

## DECLARATION OF JUDGE ODA

1. I voted in favour of the Court's Order with great hesitation as I considered that the request for the indication of provisional measures of protection submitted by Germany to the Court should have been dismissed. However, in the limited time — only several hours — given to the Court to deal with this matter, I have regrettably found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. I can, on humanitarian grounds, understand the plight of Mr. Walter LaGrand and recognize that owing to the fact that Germany filed this request as late as yesterday evening (namely, at 7.30 p.m. on 2 March 1999), his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Walter LaGrand has been treated in all legal proceedings in accordance with the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters. Whether capital punishment would be contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights is not a matter to be determined by the International Court of Justice — at least in the present situation.

3. As I stated earlier, Germany's request was presented to the Court at 7.30 p.m. on 2 March 1999 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Mr. Walter LaGrand was brought to the domestic courts of the United States for the alleged murder which took place in 1982.

If there was any dispute between Germany and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Walter LaGrand, as the United States did not inform the German consular officials of that event.

In fact, the German consular officials were not aware of the situation until 1992 and only learned of it from Mr. Walter LaGrand himself.

4. What did Germany ask the Court to decide in its request for the indication of provisional measures of protection of 2 March 1999? Germany asked mainly for a decision relating to Mr. Walter LaGrand's personal situation, namely, his pending execution by the competent authorities of the State of Arizona, which Germany did not attempt to deal with until yesterday.

Germany requested the restoration of the *status quo ante*. However, if consular contact had occurred at the time of Mr. Walter LaGrand's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different.

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve *rights of States* exposed to an imminent breach which is irreparable and these *rights of States* must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the application instituting proceedings or be *directly* related to it. In this case, however, there is no question of such *rights* (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

I would like to reiterate that the request for the indication of provisional measures must essentially be related to the application instituting proceedings presented by the State. The fact that the United States failed to notify the German consular authorities of the arrest, detention and trial of Mr. Walter LaGrand and that Germany did not until yesterday take steps before this Court, is not — however much it may appear to be — *directly* related to the imminent execution of that German national. The purpose of provisional measures is to preserve the *rights of States* exposed to an imminent breach which is irreparable.

6. If the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continues. In addition, the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.

While I consider that the International Court of Justice should be uti-

lized more frequently in the world, I cannot condone the use of the Court for such matters as the above under the pretext of the protection of human rights.

7. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Germany's request. I reiterate and emphasize that I voted in favour of the Order solely for humanitarian reasons.

*(Signed)* Shigeru ODA.

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