

INTERNATIONAL COURT OF JUSTICE

YEAR 2003

**2003
5 February
General List
No. 128**

5 February 2003

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 9 January 2003, whereby 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,

Makes the following Order:

1. Whereas in its aforementioned 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”);

2. Whereas the Application states that 54 Mexican nationals are on death row in the United States; whereas it is alleged that these individuals were arrested, detained, tried, convicted and sentenced to death by competent authorities of the United States following proceedings in which those authorities failed to comply with their obligations under Article 36, paragraph 1 (b), of the Vienna Convention; whereas it is contended that this provision requires that the authorities of the receiving State inform without delay any national of another State detained by those authorities of his right to contact his consulate, that, if the detained national so requests, it further requires those authorities to inform without delay the nearest consular post of the State concerned of the detention, and lastly that it obliges those authorities to forward without delay any communication addressed to the consular post by the detained individual; and whereas it is alleged that, in the cases of 49 of the detained Mexican nationals, the competent authorities of the United States made no attempt at any time to comply with Article 36 of the Vienna Convention, that in the cases of four other detained individuals, the required notification was not made “without delay”, and finally that in one case, while the detained national was informed of his rights, it was in connection with proceedings other than those involving capital charges against him;

3. Whereas in its Application Mexico states that “[t]he rights conferred by Article 36 . . . are not rights without remedies” and that in particular, as the Court determined in the Judgment delivered on 27 June 2001 in the case concerning *LaGrand (Germany v. United States of America)*:

“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 receiving State must ‘allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention’”;

4. Whereas Mexico alleges that various rules of United States municipal law, specifically “[t]he rule of procedural default, the need to show prejudice and the interpretation of the Eleventh Amendment of the United States Constitution followed by the United States tribunals”, rendered ineffective all actions brought before state or federal courts in the United States seeking relief for the violations of the Vienna Convention, whether those actions were brought by Mexican nationals or by Mexico itself;

5. Whereas in the Application Mexico explains that it has made numerous démarches to the competent authorities of the United States with a view to vindicating its rights and those of its nationals, but that these authorities have consistently refused to provide relief adequate to put an end to these violations and to ensure Mexico that they will not reoccur in the future;

6. Whereas Mexico further notes that the diplomatic démarches which it has made over the last six years to the executive branch of the federal Government of the United States and to the competent authorities of the constituent States have been ineffective; whereas, despite many diplomatic protests during that period, those authorities carried out the execution of several Mexican nationals whose rights under the Vienna Convention had been violated; and whereas the only response ever received by Mexico from those authorities has consisted of formal apologies made after the executions;

7. Whereas in its Application Mexico maintains that the United States, by breaching its obligations under Article 36, paragraph 1 (b), of the Vienna Convention, prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 of the Convention, which “could have prevented the convictions and death sentences”; whereas it contends that the steps taken by the United States to improve compliance with the Vienna Convention do not enable full effect to be given to the rights established by the Convention; whereas it claims that apologies by the United States in cases of breaches of the Convention are an insufficient remedy; and whereas Mexico accordingly asserts that it has suffered injury, in its own right and in the form of injury to its nationals [Application of Mexico, para. 2], and that it is entitled to *restitutio in integrum*, that is to say, to the “reestablish[ment of] the situation which would, in all probability, have existed if [the violations] had not been committed”;

8. Whereas 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";

9. Whereas, on 9 January 2003, after filing its Application Mexico also submitted a request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

10. Whereas in its request for the indication of provisional measures Mexico refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it reiterates in particular that the United States has systematically violated the rights of Mexico and its nationals under Article 36 of the Vienna Convention;

11. Whereas in the request for the indication of provisional measures Mexico states that three Mexican nationals, namely Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, risk execution within the next six months and that many other Mexican

nationals could be executed before the end of 2003; and whereas Mexico further states that César Roberto Fierro Reyna's execution could take place as early as 14 February 2003;

12. Whereas in the request for the indication of provisional measures Mexico notes that the Court indicated provisional measures to prevent executions in two prior cases involving claims brought under the Vienna Convention by States whose nationals were subject to execution in the United States as a result of criminal proceedings conducted in violation of the Convention; whereas it states that “[t]here can be no question of the importance of the interests at stake”, that “[i]nternational law recognizes the sanctity of human life” and that “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”; and whereas Mexico states in the following terms the grounds for its request and the possible consequences if it is denied:

“Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court's decision on the merits of Mexico's claims, the executive officials of constituent states of the United States will execute Messrs. Fierro [Reyna], Moreno Ramos, Torres [Aguilera], or other Mexican nationals on death row before the Court has had the opportunity to consider those claims. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals. As the Court recognized in the *LaGrand* case, such circumstances would constitute irreparable prejudice . . .”;

13. Whereas Mexico concludes that “[p]rovisional measures are therefore clearly justified in order both to protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks”;

14. Whereas Mexico adds in its request that “[t]here can also be no question about the urgency of the need for provisional measures”;

15. Whereas Mexico states that, while it recognizes that the Court may wish to leave to the United States the choice of means to ensure compliance with the provisional measures ordered, it nevertheless requests that the Court “leave no doubt as to the required result”;

16. Whereas Mexico notes specifically in its request that “[a]s a matter of international law, both the United States and its constituent political subdivisions have an obligation to abide by the international legal obligations of the United States”; and whereas Mexico takes the view that, “[h]aving undertaken international obligations on behalf of its constituent political entities, the United States should not now be heard to suggest that it cannot enforce their compliance with its obligations”;

17. Whereas Mexico further states that,

“[g]iven the clarity of both international law and United States municipal law, there can be no doubt that the United States has the means to ensure compliance with an order of provisional measures issued by this Court pursuant to article 41 (1) [of its Statute]”;

18. Whereas Mexico asks 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”;

and whereas Mexico further asks the Court to treat its request as a matter of the greatest urgency “[i]n view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican citizen”;

19. Whereas on 9 January 2003, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith sent it originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of that filing;

20. Whereas on 9 January 2003 the Registrar informed the Parties that the President of the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 20 January 2003 as the date for the opening of the oral proceedings;

21. Whereas, pending notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission, in two languages, of the printed text of the Application to the States entitled to appear before the Court, on 9 January 2003 the Registrar informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

22. Whereas, following the Registrar's subsequent consultations with the Parties, the Court decided to hear the Parties on 21 January 2003 concerning Mexico's request for the indication of provisional measures; and whereas the Parties were so advised by letters of 14 January 2003 from the Registrar;

23. Whereas by a letter of 17 January 2003, received in the Registry on the same day, the United States Government informed the Court of the appointment of an Agent and a Co-Agent for the case;

24. Whereas 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; whereas it 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";

25. Whereas, at the public hearings held on 21 January 2003 in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the following representatives of the Parties:

On behalf of Mexico: H.E. Mr. Juan Manuel Gómez Robledo,
H.E. Mr. Santiago Oñate,
H.E. Mr. Alberto Székely,
Ms Sandra Babcock,
Mr. Donald Francis Donovan;

On behalf of the United States: The Honorable William H. Taft, IV,
Mr. Stephen Mathias,
Ms Catherine W. Brown,
Mr. James H. Thessin,
Sir Elihu Lauterpacht,
Mr. Daniel Paul Collins;

and whereas at the hearings a question was put by a Member of the Court, to which an oral reply was given;

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26. Whereas in the first round of oral argument Mexico restated the position set out in its Application and in its request for the indication of provisional measures, and stressed that the requirements for the indication by the Court of the provisional measures requested were met in the present case;

27. Whereas Mexico has stressed that neither the apologies offered by the Government of the United States following the execution of Mexican nationals whose rights under the Vienna Convention had been violated, nor the review by an executive official “as a matter of grace and not of legal right” could represent a sufficient remedy for violations by competent authorities in the United States of obligations arising from the Vienna Convention; that a “meaningful ‘review and reconsideration’ of its nationals’ claims in accord with the Judgment in *LaGrand*” requires the provision of “a remedy *at law*”; and that only the restoration of the *status quo ante*, that is, the re-establishment of the situation that existed before the violation, would be such a remedy;

28. Whereas Mexico has insisted that, unless provisional measures are indicated by the Court, three of its nationals, namely Messrs. Fierro Reyna, Moreno Ramos and Torres Aguilera, risk execution in the next few months and that many others could also be at risk of execution before the Court rules on the merits; and whereas it accordingly contends that the condition of urgency required for the indication of provisional measures is satisfied;

29. Whereas in the first round of oral argument the United States contended that the request by Mexico was without foundation in fact or in law and that the requirements for the Court to indicate provisional measures were not met;

30. Whereas the United States submitted that the Court had ruled in the *LaGrand* case that, where there had been a violation of the obligation of notification prescribed by Article 36, paragraph 1 (b), of the Vienna Convention “in death penalty cases”, the remedy to be provided by the receiving State was to ensure that there was in every case review and reconsideration of the decision; whereas it stated that, following the *LaGrand* case, the competent authorities in the United States had instituted measures providing for review and reconsideration in all such cases, that so far these measures had proved effective and that there was no reason to think that they would not be effective in future cases; whereas it added that the receiving State was, on the other hand, under no obligation to quash all convictions and to recommence the trial process in such cases; and whereas the United States accordingly concluded that the request by Mexico seeking, by way of indication of provisional measures, to preserve a right to the restoration of the *status quo ante* was not a request seeking preservation of a right protected by the Vienna Convention, and that therefore the request should be denied;

31. Whereas the United States further contended that the request by Mexico did not satisfy the condition of urgency and did not show that imminent serious harm was likely, because United States proceedings in each of the 51 cases were continuing and none of the Mexican nationals

covered by the request for indication of provisional measures was scheduled to be executed; and whereas it pointed out that in some of the cases referred to by Mexico no violation of Article 36 of the Vienna Convention had been established, that in others Mexico would have an opportunity to raise any failure of notification at a later stage in the domestic legal proceedings, and, finally, that review and reconsideration remained available in all the cases;

32. Whereas the United States further maintained that the request by Mexico was too sweeping and did not respect the essential balance of the rights of the Parties because, if it were accepted by the Court, it would prejudice the sovereign right of the United States to operate its criminal justice system; and whereas the United States concluded that the order for the indication of provisional measures requested by Mexico “would constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States even as it goes far beyond preserving Mexico’s rights under the Convention”;

33. Whereas in its second round of oral argument Mexico stated that it could not accept the conclusions derived by the United States from the Court’s Judgment in the *LaGrand* case in regard to the remedies available for breaches of its obligations under Article 36 of the Vienna Convention; whereas Mexico added that the Court would not, however, need to address those issues until its examination of the merits of the case; and whereas it submitted that the purpose of its request was unquestionably to preserve rights arising out of the Vienna Convention and that its request should accordingly be upheld;

34. Whereas Mexico contended that, for the condition of urgency to be met, it was sufficient that there was a “likely” threat of irreparable prejudice, and that in the present case, since execution dates for the Mexican nationals named in the request could be set at any time by the competent authorities of the United States and since, once those dates had been set, those nationals could be executed at very short notice, the condition of urgency was accordingly met;

35. Whereas, finally, Mexico argued that an order of the Court enjoining the United States not to proceed with the execution of the said Mexican nationals could not be considered as capable of causing any real harm to the legitimate interest of the United States in operating its criminal justice system;

36. Whereas in its second round of oral argument the United States stressed the fact that, following the Court’s Judgment in the *LaGrand* case, it had put in place a vast programme to ensure compliance with the obligation of notification under Article 36, paragraph 1 (*b*), of the Vienna Convention and had also taken measures to ensure review and reconsideration in all death penalty cases where that obligation had been breached; and whereas the United States reiterated its view that Mexico’s request for the indication of provisional measures was not consistent with the *LaGrand* Judgment and that it was seeking to preserve non-existent rights, so that there was neither any risk of irreparable prejudice nor any urgency; whereas the United States further pointed out that, according to the United States Supreme Court, “the clemency power . . . [was] an integral mechanism in the administration of our criminal laws”, and “clemency ‘has provided a fail-safe in our criminal justice system’”;

37. Whereas at the hearings a Member of the Court put the following question to the Agent of the United States:

“Under what circumstances will the Legal Adviser of the State Department notify an appellate court rather than later notify a clemency body of the obligations of the United States consequent upon an admitted violation of Article 36 of the Vienna Convention? Is the matter simply one of timing?”;

whereas, in response to that question, the Agent stated *inter alia* the following:

“We . . . have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in *LaGrand*. [That Judgment] expressly left the choice of means of providing the review and reconsideration to the United States[.] . . . [C]lemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles, the review and reconsideration this Court called for”;

and whereas the Agent added that his

“Government would . . . inform a court upon request, at any time, of the international legal obligations of the United States, and how in the particular posture of a given case they [might] or [might] not apply and whether and how they might be carried out under the applicable domestic law in that court”;

while explaining that “a court [might] determine . . . that domestic law principles still preclude[d] an express judicial remedy for a failure of consular notification”;

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38. Whereas, on a request for the indication of provisional measures, the Court 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;

39. Whereas Article I of the Optional Protocol, which Mexico invokes as the basis of jurisdiction of the Court in the present case, is worded as follows:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol”;

40. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Mexico and the United States have been parties to the Vienna Convention since 16 June 1965 and 24 November 1969 respectively, and to the Optional Protocol since 15 March 2002 and 24 November 1969 respectively, in each case without reservation;

41. Whereas 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 whereas it has accordingly concluded that the Court has the jurisdiction necessary to indicate the provisional measures requested; and whereas 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”;

42. Whereas, 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;

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43. Whereas in its Application Mexico, as stated previously (see paragraph 8 above), asks 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”; whereas Mexico seeks various measures aimed at remedying these breaches and avoiding any repetition thereof; whereas it contends, 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 is executed and that no execution date be set in respect of any such national;

44. Whereas the United States acknowledges 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; whereas it argues, however, that in such cases, in accordance with the Court’s Judgment in the *LaGrand* case, the United States 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”; whereas 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; whereas the United States contends that 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; whereas it claims 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;

45. Whereas, 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"; whereas "the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court's mandate [in the *LaGrand* case]";

46. Whereas 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; whereas that dispute belongs to the merits and cannot be settled at this stage of the proceedings; whereas 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;

47. Whereas the United States argues, however, 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;

48. Whereas the Court, when considering a request for the indication of provisional measures, "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" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 35), without being obliged at this stage of the proceedings to rule on those rights; whereas 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"; whereas "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"; (*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 25); whereas the Court may indicate provisional measures without infringing these principles; and whereas the argument put forward on these specific points by the United States accordingly cannot be accepted;

49. Whereas

“the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings” (*LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, pp. 14-15, para. 22);

50. Whereas, moreover, “provisional measures under Article 41 of the Statute 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” (*Passage through the Great Belt (Finland v. Denmark)*), *Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23);

51. Whereas Mexico’s principal request is that the Court should order the United States “to take measures sufficient to ensure that no Mexican national be executed and that no date for the execution of a Mexican national be set”; whereas 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; whereas, accordingly, the Court cannot rule on the rights of Mexican nationals who are not alleged to have been victims of a violation of that Convention;

52. Whereas, however, Mexico argues that 54 of its nationals have been sentenced to death following proceedings that allegedly violated the obligations incumbent on the United States under Article 36, paragraph 1 (*b*), of the Vienna Convention; whereas Mexico provides a list of those nationals and some information relating to their respective cases; whereas it adds that three of them have had their sentences commuted; whereas at the oral proceedings its Agent requested that the United States be ordered “to refrain from fixing any date for execution and from carrying out any execution in the case of the 51 Mexican nationals covered by the Application, until the Court has been able to decide on the merits of the case”;

53. Whereas the United States argues that no execution date has been scheduled with respect to any of the Mexican nationals concerned (see paragraph 31 above); whereas it points out that this is so both for the three individuals specifically named in its request for the indication of provisional measures and in regard to the others; whereas it observes that, in the case of these latter, “any execution date is even more remote”; and whereas it accordingly concludes that the request for the indication of provisional measures is thus premature;

54. Whereas “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” *LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 3 March 1999*,

I.C.J. Reports 1999 (I), p. 14, para. 19); whereas, moreover, the Supreme Court of the United States observed, when considering a petition seeking the enforcement of an Order of this Court, 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” (*Breard v. Greene*, 523 US 371, 378 (1998)); whereas, 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;

55. Whereas it is apparent from the information before the Court 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; whereas their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides;

56. Whereas 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 of this Order; whereas 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;

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57. Whereas it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; whereas 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;

58. Whereas 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 whereas 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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59. 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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of February, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(*Signed*) Gilbert GUILLAUME,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge ODA appends a declaration to the Order of the Court.

(*Initialed*) G. G.

(*Initialed*) Ph. C.
