Court need not be finally satisfied that it had jurisdiction on the merits before it could decide on provisional measures. However, it should not indicate measures unless the basis the applicant had invoked appeared *prima facie* to afford a basis on which its jurisdiction could be founded.
4. Without prejudice to its right to contest the Court's jurisdiction at an appropriate stage later, the United States stated that it did not wish to make an issue on whether the Court possessed *prima facie* jurisdiction. Consequently, the Court would deem that it had jurisdiction *prima facie* under Article I of the Optional Protocol to hear the request.
5. The issues before the Court did not concern the right of the states in the United States to impose the death penalty for the most heinous crimes. It was not the Court's function to act as a court of criminal

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<sup>19</sup> *Ibid* paras 47-48.

<sup>20</sup> *Cameroon v Nigeria* 22 para 35; Order of Court para 48.

appeal but to resolve international legal disputes arising between states that *inter alia* concern the interpretation of international conventions, as in this case.<sup>21</sup>

6. Provisional measures under Article 41 of the Court's Statute would only be justified if urgency existed in relation to likely action being taken before a final decision was given that would likely prejudice the rights of either party.<sup>22</sup>
7. Mexico had requested the Court to order the United States to ensure that no Mexican national be executed and ensure that no date for the execution be set. However, the Court noted that its jurisdiction was limited to the dispute on the interpretation and application of the Convention concerning Mexican nationals identified as victims following the violation of the Convention. The Court therefore could only rule on the rights of Mexican nationals falling within this class.<sup>23</sup>

In addition, the Court made the following observations:

1. In a request for provisional measures the Court need not be finally satisfied that it has jurisdiction on the merits of the case. However, it cannot grant the request unless the provisions invoked by the applicant in support of jurisdiction "appear prima facie to afford a basis on which the jurisdiction of the Court might be founded".<sup>24</sup>
2. The sound administration of justice required that a request for provisional measures under Article 73 of the Rules of Court be submitted in good time.<sup>25</sup>
3. In an earlier case, the United States Supreme Court, when considering a petition to enforce an Order of the International Court, had described that it was "unfortunate" that the case had come before it when proceedings were already pending before the International Court. The Supreme Court added that the petition could have been brought before it sooner.<sup>26</sup>

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<sup>21</sup> LaGrand 15 para 25; see Order of Court para 48.

<sup>22</sup> Passage through the Great Belt (Finland v Denmark) (Provisional Measures) [1991]

1 International Court of Justice Reports 17 para 23; Order of Court para 50.

<sup>23</sup> Order of Court para 51.

<sup>24</sup> Ibid para 38.

<sup>25</sup> LaGrand 14 para 19; Order of Court para 54.

<sup>26</sup> Breard v Greene (1998) 523 United States 371, 378; Order of Court *ibid*.

4. The fact that no dates had been fixed in any of the cases before the Court regarding clemency and execution in several states of the United States was not *per se* a factor that should preclude the International Court from indicating provisional measures.<sup>27</sup>
5. Since the evidence had shown that Reyna, Ramos and Aguilera were at risk of execution possibly in the coming months or even weeks, their execution would irreparably prejudice any rights that the Court might later adjudge to belong to Mexico.<sup>28</sup>
6. It would clearly benefit both parties if their respective rights and obligations were to be determined definitively as soon as possible. It was also appropriate that the Court, with the co-operation of the parties, ensure that a final judgment be delivered as soon as possible.<sup>29</sup>

Finally, the Court held that the decision in the present proceedings did not prejudge in any way the question of the Court's jurisdiction to deal with the merits of the case or the merits themselves, or any other question on the admissibility of Mexico's application.<sup>30</sup>

#### V. DECLARATION OF JUDGE ODA<sup>31</sup>

Although Oda J voted in favour of the Order, he expressed doubts on the Court's definition of "disputes arising out of the interpretation or application" of the Vienna Convention, doubts similarly expressed in *Breard* and *LaGrand*.

Oda J felt that Mexico's application was more an attempt to save the lives of its nationals sentenced to death by United States domestic courts. As the United States had admitted it failed to provide consular notification, there was no dispute on the interpretation or application of the Convention. Instead, Mexico had seized upon the United States admission that it had violated the Convention to subject the United States to the compulsory jurisdiction of the Court.

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<sup>27</sup> Order of Court *ibid*.

<sup>28</sup> *Ibid* para 55.

<sup>29</sup> *Ibid* para 57.

<sup>30</sup> *Ibid* para 58.

<sup>31</sup> For more information see International Court of Justice, General List No 128, 5 February 2003 at <[http://212.153.43.18/icjwww/idocket/imus/imusorder/imus\\_iorder\\_2003020\\_5.PDF](http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iorder_2003020_5.PDF)> (visited December 2003); International Court of Justice, Annex to Press Communiqué 2003/9bis, Press Release 2003/9bis, 5 February 2003.

Oda J noted that the Mexican nationals were in most cases given consular assistance in the judicial processes that followed their initial sentencing. He stressed that this case could not be about United States domestic legal procedure since that fell within the sovereign discretion of that state. Nor was it about the Convention because the United States had admitted its violation. Neither was it about the remedy for the violation because that was a matter of general international law, not on the interpretation or application of the Convention. In other words, the case was really about the abhorrence of capital punishment.

Oda J stated that if the Court interfered in a state's domestic criminal law system, it would be disrespectful of that state's sovereignty placing itself on par with the supreme court of that state. He referred to his observation in *LaGrand* that the Court could not act as a court of criminal appeal and could not be petitioned for writs of *habeas corpus*. Further, the present case having been brought under the Convention was not the appropriate context to determine whether capital punishment would be contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights.

Finally, in light of the significant issues surrounding the death penalty Oda J reiterated his views in *LaGrand* that if the rights of those accused of violent crimes were to be respected, then the rights of the victims should also be taken into consideration.