CR 2003/4

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 21 January 2003, at 6 p.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 18 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire* Avena et autres ressortissants 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 en faveur des ressortissants mexicains 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. La séance est ouverte pour le deuxième tour de plaidoirie des Etats-Unis d'Amérique et je donne immédiatement la parole à M. William Taft, conseiller juridique du département d'Etat et agent des Etats-Unis d'Amérique.

Mr. TAFT: Thank you, Mr. President. At the outset of our afternoon session I should say I have the pleasure of advising the Court that Ambassador Sobel, the Ambassador of the United States to the Kingdom of the Netherlands, is now with us.

Mr. President, Members of the Court, the United States will use this afternoon's session to respond to a number of points presented by Mexico this morning. Specifically, Ms Brown of the Department of State will respond to the points concerning the operation of the United States programme for complying with the Vienna Convention and the operation of the executive clemency process. Mr. Dan Collins of the United States Department of Justice will respond to the points concerning the several court cases that are referred to by Mexico in its presentation. Mr. Collins will be followed by Sir Elihu Lauterpacht, and I will conclude our presentation. I have a response to Judge Higgins's question which I will present at the beginning of my conclusion. Ms Brown should be called on next.

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

Ms BROWN: Thank you, Mr. President, Members of the Court. I would like this evening to address three points that were raised by the Government of Mexico. Some of them were touched on this morning and the other is in Mexico's rebuttal. First, I would like to address the allegation that Mexico has made that the United States is engaged in a systematic violation of Article 36. Second, I will address its allegation that we are violating our obligations under the Vienna Convention by providing review and reconsideration in the clemency process. And third, I will briefly address the question of urgency.

With respect to our compliance efforts, which were touched on by Mexico in an effort to provide a context for its Application, I must say we were particularly disappointed to see in Mexico's Application and then to hear again today its claim that we engage in systematic violations

of Article 36. This accusation is inaccurate and it should not serve as a premise for this Court's decision.

The Court will recall that in *LaGrand* we described in detail the efforts we have taken to improve compliance by the United States with the requirements of Article 36. We provided a detailed explanation of this programme to the Court, and we provided the Court with copies of training materials that we had developed specifically in response to our concern about death penalty cases that had been brought to our attention, including a brochure and a pocket card, that we were distributing to law enforcement officials throughout the United States. This programme is discussed in paragraphs 20 through 24 of the United States Counter-Memorial and in our attached exhibits. We noted in our presentation that it is an ongoing challenge. We have well over 700,000 law enforcement officers in the United States, they are in tens of thousands of different jurisdictions, and it is extremely difficult for them to distinguish always when they arrest somebody whether that person is an American citizen or not. In fact, you will recall that in the *LaGrand* case, the LaGrands themselves identified themselves as American citizens at the time of their arrest.

The Court acknowledged our programme in its decision in the *LaGrand* case, and it took note of our commitment to this programme, including in the *dispositif*, paragraph 128, subparagraph 6. The Court noted that our commitment should be considered sufficient to meet Germany's request for a general assurance of non-repetition. The Court also noted that it would not require an absolute guarantee from the United States of non-repetition, and that in fact no State could give such a guarantee. And I suggest that the Court in this respect recognize the nature of the obligation and the difficulty that all States party to the Vienna Convention have in complying with it.

You will recall that one aspect of our presentation related to the practice of states as a result of our state practice survey. Mr. President and Members of the Court, I can assure you that since *LaGrand* our commitment to improving compliance with the obligations of Article 36 has been undiminished, we continue to engage in a robust campaign to improve compliance throughout the United States. The programme is not only continuing but it has been expanded. The Department of State has created a new office specifically charged with implementing this programme, and that office is engaged in conducting educational programmes throughout the United States. It is

involved on a daily basis with state and federal law enforcement officials throughout the United States, answering questions and giving guidance. We have now distributed over 90,000 copies of our handbook and over 600,000 copies of our pocket card to government officials charged with compliance. In addition, in 2001, we produced a training video designed for use in law enforcement training that explains the role of consular officers and the importance of compliance with consular notification obligations. We have been distributing this to law enforcement agencies around the country, and we would be happy to provide the Court with a copy. Should you choose to review the videotape you will see in it not only American consular officers but consular officers of Mexico and Canada who co-operated with us in producing it.

We are also in the process of updating and expanding our handbook and plan a significant mailing campaign when the revised edition is completed. In fact, Mr. President, Members of the Court, Mexico itself has repeatedly in recent years, as Mr. Lauterpacht noted this morning, advised us that it is in fact seeing significant improvements in United States compliance. It has noted the irony that with our improvement has come an increase in its own burden to respond by providing consular assistance, and it is increasingly difficult for it to respond and to sort out the cases in which it is to provide consular assistance and those in which it cannot.

It has also acknowledged our programme in formal bilateral communiqués, and it has asked our officials who are involved in training to come and speak to consular officers about our efforts. And, as I just noted, it has participated at our request in our training programmes including the videotape I just mentioned, and it has asked for copies of our training material to use itself. Mexico's favourable reaction is consistent with what we are hearing from other consular officers throughout the United States: they are seeing measurable improvements in compliance due to our efforts.

In this context, the Court should consider the 54 cases Mexico has brought to its attention, in which it alleges there were violations of Article 36. I can tell you now, without having studied those cases closely, that we will disagree that there were violations in a number of them, based simply on Mexico's own representations. I would note that all of the arrests predate the *LaGrand* decision, and many predate our efforts to intensify our compliance efforts which began in the early 1990s.

I would also note that Mexico failed to acknowledge that there are literally thousands of Mexicans arrested in the United States each week, and there are hundreds of thousands of Mexicans living in the United States. Viewed in that context, I submit that Mexico has failed to show that there is even a likelihood that a Mexican arrested today in the United States will not be advised of his rights under Article 36. Accordingly, the notion that we are engaged in systematic violation of Article 36 is false and it is contradicted by Mexico's own support of, involvement in and assessment of our programme.

I would like now to turn to the issue of clemency. First, I would like to respond to some comments made by Ms Babcock and that were echoed by Mr. Donovan this afternoon and that was the suggestion that our position is inconsistent with the decision in the *LaGrand (Germany* v. *United States of America)* case because there was a clemency process available to the LaGrand brothers. There is no validity to that suggestion. The clemency process that occurred in the *LaGrand* case was fundamentally different from the clemency process as it has been used by the United States since the *LaGrand* decision in four respects. First, you will recall that in the *LaGrand* case there was no confirmed violation of Article 36, even I suggest, until after the second LaGrand brother was executed. It was between the execution of the first brother and the second brother that Germany first formed the view, as a result of events during the clemency hearing of Karl LaGrand, that there had been a violation. Until that time, as far as we can tell, it assumed that there was no violation because there had been a genuine understanding by the arresting officials that the LaGrands were Americans, and it was only at Karl LaGrand's clemency hearing that Germany acquired different information that made it believe that there was possibly a consular notification violation. The United States did not confirm the violation until long after the second execution because Germany did not raise the case with us until the last minute. So the second point of distinction is that the case, the violation, was not even brought to our attention before the executions and accordingly, the third distinction is that there was no intervention by the United States in the clemency hearing to request any kind of consideration of a violation. Finally and most significantly, of course, at the time of the LaGrand clemency hearings, we had no understanding that the Vienna Convention on Consular Relations required a remedy, a review and reconsideration. Thus, there is no way that one could say that the clemency process afforded in

LaGrand is the same as the clemency process as we are using it to provide review and reconsideration in light of the conviction and sentence, as the Court directed in *LaGrand*.

Second, again regarding the clemency process, I would like to note some anomalies and discrepancies in the views that have been expressed today by Mexico, in the context of addressing the adequacy of the clemency process for review and reconsideration. What we heard this morning was, from Mr. Donovan, an approving view of clemency in so far as he stated that in the clemency process our state governments have virtually unlimited powers to implement the international obligations of the United States. We also learn that Mexico views clemency favourably in so far as it resulted in the commutation of sentences for three Mexicans in Illinois. It viewed clemency favourably when the Oklahoma Board that considered Mr. Valdez's petition recommended commutation of sentence to the Governor of Oklahoma. But it viewed clemency unfavourably when in Valdez the Governor concluded after review and reconsideration that he would not grant commutation of sentence. Similarly, Mexico viewed clemency unfavourably when, in the Suarez case the Texas Board concluded after review and reconsideration that it would not recommend commutation of sentence. While Mexico to some extent has suggested that it would prefer to see review and reconsideration in the judicial process, we actually find the same patterns of inconsistency. Traditional review was welcomed by Mexico in the Valdez case because it led to a new sentencing hearing. But if you look closely at its descriptions of the 54 cases, you will see that in many of those cases — and I counted as many as 16, which I cited in footnotes to my morning presentation, if the Court wishes to look — in many of those cases Mexico, by its own admission is saying that the Court looked at the issue of the consular notification violation and concluded that there was no prejudice. In these cases Mexico is dissatisfied, even with judicial review. What is clear, when you look at their submission in this regard, is that the only outcome acceptable to Mexico is an obligation, an outcome of result. The only time they are satisfied with clemency is if it results in a commutation of sentence. The only time they are satisfied with a judicial review is if it results in a new trial or a new sentencing or, in their view, a decision to suppress evidence.

The third point I would like to make about the clemency process is that Mexico has wrongly disparaged it and United States efforts to use it to ensure review and reconsideration, although,

again, here they have been inconsistent in how they have described it. First they have suggested that we do not in fact seriously attempt to provide review and reconsideration in the clemency process. Ms Babcock and Mr. Donovan disparage the letters that the Legal Adviser sent, for example, to Governor Keating and to the Texas Parole Board. Their reaction is inconsistent with the reactions we had received at the time from the Mexican Government, which thanked us for sending the letters and acknowledged their value. The reaction also fails to appreciate how extraordinary, how truly extraordinary it is for an official of the federal executive branch to write a letter of that nature to an official of the executive branch of a state of the United States. These letters are unprecedented and extraordinary interventions on our behalf.

Ms Babcock and Mr. Donovan wrongly assume that because these letters make their requests respectfully that they are not also firm and effective. We suggest that these letters must be judged by their outcome and that there can be no doubt that they ensured and triggered a meaningful review and reconsideration by Oklahoma and by Texas to the clemency process.

We have also heard the clemency process disparaged calling it an act of grace, a process that involves total discretion, as if to suggest that it is arbitrary and capricious. We heard a suggestion that it is not a matter of right; there was some effort to distinguish it from what might be available through judicial review. But, in fact, in all states that are at issue here and in all states of the United States, to my knowledge, there is a right to petition for clemency. There is a process for petitioning for clemency. That process permits the submission of written materials, it permits requesting interviews, and in some cases hearings, and it permits the consideration of any information, any information submitted, regardless of the kinds of roles that would constrain a court and regardless of the kinds of obstacles to judicial review that a court must deal with.

As Mr. Donovan said, it is a process that provides virtually unlimited power to implement the international obligations of the United States. It is a process that requires the exercise of judgment. But I think it is significant and important to remember that review and reconsideration in the judicial process would also require the exercise of judgment. And I suggest that the real quarrel that Mexico has is with review and reconsideration and the exercise of judgment, because what it really wants is a change in the outcome or it will not be satisfied. It will not accept that review and reconsideration in any process can result in a decision to leave a sentence undisturbed.

We suggest that contrary to Mexico's presentation, Governor Ryan, who commuted the three sentences of the three Mexicans in Illinois, acted with great deliberation, but that Governor Keating, who decided not to commute the sentence of Mr. Valdez, also acted with great deliberation, and that the Texas board that decided not to recommend clemency for Mr. Suarez, also acted with great deliberation. There is absolutely no basis for this Court to conclude that the decisions made by Governor Keating or by the Texas board, were not reasonable decisions, and that were not the reasonable outcomes of review and reconsideration of the convictions and sentences in those cases in light of the violations.

As I said, if review and reconsideration is the remedy, as stated by this Court in *LaGrand*, someone must exercise judgment. Mexico's problem is with the way judgment is exercised, not with who exercises it. They want an obligation of result, they want a change in outcome and there are two fundamental problems with this in respect to the request for provisional measures.

First, as we have said, it is inconsistent with *LaGrand*, which Ambassador Székely has himself said, gave a definitive interpretation of the obligations imposed by Article 36. It is inconsistent because *LaGrand* requires review and reconsideration, it does not dictate the outcome of that review and reconsideration.

Secondly, because it is inconsistent with *LaGrand*, it necessarily seeks to preserve non-existent rights, and therefore a grant of provisional measures as requested by Mexico would not preserve its existing rights in this case. It would however, as Mr. Tessin said this morning, severely damage the rights of the United States.

Finally, I would like to just make a few points on urgency. Mexico, this afternoon, erroneously equated the circumstances in the *Breard* and *LaGrand* cases with the circumstances in this case, and attempted to suggest that we complain on the one hand that they are too late, and on the other hand, that they are too early, with their requests. In fact, however, this case is fundamentally different than the *Breard* case and the *LaGrand* case in two important respects.

First, in both of those prior cases, an execution date had been set and was known well in advance of the time that Paraguay and Germany came to this Court. And yet you will recall in the *LaGrand* case, Germany waited so long notwithstanding knowing the execution date, that there was not even time for this Court to have a hearing. In this case in contrast, there is no execution

date, and while Ms Babcock was happy to say a date "could" be set today, in fact, a date has not been set today, and there is no reason to think a date will be set in any time in the next foreseeable future, as I explained this morning. This is not to say that dates will not be set, but there is no date now and we cannot say when a date will be set.

But more significantly, at the time of *Breard* and *LaGrand*, this Court had not issued its decision with respect to remedies for violations of Article 36. Today, we have its decision; today we know the remedy is review and reconsideration. This must mean that it is not enough for Mexico to show the likelihood of an execution between now and when this case can be decided on the merits, it must also have to show a likelihood of an execution without review and reconsideration having been provided. And it must have to show that likelihood of an execution without review and reconsideration is imminent, but it has failed completely to do so. Thank you, Mr. President. I would now ask you to call upon my colleague, Mr. Collins.

The PRESIDENT: Thank you very much, Ms Brown. J'appelle maintenant à la barre M. Daniel Collins.

Mr. COLLINS: Mr. President, distinguished Members of the Court. Mexico claimed, in its presentation this morning, that there has been a total failure to provide remedies in the courts of the United States since the *LaGrand* decision was issued. In making this assertion, they relied principally on 22 reported decisions of the courts that have been issued since the *LaGrand* decision was handed down. An examination of these decisions is, I think, informative in evaluating the role of the courts in providing review and reconsideration, a question that touches upon both the strength of Mexico showing that the continued operation of the American justice system unimpeded will result in, as it claims, irreparable prejudice to its Vienna Convention rights, and also, to the question of urgency.

In evaluating these illustrative 22 decisions that they placed before the Court, it is important to keep in mind, first, some basic points about the framework established by this Court's decision in *LaGrand*. The Judgment in *LaGrand*, as has been noted, specifically stated that the review and reconsideration described therein "can be carried out in various ways" and that the "choice of means must be left to the United States".

Thus, the question of how to carry out that review within the context of a complex domestic criminal justice system with state levels, federal levels of *habeas corpus* review and then also the review provided by the mechanism of executive clemency; thus how that review was carried out in the context of that system was given by this Court to the United States Government and not specifically to one agency, the United States courts. Accordingly, any notion that *LaGrand* itself specifies that any particular domestic law has to be changed by the courts, is not sustained by an examination of the Court's decision.

On the contrary, this Court went specifically out of its way to emphasize that it did not find that any law of the United States, whether substantive or procedural in character is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention.

Now, as has been described in the submission of the United States, clemency has been one of the principal means by which the United States has sought to accomplish the review and reconsideration contemplated by this Court in *LaGrand*. It has elected to rely on the clemency process in the specific cases that have arisen since *LaGrand*, precisely because within the context of our domestic legal system, the grounds upon which clemency may be granted are relatively unlimited. The kinds of procedural bars or other applicable requirements that might hinder a court, do not have any force in the context of clemency, and therefore an unimpeded review of the effect of the violation may take place within the context of that procedural framework. It is thus the surest and most effective way to take account of the violation of the Vienna Convention rights.

The courts however do, and can have, some role in the process of review and consideration of Vienna Convention claims. It may depend upon the specific facts of the case and the specific substantive laws that will have to be applied by the Court. Now Mexico claimed that in these 22 cases, no remedies were provided by the courts and there has been a suggestion that the courts have simply continued to apply pre-*LaGrand* law. But in evaluating what the courts have actually done in these cases, two important points must first be kept in mind.

First, as I noted, because *LaGrand* does not require specific changes to be made to the domestic laws by the courts themselves, the courts continued application of established domestic law cannot by itself establish that review and reconsideration has not been afforded and that *LaGrand* has not been complied with in a particular case. If, because of the particular obstacles in

domestic law, the judicial process has not itself produced review and reconsideration, there remains the availability of such review in the clemency process and that is one of the reasons why we have put such emphasis on it.

But second, Mexico also incorrectly assumes that the judicial process cannot provide the requisite review and reconsideration unless it has provided a domestic law remedy that applies specifically to Vienna Convention claims *qua* Vienna Convention claims. But this fails to take into account the possibility that the ??? of the Vienna Convention violation might adequately be considered under the rubric of a different but overlapping domestic law doctrine. The *Valdez* case, which was described by my colleague Ms Brown at length this morning, is a perfect illustration of this. The court believed that it could not, because of a ruling of the United States Supreme Court, review specifically the Vienna Convention violation as a Vienna Convention violation. However, it then proceeded to use the very factual record, the very deficiencies identified by Mexico in the submissions made by it to afford on a different state law ground, the ground of ineffective assistance of counsel in the context of that case. By doing so, it redressed and afforded review and reconsideration of the substance of the claim. Now while this Court recognized that, as in *LaGrand*, review under the ineffective assistance doctrine may not always be sufficient to take into account the violation of Vienna Convention rights — I am referencing paragraph 91 of the decision — it may be the case, as in *Valdez*, that it will be sufficient for this purpose in some cases. But to contend, as Mexico, does that the Oklahoma court's decision granting a new sentencing hearing based on the submission made by Mexico, to contend that that does not provide review and reconsideration is simply contradicted by the decision itself.

Now turning specifically to the 22 cases, Mexico's claims that they failed to provide remedies so that they disregard *LaGrand*, is simply wrong. In these 22 cases — and again I am referring to the 22 cases that have reported decisions available on computerized research services, as they have indicated — in those cases, only two of them have relied exclusively on doctrines of procedural default in rejecting Vienna Convention claims. The remaining 20 cases do in fact reach the merits of particularly the Vienna Convention claims that were presented.

Now the nature of the claims that were presented fall into several classes. The first and largest class involving 12 of the 22 cases involve request to suppress post-arrest statements. The

defendant made a statement shortly after the arrests and sought to have the statement suppressed on the strength of an alleged violation of the Vienna Convention. Now it may be that in many of these cases, the narrowness of the claim presented — in other words, the request for a specific remedy of suppression — may reflect the lack of any other form of prejudice in the record and available to the defendant to present. And also, because statements are often taken relatively soon after the arrest, that also raises the question on if whether or not such cases, in the particular circumstances of any one of them, may actually involve the Vienna Convention violation.

However, those courts all concluded that the Vienna Convention does not afford a remedy for suppression of statements, and in doing so they have analysed at some length the relevant principles. One example among the 22 cases cited is the *Minjares-Alvarez* case and in there, the court made a number of points in analysing the substance of whether this particular remedy requested was available under the Vienna Convention. They indicated "there is no evidence that the Vienna Convention's drafters intended to remedy violations of Article 36 through the suppression of evidence" and then further down "moreover, there is no reason to think the drafters of the Vienna Convention had the uniquely American fifth and sixth amendment rights in mind given the fact that even the United States Supreme Court did not require the fifth and sixth amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." Indeed, no other country has interpreted the Vienna Convention to require suppression as a remedy for violation of Article 36. And then in a footnote, the court proceed to reference specifically this Court's decision on *LaGrand* and to indicate that in its view, nothing in *LaGrand* required the creation of a specific suppression remedy — which, again, is something of a novelty to American law — that that needed to be created in order to address and dispose of the particular claims presented.

A thirteenth case involved the request for the dismissal of the indictment: again, a somewhat extraordinary remedy to require that the criminal proceedings terminate because of the Vienna Convention violation and the Court in that case, the *Flores* case, rejected that contention. Now seven of the 22 cases specifically contain some reference or analysis on the question of prejudice. One example would be the *Passeano Flores* case. There the Court set forth the following test in order to analyse the Vienna Convention claim,

"to establish prejudice, a defendant must show:

(1) he or she did not know of the right to contact a consul or official;

(2) he or she would have taken advantage of the right that, had he or she known of it; and

(3) the contact would likely have resulted in assistance to the defendant".

A similar analysis is found in the *Lopez* case from the Iowa court also adding in a fourth element of whether or not the violation established had any effect on the actual outcome of the trial. In these seven cases, that specifically make some finding, or determination, on the question of prejudice, there can be no contention that that is not the view of the merits of the Vienna Convention claim. It is not the outcome that Mexico may have thought was appropriate on the facts of those cases, but nonetheless the courts have reached the merits of those claims in those seven case and have determined that there was simply a lack of prejudice shown from the alleged violation in the case.

An additional case, the *Ortiz Rodriguez* case, is one in which the court concluded that it would not and could not consider the issue because there was no indication in the record that Mexico had protested about the violation. And then, finally, there are two cases in which the ultimate judgment in the disposition of the matters was favourable to the defendant, not necessarily *on* the Vienna Convention claim but in one, the *Ruiz* case, there was a reversal with an order to allow the defendant to withdraw the plea and then, of course, there is the *Valdez* case, which we have already discussed at some length.

Now this shows, far from what they contended, which is that these 22 cases show a disregard and a systematic violation of the Vienna Convention. They show that the courts in many cases are addressing the merits of claims, and that in many cases defendants are raising them at the appropriate times and in the appropriate procedural devices.

Now, having referenced the fact that the courts — as illustrated by this group of cases — that the courts have in some cases been able to reach the merits of claims and have engaged in this kind of analysis about the types of remedies, what the prejudice analysis would have to establish in order to show that a Vienna Convention violation warranted relief on the specific facts of a case, it is important to still note that domestic law constraints can, and in many cases do, operate to limit the ability of courts to modify, for example, procedural default doctrines. So when a case, and

there was reference to such a case among the 54 in the presentation this morning, where Mexico is aware of the violation prior to the trial and nonetheless there is a failure to raise the claim at any point during the trial or in the first appeal, it may be the case that domestic law will attach a consequence to Mexico's failure and the defendant's failure to raise the claim at an appropriate time when the record could have been developed in the course of the trial. There are values at stake here.

But it is precisely because there may be these kinds of obstacles, and again it is not the concern of this Court to get into the nature of what they may be in any particular case, but it is precisely because of the complexity and nature of the judgments that must be made by courts in any particular case, that in carrying out the *LaGrand* decision we have placed such emphasis on the clemency process, because it is free of those constraints. And far from being the process that Mexico scorned at as begging for mercy and putting in a piece of paper begging for mercy, and the disparaging comments made to the executive branch of some of our constituent states, the Supreme Court of the United States has given a different characterization to the clemency process. They noted in the *Herera* case, *Herera* v. *Collins*, that the clemency power has ancient roots in the common law system and is an integral mechanism in the administration of our criminal laws. Indeed, the Court has explained that clemency "has provided the fail-safe in our criminal justice system". That is precisely what we have taken advantage of in implementing the *LaGrand* decision, and that is of course most dramatically illustrated by the relief granted in part based on the Vienna Convention violations by Governor Ryan within the last week.

Thank you, Mr. President, I would now ask that you call Sir Elihu Lauterpacht.

Le PRESIDENT : Je vous remercie, M. Collins. J'appelle maintenant à la barre sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Mr. President, Members of the Court, you will have observed that in describing the likely content of the contributions that counsel for the United States are making to this rebuttal, the distinguished Agent did not attribute any particular subject to me. This is because my lot covers a number of diverse points.

The first point for treatment is the question of the degree of certainty that is required in relation to the anticipated damage that is said to be irreparable. In discussing this question, it is essential clearly to identify the prospective danger. Are we talking of the certainty or likelihood of the danger of any execution? Or is it the danger of an execution that has not been the subject of revision and reconsideration, the remedial procedures for breach of Article 36 of the Vienna Convention?

In the submission of the United States it is the latter. The danger against which Mexico is entitled for protection is that of an execution of a person who has not had the benefit of review and reconsideration. Of this danger, Mexico has not shown even any likelihood. Each of the three persons whom Mexico has named as in imminent danger will have the benefit of certain review and reconsideration before he can possibly be executed. If the review and reconsideration process leads to a decision that the sentence should be commuted, then it will not be carried out. The United States has already given the Court an assurance that it will continue its existing practice in this regard. More than this, Mexico cannot ask. The decision in *LaGrand* does not mean that there can be no more executions, only that they can take place after appropriate procedures.

Next, I shall just say a word about one aspect of the Request that has not been the subject of any elaboration by Mexico. In paragraph *(d)*, Mexico asks that the Court require the United States to ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any decision this Court may render on the merits of the case.

It may be forgetfulness on my part, but I cannot presently recollect any case in which the Court has required a sovereign State to guarantee the due performance of its own obligations. Indeed, there are at the margins of my recollection, cases in which the Court has said precisely that it cannot be assumed that a State will not comply with its international legal obligations.

In this connection, one may recall in paragraph 120 of the *LaGrand* Judgment, the Court noted that Germany's fourth submission sought several assurances. One of them was an assurance that the United States would ensure in law and practice more effective exercise of the rights under Article 36. The Court noted that, unlike Germany's request for an assurance of non-repetition of consular violations, which did not specify the means by which non-repetition is to be assured, this

request went further because, "by referring to the law of the United States, it appear[ed] to require specific measures as a means of preventing recurrence". Those are the words of the Court.

The Court returned to this matter in paragraph 125 of its decision. The Court noted that

> "it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention . . [T]he violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such."

The Court did not adopt the German formulation as its own. While the Court agreed with Germany that in certain cases an apology would not suffice, it did not adopt Germany's request that the United States be required to "ensure in law and practice the effective exercise of the rights under Article 36". As just noted, the Court had its first concern that Germany's submissions went too far, and that this request for an assurance sought to have the Court prescribe specific means or measures to achieve an outcome. The Court clearly concluded that this would be inappropriate. Instead, the Court said that:

> "In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States."

It is important to note that this decision to leave the choice of means to the United States was not an act of generosity from the Court to the United States. On the contrary, it was a recognition by the Court that in the light of the differences in the circumstances of the various cases that might arise and the complexity of the means of direct appeal or recourse to *habeas corpus* or executive review in the United States criminal justice system, the United States was in the best position to identify appropriate means to secure review and reconsideration in all cases where it is called for. And, further, it was a recognition that the role of the Court is not to specify domestic law legal mechanisms but rather solely to describe the requirements of international law.

The next point, Mr. President, is a brief one. The Court will no doubt take note of the fact that Mexico did not deal at all with the question of the extension of the scope of its request from the protection of the 54 named Mexicans to that of all Mexican nationals, as set out in paragraph 31 *(a)*

and *(b)* of its request. Mexico has provided no justification at all for that extended aspect of its request. The United States submits that it should be completely rejected.

Another point with respect to the scope of the proposed provisional measures order concerns the nature of the obligation that the order might impose on the United States. Mexico itself has conceded to the Court today that it is seeking a required result and that such a required result is inconsistent with the Orders provided in the *Breard* and *LaGrand* decisions. Mexico wants the Court to order that there be no executions or execution dates set during the months or years this case proceeds before this Court. Regardless of what happens in the individual cases and regardless of whether review and reconsideration as described in *LaGrand* has been provided. That stands in marked contrast to the provisional measures the Court indicated in the *LaGrand* case, where the Court expressly disavowed the creation of an obligation of result. Similarly when Paraguay requested in the *Breard* case that all measures necessary to ensure that no execution would occur, the Court's Order stopped short of imposing such a burden. Instead it only stated that the United States should take all measures at its disposal to ensure the executions did not occur pending the Court's final decision. Mexico has not demonstrated the need for the Court to depart from this position.

Next just a short word about the question of the assurances in the *Great Belt* case with which Mr. Donovan took issue earlier today. As he described it to the Court, Denmark gave the Court assurances it would not do what Finland was seeking provisional measures for. That however, is not entirely accurate. Finland was seeking provisional measures on several grounds in that case. First, it sought to have Denmark not construct a bridge over the Great Belt on the grounds that it would harm its shipping rights and port privileges. It also asked that the Order extend to halting construction of the bridge itself on the grounds that the act of construction would reduce its ability to obtain contracts for its shipping industry and ports. Denmark's assurance, however, which the Court accepted, was limited to an undertaking that it would not complete construction of a bridge and thereby obstruct passage through the Great Belt during the pendency of the proceedings. It did not assure the Court that it would cease construction, nor did the Court ask it to. In finding that Denmark's assurance was sufficient, the Court noted that Finland had failed to produce evidence showing that its rights would be harmed by the mere act of construction.

The United States submits that the Court should take a similar view here in light of the assurances given by it in accordance with the decision in the *LaGrand* case.

I now reach, Mr. President, my last two points, both of them short.

First, I should recall that interim measures are an exceptional and peremptory procedure. They impinge heavily on the normal rights of the respondent State. The indication of provisional measures should, therefore, be approached with reserve. The burden of persuading the Court that such measures should be ordered rests upon the requesting State. It is not the respondent State that carries the burden of persuading the Court that such measures should not be ordered. Provisional measures should be ordered only when the applicant State has established that such measures are clearly necessary to cope with a precisely identified, real and immediately pressing need. Such measures should not be ordered when the respondent has made it clear, as has the United States in the present proceedings, that adequate measures are already in place in the United States legal system.

My last point, Mr. President. Secondly, I venture to suggest that today's proceedings conducted under such extreme pressure are not the proper context in which to engineer a major change in the terms of the carefully considered and expressed substantive Judgment of the Court in the *LaGrand* case. I respectfully submit that the terms of that decision relating to review and reconsideration should be upheld in their entirety.

In closing, Mr. President and Members of the Court, I cannot forebear from observing that this is the fiftieth year since I first had the honour of appearing before this Court, albeit in a relatively humble role. For a number of reasons, this Court has occupied a major place in my life. I hold it now in the same high regard as I did when I first crossed its threshold. Thank you, Mr. President and Members of the Court.

Le PRESIDENT : Je vous remercie, sir Elihu et je donne maintenant la parole à M. William Taft, agent des Etats-Unis d'Amérique.

Mr. TAFT: Thank you Mr. President.

The question put by Judge Higgins was as follows:

> "Under what circumstances will the Legal Adviser of the State Department notify an appellate court rather than later notify a clemency body of the obligations of the United States consequent upon an admitted violation of Article 36 of the Vienna Convention? Is the matter simply one of timing?"

The answer is that it is, in certain cases, a matter of timing. Where court proceedings are complete a clemency body is the only available forum. We also have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in *LaGrand*. *LaGrand* expressly left the choice of means of providing the review and reconsideration to the United States and for reasons that my colleague Mr. Collins has outlined, clemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles, the review and reconsideration this Court called for. That said, the Government would, of course, inform a court upon request, at any time, of the international legal obligations of the United States, and how in the particular posture of a given case they may or may not apply and whether and how they might be carried out under the applicable domestic law in that court. In saying this, however, I want to make sure that I leave the Court with no misimpression. A court may determine, as Mr. Collins stated, that domestic law principles still preclude an express judicial remedy for a failure of consular notification.

It is not usually our practice to communicate with the courts absent such a request for our views. Of course, Mexico and any other country concerned about one of its nationals in our criminal process may file a brief before the court as an *amicus curiae*, setting out its views of the international legal obligations of the United States and their impact on the case. If the court found this presentation persuasive, it could result in a request from the court for our views, to which we would, as I stated, respond.

Mr. President, Members of the Court, as presented in its original submission, Mexico's Request for provisional measures suggested a number of important issues that, in considering the Request, the Court would need to address. A few of these issues are: is there an urgent need for the Court to direct the United States to ensure that no executions of Mexican nationals take place when no executions are scheduled? Should the Court direct the United States to provide different remedies for violations of the Convention to Mexican nationals from what it is already providing them and other nationals, other foreign nationals, consistent with the Court's decision in *LaGrand*?

Should the Court apply a single inflexible rule to a large number of criminal cases about which little is known except that their circumstances and facts vary enormously?

The United States has shown the Court that it is providing review and reconsideration of convictions and sentences in cases where there have been violations of Article 36. It has assured the Court that this practice will continue. Mexico asks the Court to go beyond this procedure, which the Court has said the United States should carry out by means of its own choosing. Where will the Court be able to stop? Specifically, if the Court is to do more than direct the United States to provide an opportunity for review and reconsideration of the violation of Article 36, how can it avoid having to examine itself each case, as a court of criminal appeals would do, to determine whether the result of the review was justified? And is this a function that this Court can or should perform? And finally, should the Court indicate provisional measures to preserve rights that go beyond those created by the Convention as it was interpreted by the Court after the most careful consideration just 18 months ago?

Mexico's Request for provisional measures raised these question and more. So we would have expected its presentations here today to answer at least some of them, but it has not. Instead, Mexico has accused the United States of systematically violating the Vienna Convention and of making no effort to comply with its international legal obligations. Ms Brown has described the steps that we have taken in this regard. It is doubtful that any country has done more to fulfil its obligations under Article 36.

Second, Mexico has accused the United States of providing no remedy for violations of the Vienna Convention when they occur, except inadequate ones, as it puts it, in the process of executive clemency review. Again, Ms Brown has shown the way the clemency process works. When it results in commuting sentences, as in Illinois, Mexico appears to find the clemency process satisfactory enough. When it does not have that result, Mexico finds it inadequate. Mr. Donovan concedes, however, the plenary character of the clemency process, and we have shown how it works to provide review and reconsideration. There is no question here of the means swallowing the result, as Mr. Donovan puts it. The means have already produced different results in Illinois and in Texas. It is Mexico that wants a single result regardless of the means chosen for review and reconsideration.

Mexico has reviewed at length the provisional measures issued in the *Breard* and *LaGrand* cases, but does not give proper attention to the *LaGrand* Judgment. It assumes *LaGrand* established a right not to be executed, when actually it established that execution could only occur after review and reconsideration taking into account any violation of Article 36.

Mexico has said there is every reason to believe that Mexicans will be executed unless provisional measures are ordered. It does not show there is any reason to believe they will not have their cases reviewed and reconsidered, and this has not in fact occurred since *LaGrand*. Mexico has said review must be at law, but the Court has said it should be by means of the United States choosing. The United States puts emphasis on this phrase from the *LaGrand* Judgment, not because, as Mexico suggests it enables the United States to be capricious and arbitrary in carrying out its obligation, or somehow evade that obligation, or because it views this remedy as a matter of grace. The choice the Court confided to the United States gives it the ability to select the means best suited to a large number of cases with widely varying facts in different procedural postures. Mexico would replace this flexibility with a uniform rule.

Finally, Mexico has argued at length that the federal structure of the United States is irrelevant to the determination of a State's international obligations. Mr. President, with this argument, we agree. Yet, the issues raised by Mexico's Request remain. And even if Mexico does not consider them, the Court must do so. Regarding them, I submit:

No provisional measures prohibiting executions are necessary or appropriate where no executions have even been scheduled. The Court should not indicate provisional measures directing the United States to apply remedies for violations of the Convention different from those that the United States is already providing to all foreign nationals consistent with the Court's decision in *LaGrand*. The Court should not, through an indication of provisional measures, apply an inflexible rule to each of a large number of criminal cases about which little is known except that their circumstances and facts vary enormously. The Court should not become a general court of criminal appeals in all consular notification death penalty cases. And finally, the Court should not indicate provisional measures to preserve rights beyond those created by the Vienna Convention as interpreted by the Court just 18 months ago after its most careful consideration.

Before closing, let me repeat the assurance I provided the Court this morning. The United States thinks this assurance is important because, in our judgment, it preserves completely the rights Mexico has in any case where there has been a breach of Article 36. The United States has, consistent with the Court's Judgment in *LaGrand*, provided review and reconsideration of cases involving Article 36 violations and severe sentences. It has, as the Court expressed it, done this by means of its own choosing adapted to the circumstances and procedural posture of the individual cases. It will continue this practice.

In view of this assurance, the United States submits that no provisional measures should be indicated in this case. Mexico has invited the Court to fulfil itself the role that it assigned to the United States in *LaGrand*, but the United States is carrying out that role, as we have demonstrated today. Accordingly, the Court should decline Mexico's invitation.

Mr. President, Members of the Court, Samuel Johnson, the great lexicographer of the English language, admired very much the poet John Milton. Still, he wrote of Milton's great but long epic poem Paradise Lost, "few would have wished it longer". We have had a useful, but a long day. I will conclude.

The submission of the United States is as follows: that the Court reject the request of the United Mexican States for the indication of provisional measures of protection and not indicate any such measures.

On behalf of my colleagues, I thank the Court for its kind attention over the course of the day to our presentation, and for its consideration of our arguments. Thank you Mr. President.

Le PRESIDENT : Je vous remercie. Ceci met un terme au deuxième tour de plaidoirie des Etats-Unis d'Amérique, ainsi qu'à l'ensemble de cette procédure orale. Il me reste à remercier les représentants des deux Parties pour l'assistance qu'ils ont bien voulu fournir à la Cour par leurs observations orales. Je leur souhaite un heureux retour dans leurs pays respectifs, et conformément à la pratique, je prierai les agents de bien vouloir rester à la disposition de la Cour. Sous cette réserve, je déclare la procédure orale close.

La Cour rendra son ordonnance sur la demande en indication de mesures conservatoires le plus tôt possible. La date à laquelle cette ordonnance sera prononcée en séance publique sera communiquée aux agents des Parties en temps utile.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 19 h 10.

_____