CR 2003/1

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 21 January 2003, at 9.30 a.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Avena and other Mexican Nationals (Mexico *v.* United States of America)**

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mardi 21 janvier 2003, à 9 h 30, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire* Avena et autres nationaux mexicains (Mexique c. Etats-Unis d'Amérique)**

COMPTE RENDU

Present:	President	Guillaume
	Vice-President	Shi
	Judges	Oda
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Registrar	Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Oda
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby, juges

M. Couvreur, greffier

The Government of the United Mexican States is represented by:

H.E. Mr. Juan Manuel Gómez Robledo, Ambassador, Legal Counsellor, Secretary of Foreign Affairs,

H.E. Mr. Santiago Oñate, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agents, Counsellors and Advocates;

Mr. Donald Francis Donovan, Esq., Debevoise & Plimpton,

Ms Sandra Babcock, Esq., Attorney at Law, Director of the Mexican Capital Legal Assistance Programme;

as Counsellors and Advocates;

Ms Catherine Birmingham, Debevoise & Plimpton,

Mr. Dietmar Prager, Debevoise & Plimpton,

Mr. Erasmo Lara Cabrera, Director International Law, Ministry of Foreign Affairs,

Mr. Guillaume Michel, Deputy Director International Law, Ministry of Foreign Affairs,

Mr. Jorge Cicero, Ministry of Foreign Affairs,

H.E. Mr. Alberto Székely, Ambassador, former member of the United Nations International Law Commission,

as Counsellors;

Mr. Michel L'Enfant, Debevoise & Plimpton,.

as Adviser.

The Government of the United States of America is represented by:

Mr. William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Tessin, Principal Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. Daniel Paul Collins, Associate Deputy Attorney General, United States Department of Justice,

Sir Elihu Lauterpacht CBE, QC, Honorary Professor of International Law, University of Cambridge; Member of the Institut de Droit International,

Le Gouvernement des Etats-Unis du Mexique est représenté par :

S. Exc. M. Juan Manuel Gómez Robledo, ambassadeur, conseiller juridique et secrétaire au ministère des affaires étrangères,

S. Exc. M. Santiago Oñate, ambassadeur du Mexique auprès du Royaume des Pays-Bas,

comme agents, conseils et avocats;

M. Donald Francis Donovan, Esq., du cabinet Debevoise & Plimpton,

Mme Sandra Babcock, Esq., avocate, directrice du programme d'assistance juridique du Mexique aux personnes encourant la peine de mort,

comme conseils et avocats;

Mme Catherine Birmingham, du cabinet Debevoise & Plimpton,

M. Dietmar Prager, du cabinet Debevoise & Plimpton,

M. Erasmo Lara Cabrera, directeur du droit international, ministère des affaires étrangères,

M. Guillaume Michel, directeur adjoint du droit international, ministère des affaires étrangères,

M. Jorge Cicero, ministère des affaires étrangères,

S. Exc. M. Alberto Székely, ambassadeur, ancien membre de la Commission du droit international de l'Organisation des Nations Unies,

comme conseils;

M. Michel L'Enfant, du cabinet Debevoise & Plimpton,

comme conseiller.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. William H. Taft IV, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. James H. Thessin, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

comme coagent;

Mme Catherine W. Brown, directeur chargé des affaires consulaires auprès du conseiller juridique du département d'Etat des Etats-Unis,

M. Daniel Paul Collins, adjoint au vice-*Attorney General*, ministère de la justice des Etats-Unis,

Sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international,

Mr. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Counsel and Advocates;

Mr. Duncan B. Hollis, Attorney-Adviser for Treaty Affairs, United States Department of State,

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Mr. Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Ms Kathleen A. Wilson, Attorney-Adviser for Consular Affairs, United States Embassy The Hague,

as Counsel.

M. Stephen Mathias, directeur chargé des questions concernant les Nations Unies auprès du conseiller juridique du département d'Etat des Etats-Unis,

comme conseils et avocats;

M. Duncan B. Hollis, avocat-conseiller chargé des affaires relatives aux traités au département d'Etat des Etats-Unis,

M. Clifton M. Johnson, conseiller juridique auprès de l'ambassade des Etats-Unis à La Haye,

M. David A. Kaye, conseiller juridique adjoint auprès de l'ambassade des Etats-Unis à La Haye,

M. Patrick F. Philbin, adjoint au directeur chargé des fonctions de conseiller juridique auprès de l'*Attorney General*, ministre de la justice des Etats-Unis,

Mme Kathleen A. Wilson, avocat-conseiller chargé des affaires consulaires auprès de l'ambassade des Etats-Unis à La Haye,

comme conseils.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre, conformément au paragraphe 3 de l'article 74 de son Règlement, les observations des Parties au sujet de la demande en indication de mesures conservatoires présentée par les Etats-Unis du Mexique en l'affaire *Avena et autres nationaux mexicains (Mexique c. Etats-Unis d'Amérique)*.

L'instance a été introduite le 9 janvier 2003 par le dépôt au Greffe de la Cour d'une requête des Etats-Unis du Mexique contre les Etats-Unis d'Amérique. Dans cette requête, le Gouvernement mexicain invoque, pour fonder la compétence de la Cour, l'article premier du protocole de signature facultative concernant le règlement obligatoire des différends qui accompagne la convention de Vienne sur les relations consulaires du 24 avril 1963.

Le Mexique soutient que les Etats-Unis, en méconnaissant leurs obligations aux termes de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention de Vienne, l'ont empêché d'exercer les droits et les fonctions consulaires prévues aux articles 5 et 36 de la convention, concernant cinquante-quatre ressortissants mexicains condamnés à mort par les Etats de Californie, du Texas, de l'Illinois, de l'Arizona, de l'Arkansas, de la Floride, du Nevada, de l'Ohio, de l'Oklahoma et de l'Oregon. Selon les Etats-Unis du Mexique, ses ressortissants ont été arrêtés, détenus, jugés, reconnus coupables et condamnés à la peine capitale par des autorités compétentes des Etats-Unis d'Amérique à l'issue de procédures au cours desquelles ces autorités ont manqué aux obligations qui leur incombaient en vertu de la convention de Vienne. Les Etats-Unis du Mexique soulignent avoir subi un préjudice, en leur nom propre et en la personne de leurs ressortissants, et en concluent qu'ils ont droit à une *restitutio in integrum*, c'est-à-dire au «rétabli[ssement de] la situation qui aurait vraisemblablement existé si [les violations] n'avaient pas été comm[ises]».

J'inviterai maintenant le greffier à bien vouloir donner lecture de la décision demandée à la Cour, telle que formulée au paragraphe 281 de la requête des Etats-Unis du Mexique :

Le GREFFIER :

«le Gouvernement des Etats-Unis du Mexique prie la Cour de dire et juger que :

1) en arrêtant, détenant, jugeant, déclarant coupables et condamnant les cinquante-quatre ressortissants mexicains se trouvant dans le couloir de la mort, et dont les cas sont décrits dans la présente requête, les Etats-Unis d'Amérique

ont violé leurs obligations juridiques internationales envers le Mexique, en son nom propre et dans l'exercice du droit qu'a cet Etat d'assurer la protection consulaire de ses ressortissants, ainsi qu'il est prévu aux articles 5 et 36, respectivement, de la convention de Vienne;

2) le Mexique a en conséquence droit à la *restitutio in integrum*;

3) les Etats-Unis d'Amérique ont l'obligation juridique internationale de ne pas appliquer la doctrine de la carence procédurale *(procedural default)*, ni aucune autre doctrine de leur droit interne, d'une manière qui fasse obstacle à l'exercice des droits conférés par l'article 36 de la convention de Vienne;

4) les Etats-Unis d'Amérique sont tenus, au regard du droit international, d'agir conformément aux obligations juridiques internationales susmentionnées dans le cas où, à l'avenir, ils placeraient en détention les cinquante-quatre ressortissants mexicains se trouvant dans le couloir de la mort ou tout autre ressortissant mexicain sur leur territoire ou engageraient une action pénale à leur encontre, que cet acte soit accompli par un pouvoir constitué — législatif, exécutif, judiciaire ou autre —, que ce pouvoir occupe une place supérieure ou subordonnée dans l'organisation des Etats-Unis et que les fonctions de ce pouvoir présentent un caractère international ou interne; et

5) le droit de notification consulaire garanti par la convention de Vienne fait partie des droits de l'homme;

et que, conformément aux obligations juridiques internationales susmentionnées :

1) les Etats-Unis d'Amérique doivent restaurer le *statu quo ante*, c'est-à-dire rétablir la situation qui existait avant les actes de détention, de poursuite, de déclaration de culpabilité et de condamnation des ressortissants mexicains commis en violation des obligations juridiques internationales des Etats-Unis d'Amérique;

2) les Etats-Unis d'Amérique doivent prendre les mesures nécessaires et suffisantes pour garantir que les dispositions de leur droit interne permettent la pleine réalisation des fins pour lesquelles sont prévus les droits conférés par l'article 36;

3) les Etats-Unis d'Amérique doivent prendre les mesures nécessaires et suffisantes pour établir en droit une voie de recours efficace contre les violations des droits conférés au Mexique et à ses ressortissants par l'article 36 de la convention de Vienne, notamment en empêchant que ne soit, en droit interne, pénalisé sur le plan procédural un ressortissant n'ayant pas, en temps voulu, fait valoir une réclamation au titre de la convention de Vienne ni excipé de celle-ci dans le cadre de sa défense, lorsque des autorités compétentes des Etats-Unis d'Amérique ont violé l'obligation qui est la leur d'informer ce ressortissant des droits qu'il tire de cette convention; et

4) les Etats-Unis d'Amérique doivent, au vu du caractère récurrent et systématique des violations décrites dans la présente requête, donner au Mexique une pleine garantie que de tels actes illicites ne se reproduiront pas».

Le PRESIDENT : Immédiatement après le dépôt le 9 janvier 2003 de la requête, l'agent des Etats-Unis du Mexique a déposé au Greffe une demande en indication de mesures conservatoires,

en invoquant l'article 41 du Statut de la Cour et les articles 73, 74 et 75 du Règlement de celle-ci. Dans leur demande, les Etats-Unis du Mexique exposent ce qui suit :

> «Au cours des six prochains mois, trois ressortissants mexicains — MM. César Roberto Fierro Reyna, Roberto Moreno Ramos et Osbaldo Torres — risquent d'être exécutés à moins que la Cour n'indique des mesures conservatoires. L'exécution de M. Fierro pourrait intervenir dès février 2003, celle de M. Moreno Ramos dès avril 2003 et celle de M. Torres dès juillet 2003. L'exécution de plusieurs autres ressortissants mexicains pourrait avoir lieu avant la fin de 2003.»

J'inviterai à présent le greffier de bien vouloir donner lecture des mesures conservatoires que le Gouvernement des Etats-Unis du Mexique prie la Cour d'indiquer.

Le GREFFIER :

> «[Le] Gouvernement des Etats-Unis du Mexique, agissant en son nom propre et dans l'exercice de la protection diplomatique de ses ressortissants, … prie donc respectueusement la Cour d'indiquer, en attendant l'arrêt définitif en l'instance, des mesures tendant à ce que :
>
> *a)* le Gouvernement des Etats-Unis d'Amérique prenne toutes les mesures nécessaires pour faire en sorte qu'aucun ressortissant mexicain ne soit exécuté;
>
> *b)* le Gouvernement des Etats-Unis d'Amérique prenne toutes les mesures nécessaires pour faire en sorte qu'aucune date d'exécution ne soit fixée pour aucun ressortissant mexicain;
>
> *c)* le Gouvernement des Etats-Unis d'Amérique porte à la connaissance de la Cour toutes les mesures qu'il aura prises en application des alinéas *a)* et *b)*; et
>
> *d)* le Gouvernement des Etats-Unis d'Amérique fasse en sorte qu'il ne soit pris aucune mesure qui puisse porter atteinte aux droits des Etats-Unis du Mexique ou de leurs ressortissants en ce qui concerne toute décision que la Cour pourrait prendre sur le fond de l'affaire.»

Le PRESIDENT : Le 9 janvier 2003, date à laquelle la requête et la demande en indication de mesures conservatoires ont été déposées au Greffe, le greffier a avisé le Gouvernement des Etats-Unis d'Amérique du dépôt de ces documents et lui a immédiatement remis un original de la requête, en application du paragraphe 2 de l'article 40 du Statut et du paragraphe 4 de l'article 38 du Règlement, ainsi qu'un original de la demande en indication de mesures conservatoires, en application du paragraphe 2 de l'article 73 du Règlement. Il a également informé le Secrétaire général de l'Organisation des Nations Unies de ce dépôt.

Selon l'article 74 du Règlement de la Cour, une demande en indication de mesures conservatoires a priorité sur toutes autres affaires. La date de la procédure orale doit être fixée de

manière à donner aux parties la possibilité de s'y faire représenter. En conséquence, par des lettres en date du 9 janvier 2003, le greffier a informé les Parties que le président, conformément au paragraphe 3 de l'article 74, avait fixé au 20 janvier 2003 la date d'ouverture de la procédure orale. A la suite de consultations que le greffier a ultérieurement tenues avec les Parties, la Cour a décidé que celles-ci pourraient présenter en définitive leurs observations sur la demande en indication de mesures conservatoires aujourd'hui, 21 janvier 2003, et a fixé l'organisation de la procédure orale. Il a été décidé que chacune des Parties disposerait d'une heure et demie au cours tant du premier que du deuxième tour de plaidoirie pour présenter ses observations. Ces décisions ont été portées à la connaissance des Parties par des lettres du greffier en date du 14 janvier 2003.

Par une lettre du 20 janvier 2003, reçue au Greffe le même jour, l'agent des Etats-Unis du Mexique s'est référé au cas de trois ressortissants mexicains dont la condamnation à mort a été commuée le 11 janvier 2003. Dans cette lettre, il était indiqué ce qui suit :

> «Au vu de la commutation de leur peine capitale, il n'est plus nécessaire, dans le cas de ces trois personnes, que le Mexique demande des mesures conservatoires pour protéger ses droits. Par conséquent, le Mexique retire par la présente sa demande de mesures conservatoires en faveur de ces trois personnes. Sa demande en indication de mesures conservatoires demeure inchangée s'agissant des cinquante et un autres ressortissants mexicains visés dans la requête. La requête demeure inchangée sur le fond en ce qui concerne les cinquante-quatre cas.»

Cette lettre a immédiatement été communiquée par le greffier au Gouvernement des Etats-Unis d'Amérique.

Je constate la présence devant la Cour des agents et conseils des deux Parties. La Cour entendra tout d'abord les Etats-Unis du Mexique, qui sont le demandeur au fond et dont émane la demande en indication de mesures conservatoires.

Je donne donc maintenant la parole à S. Exc. M. Juan Manuel Gómez-Roblebo, agent des Etats-Unis du Mexique.

M. GÓMEZ-ROBLEDO : je vous remercie Monsieur le président.

1. Monsieur le président, Madame et Messieurs les Membres de la Cour, je suis Juan Manuel Gómez-Robledo, conseiller juridique du ministère des affaires étrangères du Mexique. Soyez assurés de l'immense honneur que nous éprouvons en comparaissant devant la

Cour internationale de Justice. Permettez-moi à présent, de vous présenter les membres de ma délégation qui prendront la parole au cours de cette audience :

— S. Exc. M. Santiago Oñate, ambassadeur du Mexique auprès du Royaume des Pays-Bas;

— S. Exc. M. l'ambassadeur Alberto Székely, ancien membre de la Commission du droit international des Nations Unies;

— M[e] Sandra Babcock, directrice du programme d'assistance juridique en faveur des ressortissants mexicains qui font face à la peine de mort; et

— M[e] Donald Francis Donovan, du cabinet Debevoise & Plimpton à New York.

2. Monsieur le président, Madame et Messieurs les Membres de la Cour, le Mexique comparaît devant la plus haute instance judiciaire internationale et ce, pour la première fois au contentieux, pour une affaire de la plus grande importance pour le Mexique et pour la communauté internationale dans son ensemble. Il s'agit, en effet, de la protection des droits visés aux articles 5 et 36 de la convention de Vienne sur les relations consulaires. Le Mexique a la ferme conviction que l'introduction d'une requête devant la Cour est, avant tout, l'expression de sa confiance en la primauté du droit, à laquelle mon pays, tout comme les Etats-Unis, est profondément attaché. Nul ne saurait mettre en cause les profonds rapports d'amitié et de coopération qui lient le Mexique aux Etats-Unis. Il est toutefois devenu évident, au cours des derniers mois, que le Mexique et les Etats-Unis ont des points de vue irréconciliables en ce qui concerne l'interprétation et l'application de la convention de Vienne.

3. Monsieur le président, le Gouvernement de la république a pris cette décision après mûre réflexion, car il en a conclu, pour deux raisons essentielles que je ne manquerai pas d'évoquer, qu'il n'avait pas d'autre choix.

4. La première de ces raisons tient au fait que les droits du Mexique et ceux de ses ressortissants en vertu de la convention de Vienne, ont été et sont toujours, l'objet d'une violation systématique par les autorités compétentes des Etats-Unis. L'omission, maintes fois répétée, par les autorités des Etats-Unis de notifier «sans retard» les ressortissants mexicains de leur droit à l'assistance consulaire, viole le principe *pacta sunt servanda*, fondement même du droit international et, par là même, prive le Mexique de l'exercice de son droit à pourvoir une assistance consulaire efficace, telle que prévue aux articles 5 et 36 de la convention de Vienne. Ces violations

répétées sont particulièrement troublantes lorsqu'elles ont pour conséquence la condamnation d'un individu à la peine de mort, étant donné que le défaut de notification des droits consulaires, reconnus et protégés par la convention de Vienne, conduit irrémédiablement, et l'expérience le prouve, de la vie au trépas.

5. La deuxième raison qui a conduit le Mexique à introduire la présente requête résulte de ce le Gouvernement de mon pays a hélas épuisé tous les moyens diplomatiques pour revendiquer ses droits et ceux de ses ressortissants, sans jamais obtenir une réponse satisfaisante de la part des autorités compétentes des Etats-Unis.

6. Au cours des six dernières années, le Mexique a présenté aux Etats-Unis un grand nombre de notes diplomatiques concernant, pour le moins, vingt cas de ressortissants mexicains condamnés à la peine capitale, notes dans lesquelles mon gouvernement faisait part de violations répétées à l'article 36 de la convention de Vienne et demandait au Gouvernement des Etats-Unis de transmettre aux autorités locales qu'il leur appartenait de prendre toutes les mesures nécessaires à la sauvegarde de ces droits fondamentaux de la personne.

7. De même, le Gouvernement du Mexique a accompagné, et accompagne toujours, sans relâche, les efforts de ses ressortissants devant différents tribunaux des Etats-Unis, en vue d'obtenir une réparation au dommage subi, laquelle aurait dû et devrait se traduire par la revision et la reconsidération de leur condamnation et de leur peine. Cependant, les tribunaux ont invariablement rejeté tous les arguments de droit international avancés, en s'appuyant notamment sur la doctrine dite de la «carence procédurale» *(procedural default)*, nonobstant la clarté de l'arrêt de la Cour dans l'affaire *LaGrand*.

8. Par ailleurs, et à titre d'exemple seulement, le Mexique a pris également l'initiative de porter plainte, auprès d'un tribunal fédéral des Etats-Unis, pour le compte de son ressortissant Ramon Martinez-Villareal. A cette occasion, le Mexique a soutenu que les Etats-Unis avaient violé les obligations qu'ils ont envers le Mexique en vertu de la convention de Vienne et demandaient de surseoir à l'exécution de M. Martinez-Villareal. S'il est vrai que les Etats-Unis ont reconnu cette violation, les tribunaux fédéraux ont en revanche refusé toute réparation, en se fondant sur leur droit interne, notamment le onzième amendement de la Constitution des Etats-Unis (*United Mexican States* v. *Woods*, 126 F.3d 1220 (9^{e} circuit 1997)).

9. Finalement, le Mexique a demandé, et obtenu, un avis consultatif de la Cour interaméricaine des droits de l'homme, qui précise le contenu et la portée des droits de tout Etat partie à la convention de Vienne, ainsi que des droits reconnus à tout individu se trouvant hors de son pays, ceux-ci ayant été qualifiés d'authentiques droits de l'homme. La Cour a également conclu qu'une exécution en violation de l'article 36 de la convention de Vienne serait une privation arbitraire de la vie en contravention du pacte international sur le droit civil et politique (*Le droit à l'information sur l'assistance consulaire dans le cadre des garanties du droit à une procédure judiciaire* OC-16/99 du 1er octobre 1999, séries A, no 16)).

10. Malheureusement, ni les efforts réalisés par la voie diplomatique, ni les recours intentés auprès des tribunaux des Etats-Unis, ni même l'avis consultatif de la Cour interaméricaine des droits de l'homme, n'ont eu de succès dans la reconnaissance des droits des ressortissants mexicains à l'assistance consulaire, ni de ceux du Mexique à pourvoir sa protection consulaire. Depuis 1997, les Etats-Unis ont exécuté quatre ressortissants mexicains, dont les droits avaient été violés en dépit des nombreuses interventions de mon gouvernement auprès des autorités locales et fédérales des Etats-Unis. A l'heure actuelle, il n'existe pas moins de cinquante et un ressortissants mexicains qui se trouvent condamnés à la peine de mort, à la suite de procédures judiciaires au cours desquelles les autorités compétentes ont omis de leur notifier «sans retard» leur droit à l'assistance consulaire. Les Etats-Unis n'ont pas seulement omis de corriger les conséquences de la violation à la convention de Vienne, mais les autorités compétentes des Etats-Unis continuent — à ce jour — d'arrêter et de poursuivre en justice, des ressortissants mexicains dont les droits conférés en vertu de la convention de Vienne n'ont pas été, et ne sont toujours pas, respectés.

11. Monsieur le président, Madame et Messieurs les Membres de la Cour, permettez-moi, maintenant de me référer à deux aspects concernant la nature des mesures conservatoires que demande le Mexique, tout particulièrement pour ce qui est de la portée limitée que devraient revêtir lesdites mesures.

12. Premièrement, faisons référence à la requête introduite par mon pays. Il n'est point nécessaire d'insister, mais il va sans dire que le Mexique n'approuve, en aucun cas, la conduite criminelle dont sont accusés les ressortissants qui font l'objet de cette requête, pour autant que cette conduite soit pleinement prouvée, bien entendu. Le Mexique ne conteste pas non plus le droit des

Etats-Unis, ni celui de ses autorités locales de faire appliquer les lois de ce pays. Il convient également de signaler que cette requête ne prétend en aucune façon démontrer que l'imposition de la peine de mort soit, en elle-même, interdite par le droit international positif.

13. Toutefois, le Mexique insiste sur le fait que les Etats-Unis doivent conduire les procédures judiciaires criminelles de telle sorte que soient respectées les obligations internationales qui pèsent sur les Etats-Unis. Le Mexique insiste également sur le fait que ces obligations revêtent une gravité toute particulière lorsque la peine de mort y est impliquée.

14. En second lieu, je ferai allusion à la demande en indication de mesures conservatoires. Alors que le Mexique cherchera à revendiquer ses droits en vertu de la convention de Vienne dans la partie consacrée au fond de cette affaire, nous souhaiterions que les mesures conservatoires que nous demandons soient limitées autant que possible. A ce stade de la procédure engagée devant la Cour, le Mexique ne demande pas de nouveaux jugements, ni la revision des peines imposées. Le Mexique demande seulement que les autorités locales compétentes soient empêchées de faire le seul pas dont les conséquences seraient irréparables. Et, cela ne peut se faire que s'il est ordonné, je dis bien ordonné, aux Etats-Unis, qu'aucune date d'exécution ne soit fixée et qu'aucune exécution n'ait lieu dans les cas des cinquante et un ressortissants mexicains qui font l'objet de la requête, jusqu'à ce que la Cour ait pu trancher sur le fond de l'affaire.

15. Nous sommes persuadés que ceci est le minimum requis par le droit international, par le Statut de la Cour et par le respect dû à la dignité de l'être humain. Aujourd'hui, plus que jamais, le droit international est la mesure de la civilisation du village planétaire.

16. Monsieur le président, Madame et Messieurs les Membres de la Cour, comme la Cour le sait fort bien, voici la troisième fois qu'elle est saisie d'une requête par laquelle un Etat cherche à éviter aux Etats-Unis l'exécution de ressortissants condamnés à la peine de mort à la suite de procédures judiciaires au cours desquelles la convention de Vienne a manifestement été violée. Il s'agit aussi de la troisième fois que l'Etat demandeur fait une demande en indication de mesures conservatoires, dans le but d'éviter l'exécution de ces mêmes ressortissants en attendant que la Cour décide du bien-fondé de la requête. Nous déposons notre entière confiance dans la jurisprudence de la Cour.

17. Je vous propose, Monsieur le président, si vous le voulez bien, de procéder à la présentation de notre plaidoirie en cinq étapes.

18. Pour commencer, S. Exc. M. l'ambassadeur Santiago Oñate établira le fondement de la juridiction de la Cour.

19. En deuxième lieu, S. Exc. M. l'ambassadeur Alberto Székely, va brièvement traiter des bases juridiques de cette requête. Plus particulièrement, il s'attachera à décrire les dispositions pertinentes de la convention de Vienne et les arguments que cette Cour a soutenus dans les ordonnances relatives aux affaires du *Paraguay* et de l'*Allemagne*, ainsi que, bien évidemment, dans l'arrêt à la suite de l'affaire *LaGrand*.

20. Ensuite, je demanderai à M[e] Sandra Babcock de décrire les circonstances qui nous conduisent à solliciter des mesures conservatoires. Plus particulièrement, M[e] Babcock expliquera qu'en l'absence des mesures demandées, il est tout à fait certain que les ressortissants mexicains, qui font l'objet de cette requête, feront face à leur exécution avant que cette Cour ait pu trancher sur le fond de l'affaire.

21. M[e] Donovan démontrera pourquoi le Mexique peut légitimement demander des mesures conservatoires, en vertu du droit international.

22. Finalement, M[e] Donovan proposera à la Cour la forme que pourrait prendre l'ordonnance qui est ici demandée.

23. Je vous remercie, Monsieur le président, Madame et Messieurs les Membres de la Cour, et vous demande, maintenant, de bien vouloir permettre à S. Exc. M. l'ambassadeur Santiago Oñate de continuer avec la présentation orale des arguments du Mexique.

Le PRESIDENT : Je vous remercie beaucoup et je donne maintenant la parole à M. l'ambassadeur Santiago Oñate.

Mr. OÑATE : Merci bien, Monsieur le président.

Jurisdiction

24. Mr. President, it is an honour to appear today before this most honourable Court. I would like, Mr. President, to address briefly the Court's jurisdiction in this matter.

25. As the Court has indicated on many prior occasions, the Court need not at this phase of the proceedings, in the formulation it used on Paraguay's request, "finally satisfy itself that it has jurisdiction on the merits of the case" but may indicate such measures when "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded". (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 23; *LaGrand (Germany* v. *United States of America), Order of 3 March 1999*, para. 13; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 14.)

26. Mexico, Mr. President, plainly meets this test. Mexico bases the Court's jurisdiction on Article I of the Optional Protocol to the Vienna Convention on Consular Relations — the same provision on which this Court affirmed its prima facie jurisdiction upon the requests for provisional measures filed by Paraguay on the *Vienna Convention* and Germany on *LaGrand*.

27. Article I of the Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna Convention on Consular Relations] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol".

28. Article I, Mr. President, lays down two requirements for the Court to have jurisdiction. *First*, the Applicant must be a party to the Optional Protocol. *Second*, there must be a dispute "arising out of the interpretation or application" of the Vienna Convention on Consular Relations.

29. According to this Court's long-standing jurisprudence, these jurisdictional requirements must be met as of the date of the filing of the Application, which is the critical date for the Court to determine its prima facie jurisdiction. I refer the Court to its decisions in the *Arrest Warrant* case and the two *Lockerbie* cases. (See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000*, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; *Questions of Interpretation and Application of the 1971*

Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37.)

30. I would now address, Mr. President, the first requirement set forth by Article I. On 9 January 2003, when the Application was filed, Mexico and the United States of America were both parties to the Vienna Convention on Consular Relations and to the Optional Protocol. The United States has been a party to both the Vienna Convention on Consular Relations and to its Optional Protocol since 24 November 1969. Mexico, in its turn, has been a party to the Vienna Convention since 16 June 1965, and acceded to the Optional Protocol on 15 March 2002. Neither of the two parties made any reservations to the Optional Protocol.

31. I will now, if I may, turn to the second requirement set forth by Article I, namely the existence of a dispute. On 9 January 2003, there clearly existed a dispute "arising out of the interpretation or application" of the Vienna Convention. As His Excellency Ambassador Gómez-Robledo has already described and as my learned colleague Sandra Babcock will later elaborate, Mexico has already undertaken considerable efforts to vindicate its rights and those of its nationals under Article 36 of the Vienna Convention and has spared no effort to persuade the United States of America to comply with its obligations under the Vienna Convention. This, Mr. President, regrettably to no avail. After all of these efforts, diplomatic and legal, there can be no doubt for the Court that Mexico and the United States of America hold now irreconcilable views about the mandate of the Vienna Convention, including fundamental disagreements about the remedy to which the sending State and its nationals are entitled in the event of a breach of the Convention in a proceeding that leads to the death penalty.

32. It is Mexico's firm view that the United States of America must restore the *status quo ante*, that is, the United States of America must re-establish the situation that existed at the time of the detention and before the convictions and sentences of Mexico's nationals as a result of proceedings that violated the United States obligations under the Vienna Convention. To date, however, the United States has made no effort to provide any remedy other than repeated apologies, which this Court determined clearly in *LaGrand* are inadequate. They have also adopted

discretionary reviews by executive officials as a remedy; Mexico believes this to be equally inadequate. (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, para. 123.)

33. In its Order on provisional measures in the *Paraguay* case, this Court found that a dispute concerning the remedy for violations of Articles 5 and 36 of the Vienna Convention constituted a "dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol". (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 31.) In *LaGrand*, citing the case concerning the *Factory at Chorzów*, the Court reiterated that "a dispute regarding the appropriate remedies for the violation of the Convention . . . is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction" (*LaGrand (Germany* v. *United States of America), Merits, Judgment, I.C.J. Reports 2001*, para. 48).

34. In short, Mr. President, since both the Applicant and the Respondent are parties to the Optional Protocol, and the disputes concern the interpretation and application of the Vienna Convention on Consular Relations, there can be no question whatsoever as to this Court's jurisdiction to entertain Mexico's claims under Article I of the Optional Protocol.

35. I now kindly ask, Mr. President, that you call upon my colleague, Ambassador Alberto Székely.

Le PRESIDENT : Je vous remercie, Monsieur l'ambassadeur. Je donne maintenant la parole à M. l'ambassadeur Alberto Székely.

Mr. SZÉKELY: It is a great honour to appear before the Court.

Legal Framework: Vienna Convention, case concerning the *Vienna Convention*, and *LaGrand*

36. If I may turn now to the legal framework.

37. Mexico bases its Application to this Court on the Vienna Convention of Consular Relations, to which both Mexico and the United States are parties.

38. As specifically relevant here, Article 36 of the Vienna Convention governs communication between consular officials and the nationals of the sending State. The requirement of Article 36 (1) *(b)* is threefold: first, that the authorities of the receiving State inform any foreign national of the sending State who is detained in the receiving State "without delay of his rights" to contact his consulate; second, that "[i]f the [detained national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other matter"; and third, that the authorities must forward any communication addressed to the consular post by the detained national "without delay" (Vienna Convention, Art. 36 (1) *(b)*).

39. In the present case, the violations of the United States of its obligations under the Vienna Convention as to detained Mexican nationals are nearly identical in substance to those raised by Paraguay and Germany. Consistent with the Court's reasoning in the *LaGrand* case, where the United States fails to comply with its obligations under Article 36 (1) *(b)* a detained Mexican national will not typically be aware of, or be in a position to, contact his consular officer. Such a failure, in turn, renders a notification "without delay" of Mexico's consulate highly improbable, if not impossible. When Mexico is not aware of the detention of its nationals, it is prevented from exercising its rights under the Vienna Convention, Article 36 (1) *(c)*, namely to visit, communicate with, arrange legal representation for, and otherwise assist the detained national.

40. On 3 April 1998, the Republic of Paraguay brought proceedings against the United States alleging that the United States had breached its international obligations under Articles 5 and 36 of the Vienna Convention in the criminal proceedings against its national Angel Francisco Breard that had resulted in a sentence of death.

41. Simultaneously, Paraguay filed a request for the indication of provisional measures of protection to prevent the execution of Mr. Breard pending the Court's final judgment on the merits. Following a public hearing held before this Court on 7 April 1998, the Court rejected each of the United States objections to the issuance of the order, including its jurisdictional objections. The Court held that because the execution of Mr. Breard "would render it impossible for the Court to

order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims", the circumstances required the indication, "as a matter of urgency," of provisional measures (*Order of 9 April 1998*, paras. 32-34).

42. The executive branch of the United States Government took the position that the Order was not binding and so advised the United States Supreme Court, which declined to issue a stay of execution. The Governor of the State of Virginia also declined to halt the execution, and Virginia officials executed Mr. Breard.

43. On 2 March 1999, the day before the execution of its national, Walter LaGrand, the Federal Republic of Germany brought proceedings against the United States on its own behalf and on behalf of Mr. LaGrand and his brother Karl LaGrand, who had already been executed *(LaGrand, Application of 2 March 1999)*. Germany's Application arose from nearly identical factual circumstances as those of Paraguay, and it made similar claims. On the filing of the Application, Germany sought an order for provisional measures to prevent the execution of Walter LaGrand the next day.

44. In accord with its Order in the Paraguay case, the Court held that the execution of Walter LaGrand "would cause irreparable harm to the rights claimed by Germany in this particular case" (*LaGrand, Order of 3 March 1999*, para. 24). Thus, on the day of the execution, for the first time in its history, the Court indicated provisional measures, *proprio motu*, ordering the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings" (*LaGrand, Order of 3 March 1999*, para. 29).

45. Finding that "implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona", the Court also expressly held that that state official was "under the obligation to act in conformity with the international undertakings of the United States" (*ibid*., para. 28). Thus, the Court also ordered the United States to transmit the Order to the Governor (*ibid.*, para. 29).

46. Again, the executive branch of the United States Government took the position that the Order was not binding; again, it so advised to the Supreme Court of the United States; and again,

that Court declined to issue a stay. Again, the Governor declined to halt the execution, and again state officials carried out the execution that this Court had ordered the United States to "take all measures at its disposal" to prevent.

47. Unlike the Paraguay case, the Germany case went to judgment on the merits. In the *LaGrand* Judgment, after dismissing challenges to its jurisdiction and to the admissibility of the claims, this Court gave a definitive interpretation of the obligations imposed by the Vienna Convention, and of the obligation imposed by an order of provisional measures of this Court.

48. While the *LaGrand* case established the Article 36 rights of the sending State and its nationals as between Germany and the United States, the President of the Court emphasized that "there can be no question of applying an *a contrario* interpretation" to "the position of nationals of other countries" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, declaration of President Guillaume).

49. Mr. President, we would respectfully suggest that the Court's provisional measures Orders in response to Paraguay's and Germany's requests and its Judgment in *LaGrand* resolved every issue that might be relevant to the request for provisional measures now before this Court. Mexico's request stands firmly on the foundation laid by this Court in the Paraguay and Germany cases, and, we would respectfully suggest that the Court's Orders there, coupled with its Judgment in *LaGrand*, compel the relief sought here, specifically, that no Mexican national be executed and that no execution dates be set for any Mexican nationals before this Court has ruled on the merits.

50. I would now ask the Court to call upon my colleague, Sandra Babcock, so that she may advise the Court of the status of the United States proceedings out of which Mexico's Application arises.

Le PRESIDENT: Je vous remercie, Monsieur l'ambassadeur. Je donne maintenant la parole à M^{e} Sandra Babcock.

Ms BABCOCK:

Factual basis for application and request

51. Good morning Mr. President, distinguished Members of the Court, it is truly an honour to appear before you for the first time on behalf of the Government of the United Mexican States.

My name is Sandra Babcock and I am the Director of the Mexican Capital Legal Assistance Programme. In this capacity, for the past two and a half years, I have been monitoring the cases of Mexican nationals around the United States and I am in regular contact with their attorneys.

52. Mr. President, distinguished Members of the Court, I can tell you that one fact is certain: absent an order of provisional measures from this Court, Mexican nationals will be executed while this case is pending. Standing here today, Mexico cannot predict the precise date and time of those executions. But we can assure you that, in light of the procedural posture of those cases, and in light of their geographical location, executions will be carried out unless this Court grants the measures Mexico is seeking.

53. In deciding to seek provisional measures, Mexico was keenly aware of the likely time frame of this case. In the *LaGrand* case, Germany filed its Application in March 1999. The Court acted expeditiously to resolve the dispute between the parties in that case, and was able to issue a judgment in slightly more than two years. If we take that time frame to estimate the likely duration of the proceedings in this case, we must assume that the Court will issue its judgment, at the very earliest, sometime in 2005. It is therefore critical that we consider, as a practical matter, the risk that Mexican nationals will be put to death in the United States over the next two years.

54. My presentation will be broken into two parts. First, I will discuss the numbers of Mexican nationals who could face execution during the months and years ahead, with particular focus on the case of Cesar Fierro. Second, I will explain why, even after this Court's decision in *LaGrand*, none of the Mexican nationals that are the subject of this litigation are likely to receive stays of execution — even in those cases in which the Article 36 violation is uncontested.

Mexican nationals facing execution

55. As Mexico explained in its Application, three of its nationals are in immediate danger of execution, and many more will be executed in the months ahead, unless this Court issues provisional measures. Indeed, due to the vagaries and uncertainties of death penalty litigation, and given our inability to predict precisely how long proceedings on Mexico's Application will be

pending, we must assume that all Mexican nationals on death row are at risk. In particular, over 20 Mexican nationals are nearing the end of the appellate process; the vast majority of them in Texas — the state that executes the greatest number of prisoners, at the greatest speed.

56. Federal *habeas corpus* proceedings represent the final stage of the appellate process in a capital case and depending on the jurisdiction, federal *habeas corpus* petitions can be disposed of within a matter of months. In states, particularly such as Texas and Oklahoma, once a prisoner has filed a federal *habeas corpus* petition, he is nearing the end of the appellate process — and his execution is quickly approaching.

57. Seventeen of the Mexican nationals listed in the Application, including the three that I mentioned earlier who are in imminent danger, have begun federal *habeas corpus* proceedings. Eleven of those nationals are incarcerated in Texas or Oklahoma. Six more nationals, all in Texas, will soon complete the appellate process in state court and will quickly move into federal court. In light of our time constraints, I cannot discuss the facts of every case listed in Mexico's Application. But allow me to dwell just briefly, however, on the case of Mr. Fierro — whose case is one of those that presents the gravest risk of imminent execution.

The case of Cesar Fierro

58. In 1979, César Roberto Fierro was arrested and charged with capital murder in El Paso, Texas. Although his nationality was well known to the police, the El Paso police never informed him of his right to communicate with Mexican consular officials.

59. The centrepiece of the prosecution's case against Mr. Fierro was an alleged confession that he gave to El Paso police officers at the time of his initial detention. At trial, Mr. Fierro insisted that he confessed only to secure the release of his parents, who had been abducted by Mexican police officers across the border in Ciudad Juárez, Mexico. But the trial judge admitted his confession based on the testimony of police officers, who swore they had done nothing improper.

60. In 1994, a Texas state court found that the El Paso police had perjured themselves at Mr. Fierro's capital murder trial, and that they knew Mr. Fierro's parents had been wrongfully

arrested for the purpose of coercing his confession. Based on those facts, the court recommended that Mr. Fierro's conviction be reversed. The Texas appellate court, however, rejected that recommendation and for that reason Mr. Fierro remains on death row.

61. I relate these facts, not because Mexico is trying to demonstrate that Mr. Fierro is innocent — although he may well be innocent — but to illustrate the vulnerability of a detained Mexican national who is deprived of his rights to consular notification and access. If consular officials had known of Mr. Fierro's plight, they would have immediately sought and obtained the release of his parents from illegal detention. In other words, prompt compliance with Article 36 could have prevented the forced confession in the first place.

62. Despite the uncontroverted evidence that Mr. Fierro's conviction rests on a coerced confession, and that local authorities failed to comply with their obligations under Article 36, the federal courts have refused to review the merits of those arguments. They have, instead, relied on a series of complex procedural rules to deny Mr. Fierro the relief that he seeks. His petition for review is now pending before the United States Supreme Court.

63. At this stage, Mr. Fierro's chances of survival are slim. As this Court may recall from the *Breard* proceedings, it is exceedingly rare for the Supreme Court to grant review of a petitioner's case. The Supreme Court could deny his petition today, or tomorrow, or next week, and in that event, it is likely that the Texas courts will immediately set an execution date. Under Texas law, his execution could take place as early as 31 days after the Supreme Court's decision, that is 31 days from today.

64. Mexico has vigorously supported Mr. Fierro's attempts to obtain a meaningful remedy for the Article 36 violation in his case. Mexico filed a diplomatic protest with the United States Department of State in November 1997, alerting the United States to the violation of Article 36, and requesting that the State Department intercede on Mexico's behalf before the authorities of the state of Texas. To date, Mexico has not received any response to this note.

65. Mexico has also intervened directly with the Texas state authorities. On 3 October 2002, Mexican consular representatives met with the Texas Secretary of State and legal counsel for Governor Richard Perry. During that meeting, Mexico expressed its view that Mr. Fierro's death

sentence should be commuted as a partial remedy for the violation of Article 36. Notwithstanding the disturbing facts of Mr. Fierro's case, Mexico believes it is highly unlikely that the Texas authorities will commute Mr. Fierro's death sentence, or even grant a temporary reprieve.

66. Mr. Fierro's prospects for a stay of execution must be viewed against the backdrop of the administration of the death penalty in Texas. Since 1976, Texas has executed 289 prisoners, far more than any other state in the United States. Last year, Texas executed 33 prisoners — equal to the number of executions carried out by all other states combined. Texas has already executed two prisoners this year, and plans to carry out ten more executions by the end of February. One execution is scheduled for tomorrow night, another for Thursday night. At this rate, Texas will execute 60 prisoners by the end of 2003.

67. Moreover, executive clemency is virtually non-existent in Texas. A Texas death row inmate has less than a 1 per cent chance of having his death sentence commuted by Texas authorities. Over the last three decades, only one prisoner has received a commutation of his death sentence — and only after that inmate presented overwhelming evidence of his innocence.

68. There are 15 other Mexican nationals on death row in Texas, including Mexican national Roberto Moreno Ramos. Mr. Moreno Ramos has completed state and federal post-conviction proceedings, and the Supreme Court denied his petition for writ of certiorari on 7 October 2002. In other words, Mr. Moreno Ramos has exhausted all of his legal options. For the moment, Texas prosecutors have agreed to refrain from seeking an execution date in his case, after meeting with Mexican consular officials and learning that the Inter-American Commission on Human Rights had issued Precautionary Measures in the case on 8 November 2002.

69. If time allowed, I would also discuss the case of Osbaldo Torres in Oklahoma. Suffice it to say that Mr. Torres is also in the final stages of the appellate process, and could face execution by the summer of 2002.

The lack of review and reconsideration post-*LaGrand*

70. There is every reason to believe that Mr. Fierro, Mr. Torres, Mr. Moreno Ramos, and other Mexican nationals will be executed in the absence of provisional measures. In the last six years, four Mexican nationals have been executed: Irineo Tristan Montoya, Mario Murphy,

Miguel Angel Flores, and Javier Suárez Medina. In each case, the violation of Article 36 was uncontested. In each case, Mexico pleaded for clemency with state authorities, filed *amicus* briefs in support of its nationals in the courts, and presented diplomatic Notes of protest with the Department of State. And in each case, Mexico's efforts were unavailing.

71. In the post-*LaGrand* world, the United States has continued to execute foreign nationals despite the protests of their governments. Moreover, in the recent cases of Mexican nationals Gerardo Valdez and Javier Suárez Medina, the courts applied the municipal doctrine of "procedural default" to avoid resolving the merits of the uncontested Article 36 violations in their cases — even though they were fully briefed on the significance of this Court's Judgment in *LaGrand*. (*Valdez v. State*, 46 P.3d 703, 709 (Ok. Crim. App. 2002); *Ex Parte Suarez Medina*, No. 37,792-02, slip op. at 2 (Tex. Crim. App. 2002).) Although the United States Government was informed of each case with ample time to intercede in judicial proceedings, it chose not to do so.

72. In the case of Mr. Valdez, as in the case of Mr. Suárez Medina, the only action taken by the United States was to send carefully worded letters to state clemency authorities, requesting that they "consider" the violations of Article 36. You have those letters perhaps in front of you today, they have been submitted late last night by the United States and we urge you to read them very carefully. Those letters support one of the fundamental propositions underlying Mexico's request for provisional measures and its Application: namely, that the United States does not believe that executions need be stopped in cases presenting uncontested violations of Article 36. Rather, the United States believes that state authorities have unfettered discretion to grant or deny hearings; to grant or deny commutation; to grant or deny reprieves of execution — all as a matter of grace. And that is precisely why there is a dispute between Mexico and the United States on the issue of remedy, and that is precisely why provisional measures are necessary.

73. Allow me to provide some context for the letters before you. Parenthetically I should mention that Mexico only received these exhibits late last night and would like to reserve the opportunity to submit our own exhibits in response. One set of letters you have relates to the case of Gerardo Valdez, a Mexican national sentenced to death in Oklahoma in 1989. The violation of

Article 36 in his case was egregious and undisputed. Mexico only learned of his detention in April 2001, two months before he was scheduled to be executed, 12 years after his initial arrest, and well after Mr. Valdez had exhausted his legal remedies.

74. After learning of Mr. Valdez's predicament, Mexico hired experienced counsel, an investigator and a bilingual neuropsychologist to assist Mr. Valdez. In a matter of weeks, Mexico discovered critical mitigating evidence that had never before been presented: Mr. Valdez — who had only a sixth grade education — had suffered brain damage as a result of a series of traumatic head injuries. Mexico prepared a several-page submission to the Oklahoma Pardon and Parole Board based on this evidence, explaining the consequences of the Article 36 violation and the role of consular officials, and asked the Board to commute his death sentence. The Board granted the request.

75. In Oklahoma, however, the Governor makes all final decisions regarding executive clemency. So the Board's recommendation was forwarded to Oklahoma Governor Frank Keating, who, at the urging of President Vicente Fox, granted a 30-day reprieve to study the case.

76. Less than two weeks after Governor Keating granted a reprieve, this Court issued its decision in *LaGrand*. Mexico sent diplomatic representatives to meet with the Governor, urged the Governor to follow the Board's recommendation, and argued that Mr. Valdez's death sentence should be commuted. Governor Keating turned to the State Department for guidance.

77. After receiving the letter you have before you from Mr. William Taft, Governor Keating rejected the Board's recommendation, and denied clemency. In Governor Keating's letter to President Fox, he explained his decision in the following terms:

> "While it is true that Mr. Valdez was not notified of his right to contact the Mexican Consulate in clear violation of Article 36 of the Vienna Convention on Consular Relations, that violation, while regretful and inexcusable, does not, in and of itself, establish clearly discernible prejudice or that a different conclusion would have been reached at trial or on appeal of Mr. Valdez's conviction or sentence."

78. Luckily for Mr. Valdez, the Oklahoma Court of Criminal Appeals subsequently vacated his death sentence in a truly unprecedented decision, based not upon the violation of Article 36, but rather upon his trial attorney's failure to uncover the mitigating evidence that had been presented by Mexico.

79. The case of Javier Suárez Medina, which is discussed in four of the letters you have received, did not end so well. Mr. Suárez was convicted and sentenced to death in the state of Texas also in 1989 like Mr. Valdez. As in the case of Mr. Valdez, Mexico vigorously supported Mr. Suárez's efforts to obtain judicial review of his Article 36 violation, again filing *amicus curiae* briefs in the Texas Court of Criminal Appeals and the United States Supreme Court. When the Texas court invoked the municipal doctrine of procedural default to avoid reaching the merits of the claim, Mexico and 13 other nations filed an *amicus* brief in support of Mr. Suárez's petition for review with the United States Supreme Court. The Supreme Court refused to review the case.

80. Mexico also supported Mr. Suárez's petition for executive clemency, meeting with state officials and holding extensive consultations with State Department representatives. In addition, Mexico filed two diplomatic Notes. In response, the State Department sent a letter to the Chairman of the Texas Board of Pardons and Paroles, Gerald Garrett. In the letter — which you also may have in front of you here — Legal Adviser William K. Taft explained the "review and reconsideration" requirement set forth in *LaGrand* in the following terms:

> "We believe that, in light of the unique role of the Texas Board of Pardons and Paroles, a careful consideration of this issue by the Board would be consistent with the 'review and reconsideration' described by the International Court of Justice in its decision construing the Vienna Convention in *LaGrand*. We recommend that, in rendering its decision, *regardless of the outcome*, the Board consider preparing a written statement setting out the Board's consideration of this issue. Such a written statement would be useful in establishing that the Board in fact reviewed and reconsidered Mr. Suárez's conviction and sentence in light of the failure of consular notification, should that be necessary in any subsequent legal proceedings."

81. This letter — in even more explicit terms than the letter sent to Governor Keating — clearly conveys that the decision regarding remedies is wholly within the unfettered discretion of the Board. While Mr. Garrett apparently forwarded the State Department's letter to the 16 other Board members, there is no evidence that any of the individual Board members even understood the rights provided under Article 36. Following their customary practice, the members of the Texas Board did not meet to discuss the issue. Without convening a hearing, or even responding to Mr. Suárez Medina's request for a hearing, all 17 Board members voted — by fax — to deny commutation. There is no record of any deliberations. Contrary to the State Department's advice,

they provided no written explanations for their action. In the letter you have before you from Mr. Garrett to Mr. Taft on 14 August 2002, the date Mr. Suárez was executed, Mr. Garrett simply communicates the fact of the Board's vote, without explaining the basis for the decision.

82. Mr. President, the facts I have just described and the letters you have before you provide unequivocal proof that today, Mexican nationals have no greater chance of receiving stays of execution based on Article 36 violations nor of receiving review and reconsideration than they did before this Court issued its historic Judgment in the *LaGrand* case.

83. Thank you, Mr. President. I now request that you call on my colleague, Donald Donovan, who will address the legal basis for Mexico's request for provisional measures and the form of the order requested.

Le PRESIDENT : Je vous remercie, Maître. Je donne maintenant la parole à M[e] Donald Donovan.

Mr. DONOVAN:

Legal basis for order of provisional measures

84. Thank you, Mr. President. With the Court's permission, I will address Mexico's entitlement to the order requested in light of the standards enunciated by this Court for the indication of provisional measures pursuant to Article 41 of the Statute, and then I will make some observations on the form of the order that Mexico requests.

85. The applicable standards are well established. To qualify for provisional measures, the Applicant meet three requirements. *First*, the measures sought must be intended to preserve the respective rights of the parties. *Second*, the measures must be intended to prevent irreparable prejudice to the disputed rights. *Third*, the indication of provisional measures should not anticipate the Court's judgment on the merits.

86. The provisional measures that Mexico seeks here are simple, straightforward, and exceedingly narrow. Plain and simple, Mexico asks the Court to order that no execution date be set for any Mexican national, and that no Mexican national be put to death, until this Court has

rendered its judgment on the merits of Mexico's claims. Particularly in light of the Paraguay Order of provisional measures, the Germany Order of provisional measures, and the *LaGrand* Judgment, that request squarely meets this Court's requirements.

87. *First*, Mexico's request is plainly intended to preserve the rights that it asserts in its Application. Mexico recognizes that the Court does not determine the merits of the parties' respective claims and defences on a request for provisional measures, and hence that at this stage of the proceedings, Mexico need not prove the violations it alleges.

88. To leave no doubt, however, that Mexico's request for provisional measures grows out of the Vienna Convention rights asserted in the Application, and hence meets the first requirement for provisional measures, I shall take a moment here to review with the Court the systematic non-compliance by the United States with its Vienna Convention obligations that gives rise to Mexico's claims. That non-compliance extends both to the consular notification provisions of paragraph 1 of Article 36 and to the corresponding requirement of paragraph 2 that the internal law of the receiving State "enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended".

89. In the Paraguay and Germany cases, the Court has already dealt with Vienna Convention non-compliance by constituent states of the United States in death penalty cases. In both cases, both the failure to notify and the application of the procedural default doctrine to bar review of the failure were uncontested, and in the *LaGrand* Judgment, both were adjudged violations of the Convention.

90. The same systematic non-compliance appears from the most recent executions of Mexican nationals in the United States. As Ms Babcock just described, in the cases of Messrs. Montoya, Murphy, Flores, and Suárez Medina, the Article 36 violations were conceded by the United States. In each case, the United States did nothing to secure judicial review of the violation before the execution, but only apologized after the execution.

91. Reported decisions in the United States since this Court's Judgment in *LaGrand* confirm the pattern of violations of both paragraph 1 and paragraph 2 [of Article 36].

92. As to paragraph 1, choosing the date of the *LaGrand* Judgment as a starting point, and therefore collecting relatively recent cases – although I should note not necessarily cases in which

the violations occurred after the *LaGrand* Judgment itself – there have been 22 reported decisions of United States courts, state and federal, that are available through standard research means that involved Mexican nationals who alleged violations of Article 36 of the Vienna Convention. In 13, there is no indication, in the report of the decision, that the authorities contested the fact of the violation. In eight, the violations were either expressly conceded or found by the court. And in only one did the court find that the violation had not been established.

93. We provide the citations to these cases in the written version of these submissions. (See *Ortiz Rodriguez v. State*, No. 5DO2-26, 2002 WL 31875012 (Fla. Dist. Ct. App. Dec. 27, 2002) (violation not expressly contested); *State v. Lopez*, No. 3578, 2002 WL 31747310, at *2, (S.C. Ct. App. Dec. 9, 2002) (state conceded "that it unintentionally failed to advise Lopez of his rights under the [Vienna Convention]"); *People v. Ruiz*, No. C038195, 2002 WL 31341643 (Cal. Ct. App. Oct. 18, 2002) (violation not expressly contested); *People v. Preciado-Flores*, No. 99CA2533, 2002 WL 31357331, at *2 (Colo. Ct. App. Oct. 10, 2002) (violation found by the court); *United States v. Gamez*, 301 F.3d 1138, 1141 (9th Cir. 2002) (undisputed that the Federal Bureau of Investigation failed to advise the defendant "of his right to contact the Mexican consulate"); *United States v. Flores-Flores*, 42 Fed. App. 868, 2002 WL 1732617 (7th Cir. July 25, 2002) (violation not expressly contested); *State v. Reyes*, 52 P.3d 948 (N.M. 2002) (violation not expressly contested); *People v. Ortiz*, No. B145601, 2002 WL 937642, at *1 (Cal. Ct. App. May 8, 2002) (finding that "the police violated the [Vienna Convention] . . . by failing to advise [the defendant] he could contact the consulate"); *Valdez v. State*, 46 P.3d 703, 705 (Okla. Ct. Crim. App. 2002) (no dispute that "the State of Oklahoma did not comply with the requirements of Article 36 of the Vienna Convention on Consular Relations"); *State v. Rivera-Carrillo*, No. CA2001-03-054, 2002 WL 371950 (Ohio Ct. App. Mar. 11, 2002) (violation not expressly contested); *Lopez v. State*, 558 S.E.2d 698 (Ga. 2002) (violation not expressly contested); *United States v. Felix-Felix*, 275 F.3d 627, 632, 635 (7th Cir. 2001) (violation found by the district court); *State v. Ruvalcaba*, No. 20585, 2001 WL 154646 (Ohio Ct. App. Dec. 5, 2001) (violation not expressly contested); *State v. Hernandez*, No. C1-01-720, 2001 WL 1530886, at *2 (Minn. Ct. App. Dec. 4, 2001) (violation found by the court where, after arrest, the police "questioned [the defendant] without informing him about his right to contact Mexican consular officials"); *State v.*

Gomez-Silva, No. CA2000-11-230, 2001 WL 152316 (Ohio Ct. App. Dec. 3, 2001) (violation found by the court where "[i]t appear[ed] from the record that appellant was not notified of his rights under Article 36 of the Vienna Convention on Consular Relations"); *Vasquez v. State*, 793 A.2d 1249, No. 290,2001, 2001 WL 1398441 (Del. 2001) (violation not expressly contested); *Villarreal v. State*, 61 S.W.3d 673 (Tx. Ct. App. 2001) (violation not expressly contested); *United States v. Carrillo*, 269 F.3d 761 (7th Cir. 2001) (violation not expressly contested); *State v. Martinez-Rodriguez*, 33 P.3d 267, 271 (N.M. 2001) (violation unclear; not established in the trial court); *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001) (violation not expressly contested); *United States v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001) (violation not expressly contested); *State v. Mendoza*, No. 9-01-02, 2001 WL 731084 (Ohio Ct. App. June 29, 2001) (violation not expressly contested).)

94. Plainly, there has been a pattern of systematic non-compliance with paragraph 1 of Article 36 in the United States.

95. As to paragraph 2, in the absence of Supreme Court precedent, the United States federal courts of appeals establish binding federal law for all the district courts, all the trial courts, within the geographical reach of a given circuit. None of the federal courts of appeals recognizes a right of a foreign national to a judicial remedy for violations of Article 36 of the Vienna Convention — either before *or* after this Court's decision in *LaGrand*. Again, we provide citations to the relevant United States authority in the written version of these submissions. (See *United States v. Li*, 206 F.3d 56, 60 (1st Cir.) (even if Vienna Convention confers individual rights on foreign nationals, appropriate remedies for violations of those rights do not include suppression of evidence or dismissal of an indictment), *cert. denied*, 531 U.S. 956 (2000); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (government's failure to comply with the Vienna Convention does not justify the extraordinary remedy of dismissal of an indictment because Article 36 rights do not qualify as "fundamental"); *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir.) (*habeas corpus* petitioner does not make "a substantial showing of the denial of a constitutional right," the precondition for obtaining appellate review, by asserting violation of his Vienna Convention rights), *cert. denied*, 116 F.3d 97 (1997); *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir.) (Vienna Convention creates no judicially enforceable rights, but even assuming the contrary,

suppression of evidence would be an inappropriate remedy), *cert. denied*, 533 U.S. 962 (2001); *United States v. Page*, 232 F.3d 536, 540-41 (6th Cir.) (even if Vienna Convention confers rights on foreign nationals, the nature of those rights does not justify the judicially created remedies of dismissal of an indictment or suppression of evidence), *cert. denied* 532 U.S. 935 (2001); *see also United States v. Emuegbaum*, 268 F.3d 377, 390-91 (6th Cir. 2001) (same; post-*LaGrand*), *cert. denied*, 122 S. Ct. 1450 (2002); *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir.) (even if Vienna Convention confers rights on foreign nationals, suppression of evidence is not the appropriate remedy for a violation of those rights), *cert. denied*, 531 U.S. 1026 (2000); *see also United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000) (reaffirming *Chaparro-Alcantara* and asserting that Article 36 of the Vienna Convention does not provide such an "extraordinary remedy"), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Santos*, 235 F.3d 1105, 1107-08 (8th Cir. 2000) (even if Vienna Convention confers judicially enforceable rights on foreign nationals, and even if the remedy for violations of those rights includes suppression of evidence, defendant foreign national's delay in exercising his Vienna Convention rights and the overwhelming evidence against him made any possible violation "harmless error"); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir.) (*en banc*) (even if Vienna Convention creates individually enforceable rights, the exclusion of evidence in a criminal proceeding is not among them), *cert. denied*, 531 U.S. 991 (2000); *see also United States v. Gamez*, 301 F.3d 1138, 1143-44 (9th Cir. 2002) (same; post-*LaGrand*); *United States v. Minjares Alvarez*, 264 F.3d 980 (10th Cir. 2001) (even if Vienna Convention creates individually enforceable rights, the judicially created exclusionary rule is an inappropriate remedy, and even assuming the contrary, the defendant failed to show that the violation prejudiced him; post-*LaGrand*); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195-96 (11th Cir. 2000) (even if Vienna Convention creates rights enforceable by individuals, court would follow the lead of other circuits in holding that available remedies do not include suppression of evidence or dismissal of an indictment, and even assuming the contrary, the defendant would not be entitled to those remedies absent a showing of prejudice), *cert. denied*, 531 U.S. 1131 (2001); *United States v. Duarte-Acero*, 296 F.3d 1277,

1281-82 (11th Cir.) (holding, post-*LaGrand*, that violations of the Vienna Convention do not justify dismissal of an indictment and deferring to State Department's view that "the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law"), *cert. denied*, 123 S. Ct. 573 (2002).)

96. Similarly, appellate state courts in both Texas and California — the states in which most of the Mexican nationals enumerated in Mexico's Application remain incarcerated under a sentence of death — have declined to provide any judicial remedy for Article 36 violations. (See, e.g., *Rocha v. State*, 16 S.W.3d 1, 13, 19 (Tex. Crim. App 2000) (Vienna Convention, and indeed all international treaties, do not create "laws" within the meaning of Texas state statute that excludes evidence obtained in violation of the constitution or laws of Texas or the United States); *People v. Corona*, 108 Cal. Rptr.2d 210, 211-12 (2001) (exclusionary rule does not apply to violations of Article 36 of the Vienna Convention).)

97. In other words, notwithstanding *LaGrand*, the United States still takes the position that an apology is sufficient or, as in the recent Texas and Oklahoma cases described by Ms Babcock, that the sending State and its national are entitled to nothing more than to have the Governor of the state in which the national was sentenced to death consider whether — as a matter of grace and not of legal right — the sending State's national might receive clemency.

98. Particularly given the huge political dimension of any decision by an elected official to grant a pardon or commute a death sentence, the prospect of wholly discretionary review by an executive official, be it the governor or a clemency board, provides a poor substitute for the rights afforded by the Convention to one who has been sentenced to death in a proceeding that violates the Convention. If that is "review and reconsideration," this Court's Judgment in *LaGrand* would be rendered meaningless. Mexico is confident that it is not.

99. Plainly, there remains systematic non-compliance in the United States with paragraph 2 of Article 36, as well.

100. To remedy these violations, as has already been outlined, Mexico asks the Court for a judgment that Mexico is entitled to *restitutio in integrum*, for establishment of the situation which would, in all probability, have existed if the violations had not been committed. (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.) Mexico claims that

meaningful "review and reconsideration" of its nationals' claims in accord with the Judgment in *LaGrand* requires the vacatur of any conviction and sentence imposed on Mexican nationals on death row in violation of the Vienna Convention, so that any retrial and resentencing may be carried out in conformity with international law. In Mexico's view, international law requires the provision of a remedy *at law* allowing for redress of Vienna Convention violations — not the hope of executive grace, but the right to legal review.

101. Given the violations Mexico alleges on this Application and the relief on the merits that it seeks, there can be no doubt that the provisional relief requested arises squarely from those claims and is necessary to preserve the rights it seeks to vindicate.

102. The second requirement is the threat of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*LaGrand, Order of 3 March 1999*, para. 23.) That requirement is the crux of any request for provisional measures.

103. Surely after the Paraguay and Germany Orders, there can be no doubt — if there ever could have been — that irreparable prejudice would be caused by the execution of a national when the applicant State seeks a judgment that the death sentence be declared void or, at a minimum, be judicially reconsidered on legal standards that take account of the violation.

104. Ambassador Székely has reviewed the Court's Orders in response to Paraguay's and Germany's request for relief. In those Orders, the Court held squarely as, for example, in the *Paraguay* Order, that the execution of a national "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims" (Vienna Convention on Consular Relations (*Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J Reports 1998*, para. 37). The Court made, of course, precisely the same point in the Germany Order when it said that the execution of Walter LaGrand "would cause irreparable harm to the rights claimed by Germany" in that case. (*LaGrand, (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999*, para. 24.)

105. That same point applies here — except 51 times over. No compensation or restitution in any material form whatsoever could restore human life or otherwise make amends for the death of a single Mexican national whose proceedings form part of the subject-matter of this dispute.

106. The Court's third requirement is that the provisional measures sought do not anticipate the judgment. As the Court put it in the Paraguay and Germany Orders, "the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent." (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 35; *LaGrand (Germany* v. *United States of America), Order of 3 March 1999*, para. 22.) Respecting that requirement, and seeking only to halt any executions, Mexico has sought the narrowest conceivable relief consistent with its objective to prevent irreparable injury. Indeed, the Court has already confirmed, in the Paraguay and Germany Orders, that an order requiring that an execution be stopped does not prejudge the merits of the dispute or anticipate the judgment. (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 40; *LaGrand (Germany* v. *United States of America), Order of 3 March 1999*, para. 27.)

107. As Ambassador Gómez-Robledo explained at the outset, Mexico does not seek by this request for provisional measures to dictate to the United States how it might fulfil its consular notification obligations under Article 36. It does not seek any relief that would affect law enforcement activity by the United States. It does not seek the temporary release of any incarcerated individual. It does not ask for any retrial or re-sentencing of any individual at this time.

108. Mexico, instead, asks only one thing: that the United States be required to forbear from taking the final, irrevocable, irremediable step of executing a Mexican national, of scheduling an execution and actually carrying it out. That final step is the only relief that Mexico requests at this time.

109. From the standpoint of the United States, that relief would impose no burden but a modest delay in an execution that could still be carried out in the manner planned should the United States succeed in defending against Mexico's claims.

110. From Mexico's standpoint, however, it is the very minimum that the Court must indicate in order to preserve its ability fully to vindicate Mexico's rights in a final judgment. If the Court does not order the provisional relief Mexico seeks, it will disable itself, of course, from

providing in the final judgment anything but the most superficial and inadequate relief on Mexico's claims, because, no matter how wrongful an execution might subsequently prove to be, death cannot be remedied.

111. Hence, in the most profound sense, the only way that this Court might prejudge the merits of this case would be to *deny* Mexico's request for provisional measures.

112. I would like to say a final word about urgency. In both the Paraguay and Germany Orders, the Court stated that provisional measures "are only justified if there is urgency." (Case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998,* para. 35; *LaGrand (Germany* v. *United States of America), Order of 3 March 1999,* para. 22.) It is clear from those Orders, as well as the Court's jurisprudence generally, that urgency is defined by the threat of irreparable injury. As the Court had occasion to state in its 1991 order in the *Great Belt* case, for example, "provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case," and they 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. 12, para. 23; emphasis added.)

113. It is the threat of irreparable prejudice, after all, that both creates the need for provisional measures and their justification. The Court acts provisionally in order to ensure that events occurring after it is seized of a case, but before it can render judgment, do not compromise its ability to render a fully effective judgment. It follows that where there is a threat of irreparable prejudice prior to final judgment, there is necessarily urgency. And here, as Ms Babcock has demonstrated, it is certain beyond doubt that several, maybe scores, of Mexican nationals will face execution before this Court could possibly render final judgment.

114. In any event, Mexico is confident that the United States will not contest urgency here, both because of the paradigmatic nature of the irreparable harm Mexico faces and the position that the United States took on the earlier applications by Paraguay and Germany.

115. In the Paraguay case, where the Application and request were filed eleven days before the scheduled execution, and in the Germany case, where they were filed the day before, the United

States objected to what it regarded as undue delay in the filing. Indeed, in *LaGrand*, the United States urged the late filing as a bar to the admissibility of the claim arising from the disregard of the order of provisional measures, arguing that its ability to act upon this Court's order was constrained by the short time it had to act. (*LaGrand (Germany* v. *United States of America), Judgment of 27 June 2001*, para. 95.)

116. This Court observed in *LaGrand* that the sound administration of justice requires the submission of a request for the indication of provisional measures under Article 73 of the Rules of the Court in "good time." (*Order of 3 March 1999*, para. 19.) Mexico agrees. It therefore filed the Application and request promptly upon concluding that its exhaustive efforts in the United States courts and discussions with the United States authorities had not succeeded. To be concrete, it initiated these proceedings once it concluded that these proceedings and a request for provisional measures was the only way to prevent further executions — and, by definition, irreparable harm.

117. Ambassador Székely said earlier in these submissions, Mr. President, that the Paraguay and Germany Orders and the *LaGrand* Judgment laid a foundation that, Mexico would respectfully submit, compels the issuance of the order sought. If there are any differences in the circumstances in those two cases and the circumstances here, they are but two. First, it is even clearer here than it was in the earlier cases that the applicant State has acted in good time, out of respect for the sound administration of justice by this Court and the concerns raised by the United States on the earlier occasions. Second, as I have already pointed out, on this request depend the lives not of one or two nationals — each of whose life is unique — but of 51.

118. We respectfully submit that Mexico has conclusively demonstrated its entitlement to the provisional measures it seeks.

Form of order

119. With the Court's permission, Mr. President, I will therefore turn now to the form of the provisional order that Mexico requests from this Court. Mexico recognizes that, as in the Paraguay and Germany cases, each of the Mexican nationals that are the subject of its Application have been sentenced to death in proceedings conducted by a constituent state of the United States. So I want

to address right up front any suggestion that either the character of the United States as a federated State or the status of its internal law in any way might diminish Mexico's rights under the Vienna Convention or its entitlement to provisional measures under Article 41 of this Court's Statute.

120. As the Court knows from the request, Mexico seeks an order that no Mexican national be executed and no execution date be set for any Mexican nationals pending final judgment in the case. Mexico recognizes that in the Paraguay and Germany cases, the Court ordered the United States to "take all measures at its disposal" to prevent the execution of the sending State's national pending the final decision. In the *LaGrand* Judgment, the Court stated that its provisional measures order had not "impose[d] an obligation of result". (*Judgment of 27 June 2001*, para. 111.) Specifically, the Court said, its Order "did not require the United States to exercise powers it did not have" (*Ibid.*, para. 115).

121. Notwithstanding those earlier Orders, Mexico respectfully requests the Court to issue an order for provisional measures in the unequivocal terms that I have just set forth.

122. Mexico starts with a basic proposition. The Vienna Convention does not impose an obligation that the contracting States use their best efforts to comply, or that those States that have a federal character do their best to persuade their constituent entities to comply. To the contrary, the contracting States took on the obligations set forth in the Convention on behalf of all their competent authorities. Likewise, the obligation to comply with the orders and judgments of this Court pursuant to its Statute is not conditioned on a party's ability to gain the co-operation of responsible government officials or to reconcile the international obligation imposed with the dictates of its internal law.

123. Thus, considerations of constitutional structure or internal law are utterly irrelevant to the obligations imposed by the Vienna Convention and this Court's Statute. Countless decisions of this Court and its predecessor confirm the rule that a State may not invoke its internal structure or internal law as justification for failure to perform an international legal obligation. In the case concerning the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932*, the Permanent Court of International Justice emphasized that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force". (*Advisory*

Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 4.) To similar effect, in *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court said that a State "cannot rely on [its] own legislation to limit the scope of [its] international obligations". (*Order of 6 December 1930, P.C.I.J., Series A, No. 24*, at p. 12.)

124. This Court, too, has unequivocally embraced this principle. In its Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, for example, the Court said that where a "claim is based on the breach of an international obligation on the part of [a] Member [State], the Member [State] cannot contend that this obligation is governed by municipal law" (*I.C.J. Reports 1949*, p. 174, at p. 180). (See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999*, para. 62 (customary law that the "conduct of any organ of a State must be regarded as an act of that State").)

125. In addition, of course, Article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

126. And, most recently, in the Draft Articles on State Responsibility, in a section styled "The irrelevance of internal law," the International Law Commission stated squarely: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."

127. If it were true that the municipal laws of the United States made it impossible for officials of the United States to ensure compliance with provisional measures ordered by this Court, then those laws would place the United States in violation of international law, giving rise to a right for a remedy. They would not provide cause for excusing the breach. Again, the Permanent Court of International Justice called: "[A] State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." (*Exchange of Greek and Turkish Populations, 1925, P.C.I.J., Series B, No. 10*, p. 20. See also Arnold Duncan McNair, *The Law of Treaties* 78 (1968) (emphasis added).)

128. This rule — that a State may not rely on its internal structure or internal law to excuse a breach or diminish its international obligations — could not be more fundamental to the structure of international law.

129. I should now digress for a moment. I have just said that a State's internal structure and internal law cannot be adduced as justification for the breach of its international obligations, and hence is irrelevant to the question of Mexico's entitlement to provisional measures here. I should hasten to add, however, so that there is no confusion on the matter, that the supremacy of federal law, including treaty law, over inconsistent state law is equally fundamental to the governmental structure of the United States.

130. Article VI, clause 2 of the United States Constitution, provides — and has provided since the founding of the Republic — that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

131. The following clause, Article VI, clause 3, mandates that not only federal authorities, but "the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution".

132. The United States Supreme Court has repeatedly endorsed the principle set forth so clearly in Article VI — the supremacy of the Constitution and federal law, including treaties. (See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 640, 575-76 (1840) ("[i]t was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation"); *United States v. Belmont*, 301 U.S. 324 (1937) ("in respect of our foreign relations generally, state lines disappear. As to such purposes, the State . . . does not exist"); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("[p]ower over external affairs is not shared by the State; it is vested in the national government exclusively").) As Professor Laurence H. Tribe, the pre-eminent living scholar of United States constitutional law, stated in the 2000 edition of his treatise, "[u]nder the

supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters within state control. Indeed, the treaty controls whether it is ratified before or after the enactment of the conflicting state law." (Laurence H. Tribe, 1 *American Constitutional Law* 645, § 4-4 (3d ed. 2000).)

133. In short, far from inhibiting compliance with the United States treaty obligations, the fundamental law of the United States *requires* state executive and judicial authorities to comply if they are to carry out their official duties in conformity with the Constitution of the United States that they have sworn to uphold.

134. Given that both state and federal officials have a constitutional obligation to uphold federal law, including treaties, it is not surprising that state officials have the means to do so, or that federal authorities have the means to compel compliance by state officials should those officials fail in their obligation.

135. First and foremost, the President, the head of the executive department, has the obligation, pursuant to Article 2, clause 3 of the Constitution, to "take Care that the Laws be faithfully executed." (U.S. Const., art. 2, cl. 3.) To achieve that goal, he can, for example, issue an executive order in appropriate circumstances. His authority can also be exercised by other means. For example, courts both state and federal in the United States accord great weight to the executive's views on United States treaty obligations, so that an authoritative statement of position by the executive or the filing of a brief in a particular case carries great weight and could achieve the desired result of compliance.

136. If not, the Attorney General of the United States can bring suit in federal court to enforce paramount treaty obligations in the face of inconsistent state law or conduct. Indeed, as we pointed out in the Request for Provisional Measures, in the *amicus curiae* brief to the United States Supreme Court that the United States itself filed in the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)* matter, the United States expressly asserted the authority of the federal executive to sue in federal court to enforce state officials' 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.) In suit by the Attorney General, the eleventh amendment immunity bars that

first Paraguay and then Mexico met when they sought on their own right to enforce the Vienna Convention in United States federal courts would not apply, because those bars do not apply to the United States itself.

137. Further, of course, as this Court recognized in paragraph 114 of the *LaGrand* Judgment, the United States Supreme Court enjoys undoubted authority to enjoin state authorities from carrying out executions in violation of federal law as the lower federal courts do as well. For example when the Supreme Court concluded some several years ago in *Furman v. Georgia*, (408 U.S. 238 (1972)), that the death penalty as applied violated the Constitution's prohibition of cruel and unusual punishment, it effectively vacated the capital sentences of hundreds of inmates on death row in the constituent states. To stay the capital sentences of Mexican nationals is also plainly within the Supreme Court's power.

138. Finally, I should reiterate that if federal authorities needed to enforce compliance with an order of this Court, they would only enforce an obligation that state officials already carry independently. As I have just said, Article VI of the Constitution says explicitly that "the Judges in every State shall be bound" by treaties made under the authority of the United States, again repeating, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A state judge could therefore ensure compliance with an order of this Court simply in the exercise of his or her own judicial authority. And without exception, as Ms Babcock explained, competent executive authorities of the constituent states — in the form of the governor or state clemency boards — have virtually plenary authority to stay or commute the sentences of death imposed in their respective states. (See, e.g., Article V, Section 8 *(a)*, California Const. ("the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment"); Article IV, Section 11 *(b)*, Texas Const. ("[i]n all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and persons").)

139. In short, the United States surely has the capacity as a matter of its municipal law to carry out its treaty obligations.

140. While we have outlined both the obligations of United States officials as a matter of United States law to abide by United States treaty obligations, and the ample means by which those officials might achieve compliance, I end this digression by emphasizing again that, for the purposes of this Court's obligation to vindicate international law, it does not matter. This Court is here to vindicate the Vienna Convention and its own Statute, not to enforce United States municipal law. To vindicate the Convention and the Statute, the Court should issue an order on the terms Mexico requests.

141. I close by returning for a moment to urgency, and specifically to a practical consideration counselling in favour of the issuance of an order of provisional measures at the earliest possible time. As Mexico has acted promptly, it respectfully requests the Court to act promptly, in order to — and Mexico will be straightforward on this point — maximize the prospect of compliance by the United States with the order.

142. Let me explain. As I have already mentioned, and need not remind the Court, the United States declined to comply with the two earlier indications of provisional measures from this Court intended to halt scheduled executions. It did so, at least in part, on the basis of its view, as the federal executive advised the United States Supreme Court in both cases, that those indications did not impose binding obligations. In the *LaGrand* Judgment, consistent with the view advanced first by Paraguay in its Memorial prior to the withdrawal of its case, and then by Germany in the case that went to Judgment, the Court established that that view was incorrect.

143. Mexico has no doubt that if the Court indicates provisional measures here, the United States will treat them as binding in accord with the *LaGrand* Judgment. We cannot be certain, however, what steps will need to be taken in order to give the order effect. As I have discussed, depending on the course of events, officials from one or more of the state executive and judicial branches and from the federal executive and judicial branches, will have to act or forbear from acting in order to achieve compliance.

144. We respectfully urge the Court to give any of those authorities asked to act or forbear from acting the time to appreciate the import, in light of *LaGrand*, of any order the Court might issue or, if they do not do so appreciate the import, time for the federal executive and, if necessary, the federal judiciary to bring to bear their own authority. For example, in rejecting Paraguay's

request that it give effect to the provisional measures Order issued in that case by staying the execution of Mr. Breard, the United States Supreme Court observed: "It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier" (*Breard v. Greene*, 523 U.S. 371, 378 (1998)). In rejecting Germany's request for the same relief a year later, the Supreme Court cited, among other things, the "tardiness of the pleas" (*Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999)).

145. Mexico will respectfully urge this Court to ensure that United States authorities have no such complaints in the future. To maximize the prospect of compliance, state prosecutors should have any order this Court might issue before them when considering whether to seek an execution date, and other competent authorities, state and federal, should have this Court's guidance in hand should any prosecutor, notwithstanding the order, seek to do so.

146. Needless to say, I do not mean to suggest that the timing of any such order would affect its binding character. As *LaGrand* demonstrates, an indication of provisional measures by this Court would be binding whenever issued. But Mexico believes that it would be in everyone's interest — most immediately, of course, that of the Mexican nationals sentenced to death, but in addition that of Mexico, that of the United States, that of this Court, and, if I may say so, that of the rule of law — for any indication of provisional measures by this Court to meet with compliance. Mexico therefore urges the Court to issue an order of provisional measures at the earliest possible time, so that the United States will have the fullest possible opportunity to comply.

Mr. President, that concludes Mexico's submissions this morning and Mexico is grateful for the patience and courtesy of this Court in hearing those submissions.

Le PRESIDENT : Je vous remercie, Maître. Ceci effectivement met un terme au premier tour de plaidoirie des Etats-Unis du Mexique. La séance est levée, elle reprendra tout à l'heure pour le premier tour de plaidoirie des Etats-Unis d'Amérique.

La séance est levée à 11 h 20.

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