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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 21 January 2003, at 11.30 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 11 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,

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Mme Catherine Birmingham, du cabinet Debevoise & Plimpton,

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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,

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

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

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

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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,

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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. La séance est ouverte pour le premier tour de plaidoirie des Etats-Unis d'Amérique et je donne immédiatement la parole à M. William Taft, agent des Etats-Unis d'Amérique.

Mr. TAFT:

I. INTRODUCTION

1.1. Thank you, Mr. President, Members of the Court, learned counsel. It is an honour to appear before the Court on behalf of the United States of America. I am accompanied today by representatives of both the United States Department of State and the United States Department of Justice, a number of whom will be assisting me in presenting the United States response to Mexico's request for provisional measures pending a decision by this Court on the merits of Mexico's case. In addition, among the counsel who will be addressing you today is Sir Elihu Lauterpacht, Q.C., who is well-known to the Court. Ambassador Clifford Sobel, the United States Ambassador to the Kingdom of the Netherlands is currently en route to The Hague from New York, and I hope to be able to introduce him to the Court in person this afternoon.

1.2. We are here in strong opposition to Mexico's request. It fails to demonstrate that it is needed, either for the preservation of rights under the Vienna Convention on Consular Relations[1], or because of the urgency of events. It is unsubstantiated by the facts and finds no support in the law. At the same time, the sweeping provisional measures requested would be a radical intrusion into the proper workings of the United States criminal justice system.

1.3. Mr. President, we would also submit that acceptance of the Mexican request would involve an evident and considerable departure from this Court's own Judgment of June 2001 in the *LaGrand* case[2]. The Court there dealt with the consequences in the event a party fails to carry out its obligations under Article 36 of the Consular Convention and a criminal case results in a conviction and sentence to a severe penalty. The Court said that in such a case the United States

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[1]Vienna Convention on Consular Relations and Optional Protocol on Disputes, done at Vienna 24 April 1963 ("Vienna Convention").

[2]Case concerning *LaGrand (Germany* v. *United States of America), Judgment of 27 June 2001* (hereinafter *"LaGrand"*).

should, by means of its own choosing, provide for review and reconsideration of the conviction and sentence that would take into account the failure.

1.4. Mexico's Application and its request for provisional measures directly contradict the Court's careful approach to these issues in *LaGrand*. In essence, Mexico seeks a different remedy from "review and reconsideration" in any case where the criminal trial has resulted in a death penalty. It argues, in effect, that a breach of Article 36 automatically voids United States domestic legal proceedings — a result that this Court declined to adopt in *LaGrand*. The United States objects to a remedy that is so clearly inconsistent with the "review and reconsideration" standard found in *LaGrand* and that fails to respect the United States own sovereign rights.

1.5. Mexico's request for provisional measures goes well beyond what was requested in either the *Vienna Convention* or the *LaGrand* cases. Let us look at it closely. Mexico asks this Court to direct:

> "*(a)* That the Government of the United States take all measures necessary to ensure that no Mexican national be executed;
>
> *(b)* That the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national . . . and, [skipping over *(c)* to *(d)*]
>
> *(d)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case."

1.6. These requests are extraordinarily broad. They ask this Court to intrude deeply into the entire criminal justice system of the United States despite this Court's wise refusal in *LaGrand* to act as a Court of Criminal Appeal. Instead, Mexico seeks to have the Court begin dictating the outcomes in criminal cases. No such rights as Mexico requests the Court to preserve in indicating provisional measures can be derived from those provisions of Article 36 on which Mexico has based its case.

1.7. We recognize, of course, that under its statute, this Court may, "if it considers that circumstances so require," indicate any provisional measures "which ought to be taken to preserve the respective rights of each party"[3]. In exercising its discretion to indicate provisional measures the Court has established four factors that must be considered. The Court must find that the

[3]Statute of the International Court of Justice, Art. 41 (1).

measures sought actually conform to the standards authorizing them in the first place. It must determine that the indication of provisional measures is necessary to avoid irreparable prejudice to one party's rights. It must find that the matter is urgent. Finally, it must weigh the respective rights of the parties in determining whether the circumstances require provisional measures. As we will demonstrate to the Court this morning, these requirements are not met by Mexico's request.

1.8. First, as I have already mentioned, Mexico asks this Court to create rights going far beyond those for which the Court's recent interpretation of Article 36 provides. And it asks the Court to do so through the peremptory procedure of a request for provisional measures.

1.9. Second, Mexico has shown no real risk of irreparable prejudice. This Court carefully examined the question of remedies for violations of Article 36 in the *LaGrand* case. The United States is providing exactly what the Court has stated is warranted for consular violations in death penalty cases, taking, in each case it has become aware of, measures to ensure that there is review and reconsideration where a failure of consular notification has occurred. Although Mexico pays lip service to the *LaGrand* decision, it fails to show that the United States either has not granted or will not grant the remedy as set forth by the Court in *LaGrand*. Nor could it do so. The United States is following the practice set out by the Court in that case.

1.10. The Court made clear in *LaGrand* that the United States could use means of its own choosing to allow review and reconsideration. In the wake of *LaGrand*, we have chosen means that have succeeded in securing review and reconsideration in every case when a consular notification violation had occurred and the death penalty was to be imposed. I can assure the Court that the United States will continue to employ these measures, which have proved effective in every case so far and which there is no basis to believe will not be effective in future cases. Assurances such as the one I am giving the Court today have proved sufficient in the past to dispose of requests for provisional measures.

1.11. Third, Mexico has shown no urgency. This Court considers provisional measures only where serious harm to a party's rights under the Convention is imminent. Mexico cannot show such imminent harm because United States proceedings, in each of the 54 cases, continue. None of the Mexican nationals is scheduled to be executed. In fact, since the time that Mexico filed this petition, three of the 54 individuals it listed have had their death penalty sentences commuted to

lesser penalties[4]. The remaining cases are working their way through a complex judicial system that moves deliberately and carefully.

1.12. Although Mexico presents some facts about the 54 cases, its factual showing in these cases is wholly inadequate to support a finding of urgency. Indeed, it is so non-specific that this Court cannot reliably draw the conclusions Mexico requests. The Mexican summary does, however, attract several observations. Some cases seem not to involve violations of Article 36 at all. In addition, for a number of cases, including those where the existence of a violation is unclear, Mexico has had or will have a full opportunity to raise any failure of consular notification, either at trial or on appeal. Finally, in all cases, review and reconsideration remains available. After the courts have considered all the issues properly presented to them, there exists a clemency process in which, as the Governor of Illinois demonstrated in his grants of clemency earlier this month, review and reconsideration of any and all aspects of a case is possible.

1.13. Fourth, in making its request, Mexico ignores the important rights of the United States. Under Article 41, the Court's decision on provisional measures must take into account protection of the respective rights of both parties. The Court must therefore balance the rights of both parties before deciding whether to indicate provisional measures. The provisional measures Mexico seeks, however, would not only fail to preserve any rights to which Mexico is entitled under international law; they would severely prejudice the rights of the United States by profoundly intruding upon the operation of its criminal justice system.

1.14. The United States has an important sovereign right to operate its criminal justice system fairly and efficiently and to establish rules in the interest of fairness setting out when defendants, whether Americans or foreign nationals, must raise arguments that are known to them.

1.15. Mr. President, a decision of the Court should bring certainty and finality to an issue such as the scope of remedies available in this Court for violations of the Vienna Convention. Mexico's request before the Court today would eliminate the certainty and finality created by the Court's recent decision in *LaGrand*. And it should be rejected. Mr. President, I have two

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[4]Chicago Tribune newspaper, 12 January 2003, http://www.chicagotribune.com/news/local/chi-0301120328jan12,1,2995903.story?coll=chi%2Dnews%2Dhed (link valid as of 12 January 2003.); see also New York Times, 12 January 2003, http://www.nytimes.com/2003/01/12/national/12DEAT.html?pagewanted=print&position=top (link valid as of 18 January 2003).

administrative points, as is customary, counsel for the Unites States will not read, and I have not read the full citations that support our arguments, but they are included in the texts that are provided to the Court and I ask that they be included in the transcript of the hearing. In addition, we shall be making reference this morning to certain documents that were filed with the Court and provided to the Agent of Mexico late yesterday afternoon, and I wanted the Court to be aware of that and to have the documents.

1.16. Mr. President, Members of the Court, let me introduce the counsel for the United States and summarize very briefly the remaining presentations in our first round today.

1.17. I will ask you first to call upon Mr. Stephen Mathias of the United States Department of State, who will present the applicable law in this case and show that Mexico's request should be denied because Mexico seeks to preserve rights that the Court has previously determined the parties do not have under the Vienna Convention, either directly or indirectly as a remedy for a violation.

1.18. We will then ask the Court to hear from Ms Catherine Brown, also of the Department of State, who will show that Mexico's request should be denied for the independent grounds that Mexico has failed to show irreparable prejudice to its rights or urgency.

1.19. Following Ms Brown, we will ask you to hear from Mr. James Thessin, also of the Department of State, who will show that the balance of the respective rights of the parties clearly establishes that the Court should decline to indicate provisional measures.

1.20. Finally, I ask you to call upon Sir Elihu Lauterpacht, who will conclude this first round presentation on behalf on the United States. Thank you Mr. President.

Le PRESIDENT : Je vous remercie Monsieur l'agent et je donne maintenant la parole a M. Stephen Mathias.

Mr. MATHIAS:

II. APPLICABLE LEGAL BACKGROUND

2.1. Thank you, Mr. President. It is an honour to appear again before the Court on behalf of the United States. Mr. President, Members of the Court, my task this morning will be to recall the legal standards that this Court applies in considering a request for provisional measures and to examine the position under the Vienna Convention on Consular Relations as interpreted by this

Court in *LaGrand*. In light of that applicable law, I and my colleagues after me will outline the inadequacies of Mexico's request.

A. The requirements for the indication of provisional measures

2.2. Article 41, paragraph 1, of the Court's Statute defines the Court's authority in this area: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". It has been stated in an authoritative study of this power that it "is both discretionary and *exceptional* . . .", and should "be used with restraint and prudence"[5].

2.3. The Court has identified several criteria that it considers relevant to the determination whether the "circumstances . . . require" the indication of provisional measures.

2.4. As an initial matter, the concept of prima facie jurisdiction has been a consistent requirement[6]. The United States does not propose to make an issue now of whether the Court possesses prima facie jurisdiction, although this is without prejudice to its right to contest the Court's jurisdiction at the appropriate stage later in the case. For present purposes, we shall focus on four issues.

2.5. First, the Court requires that the rights sought to be protected by the provisional measures order are ones that fall within the scope of the jurisdiction of the Court in the main action. The Court stated in the recent *Congo* case that "once the Court has established the existence of . . . a basis for jurisdiction, it should not however indicate measures for the protection of any disputed

[5]J. Sztucki, Interim Measures in The Hague Court 61 (1983) (emphasis in original).

[6]See, e.g., *Democratic Republic of the Congo* v. *Rwanda, Request for the Indication of Provisional Measures, Order of 10 July 2002*, para. 58 (hereinafter "*Congo* v. *Rwanda*") (the Court "ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established") (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, para. 35). See also case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, para. 30; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991*, para. 14.

rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction"[7].

2.6. Second, it is essential for the requesting State to demonstrate that there is a risk of irreparable prejudice to its rights in the absence of an order. In the recent *Arrest Warrant* case, the Court noted that its indication of provisional measures "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" [8].

2.7. Third, the matter must be urgent. Again, in the *Arrest Warrant* case, the Court emphasized that "such measures are justified solely if there is urgency"[9].

2.8. Finally, the Court must consider the respective rights of both parties in deciding how to exercise its discretion. The Court does not look simply to the rights of the requesting State that may be preserved by provisional measures, but must also consider the rights of the respondent State. Indeed, Judge Koroma has pointed to "the need for the Court to balance the potential and existing harm which threatens or is complained of against the damage which is likely to be suffered if an order is indicated and complied with"[10].

2.9. In the present proceedings, each of these four issues presents a separate and independent reason why Mexico's request for provisional measures must be rejected[11]. First, the Vienna Convention does not provide the rights that Mexico seeks to preserve through its request for

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[7] *Congo* v. *Rwanda*, *Order of 10 July 2002*, para. 58 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, para. 35); see also Judge Abdul G. Koroma, *Provisional Measures in Disputes between African States before the International Court of Justice*, *in* The International Legal System in Quest of Equity and Universality 594 (L. Boisson de Chazournes & V. Gowlland-Debbas, eds., 2001) (hereinafter "Koroma") ("For the Court to be in a position to consider the request it must satisfy itself that it has been duly seised of a matter and that there is a basis for it to be able to conclude that prima facie jurisdiction exists. Furthermore, a sufficient connection must exist between the rights which the request seeks to protect and the rights to be declared protected in the principal proceedings").

[8] Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium), Order of 8 December 2000*, para. 69; see also case concerning the *Legal Status of Eastern Greenland (Norway* v. *Denmark), 1932, P.C.I.J., Series A/B, No. 48*, at 276, 284 (Interim Protection Order of 3 August).

[9] *Arrest Warrant, Order of 8 December 2000*, para. 69; see also case concerning *Trial of Pakistani Prisoners of War (Pakistan* v. *India), Interim Protection, Order of 13 July 1973*, para. 13 ("it is of the essence of a requirement for interim measures of protection that it asks for a decision by the Court as a matter of urgency").

[10] Koroma, *supra*, at 594 ("Hence the need for the Court to balance the potential and existing harm which threatens or is complained of against the damage which is likely to be suffered if an order is indicated and complied with.")

[11] *Aegean Sea Continental Shelf, Provisional Measures, Order, I.C.J. Reports 1976*, 16 (separate opinion Judge Jiménez de Aréchega) ("before interim measures can be granted all relevant circumstances must be present . . . . However, to refuse interim measures it suffices for only one of the relevant circumstances to be absent.").

provisional measures. Second, Mexico cannot show irreparable prejudice to its rights because it is already receiving the remedy of review and reconsideration that this Court set forth as appropriate for the violations that Mexico claims. Third, Mexico has utterly failed to show that there is urgency in the present circumstances to warrant the sweeping preliminary relief it seeks. Fourth, the provisional measures order requested would constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States even as it goes far beyond preserving Mexico's rights under the Convention.

2.10. My colleagues and I will elaborate on these four points. Before doing so, however, I will first provide an overview of this Court's jurisprudence concerning the scope of the Vienna Convention, which is the substantive context for the matter presently before the Court.

B. The applicable requirements of the Vienna Convention

2.11. Mexico's claims are predicated on the legal obligations arising from Article 36 of the Vienna Convention on Consular Relations. In *LaGrand (Germany v. United States of America)*, this Court thoroughly analysed the remedies that are available when Article 36 is violated in cases involving severe penalties.

2.12. It is important to keep in mind the most relevant provisions of Article 36. Subparagraph (1) *(b)* provides that "if he 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 manner". Subparagraph (1) *(b)* further provides that the authorities of the sending state "shall inform the person concerned without delay of his rights under this subparagraph". That is to say, when a foreign national is arrested or detained, the competent authorities must inform him, without delay, that he has the right to have his consular officials notified of his arrest or detention. The *LaGrand (Germany v. United States of America)* case, as the court well appreciates was about the appropriate remedies when these procedural obligations that I have just reviewed are breached.

2.13. Until *LaGrand (Germany* v. *United States of America)*, the United States — like the vast majority of States parties — acted on the assumption that the remedy owed to another State for

violations of the consular advice and notification obligations of Article 36, was a formal diplomatic apology with an undertaking to improve performance. In *LaGrand (Germany* v. *United States of America)*, this Court stated that an apology is not a sufficient remedy in all cases, and that, in cases where serious penalties were imposed on German nationals who had not received consular notification, "it would be incumbent" upon the United States to allow the review and reconsideration, by means of its own choosing, of the conviction and sentence by taking account of the violation. It is important to note that the Court's Judgment with respect to Germany's fourth submission in *LaGrand (Germany* v. *United States of America)* — regarding the application of the Vienna Convention to German nationals in future cases — differed substantially from the broader remedy that was sought by Germany.

2.14. To be sure, by its terms, the *LaGrand (Germany v. United States of America)* Judgment applies only to German nationals, and "has no binding force except between the parties and in respect of that particular case"[12]. However, the President separately indicated that, with respect to future disputes that might come before the Court, it would not apply a different construction of the Convention to nationals of other States or with respect to other penalties. Accordingly, the practice of the United States with respect to all foreign nationals — whether Germans, Mexicans, or otherwise — has been consonant with the Judgment in *LaGrand (Germany v. United States of America)* in the specific cases that have come to the attention of the United States. And the Agent of the United States has just assured the Court that, as additional specific cases are called to the attention of the United States, it will continue to employ the measures that have secured review and reconsideration in every case since *LaGrand (Germany v. United States of America)*. Such review, of course, may or may not lead to any further remedy. Review and reconsideration of the conviction and sentence can mean only one thing: that each case must be looked at individually, in good faith, in light of the violation to decide whether or not a change in either the conviction or sentence is appropriate.

2.15. I think that it is fitting to say a word in this context about the remedy that Mexico claims — restitution — and how the concept of restitution might properly be applied in a case such

[12]Statute of the International Court of Justice, Art. 59.

as this. The International Law Commission, in its *Commentaries* to the Draft Articles on State Responsibility, addressed the application of the remedy of restitution in circumstances such as those before the Court, in which the obligation that has been violated is a procedural obligation relating to the exercise of substantive powers by the other State. The Commentaries noted that "[r]estitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed"[13]. It recognized that to simply equate restitution with turning back the clock to restore, in every detail, the *status quo ante* is not proper in such circumstances. To the contrary, the *Commentaries* refer favourably to the Court's *LaGrand (Germany v. United States of America)* decision and note that the remedy of review and reconsideration adopted by the Court "would be a form of restitution which took into account the limited character of the rights in issue"[14].

III. THE REQUIREMENTS FOR THE INDICATION OF PROVISIONAL MEASURES ARE NOT MET IN THIS CASE

A. The provisional measures sought by Mexico seek to preserve purported rights that are beyond the scope of the Court's jurisdiction

3.1. Now, Mr. President, I will turn to our presentation, in detail, of the four primary reasons why Mexico's request must be rejected. The first and most basic reason is that Mexico seeks to preserve rights that are outside the Court's jurisdiction.

3.2. As I have noted, even where there is prima facie jurisdiction over the dispute before it, the Court will limit its indication of provisional measures to those that are necessary to protect rights that fall within the scope of the jurisdiction that exists[15].

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[13]Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, United Nations *GAOR*, 56th Sess., Supp. No. 10, United Nations doc. A/56/10 (2001) at 236.

[14]*Id.*, at note 518.

[15]See, e.g., case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993*, para. 36 ("having established the existence of one basis on which its jurisdiction might be founded, namely Article IX of the Genocide Convention, and having been unable to find that other suggested bases could prima facie be accepted as such, [it] ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction thus prima facie established"). The Court also noted that "it is for Bosnia and Herzegovina to show that such further measures are necessary for the protection of [the] rights [arising under the Genocide Convention]" and found that no such showing had been made. *Ibid.*, at para. 39.

3.3. Here, it is for Mexico to show that the measures it is requesting are necessary for the protection of its rights arising under the Vienna Convention. Mexico, however, has not shown and could not show that the sweeping measures that it is requesting — that the United States Government take all measures necessary to ensure that no Mexican nationals be executed and that no execution dates be set for any Mexican national — are required to protect its rights under the Vienna Convention.

3.4. Mr. President, Mexico states that it seeks to enforce its rights under Article 36 "as authoritatively interpreted by this Court in *LaGrand (Germany v. United States of America)*"[16]. It makes no attempt, however, to relate its requested provisional measures to the remedy for a violation of Article 36 as set forth in that case. To the contrary, Mexico ignores the Court's conclusion in *LaGrand* that review and reconsideration is the appropriate remedy and instead seeks provisional measures without regard to whether that remedy has been provided in any given case. The excessive scope of its request in this respect is clear.

3.5. There is another sense, as well, in which Mexico's request exceeds the scope of the rights that it is seeking to preserve. Mexico's Application in essence asks the Court to order the United States to alter its domestic law to provide some additional remedy in United States law for a violation of Article 36. It is plain, however, as *LaGrand* recognizes, that the choice of means must be left to the United States. To the extent that Mexico's measures seek to preserve an asserted right to an additional United States domestic law remedy, to which Mexico is not entitled under the Vienna Convention, they exceed the scope of the Court's jurisdiction in this case.

3.6. Thank you, Mr. President, Members of the Court. I would now ask that you call on my colleague, Ms Brown, who will address why Mexico's request should also fail on the grounds of lack of irreparable prejudice and lack of urgency.

Le PRESIDENT : Je vous remercie beaucoup. Je donne maintenant la parole à Mme Catherine Brown.

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[16]Application Instituting Proceedings Submitted by the Government of the United Mexican States, 9 January 2003, para. 5 (hereinafter "Mexico Application").

Ms BROWN:

3.7. Thank you Mr. President. Members of the Court, it is an honour to appear before you again on behalf of the United States of America. My task this morning, as Mr. Mathias has indicated, is to address Mexico's failure to establish two of the four factors that this Court requires before it will indicate provisional measures: irreparable prejudice and urgency.

B. There is no possibility of irreparable prejudice to Mexico's rights

3.8. Mr. President, Members of the Court, Mexico cannot demonstrate the possibility of irreparable prejudice to its Vienna Convention rights for two simple reasons. First, this Court in *LaGrand* has already determined that the remedy of review and reconsideration is an appropriate and indeed, what Mexico has requested as a sufficient remedy for any violation of Article 36. Second, the United States has been providing, and continues to provide, such review and reconsideration in cases involving Mexican nationals. I will discuss these two points in turn.

1. The remedy of review and reconsideration has already been determined by this Court to be a sufficient remedy, negating any claim of irreparable prejudice

3.9. With respect to the first, there can be no serious contention that there is a threat of irreparable prejudice to Mexico's rights under Article 36. Under *LaGrand*, in cases of violations of Article 36 and the imposition of severe sentences, including the death penalty, the remedy is review and reconsideration of the conviction and sentence in light of the violation. As the Agent for the United States has assured the Court, the United States has acted and will continue to act consistent with *LaGrand* by employing measures that have been successful in securing review and reconsideration in every case brought to our attention since *LaGrand*. In these circumstances, any conclusion by the Court that Mexico's rights would be irreparably prejudiced absent a provisional measures order would necessarily imply that the remedy of *LaGrand*, while sufficient for German nationals, is not sufficient for Mexican nationals. And this would be precisely the *a contrario* interpretation that the President of this Court has said is inconceivable[17]. In short, *LaGrand* is

[17] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, Declaration of President Guillaume.

inherently incompatible with Mexico's claimed right to a remedy, which it this morning has clearly described as one of a per se remedy of result.

2. The United States is allowing review and reconsideration in cases involving Mexican nationals

3.10. With respect to my second point, contrary to Mexico's description, the specific cases that Mexico has raised with the United States since *LaGrand*, evidence our commitment to allow for review and reconsideration as contemplated by *LaGrand* in cases involving Mexican nationals facing severe penalties. To understand why this is so, it is important that we correct a misimpression that Mexico has created and that underlies its assertion that the United States has not provided meaningful review of convictions and sentences[18]. This assertion reflects Mexico's position that review and reconsideration cannot occur through the process of executive clemency, notwithstanding this Court's expressed statement in *LaGrand* leaving the means of review and reconsideration to the United States[19]. In fact, the clemency process has been described by our supreme court as a process deeply rooted in the Anglo-American system of justice. It supplements the American judicial system, and it is an appropriate means for ensuring review and reconsideration of convictions and sentences. This is, in part, because the clemency process permits review and reconsideration of convictions and sentences even after the judicial process has been completed, and in light of information that a court might not have had an opportunity to consider because it was not timely presented. It is also because the powers given to those responsible for the exercise of executive clemency are extraordinarily broad.

3.11. In our federal system, the President of the United States is given the clemency power by our constitution with respect to persons convicted of federal crimes. He may commute a sentence to a lesser sentence or pardon an individual altogether and allow him to go free. In state cases, there is a similar power, sometimes exercised by the governor of the state alone, and sometimes in conjunction with a clemency board. Although each state's process is somewhat different, state governors and clemency boards have broad discretion with respect to both the

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[18]Mexico Application, paras. 58-60.

[19]*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, para. 128 (7).

evidence they consider and the measures they may take. Mexico yesterday withdrew its provisional measures request with respect to three of its nationals, precisely because this process just resulted in the commutation of death sentences imposed upon them. But it failed this morning to acknowledge at all that these commutations rested in part on recognition of violations of Article 36[20] or that this action clearly demonstrates that clemency is not only a meaningful process but that it can also result in adjustments to sentences. The clemency process has also resulted in review and reconsideration of the convictions and sentences in light of violations of Article 36 in the Valdez and Suarez cases that were mentioned again this morning and which I will discuss momentarily. Moreover, it is available in each of the remaining cases that Mexico has identified.

3. Review and reconsideration has occurred in the only two cases to date in which executions were imminent

(a) The Valdez case

3.12. One of the two cases just mentioned and discussed by Ms Babcock this morning, was that of Gerardo Valdez Maltos, who was sentenced to death by the State of Oklahoma for murder. Although he was sentenced in 1989, Mexico apparently learned of his case only in April 2001, just before he was given an execution date of 19 June 2001. At that time, no further judicial remedies appeared to be available to him, but he invoked the clemency process by filing a petition with the Oklahoma Pardon and Parole Board asking that his sentence be commuted to life imprisonment. Before the *LaGrand* Judgment, and in response to representations made to us by Mexico, the Department of State's Legal Adviser asked both the Board and the state Governor, Frank Keating, to take the failure of consular notification into account when considering Mr. Valdez's clemency petition[21]. Copies of those letters have been submitted to the Court. After the Board recommended a commutation of the sentence to life imprisonment, the Governor stayed Mr. Valdez's execution for the express purpose of giving himself more time to consider the issue.

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[20]Letter of Santiago Oñate, Agent of Mexico, to the Registrar, 20 January 2003. See Chicago Tribune newspaper, 12 January 2003, http://www.chicagotribune.com/news/local/chi-0301120328jan12, 1,2995903.story?coll=chi%2Dnews%2Dhed.(link valid as of 12 January 2003.); see also New York Times, 12 January 2003, http://www.nytimes.com/2003/01/12/national/12DEAT.html?pagewanted=print&position=top (link valid as of 18 January 2003).

[21]Letter of Mr. Taft to the Oklahoma Pardon and Parole Board, 5 June 2001; Letter of Mr. Taft to Governor Keating, 13 June 2001.

3.13. This Court's Judgment in *LaGrand* was issued shortly thereafter, on 27 June 2001. In light of that decision, the United States did not consider that its prior request to the Governor was sufficient. On the other hand, the Judgment was so new that the United States had not had a full opportunity to review it or to consider how the United States should respond, whether in cases of German nationals or others. The Legal Adviser, therefore, sent Governor Keating the third letter that is before the Court in this case, calling the Governor's attention to the *LaGrand* Judgment, noting that the Judgment was still under review, but asking him nevertheless to "specifically consider" whether the Article 36 violation "had any prejudicial effect on either Mr. Valdez's conviction or his sentence"[22]. This request foreshadowed that the United States ultimately would not limit its review and reconsideration in accordance with *LaGrand* to cases between Germany and the United States.

3.14. Governor Keating took the Legal Adviser's request seriously. In addition to considering material submitted by Mexico and Mr. Valdez, he met personally with officials of the Mexican Government. Ultimately, however, he decided to deny the clemency petition. He explained his decision directly to President Fox of Mexico. In a letter which has been provided to the Court, he advised President Fox that, "[t]aking the decision in *LaGrand* into account, I have conducted this review and reconsideration of Mr. Valdez's conviction and sentence by taking account of the admitted violation of Article 36 . . . as well as the information provided by . . . representatives of your government". The Governor nevertheless concluded that, in the total circumstances of the case, any possible prejudice to Mr. Valdez was small and was outweighed by other factors, including the heinous nature of the crime[23]. While Ms Babcock this morning dismissed his decision in contrast to her welcoming of the board's recommendation as resulting from an inadequate process, clearly Mexico's real quarrel is with the result and not with the process itself.

3.15. In reaching his decision, Governor Keating fully recognized the importance of the international legal issues involved. Because of what he described as "the gravity of the issues to

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[22]Letter of Mr. Taft to Governor Keating, 11 July 2001.

[23]Letter of Governor Frank Keating to President Fox, 20 July 2001. Although the letter does not say so, Mr. Valdez tortured his victim for some hours before killing him, and then burned the body in his barbecue.

the Government of Mexico and . . . the complicated questions of international law which have been presented," he issued an additional 30-day stay of execution[24] to permit Mexico additional "time to pursue legal and diplomatic options in the case". This additional stay allowed Mr. Valdez, with the assistance of the Government of Mexico, an orderly opportunity to seek further relief from the Oklahoma Court of Criminal Appeals, which held that Mr. Valdez was entitled to a new sentencing hearing, now scheduled for the 28th of April this year.

3.16. While Mexico lauded this decision this morning, it regrettably mischaracterizes it in its Application. It is important to recognize that, while the Court concluded that domestic law considerations precluded granting relief directly on the basis of the Vienna Convention or the *LaGrand* Judgment, the Court nonetheless thoroughly examined the question of whether Mr. Valdez was prejudiced by the consular notification failure. Moreover, the Court explicitly relied on the fact that Mexico had developed mitigating evidence relevant to Mr. Valdez's sentence. The failure of Mr. Valdez's own attorneys to obtain this evidence for use during the original sentencing hearing became the basis for ordering a new sentencing hearing, at which the evidence gathered by Mexico can be considered. Clearly, the violation of the Vienna Convention and the consequent inability of Mexico to submit its evidence at trial was material to the Oklahoma Court's decision.

3.17. Thus, in this case, two different avenues for review and reconsideration, one in the executive clemency process, and the other judicial, with the latter leading to the further relief in the form of a new resentencing hearing occurred. All three decision makers — the Board, the Governor, and the Court — considered the issue of the Article 36 violation, and both Governor Keating and the Court did so specifically in light of the *LaGrand* Judgment.

(b) *The Suarez case*

3.18. Mexico similarly has given an incomplete picture of the case of Javier Suarez Medina, who was convicted and sentenced to death in 1989 for the murder of an undercover police officer. Unlike the Valdez case, the Suarez case was known to the Government of Mexico as early as 1989. Nonetheless, no effort was made to seek judicial review of the consular notification failure until

[24]Executive Department Executive Order 2001-28, 19 August 2001.

August 2002, a week before the execution was scheduled to occur on 14 August 2002. That request for judicial review was denied on the ground that it was untimely.

3.19. On 22 July 2002, however, Mr. Suarez also had filed a petition for clemency with the Texas Board of Pardons and Paroles. In a detailed letter to the Board, which is before the Court, the Legal Adviser reviewed the *LaGrand* decision and asked the Board, in the context of considering his clemency petition, to review and reconsider the conviction and sentence in light of the violation of Article 36, which the Department of State had confirmed[25]. This letter reflects the fact that, by the time this case arose, the United States had been able to review the *LaGrand* Judgment in detail and had decided not to apply it narrowly only to German nationals.

3.20. Again, there can be no doubt that this matter was taken seriously by the Board. The Government of Mexico was provided an opportunity to meet with the Board's chairman on 8 August 2002, to discuss Mr. Suarez's petition and its views regarding the impact of the consular notification failure. The substance of that meeting was shared with all Board members, who also received copies of written materials submitted by Mexico[26].

3.21. On 13 August 2002, the Board decided not to recommend commutation of Mr. Suarez's death sentence to life imprisonment. Under Texas law, the Governor may grant clemency only if it is recommended by the Board. Thus, the clemency process ended with the Board's decision. The following day, the Board Chairman explained the process used by the Board in considering Mr. Suarez's petition in a letter to the Legal Adviser that is before the Court[27]. As the Court can see from that letter, the Board considered all of the information submitted by Mexico and Mr. Suarez and had full power to recommend that the Governor grant the further remedy if it concluded that such action was appropriate.

3.22. We recognize, of course, that Mexico hoped that the Board would reach a different conclusion. But the obligation of review and reconsideration, as articulated in *LaGrand*, is not an

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[25]Letter of Mr. Taft to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles, 5 August 2002. Mr. Taft wrote a second letter the next day, giving the Board copies of a diplomatic Note from the Government of Mexico. Letter of Mr. Taft to Gerald Garrett, 6 August 2002.

[26]See Letter of Gerald Garrett to Mr. Taft, 7 August 2002.

[27]Letter of Gerald Garrett to Mr. Taft, 14 August 2002.

obligation of result. Rather, it envisions a change in outcome if the decision maker concludes that a change is warranted. There is no doubt that, through the clemency process, the United States afforded Mr. Suarez review and reconsideration of his conviction and sentence in light of the Article 36 violation, in accordance with *LaGrand*.

4. The United States continues to provide review and reconsideration

(a) *The Moreno Ramos case*

3.23. As of today, there is also pending in Texas the case of Roberto Moreno Ramos, who was convicted and sentenced to death in 1993 for murdering his wife and two children. He has now exhausted his normal judicial remedies, but an execution date has not yet been set and a clemency petition may still be filed. As in Mr. Suarez's case, the apparent violation of Article 36 was known to Mexican officials for many years before any effort was made to raise it with a court. Moreover, Mexico has been aware of the case since before Mr. Moreno's trial, and thus had an opportunity to provide legal assistance to him during the trial and sentencing proceeding. In these circumstances, there is a question — which can be left for the merits stage — whether the case is the kind of case in which this Court has indicated that "review and reconsideration" is required[28]. Because, clearly the purposes of Article 36 were fulfilled in so far as Mexico was able to provide assistance at trial.

3.24. Leaving these issues aside, however, the clemency process remains available to Mr. Moreno[29].

(b) *The remaining cases*

3.25. Mr. President, the United States has not been able to investigate all the remaining cases cited in Mexico's Application. We have reason to believe that the facts offered there and today about some of those cases are not entirely accurate. But if we confine ourselves to how they are described in Mexico's Application, it is clear on the face of that Application that Mexico has failed

[28]See *LaGrand*, Judgment, para. 74 ("It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay . . . the sending state has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1.").

[29]See letter of Mr. Taft to Juan Manuel Gomez-Robledo, 5 November 2002.

to show that its rights are in danger of irreparable prejudice in any of these cases. This is because it fails to show that review and reconsideration has not occurred or will not occur whether in the judicial process, the clemency process, or both. In fact, it appears from the Application itself, that in many of these cases — perhaps as many as 12 — there has already been at least some judicial consideration of the issue on the merits[30]. Although Mexico is unhappy because, on the merits the courts have found a lack of prejudice. In virtually all of the cases, opportunities for review and reconsideration in the judicial process are still being sought[31]. In still others, judicial review may be precluded because of an inexplicable failure to seek judicial review even after the violation of Article 36 was known, as in the two cases I have already mentioned[32]. But in every case, review and reconsideration may still be sought in the clemency process. This is true even with respect to the cases in which the United States will dispute, at the merits stage, whether there was a violation of Article 36 at all[33]. And it is true with respect to at least 16 cases — like the Moreno case — in which Mexico by its own admission apparently was notified in time to provide consular assistance during the trial phase of the case, so that any violation could not only have been fully reviewed at trial but the purpose of Article 36 was accomplished in any event[34].

3.26. To find irreparable prejudice to Mexico's rights notwithstanding these facts, would, as I said at the outset, require adopting a view fundamentally at odds with —and incompatible with — this Court's reasoning and Judgment in *LaGrand*. It would mean that review and reconsideration of a sentence, as set out in *LaGrand*, is after all not a sufficient remedy for a failure of consular

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[30]Examples in Mexico's Application appear to include the cases of Messrs. Ayala (No. 2), Juarez Suarez (No. 10), Alvarez (No. 29), Hernandez Llama (No. 33), Leal Garcia (No. 35), Maldonado (No. 36), Medillin Rojas (No. 38), Plata Estrada (No. 40), Rocha Diaz (No. 42), Loza (No. 52), and Torres Aguilera (No. 53). It may also include the case of Mr. Vargas (No. 26).

[31]This appears to be true in all cases except those of Mr. Moreno Ramos (No. 39), and perhaps that of Mr. Plata Estrada (No. 40).

[32]This appears to be the case with respect to Mr. Benavides Figueroa (No. 3).

[33]These would include the cases of Messrs. Esquivel Barrera (No. 7), Juarez Suarez (No. 10), and Maturino Resendiz (No. 37), who apparently were advised of their rights within just a few days of arrest.

[34]These would appear to include the cases of Messrs. Ramirez Villa (No. 20), Hernandez Llanas (No. 33), Maldonado (No. 36), Moreno Ramos (No. 39), Ramirez Cardenas (No. 41), Rocha Diaz (No. 42), Tamayo (No. 44), Fong Soto (No. 48), Hernandez Alberto (No. 50) and Reyes Camarena (No. 54). While Mexico's representations are ambiguous, it appears that Mexican consular officials also knew well before trial of the cases of Mr. Flores Urban (No. 46), Solache Romero (No. 47), Hernandez Alberto (No. 50), and Torres Aguilera (No. 53). The cases of Mr. Mendoza Garcia (No. 17) and Mr. Vargas (No. 26) appear to follow the same pattern.

notification under the Convention, or that a different remedy could apply to Mexican nationals than to German nationals. The possibility of such an *a contrario* interpretation should not be entertained by the Court, nor should it be permitted to form the basis for a finding of irreparable prejudice.

C. Mexico has failed to show any urgency warranting granting provisional measures before the Court can address its case on the merits

3.27. I would like now to turn briefly to the issue of "urgency". We do, in fact, contest urgency. We contend that urgency is lacking because in none of the cases that Mexico has called to the Court's attention is there a possibility of finding what would be necessary to find an imminent threat of irreparable prejudice. That is, it would be necessary to define not only that a Mexican national is imminently facing execution, but that he is facing execution without having first received review and reconsideration of his conviction and sentence in light of any violation of Article 36. This is simply not the case.

3.28. First, Mexico agrees that as of today, no execution date has been scheduled with respect to any Mexican national. It is recognized that there never will be an execution date in three of the cases[35]. As for the remaining 51 cases, there are only three in which it suggests even the possibility of an execution occurring in the foreseeable future, suggesting that could occur perhaps in the next six months[36].

3.29. In fact, it is not certain that any of these three will, in fact, face execution at all. All three have a number of procedural steps ahead that will take some months to complete before an execution could take place. Two of them still have judicial appeals pending, and all three of them still have, at a minimum, the opportunity to petition for executive clemency. Thus, Mexico's statement that a provisional measures order is the only means of halting these executions is incorrect.

3.30. Mexico has also made misleading claims about the possible timing of executions in these cases. For example, while Mexico states that Mr. Cesar Fierro (No. 30) "could be subject to

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[35]These are the cases of Messrs. Caballero Hernandez (No. 45), Flores Urban (No. 46), and Solache Romero (No. 47).

[36]Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States, para. 5 (hereinafter "Mexico Request") ("Within the next six months, three Mexican nationals . . . will face execution unless the Court indicates provisional measures.").

execution as early as February 14"[37], it has separately advised the Department of State (by e-mail) that, in reality, "the execution date is not likely to be set for any time before the middle of April".

3.31. It states that Mr. Moreno (No. 39), whom I discussed previously, could be scheduled for execution "as early as April 2003". But our information is that an execution in his case cannot be scheduled for any time less than 91 days from the date of a scheduling order, which does not yet exist. Given that the prosecutor, as of today, has not requested a scheduling order and that a judge would likely hold a hearing before issuing such an order, the end of April or early May would seem to be the very earliest that an execution could be scheduled.

3.32. The third case specifically mentioned, that of Mr. Osvaldo Torres (No. 53) is pending in a federal appeals court. The procedural posture of this case, combined with the time periods allotted for various remaining appeals, indicates that, in reality, it is virtually impossible that he could have an execution date set for any time prior to 2004, if one is set at all. Moreover, under Oklahoma law, any execution will be preceded by, at a minimum, 30 days' notice — and perhaps as much as 60 days notice — between when the warrant is issued and the execution date.

3.33. Thus these three cases are not, in fact, imminent. The same is true with respect to the remaining 48, where any execution date is even more remote. Moreover, the possibility of clemency review will be available in all of these cases. And in virtually all of them, efforts are continuing to obtain judicial review and reconsideration in light of the claimed violation. Thus, the outcome of these cases remains a matter of speculation.

3.34. What is not a matter of speculation, however, is that the United States stands prepared in all of these cases to continue to employ the same measures that have proven successful in the past to ensure that review and reconsideration through the clemency process occurs if it does not first occur in the judicial process. This is the remedy of *LaGrand* and it precludes finding any urgency to Mexico's request.

3.35. Thank you, Mr. President, Members of the Court. Thank you for your attention, and I ask Mr. President, you now call upon Mr. Thessin.

Le PRESIDENT : Merci beaucoup, Madame Brown. Je donne la parole à M. Thessin.

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[37]Mexico Request, para. 7.

Mr. THESSIN:

D. The respective rights of the Parties do not support the indication of provisional measures

3.36. Thank you, Mr. President. It is a great honour to appear before the Court today again. I am here this morning to recall that Article 41 of the Statute guides the Court, not to preserve only rights claimed by the Applicant, but "to preserve the respective rights of either party". After balancing the rights of both Parties, the scales tip decidedly against Mexico's request in this case. Mexico's proposed provisional measures are not tailored to preserve any rights of Mexico or its nationals that are imminently threatened, rather they would constitute a profound and unwarranted infringement on the sovereign rights of the United States to administer its own criminal justice system.

1. Mexico seeks a profound intrusion into United States sovereignty to preserve purported rights that have no basis under international law

3.37. Mr. President, Members of the Court, Mr. Mathias explained that Mexico is seeking a remedy that has no basis in the Vienna Convention; it is not seeking a right to which it is entitled under that treaty. In *LaGrand*, this Court defined the remedies available when a violation of consular notification occurs, not a halt to executions, but review and reconsideration of convictions in sentences. The violations alleged by Mexico are of the same nature as those in *LaGrand*. As such, Mexico has no right to broader remedies here than review and reconsideration.

3.38. The failing in Mexico's presentation is highlighted by the fact that, despite its allegations, Mexico has provided no persuasive evidence showing that the remedy that does exist — review and reconsideration — is not being provided. This Court does not indicate provisional measures based on speculation. In the *Great Belt* case, the Court denied provisional measures where Finland offered no proof that constructing a bridge would cause it economic harm[38]. Even in cases involving human life, the same logic holds. In the *Genocide* case, the Court declined to indicate certain provisional measures requested by Yugoslavia where it had offered "no

[38]Case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991*, para. 29.

credible evidence" of the genocidal acts alleged[39]. Absent evidence that the United States has not or will not afford Mexican nationals their rights under the Vienna Convention or provide review and reconsideration consistent with the rulings of this Court for any violations, this Court should follow these Judgments and reject Mexico's request.

3.39. Weighing against Mexico's efforts to preserve non-existent or unproven rights are the substantial and fundamental rights of the United States. Mexico claims the impact on United States rights of its requested measures "would be inconsequential"[40]. Mr. President, nothing could be further from the truth. The United States, and, indeed, each state within its federal Union, has a compelling interest in the orderly administration of its criminal justice system — a system that applies to over 280 million people. That interest extends to carrying out sentences when all reviews are completed and affirmed, following extensive and orderly judicial processes and clemency hearings.

3.40. Those interests would be set aside indefinitely under Mexico's request. Mexico would have the Court address a whole class of persons, unlike *Breard* or *LaGrand* where the Court was asked to intervene in cases of only a single, named individual. As such, Mexico's requested measures would dramatically interfere with United States sovereign rights to maintain and administer its criminal justice system[41]. And the requested order would not merely preserve the status quo. It would constitute an unwarranted intrusion by the Court into numerous criminal proceedings in a way that would interrupt and halt the proper administration of justice by the United States.

3.41. Such an intrusion would also wholly disregard the rights of the United States under the Vienna Convention itself, as confirmed by *LaGrand*. Article 36 (2) of the Vienna Convention explicitly recognizes the right of the United States to establish in its own domestic laws how the treaty's rights would be provided to foreign nationals, as long as full effect is given to the purposes

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[39]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993*, paras. 43, 52.

[40]Mexico Request, para. 13.

[41]*Vienna Convention* case, Order of 9 April 1998 (Declaration of Judge Koroma) (discussing the "need for the Court to comply with its jurisdiction to settle disputes between States, which, in my view, includes respect for the sovereignty of a State in relation to its criminal justice system").

of these rights[42]. In *LaGrand*, the Court made clear that the "choice of means must be left to the United States" in giving effect to the treaty[43]. Mexico's request would seriously and improperly infringe upon these rights.

3.42. Thus, in considering the parties' respective rights, the Court should conclude, as it did in the *Lockerbie* cases, that indicating the provisional measures sought "would be likely to impair the rights which appear prima facie to be enjoyed by [the respondent States]"[44]. It should on that basis alone deny the order sought by Mexico.

3.43. I would like to say a brief word here at this point about the implementation of any provisional measures order. Mexico attempts to establish at length that there can be "no doubt that the United States has the means to ensure compliance with an order of provisional measures issued by this Court"[45]. Discussing Respondent's domestic laws in a request for provisional measures is unusual. Here, it serves notice that Mexico recognizes the extraordinary nature of what it is requesting. But how the United States treats a provisional measures order as a matter of its domestic law does not affect what remedies international law provides parties under the Vienna Convention. Thus, we will not debate with Mexico the legal principles involved in implementing United States international law obligations. I would merely note that the relationship between the United States federal government and its states is one of great sensitivity, marked by the deference to the states in certain areas, including the administration of criminal law.

3.44. In this case, Mexico requests a "required result" of indefinite stays of execution for all Mexican nationals. This request directly implicates this federal relationship. That stands in marked contrast to the measures the Court indicated in *LaGrand*, where the Court expressly

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[42]Vienna Convention, Art. 36 (2) ("[R]ights . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended.").

[43]*LaGrand, Judgment*, para. 125.

[44]Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992*, para. 41; case concerning *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), Provisional Measures, Order of 14 April 1992*, para. 44.

[45]Mexico Request, para. 24.

disavowed the creation of an "obligation of result"[46]. The Court wisely noted that it did not intend to require the United States to exercise powers it did not have[47]. Similarly, when Paraguay requested "all measures necessary to ensure" no execution in the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)* case, the Court's Order declined to impose that burden in favour of requesting the United States to take "all measures at its disposal" to ensure the execution did not occur pending the Court's final decision in those proceedings[48]. In contrast, Mexico's requested orders in this case could well test the limit of federal authority, if they would not go beyond it.

3.45. It should be clear by now that Mexico is seeking an obligation of result. Its proposed measures are designed to implement immediately — without regard to whether "review and reconsideration" has occurred or will occur — a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law. Inherent in its request is an attack on the Court's reasoning in *LaGrand*. Contrary to *LaGrand*, Mexico wants every conviction and sentence vacated, regardless of its validity and regardless of the significance of the violation of Article 36 for the conviction or sentence. Mexico, in short, is seeking precisely the outcome-oriented remedy that this Court declined to adopt in *LaGrand*. And Mexico seeks to effectuate its dramatic remedy immediately through the requested provisional measures.

3.46. This Court in *LaGrand* implicitly recognized that review and reconsideration would not necessarily lead to a reversal of a conviction or sentence. It clearly recognized that violations of Article 36 can be assessed only through careful review of the facts and circumstances of each case. The obligation imposed upon the United States under the Vienna Convention for a violation of the right of consular notification is an obligation of review and reconsideration, not an obligation of result.

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[46] *LaGrand, Judgment*, para. 111.

[47] *Ibid.*, para. 115.

[48] *Vienna Convention* case, *Order*, paras. 9 and 41.

3.47. In sum, the requested provisional measures would drastically interfere with United States sovereign rights and implicate important federalism interests, without preserving any rights afforded by international law to Mexico or its nationals.

2. The Court should not function as a general criminal court of appeal

3.48. So far, in discussing factors that bear on the Court's discretion to indicate provisional measures, I have focused solely on the respective rights of the Parties. It is clear, however, that there are other relevant factors. The Court has taken care to indicate that its function here is "not to act as a court of criminal appeal"[49]. Yet, Mexico would require the Court to address each and every case involving a Mexican national sentenced to capital punishment in the United States whenever a failure of consular notification is alleged.

3.49. Mexico has brought before the Court the cases of 54 different individuals; each case involved different opportunities to raise alleged violations of consular rights in trial, appellate, and collateral proceedings. In each case, the individual is having full access to the clemency process. It is not appropriate for this Court to review each of these proceedings. The Court has already delineated what remedy is available under international law; and the United States is implementing it.

3.50. Mr. President, in closing, the issue of how the Court responds to Mexico's request for provisional measures goes beyond rights and remedies under the Vienna Convention. Ultimately, it involves a larger question of the relationship between provisional measures and issues of law previously addressed by this Court. Granting Mexico's request would mean that any State unhappy with the reasoning found in a decision of the Court where it was not a party, could effectively undermine that reasoning temporarily through provisional measures claiming rights different from those identified in the Court's decision. Such an approach, if allowed, would upset the finality that States expect from a decision of this Court declaring the content of international law. Thus, the United States submits that, in considering whether the "circumstances" warrant provisional measures, a conflict between the measures requested and carefully reasoned decisions of the Court

[49]See, e.g., *ibid.*, para. 38; *LaGrand, Order*, para. 25.

is sufficient reason for the Court to decline to indicate such measures. Thank you, Mr. President. I ask that you now call upon Sir Elihu Lauterpacht.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur Thessin. J'appelle à la barre sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court,

4.1. It falls to me to conclude the presentation of the United States' response by a brief recapitulation and occasional elaboration of some essentials of the arguments that have just been presented.

4.2. I begin by making the obvious but necessary point that the present request must be assessed within the framework and limits of the substantive case as framed by Mexico. The parameters of the whole case, including any incidental proceedings, are established by Mexico's Application of 9 January, in particular, by the terms of paragraph 281 of that Application. They represent the *petita* of the case. Mexico asks the Court to declare five things. Important though it is to bear them in mind, I will not at this stage of the morning repeat them.

4.3. I will however recall the four main points of the Mexican request for provisional measures.

4.4. Mexico asks that the United States shall:

(1) take all measures to ensure that *no* Mexican national be executed;

(2) the United States shall take all measures necessary to ensure that *no* execution dates be set for *any* Mexican national;

(3) the United States shall report to the Court its actions taken pursuant to the first two items; and

(4) that the United States shall ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any decision that the Court may render on the merits of the case.

4.5. These requests generate a number of comments.

4.6. First, as hardly needs stating, this case is not about the death penalty. The Court is not asked to disapprove or approve of the existence of the death penalty as part of the law of the United States, of Mexico, or of any other country. All the diverse feelings that that issue raises

must, therefore, be set aside. The Court has said as much in both the cases concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America, I.C.J. Reports 1998,* p. 257) and *LaGrand (Germany v. United States of America), I.C.J. Reports 1999*, p. 15).

4.7. Second, the Court is not faced in this case by any issue regarding the responsibility of the United States Government for the conduct of the individual states of the United States. The United States federal government acknowledges its responsibility on the international plane for any breaches by it or by the authorities of the states within the United States for breaches of treaties to which the United States is a party. Thus, the repeated exposition by Mexico in its request and this morning, of the obligations of the United States in respect of its constituent States (19-21) are irrelevant and do not call for any further comment.

4.8. Third, it is important to note that the original Application was almost totally expressed in terms of the treatment of 54 specified Mexican nationals. There was only a glancing and the most very subsidiary reference to Mexican nationals generally in paragraph 281 (4). The Court should, therefore, in these interim proceedings consider only the situation of the 54 *named* Mexican nationals. The Court should not concern itself with the position of Mexican nationals generally. They cannot possibly be the subject of the present request.

4.9. Fourth, the main issue before the Court in the substantive case is that of the legal consequences of the alleged non-fulfilment by the United States of its obligations under the Consular Convention. On the one hand, Mexico contends that it is entitled to *restitutio in integrum*, a remedy which it elaborates as the re-establishment of the situation that existed before the arrest of, detention of, proceedings against, and convictions and sentences of Mexico's nationals. This is virtually a repetition of the contention advanced by Paraguay in the *Breard* case (*I.C.J. Reports 1998*, p. 256) and by Germany in the *LaGrand* case (*I.C.J. Reports 2001*, para. 10). This contention was not accepted by the Court in either case. Indeed, in paragraphs 125 and 128 (7) of the *LaGrand* Judgment, the Court stated that "by means of its own choosing" — a phrase on which I wish to place particular emphasis — "by means of its own choosing the US shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of rights set forth" in the Convention. Thus, this Court has stated that the remedy of

review and reconsideration is sufficient and this is precisely the remedy that the United States provides.

4.10. It follows that, in terms of the permissible object of a request for provisional measures, there is nothing that the Mexican request can achieve. In this respect, Mexico is pushing at an open door. It would be quite inappropriate for the Court to order the United States to take measures by way of "review and reconsideration" when it is already taking them or can take them in good time in any particular case.

4.11. It is important that there should be no misunderstanding on this point. The United States Agent has already assured the Court that the United States will continue to employ the measures that have been applied since the *LaGrand* case. These have achieved review and reconsideration in every case so far. There is no basis for believing they will not be effective in future cases. The fact that, when review and reconsideration are carried out, they may not result in the quashing of the trial proceedings or the commutation or deferment of the death penalty is, as the Court has accepted, not relevant. The important thing is that "review and reconsideration" will take place. As the Court said: "This obligation can be carried out in various ways. The choice of means must be left to the United States." (Para. 125.)

4.12. At this point, it may be helpful to the Court to recall the principal aspect of the decision of the Court in the *Nuclear Tests* case (*(Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253). In that case Australia sought from the Court (1) a declaration that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with the applicable principles of international law and (2) an order that France shall not carry out any further such tests. In July 1974 the Court held hearings on jurisdiction and admissibility. Both before and after the hearings, a number of statements were made by high French dignitaries, including the President, to the effect that atmospheric nuclear tests by France had ceased. These statements led the Court to conclude that the dispute had disappeared. The claim advanced by Australia thus no longer had any object. It followed that "any further finding would have no *raison d'être*" (*I.C.J. Reports 1974*, p. 271). After citing the *Northern Cameroons* case, the Court found that it "therefore sees no reason to allow the continuance of proceedings which it knows are bound to be

fruitless" (*ibid*.). Not fruitless in the sense that there would be nothing achieved, but that there was no purpose in continuing them.

4.13. The United States appreciates that the present case is not on all fours with the *Nuclear Tests* case, but an important parallel can be drawn between that case and the present one. In the *Nuclear Tests* case, France gave an assurance that met the requests of Australia. In the present case the United States has pointed out that the present state of the facts and of United States law and practice effectively ensure that none of the Mexicans currently under sentence of death will be executed unless there has been a review and reconsideration of the conviction and sentence that takes into account any failure to carry out the obligations of Article 36 of the Convention. True, the statements of the position in the law of the United States do not meet the standard of *restitutio in integrum* advanced by Mexico. But that is not the standard to be applied as the appropriate remedy for a breach of Article 36. The Court has made it quite clear in its Judgment in *LaGrand* that the appropriate standard is that the United States "by means of its own choosing, shall allow the review and reconsideration of the sentence by taking account of the violation of the rights set forth in the Convention".

4.14. The United States, as already explained, meets this standard by various methods, such as the appeals process and review in the context of the exercise of executive clemency. Even if the scope of the first of these methods is limited by the concept of "procedural default" the second is not. And, as must be repeated, the fulfilment of the requirement of "review and reconsideration" does not involve the quashing of every conviction and a recommencement of the trial process with the accused having the benefit of consular assistance. The function of "review and reconsideration" is not to convert an accused who, by reference to the standards normally applicable to accused persons possessing United States nationality, is objectively and verifiably guilty into a person who is innocent. "Review and reconsideration" which, it cannot be too strongly stressed, is the standard of implementation of Article 36 set by this Court, does not call for an automatic quashing of the conviction. As long as the process is fairly carried out and takes into consideration the fact that the accused did not have consular assistance, then there can be no objection if the conclusion is that the conviction and sentence can stand.

4.15. At this point, it is also important to recall the value attached by the Court to assurances given to it in the context specifically of a request for provisional measures. The *Great Belt* case has already been mentioned, there, the Court unanimously declined to indicate such measures in view of the fact that Denmark had provided assurances that no obstruction of the Channel would occur during the proceedings and that Finland had failed to provide evidence that the mere construction of the bridge would interfere with its rights[50].

4.16. I will now pass to a brief consideration of certain defects in the Mexican request.

4.17. First, the request is flawed by *exaggeration.* It characterizes the United States approach as being a "systematic violation" of Article 36 of the Convention, as if implying that the United States had made and adhered to a deliberate decision not to act in accordance with its legal obligations. This allegation was repeated by the distinguished Agent from Mexico this morning. No evidence is advanced to support his suggestion. On the contrary, this Court in the *LaGrand* case took note of the vast and detailed programme of the United States to ensure compliance with Article 36 of the Convention. Moreover, as a matter of fact, so I have been instructed, notifications have been regularly made to the Mexican authorities, so much so, that I am informed that they get so many notifications that they find it difficult to keep up with them.

4.18. Second, the request for interim measures — the second effect — is *premature*. The statements of fact in the request, and on which its validity must depend, demonstrate the lack of urgency. The tenses of the verbs used in the request themselves indicate the speculative and uncertain nature of the allegations: "Mr. Fierro *could* receive an execution date . . . Several other Mexican nationals *could* be scheduled for execution . . ."; note "could" not "will". Another example: "[s]*hould the Court deny* his [Mr. Fierro's] position, Texas prosecutors *would be expected* promptly to seek the setting of an execution date . . ."; again, "would be expected", not "will". A final example: "[h]ence, *depending on the US Supreme Court's disposition* of Mr. Fierro's petition, he *could* be subject to execution as early as February 14, 2003"; note "depending on", an uncertain predicate; again, "could be", not "will". The whole of the Mexican case is based on contingencies, not on certainties.

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[50]Case concerning *Passage through the Great Belt, Order of 29 July 1991*, paras. 27-38.

4.19. In contrast with the *Breard* and *LaGrand* cases, in none of the cases named in the request is there an *imminent* danger of execution. It follows from this that there is no *urgency* about the request. There is nothing in the Court's procedural system that requires anticipatory requests to be made at the very beginning of the proceedings in contemplation of situations that may or may not occur in the future. As Article 75 of the Court's Rules provides, a request for provisional measures may be made "at any time during the course of the proceedings". The Court has put upon this provision the gloss that such a request should be made "in good time" (*LaGrand, I.C.J. Reports 1999*, at p. 15, para. 19). But this does not mean that a request for provisional measures should be made before there is a genuinely perceived need for them. Moreover, as Article 75 (3) provides, "the rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts".

4.20. As hardly needs saying, the advancement of Mexico's interests in this case lies in the speed with which the merits of the case can be dealt with. The United States finds no indication in Mexico's application, or the speeches made today, of a wish or willingness to accelerate the proceedings by the rapid delivery of a memorial. For its part, however, the United States, having regard to what it sees as the relatively simple character of the main substantive issues when viewed in the light of the *LaGrand* decision, will be prepared to make every effort to reply promptly and appropriately to any Mexican written submission.

4.21. Third, the Court will have observed that out of the eight pages of Mexico's request, it devotes no less than two pages, that is to say one quarter, to an essay on United States law. This is apparently intended to show that the United States has the means to ensure compliance with any order of provisional measures that the Court may issue (paras. 22-30). There is no need for the United States to take the time of the Court to examine this essay. It is irrelevant, for reasons which Mexico itself gives. Mexico acknowledges that "the choice of the means" is left to the United States (Request, para. 30). This necessarily implies that the elaboration of the "means" that exist within the United States for achieving compliance with the Consular Convention is not a matter for the Court.

4.22. The fundamental defect in the Mexican position is reflected in its assertion, made as a conclusion to its essay on United States law, that the Court "should make explicit the required result," namely, that "No Mexican national should be executed in the US until the Court determines Mexico's claims on the merits" (*ibid.)*. This is quite misleading. The Court has already said in *LaGrand* that the obligation is not one of result, but one of means. The obligation of the United States is to "review and reconsider". It is not an obligation to ensure that execution is not carried out in any case that has been reviewed and reconsidered and in which the conclusion has been reached that the death penalty be maintained.

4.23. Mr. President and Members of the Court, I reach my concluding observation.

4.24. The procedure laid down in the Court's Rules under the heading of "Interim Protection" is one that calls for application with at least the same care and precision as any other aspect of the Court's procedures. It is a procedure designed to provide protection to an applicant confronted by a real and urgent danger to the rights and interests which the applicant asserts. It is not intended as a device to be employed by an applicant State hastily to draw immediate public attention to a complaint which is unlikely to withstand the Court's careful scrutiny at the merits stage. It is not a procedure that may be used for publicity purposes to gain some short-term political advantage, regardless of the weaknesses or the merits of the case. In the present case, the United States submits, that the Court cannot fail to recognize the weakness of Mexico's attempt to replace the clear indications in the *LaGrand* case of the standard of "review and reconsideration" by means of the choice of the United States, by something which is much further reaching and which the Court has already rejected. Mr. President and Members of the Court, I thank you.

Le PRESIDENT : Je vous remercie, sir Elihu. Ceci met un terme à la plaidoirie des Etats-Unis pour ce matin et met aussi un terme au premier tour de plaidoirie dans la présente affaire. Le deuxième tour de plaidoirie aura lieu cet après-midi, et commencera a 15 heures par les Etats-Unis du Mexique. Je vous remercie, la séance est levée.

La séance est levée à 13 h 10.

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