

DECLARATION OF JUDGE ODA

I voted in favour of the present Order. However, I believe it appropriate to state my doubts concerning the Court's definition of "disputes arising out of the interpretation or application" of the Vienna Convention on Consular Relations. Those doubts have already been clearly expressed on three occasions in connection with two similar cases decided by the Court (see *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Provisional Measures, Order of 9 April 1998*, *I.C.J. Reports 1998*, p. 248; *LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 3 March 1999*, *I.C.J. Reports 1999 (I)*, p. 9); *LaGrand (Germany v. United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 466).

The present case, in my view, is *in essence* an attempt by Mexico to save the lives of its nationals who have been sentenced to death by domestic courts in the United States. This case concerns human rights, specifically those of the Mexican nationals on death row, but there is no dispute between Mexico and the United States concerning the interpretation or application of the Vienna Convention. The United States has acknowledged its failure to provide consular notification — in violation of the Vienna Convention — and in fact the Mexican nationals did not receive timely consular protection.

I believe that Mexico has seized upon the Convention and the admitted violation of it as a means, and the only one potentially available, to subject the United States to the compulsory jurisdiction of the Court. Since there is currently no provision of international law conferring *universal* compulsory jurisdiction on the International Court of Justice, Mexico sought a mechanism by which it could hope to bring a case unilaterally before the Court and it relied to that end on the Convention's Optional Protocol, pursuant to which both Mexico and the United States have accepted the Court's compulsory jurisdiction in disputes involving the interpretation or application of the Convention.

Mexico contends that its nationals were sentenced to death without having received consular assistance. In most cases, however, they *were* given consular assistance in the judicial processes (including the clemency procedure) that followed their initial sentencing. This case cannot be about domestic legal procedure in the United States because that lies within the sovereign discretion of that country. It does not concern a dispute over the interpretation or application of the Vienna Convention

because the United States admits its violation. While there may be a question of the appropriate *remedy* for the violation, that is a matter of general international law, *not* of the interpretation or application of the Convention. What this case is about is abhorrence — by Mexico and others — of capital punishment.

If the International Court of Justice interferes in a State's criminal law system (encompassing trial and appellate proceedings and clemency procedures), it fails to respect the sovereignty of the State and places itself on a par with the supreme court of the State. The Vienna Convention in no way justifies the Court's assumption of that role. As I have previously stated:

“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.” (*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 18, declaration of Judge Oda.)

I added:

“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.” (*Ibid.*)

Nor is the present case, brought under the Vienna Convention and not under the International Covenant on Civil and Political Rights, the appropriate context for that determination.

I fully understand the significant issues raised by the death penalty from the perspective of those condemned to die but I shall reiterate my previous statement:

“[i]f [the rights of the accused] 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” (*ibid.*).

(Signed) Shigeru ODA.