

Case Concerning the Vienna Convention on Consular Relations

(United Mexican States v. United States of America)

**REQUEST FOR THE INDICATION OF  
PROVISIONAL MEASURES OF PROTECTION  
SUBMITTED BY THE GOVERNMENT OF  
THE UNITED MEXICAN STATES**

The Hague, 9 January 2003

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the United Mexican States against the Government of the United States of America. In accordance with article 41 of the Statute of the Court and articles 73, 74, and 75 of the Rules of Court, I hereby respectfully submit an urgent request that the Court indicate provisional measures to preserve the rights of the United Mexican States.
2. The Court has jurisdiction pursuant to article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

**FACTS**

3. As more fully set forth in the accompanying Application, Mexico and its nationals have been subject to systematic violation by the United States of their rights under article 36 of the Vienna Convention. To Mexico's knowledge, no fewer than fifty-four of its nationals have been arrested, detained, tried, and convicted of capital crimes and are now presently under a sentence of death as a result of proceedings conducted by competent authorities of the United States that violated their obligations under article 36(1)(b) the Convention.
4. In each of those cases, the violations prevented Mexico from exercising its rights and performing its consular functions under articles 5 and 36, respectively, of the Convention. Mexico was thereby prevented from protecting its own interests and those of its nationals as contemplated by those articles.

5. Within the next six months, three Mexican nationals — César Roberto Fierro Reyna, Roberto Moreno Ramos, and Osbaldo Torres — will face execution unless the Court indicates provisional measures. Mr. Fierro could receive an execution date as early as February 2003, Mr. Moreno Ramos as early as April 2003, and Mr. Torres as early as July 2003. Several other Mexican nationals could be scheduled for execution before the end of 2003.
6. César Roberto Fierro Reyna currently faces the most imminent threat of execution. Mr. Fierro is incarcerated under sentence of death in the state of Texas, which has executed more persons than any other state of the United States. His case is currently pending before the United States Supreme Court on a petition for a writ of certiorari, the grant or denial of which, as well as the timing of any such disposition, lies within the complete discretion of that Court. Should the Court deny his petition, Texas prosecutors would be expected promptly to seek the setting of an execution date from the competent Texas court.
7. Under Texas law, the Texas court may set an execution date as early as thirty days from the date of the order. Hence, depending on the United States Supreme Court's disposition of the Mr. Fierro's petition, he could be subject to execution as early as February 14, 2003.

#### **THE AUTHORITY OF THE COURT**

8. Article 41(1) of the Statute of the Court vests the Court with “power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party” pending a final judgment in the case. Orders of provisional measures pursuant to article 41 establish binding obligations. *LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2001*, para. 109.
9. The Court has 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 state criminal proceedings conducted in violation of the Convention. In the *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 9 April 1998*, the Court indicated provisional measures to prevent the imminent execution of the Paraguayan national Angel Francisco Breard pending the final judgment on the merits, and in the *LaGrand case (Germany v. United States of America), Order of 3 March 1999*, the Court afforded the same relief to prevent the execution of the German national Walter LaGrand.

10. There can be no question of the importance of the interests at stake. International law recognizes the sanctity of human life. 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.
11. Mexico brings this application to remedy the deprivation of its consular notification rights and those of its nationals in state criminal proceedings in the United States that resulted in the imposition of the death penalty on those Mexican nationals. The purpose of the consular notification provisions of the Vienna Convention is to allow consular officials of the sending State to render assistance to nationals detained by competent authorities of the receiving State. That purpose is most compelling when the national is detained on charges for which he or she might be subject to the death penalty.
12. 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, Moreno Ramos, Torres, 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. *LaGrand (Germany v. United States of America)*, Order of 3 March 1999, para. 24; *Judgment of 27 June 2001*, para. 57; see also *Case Concerning the Vienna Convention*, Order of 9 April 1998, para. 37.
13. Compared with the irremediable loss of a human life, any prejudice that the United States might suffer by a delay in an execution would be inconsequential. At most, the United States would need to forbear from executing Mexican nationals during the pendency of these proceedings. All of the nationals would remain incarcerated and subject to execution if the Court subsequently denied Mexico relief. Indeed, some of the Mexican nationals subject to execution have already been on death row for as long as ten, even twenty, years. A further delay equal to the length of the proceedings before this Court could hardly constitute a hardship to the United States.
14. Provisional 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. Indeed, the Court's indications of provisional measures in the *Case Concerning the Vienna Convention* and the *LaGrand* case unequivocally support Mexico's right to provisional measures here.

15. There can also be no question about the urgency of the need for provisional measures. Mexico recognizes that at the time of the applications in the *Case Concerning the Vienna Convention* and the *LaGrand* case, nationals of the States seeking provisional measures were subject to imminent execution on dates already established. In both of those cases, the Court therefore had to act, and did act, with the utmost dispatch. On Paraguay's request in the *Case Concerning the Vienna Convention*, the Court indicated provisional measures within six days. On Germany's request in the *LaGrand* case, the Court indicated provisional measures within twenty-four hours.
16. The Court observed in the *LaGrand* case, however, 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." *Order of 3 March 1999*, para. 19. Mexico concurs. Mexico therefore submits this Request at a time that will allow the Court to give it full and unhurried consideration.
17. Mexico also considers it critical that the Court indicate provisional measures at a time that will give the United States ample opportunity to implement the Court's order. The Court will recall that on the occasions of its orders of provisional measures in the *Case Concerning the Vienna Convention* and the *LaGrand* case, respectively, the United States took the position that an indication of provisional measures by this Court pursuant to article 41 did not impose a binding legal obligation. *LaGrand*, paras. 33, 112. The Court has now clearly established to the contrary. *Id.*, para. 109. The Court should therefore schedule proceedings on Mexico's Request at a time that will allow the United States, should the Court order provisional measures, to take any and all steps necessary to prevent the executions at which the provisional measures would be aimed.

#### **THE OBLIGATION TO BE IMPOSED**

18. Mexico respectfully requests that pending final judgment in this case, the Court indicate provisional measures ordering 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. Because in each of the cases that are the subject of the Request, the death penalty has been imposed as a result of criminal proceedings conducted by one of the constituent states of the United States, compliance with any order by this Court will require action by state authorities, federal authorities or both.
19. As 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; as a matter of United States municipal law, both state and federal authorities have both the obligation and means to ensure

compliance with any order that this Court might issue. Hence, while Mexico recognizes that the Court may wish to leave to the United States the choice of means, Mexico respectfully requests that the Court leave no doubt as to the required result.

20. It is a fundamental principle of international law that a political subdivision of a federal State may engage the international responsibility of the State. Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

*See also Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62, 87, para. 62. The Court expressly incorporated this principle in its order of provisional measures in LaGrand by observing that “the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State” and therefore that “the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.” Order of 3 March 1999, I.C.J. Reports 1999, p. 9, 16, para. 28; see also LaGrand, Merits, Judgment of 27 June 2001, para. 113.*

21. The text of the Vienna Convention itself reinforces this point. The Convention expressly imposes obligations on the “competent authorities” of a State party without regard to whether those authorities act on behalf of the national government of the State party or of one of its political subdivisions. Having 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.
22. It is an equally fundamental principle of United States constitutional law that treaties made by the President with the advice and consent of the Senate establish paramount federal law that overrides inconsistent state law. Specifically, the United States Constitution provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. 6, cl.2.

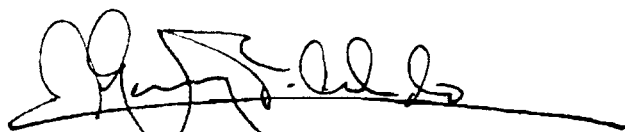
23. Because the United States has ratified the U.N. Charter and the Statute of the Court, orders of this Court within its jurisdiction enjoy the same status as “supreme Law” as any other treaty obligation under United States municipal law. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); Louis Henkin, *Foreign Affairs and the United States Constitution* 199 (2d ed. 1996). The Supreme Court has repeatedly affirmed the supremacy of federal treaty obligations in the face of inconsistent state law. *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31 (1942); *United States v. Belmont*, 301 U.S. 324, 331-332 (1937); *Asakura v. Seattle*, 265 U.S. 332 (1924).
24. Given 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). *See generally* Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 Am. J. Int’l L. 679 (1998).
25. *First*, the United States Constitution provides that “the Judges in every State shall be bound” by federal treaties as a component of supreme federal law. U.S. Const., art. 6, cl. 2. Hence, state court judges have the obligation and the authority directly to enforce United States treaty obligations. *See Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (holding that state courts must give full force and effect to United States treaties); *see also Maldonado v. State of Texas*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999)(“Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law.”)
26. *Second*, as the Court recognized in the *LaGrand* case, para. 113, governors of the constituent states of the United States generally have the authority to stay or commute criminal sentences. Either the governor or the state clemency board is authorized to grant stays or commute death sentences in all of the states on which Mexican nationals presently remain on death row. In particular, the Constitutions of both Texas and California, two states in which a substantial number of Mexican nationals have been sentenced to death, grant their respective governors or clemency boards this authority. *See* California Const., art. V, § 8(a); Texas Const., art. IV, § 11(b); *see also* Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 Am. J. Int’l L. 683, 685 (1998); Henkin, 92 Am. J. Int’l L. at 683.
27. *Third*, as the Court also recognized in the *LaGrand* case, para. 114, United States federal courts, including the United States Supreme Court, have the authority to enforce federal law, including international law, against state judicial and executive authorities by issuing a stay of execution. *See, e.g.,* All Writs Act, 28 U.S.C. § 1651 (providing that the “Supreme Court and all courts established by

Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions”); *see also Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (federal court may enjoin enforcement of state judgment entered in violation of federal law).

28. *Fourth*, the President has the authority to issue an executive order directing federal and state authorities to comply with federal law, including international law. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive authority to enter into Algiers Accords settling Iranian hostage crisis and transferring, pursuant to Accords, cases pending in United States courts to Iran-United States Claims Tribunal). Hence, here the President, in the exercise of his constitutional responsibility to “take Care that the Laws be faithfully executed,” U.S. Const., art. 2, § 3, would have the authority, if necessary, to issue an executive order to state or other authorities in order to ensure full compliance with provisional measures ordered by this Court. *See Vazquez*, 92 Am. J. Int’l L. at 685-86; Henkin, 92 Am. J. Int’l L. at 683. Indeed, a declaration of the foreign policy of the federal government generally binds state governments even in the absence of a formal executive order or legislative mandate. Henkin, 92 Am. J. Int’l L. at 682 (citing *Ex parte Peru*, 318 U.S. 578, 589 (1943), and *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945)).
29. *Finally*, if state or other competent authorities refuse to comply with provisional measures ordered by this Court, the Attorney General of the United States has the authority to bring suit against those authorities to enforce paramount treaty obligations under international law. *See United States v. County of Arlington*, 669 F.2d 925, 928-29 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982); *United States v. City of Glen Cove*, 322 F. Supp. 149, 152 (E.D.N.Y.), *aff’d per curiam*, 450 F.2d 884 (1971); *cf. Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425-26 (1925); *see also* Henkin, p. 681. In its *amicus curiae* brief to the United States Supreme Court in *Breard v. Greene*, the United States expressly asserted “the ability of the United States to sue in order to enforce compliance with the Vienna Convention.” Brief for the United States as *Amicus Curiae*, *Breard v. Greene*, 523 U.S. 371 (1998), at 15 n. 3.
30. To repeat, while the Court may wish to leave the choice of means to the United States, it should make explicit the required result: No Mexican national should be executed in the United States until this Court determines Mexico’s claims on the merits.

**THE ORDER REQUESTED**

31. On behalf of the Government of the United Mexican States, acting on its own behalf and in the exercise of the diplomatic protection of its nationals, I therefore respectfully request 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.
32. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican citizen in violation of obligations the United States owes to Mexico, Mexico respectfully asks the Court to treat this Request as a matter of the greatest urgency and set a hearing on this Request before the middle of February 2003.
33. The Government of the United Mexican States has authorized the undersigned to appear before the Court in any proceedings or hearings relating to this request that the Court or its President may convene in accordance with the terms of article 74, paragraph 3, of the Rules of Court.



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