International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Monday 15 December 2003, at 10 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le lundi 15 décembre 2003, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judge *ad hoc*	Sepúlveda
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
M. Sepúlveda, juge *ad hoc*

M. Couvreur, greffier

The Government of the United Mexican States is represented by:

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, Legal Adviser, Ministry of Foreign Affairs, Mexico City,

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

as Agents;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute, Florence,

Mr. Donald Francis Donovan, Esq., Attorney at Law, Debevoise & Plimpton, New York,

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

Mr. Carlos Bernal, Attorney at Law, Noriega y Escobedo, and Chairman of the Commission on International Law at the Mexican Bar Association, Mexico City,

Ms Katherine Birmingham Wilmore, Esq., Attorney at Law, Debevoise & Plimpton, London,

Mr. Dietmar Prager, Esq., Attorney at Law, Debevoise & Plimpton, New York,

Ms Socorro Flores Liera, Chief of Staff, Under-Secretariat for Global Affairs and Human Rights, Ministry of Foreign Affairs, Mexico City,

Mr. Víctor Manuel Uribe Aviña, Head of the International Litigation Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

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Ms Maria del Refugio González Domínguez, Chief, Legal Co-ordination Unit, Ministry of Foreign Affairs, Mexico City,

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Ms Natalie Klein, Attorney at Law, Debevoise & Plimpton, New York,

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Mr. Thomas Bollyky, Esq., Attorney at Law, Debevoise & Plimpton, New York,

Ms Cristina Hoss, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg,

Mr. Mark Warren, International Law Researcher, Ottawa,

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

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

Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,

Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,

Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,

Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas),

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Ms Sara Criscitelli, Member of the Bar of the State of New York,

Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,

Mr. Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Mr. Steven Hill, Attorney-Adviser for Economic and Business 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,

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Ms Barbara Barrett-Spencer, United States Department of State,

Ms Marianne Hata, United States Department of State,

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Mme Catherine W. Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

M. D. Stephen Mathias, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

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Mme Marianne Hata, département d'Etat des Etats-Unis,

Ms Cecile Jouglet, United States Embassy, Paris,

Ms Joanne Nelligan, United States Department of State,

Ms Laura Romains, United States Embassy, The Hague,

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Mme Cecile Jouglet, ambassade des Etats-Unis à Paris,

Mme Joanne Nelligan, département d'Etat des Etats-Unis,

Mme Laura Romains, ambassade des Etats-Unis à La Haye,

comme personnel administratif.

The PRESIDENT: Please be seated.

The Court meets today, pursuant to Article 43 and the following articles of its Statute, to hear the oral arguments of the Parties on the merits in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*.

Before recalling the principal phases of the present proceedings, it is necessary to complete the composition of the Court for the purposes of this case. First, Judge Simma recuses himself from taking part in the decision of the present case, pursuant to Article 24, paragraph 1, of the Statute of the Court. Second, since the Court does not include upon the Bench a judge of the nationality of Mexico, that Party has availed itself of its right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*, and it has chosen Mr. Bernardo Sepúlveda. Article 20 of the Statute of the Court provides that "every Member of the Court shall, before taking part in his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". By Article 31, paragraph 6, of the Statute this provision applies to judges *ad hoc*. Article 8, paragraph 2, of the Rules of Court provides that judges *ad hoc* shall make their declaration at a public sitting in the case in which they are participating. Therefore, I shall now say a few words about Mr. Sepúlveda, and then invite him to make his solemn declaration.

Mr. Bernardo Sepúlveda, of Mexican nationality, holds a law degree *magna cum laude* from the Faculty of Law at the Universidad Nacional Autónoma de México, as well as a Master's Degree and a Diploma in International Law from Cambridge University; he is also Doctor *honoris causa* from the University of San Diego and Leningrad, and Honorary Fellow of Queen's College at Cambridge. Mr. Sepúlveda has held numerous offices in the Mexican Government, being most notably Secretary of Foreign Relations of Mexico from 1982 to 1988 and Ambassador of Mexico to the United States of America and to the United Kingdom of Great Britain and Northern Ireland. As Foreign Secretary, Mr. Sepúlveda chaired, together with the United States Secretary of State, the Binational Commission, an intergovernmental organization dealing with all matters of interest in the relationship between Mexico and the United States; he participated in the Central American peace process and in the creation of such important international bodies as the Contadora Group and the Group of Eight (today known as the Rio Group). Mr. Sepúlveda also

took part, with Mexican delegations, in various United Nations conferences, and is a member of the United Nations International Law Commission since 1996. He has combined his career in the service of the Mexican Government with numerous academic activities, including teaching functions (for instance as a Professor of International Law and International Organizations at El Colegio de México) and a considerable number of publications. Mr. Sepúlveda has been honoured with numerous orders, decorations and medals, including the *Príncipe de Asturias* Prize, which he received in 1984 from King Juan Carlos of Spain, and the *Simón Bolivar* Prize, awarded by Unesco.

It is a matter of satisfaction for the Court that Mexico's choice has fallen on such an eminent individual. I shall now invite Mr. Sepúlveda to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Mr. Sepúlveda.

Mr. SEPÚLVEDA: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT: Please be seated. The Court takes note of the solemn declaration made by Mr. Sepúlveda and I declare him duly installed as judge *ad hoc* in the *Avena and Other Mexican Nationals* case.

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On 9 January 2003, the United Mexican States filed in the Registry of the Court an Application instituting proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 allegedly committed by the United States.

In its Application, Mexico based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.

On 9 January 2003, the day on which the Application was filed, the Mexican Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By an Order of 5 February 2003, the Court indicated certain provisional measures. It further decided that, "until the Court has rendered its final judgment, it shall remain seised of the matters" which formed the subject of that Order.

By an Order of 5 February 2003, the Court, taking account of the views of the Parties, fixed 6 June 2003 and 6 October 2003, respectively, as the time-limits for the filing of a Memorial by Mexico and of a Counter-Memorial by the United States. These pleadings were duly filed, within the time limits, as extended, or as subsequently validated.

In a letter of 14 October 2003, the Agent of Mexico expressed his Government's wish to amend its submissions in order to include therein the cases of two additional Mexican nationals who had been sentenced to death, after the filing of Mexico's Memorial, as a result of criminal proceedings in which, according to Mexico, the United States had failed to comply with its obligations under Article 36 of the Vienna Convention. In a letter of 2 November 2003, the Agent of the United States informed the Court that his Government objected to Mexico's request to amend its submissions, on the grounds that the request was late, that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

In a letter received in the Registry on 28 November 2003, Mexico responded to the United States objection and further amended its submissions to withdraw its request for relief in the cases of two Mexican nationals, mentioned in the Memorial, Mr. Enrique Zambrano Garibi and Pedro Hernández Alberto.

On 9 December 2003, the Registrar informed Mexico and the United States that, in order to ensure the procedural equality of the Parties, the Court had decided not to authorize the amendment of Mexico's submissions to add two further cases. He also informed the Parties that the Court had taken note that the United States had made no objection to the withdrawal by Mexico of its request for relief of two other Mexican nationals mentioned in the Memorial.

On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 56 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these new documents filed by Mexico and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. Since no objection was made to the production of the new documents, counsel for the Parties will be able to refer to them during the present hearings, with the exception of any that refer to the two additional cases that Mexico sought to include by amendment of its submissions. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents submitted by Mexico, together with a number of documents in support of those comments.

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Having ascertained the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, that copies of the pleadings and documents annexed will be made accessible to the public on the opening of the oral proceedings on the merits. Further, in accordance with the Court's practice, these pleadings without their annexes will from today be put on the Court's Internet site.

I note the presence at the hearing of the Agents, Counsel and Advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the oral hearings will comprise a first and a second round of oral argument. Each Party will have two full sessions of three hours for the first round and one session of two hours for the second round.

Mexico will present its first round of oral arguments on its claims this morning and this afternoon at 3 p.m. The United States will present its first round of oral arguments tomorrow morning at 10 a.m. and tomorrow afternoon at 3 p.m. Mexico will then present its oral reply on Thursday 18 December at 10 a.m. For its part, the United States will present its oral reply on Friday 19 December at 3 p.m.

Thus, I shall now give the floor to His Excellency Mr. Juan Manuel Gómez-Robledo, Agent of the United Mexican States.

M. GÓMEZ-ROBLEDO : Merci Monsieur le président.

I. PRESENTATION OF THE CASE

1. Monsieur le président, Madame et Messieurs les Membres de la Cour, je comparais devant la Cour, au nom du Mexique, dans un seul but : «le maintien de la justice et du respect des obligations nées des traités et autres sources du droit international», tel que nous nous sommes engagés à le faire lors de l'adoption de la Charte des Nations Unies.

2. Ceci résume bien le motif profond de notre démarche, lorsque nous prîmes, après avoir épuisé tous les recours de la diplomatie, la décision d'introduire une requête d'instance contre les Etats-Unis d'Amérique, dans le respect du principe du règlement pacifique des différends.

3. Monsieur le président, quelques données, d'abord, concernant l'intensité, mais aussi l'excellence, de nos liens à tous les niveaux avec les Etats-Unis : 90 % du commerce extérieur du Mexique se fait avec les Etats-Unis; on estime à trois cents millions le nombre de fois que la frontière de plus de 3000 kilomètres est croisée chaque année dans un sens comme dans l'autre; plus de huit millions de ressortissants mexicains vivent aux Etats-Unis qui, au prix d'un dur labeur, satisfont une demande de main d'oeuvre non couverte par le marché local, et parviennent ainsi à envoyer près de 10 milliards de dollars à leurs familles. Le Mexique et les Etats-Unis sont membres fondateurs, et collaborent étroitement, au sein des organisations internationales qui se sont créées depuis 1945, non seulement l'Organisation des Nations Unies et sa famille, mais aussi l'Organisation des Etats américains et l'ensemble du système interaméricain, ainsi que l'Organisation de coopération et de développement économique, pour ne citer que celles-là. Mon bureau recense deux cent huit traités bilatéraux en vigueur entre les deux pays, dont bien évidemment le traité portant création, avec le Canada, de la zone de libre échange d'Amérique du Nord : c'est dire, Monsieur le président, si le destin des deux peuples est lié à jamais…

4. Or, un tel niveau d'échanges ne va pas sans que nous rencontrions, de façon régulière, des difficultés qui se traduisent, parfois, par des différends juridiques. La plupart du temps, les mécanismes de consultation en place sont suffisamment efficaces pour que l'on s'abstienne d'avoir

recours au règlement judiciaire. Cependant, en matière commerciale ou d'investissements, par exemple, nous sommes souvent obligés de nous retrouver devant les instances d'arbitrage compétentes.

5. Mais, pourquoi sommes-nous venus devant la Cour ?

6. La réponse est simple. Car nous sommes en présence d'intérêts juridiques de la plus haute importance et en raison de la totale confiance de mon pays en la primauté du droit et en votre rôle en tant que garants du droit international. Il suffit de rappeler à cet égard que le Mexique reconnaît depuis 1947 la compétence obligatoire de la Cour.

7. Et c'est précisément ce dont il s'agit ici, Monsieur le président : le Mexique et les Etats-Unis ont un différend juridique concernant l'interprétation et l'application de l'article 36 de la convention de Vienne sur les relations consulaires.

8. Il convient, à présent, me semble-t-il, de situer cette affaire dans son véritable contexte, de façon à dissiper quelque doute que la Cour pourrait avoir au sujet des intentions du Mexique, dont la bonne foi a été mise en cause dans le contre-mémoire des Etats-Unis.

9. Est-il besoin de dire, encore une fois, que rien n'est plus éloigné de nos prétentions que la Cour se départisse du rôle qui est le sien ?

10. Doit-on répéter que nous ne sommes pas en train d'inciter la Cour à s'immiscer dans le système de justice pénale des Etats-Unis et à agir en tant que cour d'appel ou de cassation ?

11. Faut-il, enfin, redire que nous ne voulons pas porter atteinte aux droits souverains des Etats-Unis ?

12. De toute évidence, les Etats-Unis, comme le Mexique, ont consenti souverainement aux obligations prévues à l'article 36 de la convention de Vienne et sont tenus de les respecter.

13. Pour tout dire, ce n'est pas le Mexique qui pourrait ignorer les limites infranchissables de la souveraineté des Etats. L'histoire du Mexique et les nombreuses contributions de mon pays au développement du droit international sont suffisamment connues pour que j'aie besoin d'insister sur ce point.

14. Pourtant, les Etats-Unis veulent tout réduire à cet argument, argument qui n'a pas été retenu par la Cour dans les affaires précédentes et qui ne le sera pas davantage en l'espèce. Ce sont

seulement des questions de droit international qui nous divisent et sur lesquelles nous demandons à la Cour de céans de se prononcer.

15. Nous n'allons pas jusqu'à prétendre que la Cour choisisse, parmi la variété des moyens de droit, je dis bien de droit, dont disposent les Etats-Unis, lequel est le plus approprié pour réparer les violations de l'article 36 de la convention de Vienne.

16. Nous voulons assurer, seulement, que le moyen de droit choisi ait, dans le respect du droit interne où il sera invoqué, l'effet utile que l'on est en droit d'attendre. Il faudra en outre s'assurer qu'il n'y soit pas mis d'obstacles qui placeraient le respect du droit interne au dessus du respect du droit international.

17. La Cour, dans l'affaire *Yerodia*, a bien dit que la Belgique «doit, par les moyens de son choix, mettre à néant le mandat d'arrêt…» à l'encontre du ministre des affaires étrangères du Congo, sans pour autant prescrire les moyens de droit interne pour y parvenir[1]. Dans l'affaire *LaGrand*, la Cour a établi que «Cette obligation peut être mise en œuvre de diverses façons. Le choix des moyens doit revenir aux Etats-Unis.» On ne saurait demander que la Cour s'écarte d'un tel raisonnement[2]. Cependant, ces moyens doivent permettre «la pleine réalisation des fins pour lesquelles sont accordés ces droits en vertu du présent article»[3] (c'est-à-dire l'article 36).

18. En somme, choix des moyens certes, mais obligation d'atteindre un résultat fondé en droit.

19. Cette affaire, Monsieur le président, ne porte pas non plus sur la question de l'imposition de la peine de mort *per se*, aux Etats-Unis ou ailleurs. Le Mexique n'oserait pas mettre en cause le droit qu'ont les Etats-Unis d'appliquer la peine de mort. Le Mexique reconnaît aussi que ses cinquante-deux ressortissants ont été condamnés pour la commission de crimes abominables et nous n'oublions ni la souffrance des victimes, ni le droit qu'ont les Etats-Unis à ce que justice soit faite.

20. Nous ne demandons pas plus que les autorités compétentes rendent la liberté aux cinquante-deux ressortissants mexicains incarcérés.

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[1] *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), C.I.J. Recueil 2001, ordonnance du 17 juin 2001*, par. 78 3).

[2] *LaGrand*, par. 125.

[3] *LaGrand*, par. 91.

21. Cela étant dit, il n'en demeure pas moins que la Cour a fait une distinction de taille lorsqu'il s'agit de «cas où les intéressés auraient fait l'objet d'une détention prolongée ou été condamnés à des peines sévères», et dans cette hypothèse, «des excuses ne suffiraient pas»[4].

22. Si nous nous gardons bien de dire quoi que ce soit sur la peine de mort en tant que telle, nous estimons qu'en revanche, lorsqu'un pays l'impose, il doit le faire dans le respect le plus rigoureux des garanties de régularité de la procédure, y compris celles qui relèvent du droit international.

23. Nous sommes convaincus que la jurisprudence consacrée dans l'arrêt *LaGrand* trace la voie romaine qui doit nous mener vers une interprétation définitive des obligations qui découlent de la convention de Vienne dans le monde d'aujourd'hui. Ce monde n'est certainement plus celui où la libre circulation des personnes était limitée par un nombre important de facteurs.

24. Si ce contentieux se situe dans le sillage de celui qui opposa l'Allemagne aux Etats-Unis et fait appel, certes, à l'application des mêmes principes de droit et des raisonnements que la Cour entreprit en pareille occasion, il repose néanmoins sur un fait majeur qui rend l'affaire *Avena*, sinon substantiellement différente, en tout cas à même de décider du sort de cinquante-deux personnes aujourd'hui et d'un nombre incalculable à l'avenir.

25. En effet, alors que Walter LaGrand n'était plus de ce monde quand la Cour examina la requête allemande au fond, les cinquante-deux ressortissants mexicains qui font l'objet de cette espèce sont toujours en vie et peuvent encore bénéficier d'une réparation en droit dont les frères LaGrand furent empêchés de se prévaloir.

26. La Cour a cette fois la possibilité de résoudre des questions de droit international qui ne pouvaient plus matériellement se poser dans les affaires *Breard* et *LaGrand*, mais qui sont au cœur de cette instance.

27. Monsieur le président, nous regrettons que les Etats-Unis se soient donné tant de mal à vouloir déformer, dénaturer, dévier, comme cela ressort du contre-mémoire, l'ensemble des faits qui sont à l'origine de notre requête. Ces tactiques visent seulement à vous troubler, mais nous savons que la Cour saura distinguer le vrai du faux, et faire la part des choses.

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[4] *LaGrand*, par. 125.

28. Les droits du Mexique et ceux de ses ressortissants ont été violés : il s'ensuit que les uns et les autres doivent être rétablis. Oui, c'est bien parce qu'ici, il est encore possible de réparer «intégralement», comme l'exige l'article 31 des articles sur la responsabilité des Etats, les violations des obligations qu'avaient les Etats-Unis vis-à-vis du Mexique et de ses ressortissants que nous demandons la *restitutio in integrum*.

29. Qu'il soit clair, néanmoins, que le Mexique renonce à demander une quelconque indemnisation matérielle comme il serait en droit de le faire, car celle-ci serait, manifestement inadéquate au vu des circonstances de l'espèce. Ce sont des jugements équitables que nous voulons : l'argent ne pourrait jamais réparer de pareilles injustices !

30. Sans prétendre, à présent, faire une analyse du droit de la responsabilité internationale qui sera traitée par la suite par le professeur Dupuy, je voudrais rappeler à la Cour que ce que nous lui demandons plonge ses racines dans les institutions du droit romain et n'a, donc, rien d'inédit. En effet, l'*in integrum restitutio* constituait un moyen de droit destiné à annuler un acte juridique, qui rendait compte de l'existence d'une situation d'inégalité de fait entre personnes égales devant la loi[5].

31. Mais au-delà de la réparation que nous sommes en droit d'exiger, le Mexique a pleinement fourni la preuve que les programmes de formation des autorités fédérales et locales dont les Etats-Unis nous vantent le mérite dans leur contre-mémoire, comme ils l'avaient d'ailleurs fait devant cette Cour dans les affaires *Breard* et *LaGrand*, sont au mieux appliqués de manière hasardeuse, au petit bonheur, et n'ont pas assuré un changement substantiel du respect de la convention de Vienne aux Etats-Unis.

32. A cet égard, la Cour est appelée à se demander et à apprécier si les mesures prises jusqu'à présent par les Etats-Unis, peuvent aujourd'hui, à la lumière des faits incontestables de violations continues de la part du défendeur, «être considérées comme satisfaisant à la demande [de la République fédérale d'Allemagne] visant à obtenir une assurance générale de non-répétition»[6]. De toute évidence, non Monsieur le président.

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[5] Sohm, Rudolf, Instituciones de Derecho Privado Romano, Historia y Sistema, Antigua. Librería Robredo, Mexico, 1957, p. 409 et suiv.

[6] *LaGrand*, par. 124.

33. A ce stade, je voudrais préciser que le Mexique partage entièrement le commentaire de la Commission du droit international en ce qui concerne la nature des assurances et des garanties de non-répétition, en ce qu'elles doivent être considérées «comme un aspect du maintien et du rétablissement de la relation juridique à laquelle la violation a porté atteinte» où «l'accent est mis sur le respect futur d'une obligation et non pas sur sa violation passée»[7].

34. Monsieur le président, le Mexique n'a pas introduit cette instance sans avoir eu recours au préalable à d'autres juridictions. Dans un premier temps, nous avons cherché dans l'avis consultatif 16/99, rendu par la Cour interaméricaine des droits de l'homme, une interprétation relevant du droit international général, qui aurait dû modifier le comportement des Etats-Unis. Cet avis auquel les Etats-Unis n'accordent, dans leur contre-mémoire, qu'une indifférence condescendante, n'en a pas moins reçu le soutien de nombreux Etats et constitue le fondement d'une pratique internationale qui ne cesse de croître, comme vous le verrez par la suite.

35. Mais heureusement, il ne s'agit pas ici d'une question de foi. La Cour interaméricaine, tout comme sa devancière européenne, existe et, même si elle a une compétence spécialisée, elle applique dans une vaste partie du monde le droit international général nécessaire à la sauvegarde des droits dont elle détient la tutelle.

36. Du reste, même si les Etats-Unis s'intéressent peu ou pas à la jurisprudence de la Cour interaméricaine, l'historique précis, contenu dans notre mémoire, de nos démarches diplomatiques et le fait, Monsieur le président, que quatre ressortissants mexicains aient été exécutés au cours des dernières années aux Etats-Unis, en violation des droits prévus à l'article 36 de la convention de Vienne, en dit long sur la détermination du Mexique à résoudre ce différend par tous les moyens possibles.

37. Il a fallu se rendre à l'évidence. Seul le recours à cette haute Cour pouvait encore nous donner l'espoir que le droit international aurait, finalement, droit de cité.

38. La Cour fait face à une responsabilité dont la gravité ne peut être dissimulée. Autant pour le sort des cinquante-deux ressortissants mexicains visés dans notre requête et dans notre mémoire, que pour les millions de personnes qui, tous les jours, traversent les frontières et se

[7] Commission du droit international, rapport de sa cinquante-troisième session, A/56/10, p. 238.

rendent dans un pays qui n'est pas le leur, il est indispensable de savoir, en définitive, quelle est la portée des droits reconnus par l'article 36 et le contenu précis de la réparation qui découle de leur violation, et dont l'arrêt *LaGrand* est l'indéniable précurseur.

39. Les Etats-Unis prétendent que les droits individuels contenus dans l'article 36 de la convention de Vienne ne font pas partie des garanties de la procédure pénale[8]. A cet égard, la Cour interaméricaine a dit que les garanties de la procédure ne sont pas limitées aux recours judiciaires *stricto sensu*, mais «à l'ensemble des règles qui doivent être respectées au cours de la procédure, afin de faire en sorte que les personnes soient en état de défendre de manière adéquate leurs droits face à un quelconque agissement de l'Etat qui pourrait les affecter»[9].

40. Et peu importe, en fin de compte, l'adjectif qualificatif des droits que consacre l'article 36 de la convention de Vienne, lors même que leur contenu et leur respect revêtent un rôle central pour garantir aux individus l'accès à la justice.

41. L'interprétation que le Mexique demande à la Cour ne devrait pas écarter d'emblée la pratique ultérieure des Etats dans l'application de la convention de Vienne, de même que toute règle pertinente du droit international.

42. C'est donc, bel et bien, Monsieur le président, à une interprétation *pro homine* à laquelle il faut avoir recours pour bien saisir toute la portée des droits que consacre l'article 36 de la convention de Vienne.

43. Monsieur le président, j'en viens, maintenant, à dire quelques mots des mesures conservatoires que la Cour a indiquées dans son ordonnance du 5 février dernier.

44. Autant nous regrettons les violations de la part des Etats-Unis aux obligations qui découlent de l'article 36, autant nous constatons, avec satisfaction, que les Etats-Unis ont, jusqu'à ce jour, respecté l'ordonnance de la Cour. On a ainsi évité un dommage irréparable, en l'occurrence la perte de la vie des individus qui ont bénéficié de ces mesures.

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[8] Contre-mémoire, par. 6.79-6.83.

[9] Cour interaméricaine des droits de l'homme, *Affaire du tribunal constitutionnel, fond, arrêt du 31 janvier 2001*, par. 69, traduction non officielle.

45. Il s'agit là bien sûr d'un heureux développement pour le droit international, et pour cette Cour, surtout depuis qu'elle a levé le voile, dans l'arrêt *LaGrand*, sur le caractère obligatoire des mesures conservatoires.

46. Il nous semble que tous ont leur part de mérite dans ce résultat positif : la Cour, en premier lieu, car elle a bien voulu les indiquer; les Etats-Unis, du fait de leur respect; et, le Mexique car il a su comprendre «qu'une bonne administration de la justice exige qu'une demande en indication de mesures conservatoires fondée sur l'article 73 du Règlement de la Cour soit présentée en temps utile»[10].

47. On peut, par conséquent, avoir confiance en ce que les Parties au litige, respecteront votre décision dans son intégralité, ainsi que les autres parties à la convention de Vienne, dès lors «qu'une interprétation *a contrario*», pour reprendre la formule du président Gilbert Guillaume, irait à l'encontre de la logique la plus élémentaire[11].

48. Monsieur le président, je voudrais maintenant brosser le tableau des arguments que le Mexique développera aujourd'hui. Je dois, auparavant, faire allusion à quelques aspects de procédure.

49. Le Mexique a été surpris de constater que les Etats-Unis ont soulevé, et ce pour la première fois dans leur contre-mémoire, certaines exceptions à la compétence de la Cour pour connaître de cette affaire, ainsi qu'à la recevabilité de nos demandes.

50. Nul n'ignore que l'article 79, paragraphe 1, du Règlement de la Cour, qui fit l'objet d'une modification récente, prévoit les délais stricts dans lesquels doivent être soulevées ces exceptions. Ainsi, l'article cité dispose que les exceptions préliminaires doivent être «présentées par écrit dès que possible, et au plus tard trois mois après le dépôt du mémoire». Par voie de conséquence, si les Etats-Unis avaient voulu soulever des exceptions à la compétence de la Cour et à la recevabilité de nos demandes, ils auraient dû le faire le 20 septembre 2003 au plus tard, et non plus dans leur contre-mémoire, lequel a été déposé quarante-quatre jours après la date citée.

51. Le Mexique et les Etats-Unis n'ont pas donné leur assentiment à une exception aux délais prescrits dans l'article 79, paragraphe 1. En particulier, le Mexique et les Etats-Unis n'ont

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[10] *LaGrand, mesures conservatoires*, par. 19.

[11] *LaGrand*, déclaration du président Guillaume jointe à l'arrêt au fond.

pas donné leur accord pour que les exceptions préliminaires puissent être entendues et tranchées «lors de l'examen au fond», comme le paragraphe 10 de ce même article 79 aurait permis de le faire. En l'absence d'un accord explicite des Parties, le délai de trois mois de l'article 79 s'applique dans toute sa rigueur.

52. Le Mexique demande donc à la Cour qu'elle rejette ces exceptions préliminaires, au motif qu'elles ont été soulevées hors des délais prescrits dans le Règlement de la Cour.

53. Je vais cependant passer en revue, bien que brièvement, chacune des exceptions sur la compétence.

54. En premier lieu, les Etats-Unis fournissent un compte rendu des différentes étapes de la procédure pénale pour attaquer la première conclusion du Mexique, en prétendant que l'article 36 ne crée pas d'obligations par rapport à ces procédures. Cependant, comme vous pourrez l'apprécier par la suite, l'interprétation et l'application de l'article 36, dans le contexte de la procédure pénale, est justement ce dont il s'agit en la présente instance.

55. Deuxièmement, les Etats-Unis font objection à la quatrième conclusion du Mexique, «dans la mesure où» cette dernière ne fournirait pas la preuve qu'il existe un différend relatif à l'interprétation et à l'application de la convention de Vienne. Cette objection ne spécifie pas comment notre conclusion aurait-elle manqué de remplir cette condition. Mais, en tout état de cause, la quatrième conclusion du Mexique est explicitement liée aux demandes de constat sur lesquelles les Parties sont divisées et qui constituent toute la matière de cette instance. La quatrième conclusion du Mexique tombe bien strictement dans le domaine de compétence de cette Cour.

56. Troisièmement, les Etats-Unis font valoir que la conclusion du Mexique quant aux réparations obligerait la Cour à réécrire le droit pénal interne, ce qui ferait que la Cour assume une fonction de «cour d'appel en matière interne». Toutefois, les Etats-Unis disent à la Cour, dans leur contre-mémoire, et «cela va de soi», que les Etats-Unis sont responsables, au regard du droit international, de leurs agissements et de ceux de leurs parties constitutives. Ils reconnaissent même que la Cour a toute autorité pour interpréter la convention de Vienne et pour dire quelle réparation est requise en droit international. Ces deux éléments sont tout ce dont la Cour a besoin pour rejeter les exceptions des Etats-Unis concernant les demandes en réparation faites par le Mexique.

57. Enfin, les Etats-Unis soutiennent que la Cour manque de compétence pour décider si le droit à la notification consulaire constitue un «droit de l'homme». Je ferai remarquer à la Cour, Monsieur le président, qu'à la différence de l'Allemagne, mon pays n'a jamais demandé à la Cour de statuer là-dessus.

58. Le rejet des exceptions préliminaires devrait s'appliquer aussi aux exceptions des Etats-Unis quant à la recevabilité des demandes contenues dans le mémoire du Mexique. Celles-ci sont également sans fondement.

59. Mais, du fait que les exceptions sur la recevabilité de nos demandes, tout comme celles ayant trait à la compétence de la Cour, chevauchent largement les arguments au fond, le Mexique s'attachera à démontrer qu'elles ne sont pas plus fondées que les autres, dans le cadre de l'argumentaire dont elles constituent l'essence.

60. Monsieur le président, Madame et Messieurs les juges, je voudrais à présent vous présenter les membres de ma délégation qui s'adresseront à la Cour tout au long de cette journée.

61. Une fois terminée cette présentation d'ordre général, je vous demanderai d'accorder la parole à M[e] Sandra Babcock, directrice du programme d'assistance juridique aux ressortissants mexicains encourant la peine de mort, afin d'exposer l'ensemble des faits qui sont à l'origine de cette affaire. M[e] Babcock s'occupera aussi des exceptions soulevées par les Etats-Unis concernant la nationalité des cinquante-deux individus, ainsi que du prétendu manque de violation, de la part des Etats-Unis, aux obligations découlant de l'article 36, paragraphe 1.

62. Ensuite, mon collègue Victor Manuel Uribe, ancien consul à Houston et à la Nouvelle-Orléans, décrira le rôle ainsi que l'ampleur que joue la protection consulaire dans l'exercice des responsabilités du Mexique à l'égard de ses ressortissants. M[e] Babcock reprendra la parole pour démontrer que la protection consulaire, lorsqu'il lui est permis de déployer ses effets, a un impact réel sur le sort de nos ressortissants, ce qui est loin d'être une spéculation ou une fantaisie, comme voudraient vous le faire croire les Etats-Unis.

63. Puis, il reviendra à M[e] Donald Donovan de démontrer que les Etats-Unis ont failli à l'obligation de notifier les cinquante-deux ressortissants, qui font l'objet de cette affaire, de leurs droits, en vertu de l'article 36 de la convention de Vienne, et que les Etats-Unis adoptent une

interprétation restrictive du sens que la Cour a attribué, dans l'arrêt *LaGrand*, à l'expression «sans retard» contenue dans cette disposition.

64. M[e] Katherine Birmingham établira les violations de la part des Etats-Unis aux dispositions pertinentes du paragraphe 2 de l'article 36, avant de donner à M[e] Babcock l'occasion d'expliquer que «le réexamen et la revision du verdict de culpabilité et de la peine», par le biais de la procédure de la grâce, ne remplissent pas les conditions exigées par l'arrêt *LaGrand*.

65. Ensuite, l'ambassadeur Santiago Oñate s'attachera à démontrer le manque de fondement des motifs d'irrecevabilité invoqués par les Etats-Unis, qui concernent la prétention que la Cour joue les tribunaux d'appel, ainsi que l'absence prétendue de respect de la part du Mexique des obligations internationales qui font l'objet de cette affaire.

66. Pour sa part, Mme Socorro Flores traitera de l'exception relative à l'épuisement des recours internes, ainsi que d'avoir prétendument manqué de soulever, en temps utile, les violations à l'article 36 qui incombaient aux Etats-Unis.

67. Je prierai ensuite Me Carlos Bernal de plaider le caractère des droits individuels contenus dans l'article 36 de la convention de Vienne, par rapport aux garanties de régularité de la procédure.

68. Dans l'après-midi, M[e] Donald Donovan aura pour tâche de vous démontrer le bien-fondé de la réparation que demande le Mexique, à la lumière du droit international, c'est-à-dire la *restitutio in integrum* compte tenu des dommages subis par le Mexique et ses ressortissants.

69. Cependant, en raison des violations répétées, accumulées et continues, de la part des Etats-Unis à l'égard de ses obligations internationales, nous sommes également en droit de demander que la Cour ordonne au défendeur de cesser les faits internationalement illicites et d'offrir des assurances et des garanties de non-répétition appropriées, car, en l'espèce, et les faits le prouvent, «les circonstances l'exigent», comme le signalent les articles sur la responsabilité des Etats (art. 30). Cette partie de la plaidoirie reviendra au docteur Dietmar Prager.

70. Enfin, le professeur Pierre-Marie Dupuy fera la synthèse des violations commises par les Etats-Unis au regard de ses obligations envers le Mexique, ainsi qu'envers les cinquante-deux ressortissants qui sont visés dans cette affaire, et dira quelles sont les conséquences de ces violations au regard du droit de la responsabilité internationale.

71. Monsieur le président, l'insistance mise par les Etats-Unis dans leur contre-mémoire à déformer l'orientation générale, l'objet et la finalité de la requête du Mexique m'obligent, au terme de cette introduction, à faire la mise au point suivante.

72. Les conclusions du Mexique ne visent à rien d'autre qu'à obtenir, dans le respect absolu du droit international, le plein rétablissement de ses droits et de ceux de ses ressortissants, tels qu'ils sont établis dans l'ordre juridique international.

73. Le Mexique demande trois choses complémentaires, qui s'imposent par l'ampleur et la fréquence de la violation des obligations qui sont celles des Etats-Unis, à savoir : la satisfaction judiciaire que la Cour lui apportera en faisant le constat du nombre, de l'étendue et de la gravité des faits illicites commis par les Etats-Unis; la restauration des droits qu'il détient en son propre chef et ceux de ses ressortissants dans la situation dans laquelle ils étaient avant que les faits illicites dont ils ont été victimes n'aient été commis; et la garantie effective que de tels actes illicites ne se reproduiront plus à l'avenir.

74. Ces demandes doivent s'opérer dans les conditions que la Cour établira, quant aux droits du Mexique et aux obligations des Etats-Unis, y compris le choix des moyens pour les mettre en œuvre qui, bien que laissés à l'appréciation des Etats-Unis, doivent assurer que le résultat requis soit effectivement atteint.

75. Dans son mémoire, songeant à la clarté requise d'un jugement de la Cour pour que sa portée soit vraiment comprise par tous ses destinataires potentiels, nous avons dressé une sorte d'inventaire des implications de la réparation sollicitée. Nous ne revenons nullement sur cela mais, au terme de nos plaidoiries, il conviendra que le Mexique vous fournisse une formulation simplifiée de nos conclusions au fond qui reste fidèle à la teneur qu'il vous en a déjà donné, mais qui soit en mesure de traduire les règles du droit international qui en constituent le fondement.

76. Monsieur le président, conformément à l'habitude, je vous donnerai à la fin de notre second tour, la formulation précise dans laquelle cette requête du Mexique vous est présentée.

77. Je vous remercie Monsieur le président et vous prie d'appeler maintenant M^{e} Sandra Babcock pour la suite de cette plaidoirie.

The PRESIDENT: Thank you, Mr. Robledo. I now give the floor to Ms Sandra Babcock.

Ms BABCOCK:

II. THE FACTS

A. Introduction

78. Mr. President, distinguished Members of the Court, good morning. My name is Sandra Babcock, and it is a rare privilege to once again appear in this Great Hall of Justice. I have the honour this morning of addressing the factual evidence underlying Mexico's claims.

79. This case is not about the legality of the death penalty. Still, we cannot ignore that the lives of 52 Mexican nationals depend on the result of these proceedings. It is in that sense, as Ambassador Gomez-Robledo has just observed, that the *Avena* case differs from *LaGrand*. But the similarities between the cases of the 52 Mexican nationals and those of the LaGrand brothers are far greater than their differences. Nowhere is this more evident than with regard to the facts.

80. Fifty-two indigent Mexican nationals are, as we speak, sitting in small, windowless cells on death rows around the United States, in Livingston, Texas, in San Quentin, California, and in McAlester, Oklahoma. They are awaiting their executions, and they are awaiting news of these proceedings. It is true, as the United States points out, that all of their cases are different. They were convicted of different crimes, in different states, by different prosecutors. But they all have at least three things in common: (1) they are all Mexican nationals; (2) they were not informed, without delay, of their rights to consular notification and access, and (3) they were all sentenced to death, without receiving the full benefit of timely consular assistance.

81. These 52 Mexican nationals, nine of whom were teenagers at the time of their arrest, and many of whom had little or no formal education, were all entitled to seek the assistance of the Mexican consulate at the time of their detention — assistance which would have been provided as a matter of course, and which could have, in these capital proceedings, meant the difference between life and death.

82. The United States has tried to cloud these essential, irreducible truths by attacking Mexico's proof, and by trying to distract you with a host of immaterial facts. These tactics cannot, however, divert us from our task today. With your permission, Mr. President, I will now describe the current state of the factual record before this Court.

B. The factual scorecard

83. The factual issues before this Court are much simpler than the United States would have you believe. Contrary to the United States alarmist cry, this Court need not "re-examine and redetermine the facts and reweigh the evidence" in each of the 52 cases. In truth, there are only two factual issues that need be resolved. The first relates to nationality, the second to the existence of the Article 36 (1) *(b)* violations. I begin with nationality.

1. Nationality

(a) *Mexico has proven that all 52 individuals are Mexican nationals*

84. Mr. President, Members of the Court, Mexico has amply demonstrated that all of the 52 individuals are Mexican nationals. With its Memorial, Mexico submitted the declaration of Ambassador Roberto Rodríguez Hernández, who, in his capacity as Director General of Protection and Consular Affairs, confirmed that each and every national was, indeed, Mexican. As a predicate to providing consular assistance in each of the cases, the consular offices working under the supervision of Ambassador Rodríguez had long ago verified the Mexican nationality of each and every national. Somewhat to our surprise, the United States contested this showing in its Counter-Memorial.

85. In response, and despite the sufficiency of the evidence presented in the Memorial, Mexico submitted the birth certificates of each of the 52 nationals, which are significant since under Article 30 of the Constitution of Mexico, Mexican nationality is automatically acquired by individuals who are born on Mexican soil. In addition, Mexico submitted declarations from 42 nationals who confirmed their Mexican nationality. As to the remaining cases, either the authorities have agreed or a court has found that the authorities failed to notify them of their rights to consular notification and access, in proceedings where the United States did not contest their nationality.

86. In summary, there can be no doubt that all 52 individuals are Mexican nationals, and that the United States arguments as to admissibility on this point should be rejected.

(b) ***United States has failed to prove that any of the 52 Mexican nationals currently before this Court are also United States nationals***

87. The United States has also suggested that some of the Mexican nationals might be dual nationals. For the purposes of this litigation, Mexico does not contest that dual nationals have no right to be advised, under Article 36 (1) *(b)*, of their rights to consular notification and access. So when the United States provided proof that Enrique Zambrano was also a United States national, Mexico amended its submissions on 28 November 2003 to withdraw his name. If the United States had presented proof that any other individual was a United States national, Mexico would have withdrawn his name, as well.

88. But no such proof has been submitted. Instead, the United States has alleged — without a shred of evidence — that some 18 Mexican nationals are "possible," "likely," or "almost certain" United States nationals. In the cases of seven others, it claims that it cannot "rule out the possibility" of United States nationality[12]. In support of these allegations, the United States has relied on the declarations of Edward Betancourt and Dominick Gentile, who discuss the complexity of nationality laws in the United States and the possibility of acquiring United States nationality through parentage.

89. Incredibly, the United States has asserted that Mexico should bear the burden of proving its nationals are not United States nationals. Quite the contrary. As this Court found in the *Temple of Preah Vihear* case, it is axiomatic that a respondent putting forward certain facts bears the burden of proof as to those facts[13]. Mexico has made an affirmative showing that each of the 52 individuals are Mexican nationals, and it is not Mexico's task to prove that they are not also United States nationals. This is particularly true, when many of the documents establishing dual nationality are in the control of the United States.

90. Nevertheless, in response to the Counter-Memorial, Mexico obtained declarations from 42 nationals, attesting that they have never renounced their Mexican nationality, and have never acquired United States nationality. In addition, Mexico consulted with an immigration law expert and conducted additional investigation, the results of which are contained in documents submitted by Mexico on 28 November.

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[12]See Counter-Memorial, para. 7.8, footnote 334.

[13]*Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, 16-16.

91. On 10 December 2003, the United States filed additional documents in response. These additional documents merely confirm that the United States cannot demonstrate that any of the 52 individuals are United States nationals[14]. The United States faults Mexico for not investigating the nationality of the parents of each of the 24 Mexican nationals in question, to enable the United States to definitively ascertain whether they are United States nationals[15]. Presumably, if there were a question regarding the United States nationality of one of the parents, the United States would then ask Mexico to provide information regarding the nationals' grandparents!

92. In the ten months that this case has been pending, the United States has not been able to provide any proof that even one of the 52 individuals currently before the Court is a dual national. The United States has investigated these cases with the assistance of state prosecutors and law enforcement agents around the country[16]. Nevertheless, despite the vast resources at its disposal, the United States has neither rebutted Mexico's showing of Mexican nationality nor presented affirmative proof of dual nationality in any of the 52 cases currently before the Court.

2. The violations

93. Allow me now to turn to the violations of Article 36 (1) *(b)*. In reading the United States Counter-Memorial, I was reminded of a wonderful storyteller named Garrison Keillor who lives in the frozen tundra of Minnesota, my home state. Mr. Keillor has an old-fashioned, nationally syndicated radio show in which he tells stories about himself and the people who live in his small town. As I was driving home from work the other day, listening to his show, Mr. Keillor said, "I believe in looking reality straight in the eye and denying it." And you get the sense, when you read the Counter-Memorial, that that is precisely the strategy adopted by the United States in this case.

94. In contrast to its forthright admission of the Article 36 (1) violations in the cases of Angel Breard and Walter and Karl LaGrand, the United States here has chosen to vehemently deny any wrongdoing. Remarkably, the United States refuses to concede even a single violation of

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[14]Second Declaration of Edward Betancourt Concerning United States Nationality Law, at 3, n. 6.

[15]*Id.*, at para. 16.

[16]Remarks of the Honourable William Howard Taft, IV, Legal Adviser, United States Department of State, before the National Association of Attorneys General, Thursday 20 March 2003, at p. 8.

Article 36 (1)[17], even though the courts of competent jurisdiction in the United States have found the authorities failed to comply with their obligations in ten of the cases[18], prosecuting authorities have conceded the violation in another[19], and the United States Government itself conceded yet another violation in a diplomatic note it filed years ago[20].

95. Mr. President, with your permission, I would now like to summarize the affirmative proof of violations in the 52 cases before this Court.

(a) ***Mexico has proven violations of Article 36 (1)*** **(b)** ***in all 52 cases currently before this Court***

96. First, as I just said, in 12 of the 52 cases there is either a judicial finding that the authorities failed to notify the nationals of their Article 36 rights, or United States authorities have conceded that fact. The violations in every remaining case are confirmed, in the first instance, by Ambassador Rodríguez Hernández, who based his declaration on documents in Mexican consular files, as well as interviews conducted by consular officers and attorneys with the 52 Mexican nationals, their defence counsel, and United States authorities. If there were any doubts remaining, the Court also has before it declarations from each of the 42 nationals for whom there is not already a judicial finding or concession of a violation. These declarations provide further confirmation that none of the nationals were notified of their right to communicate with the consulate pursuant to Article 36[21].

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[17]Counter-Memorial, para. 7.12.

[18]See Juárez Suárez (#10), Mexico's Memorial, Ann. 36, at A706; see also A62, para. 54; Vargas (#26), Ann. 35, at A699; see also A81, para. 139; Hernández Llanas (#34), Ann. 50 at A1037; see also at A94, para. 200; Sánchez Ramírez (#23), Ann. 64, at A1325; see also at A77, para. 121; Ignacio Gómez (#33), Ann. 61, at A1297; see also at A93, para. 195; Félix Rocha Díaz (#42), Ann. 41, at A764; see also at A110, para. 271; Ramiro Ibarra (#35), Ann. 62, at A1306; see also A96, para. 210; Humberto Leal García (#36), Annexes 51-52, at A1072 and A1156; see also at A98, para. 218; Virgilio Maldonado (#37), Ann. 53, at A1183; see also at A98, para. 226; and José Trinidad Loza (#52), Ann. 44, at A868; see also at A131, para. 348.

[19]See Villa Ramírez (#20), Mexico's Memorial, Ann. 65, at A1329; see also at A74, para. 106.

[20]The diplomatic note was filed in the case of Carlos Rene Perez Gutierrez, and is appended to the Counter-Memorial in Ann. 1, App. 5, at A344.

[21]See Ann. 70 at A1579 to A1704.

(b) ***The United States claims that it provided timely notification in only two cases***

97. For all of its protestations that Mexico failed to prove the violations of Article 36 (1), the United States can point to only two cases where the authorities made any effort to timely comply with their obligations under Article 36 (1) *(b)*[22].

(i) In the case of Mr. Hernandez Alberto, Mexico has withdrawn its request for relief

98. One of them is the case of Pedro Hernandez Alberto, a Mexican national sentenced to death in Florida. In its Memorial, Mexico advised the Court that there was evidence the authorities had informed him of his Article 36 (1) rights, but Mexico had not yet been able to confirm that account because Mr. Hernandez is severely mentally ill[23]. We have since concluded that the authorities did inform him of his right to contact the consulate, and Mexico accordingly withdrew its request for relief on his behalf on 28 November 2003.

(ii) In the case of Mr. Juárez Suárez, a United States court has determined the authorities violated Article 36 (1) ***(b)***

99. That leaves only one case in which the United States claims to have timely complied with its obligations under Article 36 (1): the case of Arturo Juárez Suárez. Ironically, this is a case in which a United States court examined the facts of the case, and concluded that the authorities *did* violate their obligations to inform Mr. Juárez Suárez, without delay, of his rights to consular notification and access! It is somewhat puzzling to us that the United States should encourage the Court to disregard a judgment that is not to its liking, particularly after arguing that this Court should not act as a court of criminal appeal[24]. Indeed, the United States should be estopped from making such an argument. Nonetheless, in the case of Mr. Juárez Suárez there is no dispute that the authorities knew, from the moment they arrested him, that he was a Mexican national. Still, they subjected him to three rounds of interrogation in two different locations over a period of 40 hours, without even once attempting to notify him during that time of his rights to consular notification and access. There can be no question that such deliberate procrastination violates even

[22]See US Counter-Memorial, paras. 7.12-7.14.

[23]See Mexico's Memorial, Declaration of Ambassador Rodríguez Hernández, Ann. 7, at para. 326.

[24]Counter-Memorial, para. 7.14.

the United States broad definition of "without delay", which my colleague, Mr. Donovan, will address in a moment.

3. The remaining factual disputes

100. Mr. President, I would now like to briefly address some of the secondary factual disputes between the Parties, many of which the United States has raised in an attempt to undermine Mexico's credibility before this Court. None of these issues affects the proof provided by Mexico with regard to the two core issues I have identified just a moment ago. But nonetheless, we are compelled to respond, albeit briefly, to some of these allegations.

101. In contrast to the United States, Mexico has conscientiously amended its pleadings whenever it has learned of facts that shed new light on these proceedings — as in the cases of Mr. Maturino Resendez and Mr. Zambrano. We regret that the United States has criticized Mexico for the care it has taken in this regard[25]. As is evident from the Counter-Memorial, the United States believes that it is a sign of weakness to make any concessions, even when the facts are indisputable. I respectfully suggest that Mexico's approach is the more responsible one.

(a) ***Minor factual disputes over the personal characteristics of the offender and the details of the alleged crimes are not relevant***

102. As for the factual disagreements between the Parties, most are irrelevant to the issues before this Court. The United States asserts generally that it disagrees with Mexico's facts as presented and includes what it characterizes as a "more accurate statement of relevant facts" set forth in Annex 2 to its Counter-Memorial[26]. Upon examination, it is obvious that the United States case summaries focus on different — and largely immaterial — facts in each case, such as the length of time each offender has been in the United States and the details of the crimes for which he was sentenced to death. As to the length of residence in the United States, I need only remind the Court that each of the LaGrand brothers had been residents of the United States since they were toddlers, they spoke unaccented English, and had the outward appearance of United States nationals. As to the details of the crimes, they are, needless to say, entirely irrelevant.

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[25]See US Counter-Memorial, para. 7.2.

[26]Counter-Memorial, para. 7.1.

103. The scattered discrepancies that do exist between the United States rendition of the facts and Mexico's case summaries relate primarily to the personal attributes of the offender, characterizations of the evidence presented at trial, dates, and locations of certain events. Both Mexico and the United States made small errors in this regard. Allow me to use the case of Tomas Verano Cruz by way of example. Mr. Verano Cruz was arrested on 26 October 1991. In summarizing the relevant facts of his case, Mexico correctly stated that consular officials first learned of his case in February 1993. But we made a mathematical error, and we stated — to our detriment — that the consulate first became aware of his case *five* months after his arrest, when in actuality, the consulate learned of his case *one year and four months* after his arrest. The United States pointed out the inconsistent facts, and incorrectly assumed that consular officials had learned of the case in 1992, instead of 1993.

104. The United States December 10 submission contains similar observations. The United States claims that three of the declarations submitted by Mexico are "inaccurate" and "misleading". Allow me to provide just one example. In the case of Mr. Maciel Hernandez, Mexico accurately stated in its Memorial that consular officials learned of his detention in April 1998, more than two months after his trial was over, and after the jury had returned a death sentence. When they learned of his detention, consular officials began to provide consular assistance, and attended his sentencing hearing. In his declaration, however, Mr. Maciel stated that he was not able, "either before or after the trial", to receive the consulate's help, because he did not know of his right to consular assistance. Of course, Mr. Maciel did not receive consular assistance before his trial, and he did not receive consular assistance immediately after his trial. He did begin receiving consular assistance later. Would it have been more accurate for Mr. Maciel to say, "I wasn't able to receive consular assistance before or *immediately* after my trial?" Yes. But is this a major discrepancy? No. Does it change the fact that the United States did not inform him of his Article 36 rights? Of course not.

105. This sort of factual discrepancy is obviously not dispositive. It is not even relevant. And we trust the Court's ability to see through the rhetoric in the United States pleadings and focus on the issues that matter.

(b) ***United States claims seven Mexican nationals affirmatively claimed to be United States nationals at the time of their arrest***

106. There is one category of factual allegations, however, that is relevant to the violations of Article 36 (1) that Mexico has proven. The United States has argued that a number of Mexican nationals affirmatively claimed to be United States nationals at some point during their detention. This, of course, is an argument the Court heard in the *LaGrand* case, where the United States contended that Walter LaGrand claimed to be a US national. I intend to respond to these allegations as a factual matter, and my colleague, Mr. Donovan, will address their legal relevance.

(i) The United States bears the burden of proof

107. First, as it frequently does, the United States misstates the burden of proof on this issue. It is Mexico's burden to establish that all of the individuals were Mexican nationals, and that they were not notified of their rights to seek consular assistance. The United States has raised an affirmative defence that relates to some of these cases; namely, that the individuals misrepresented their nationality and that, as a result, the authorities were unaware they were Mexican nationals. The United States has the obligation to present specific facts in support of this allegation, just as it did in *LaGrand*[27], particularly when the United States has access to law enforcement reports, prison records, law enforcement witnesses, and other materials that are not available to Mexico that would provide dispositive proof.

108. Moreover, the real question is not whether the nationals volunteered evidence of their nationality, but whether the authorities knew or had reason to know they were Mexican nationals, regardless of anything the nationals said. Again, *LaGrand* is instructive on this point. Even though Walter LaGrand may have told the authorities that he was a United States national at the time of his arrest, the authorities *were* able to determine his nationality during the course of his detention. *That* was the relevant fact and this Court had no trouble finding a violation of Article 36 (1) on that basis.

[27]See "Karl and Walter LaGrand. Report of Investigation Into Consular Notification Issues", at pp. 4-8, Ann. 23, Exhibit 79 to the US Counter-Memorial.

(ii) The United States has badly misrepresented the factual record for four of the seven Mexican nationals

109. Against this backdrop, let's look at the specific facts here. The United States has asserted that seven Mexican nationals "affirmatively claimed to be United States nationals *at the time of their arrest*"[28]. With respect to four of these seven nationals, Mr. Ayala[29] (#2), Mr. Ochoa Tamayo[30] (#18), Mr. Benavides[31] (#3) and Mr. Alvarez Banda (#30), the United States has badly misrepresented the factual record. I invite you to read closely the United States factual summaries for these four individuals. Because when you do, this is what you will discover.

110. The United States has presented no evidence that any of these four men misrepresented their nationality at the time of their arrest. The table contained in your folders, which you should have in front of you, summarizes the so-called proof presented by the United States for these four men.

111. In reviewing this information, two facts are immediately apparent. First, the documents cited by the United States do not support the proposition that these men made any false statements about their nationality at the time of their arrest. At most, they indicate that someone mistakenly believed they were US nationals either long after, or in the case of Mr. Alvarez, long before, their arrest for capital murder. Perhaps the source of the information was a probation officer, perhaps a court official, perhaps a police officer on an unrelated case — we simply do not know, because the United States has not identified the source except in the case of Mr. Benavides.

112. Second, the United States has taken a position at odds with the arguments it made in *LaGrand*. There in *LaGrand*, based on the facts of that case, the United States argued that the only competent authorities for the purposes of Article 36 (1) were the arresting and detaining authorities, and therefore focused their enquiry on whether the arresting authorities knew the brothers were German nationals. Here, by contrast, the United States has focused on reports, statements, or other documents generated by unknown individuals who are *not* the arresting authorities, and has tried to

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[28]Counter-Memorial, para. 7.10.

[29]Compare US Counter-Memorial, para. 8.10, footnote 336 with Mexico Ann. 70 at 1583.

[30]See Counter-Memorial, para. 8.10, footnote 336; Ann. 2 at A143.

[31]Compare US Counter-Memorial, para. 8.10, footnote 336 with Mexico Ann. 70 at 1586.

persuade you that it is these unknown individuals, not the arresting authorities, whose state of mind matters.

(iii) The United States has failed to prove the authorities were unaware of Mr. Avena's and Mr. Tafoya's nationality throughout their trials, sentencings, and several years on death row

113. In the cases of Mr. Avena[32] (#1) and Tafoya[33] (#24), the United States has cited to documents indicating that someone, at the time of their arrest, may have believed they were either born in the United States or were United States nationals. This does not demonstrate that all of the competent authorities believed them to be United States nationals, even at the time of their initial detention. Moreover, it is important to bear in mind that Mr. Avena spent *11 years* on death row before the prison notified the Mexican consulate of his detention, and Mr. Tafoya was on death row for nearly *six years* when attorneys finally advised Mexico of his incarceration. The United States has failed to show that the authorities were unaware these two men were Mexican nationals throughout their trial, sentencings, transfer to prison, and subsequent long years on death row.

(iv) The United States has presented compelling evidence that only one national, Mr. Salcido Bojórquez, claimed to be a United States national upon his arrest

114. In the case of Mr. Salcido Bojórquez (#22), the United States does have a well-grounded claim that he held himself out as a United States national upon his arrest in Mexico. But the United States has not demonstrated that it failed to discover his Mexican nationality after his extradition to the United States.

4. Summary of proof

115. In summary, there is not a single case currently before the Court, apart from the case of Mr. Juárez Suárez, in which the United States even contends that it has met its obligations under Article 36 (1). Mexico respectfully submits that it has more than met its burden of establishing the violations in each of the 52 cases.

116. The second table that is in your folders summarizes the United States challenges to Mexico's factual showing for your convenience.

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[32]CITE.

[33]CITE.

C. The United States continuing violations of Article 36

117. I will now turn to the subject of the United States compliance with Article 36 since this Court's decision in *LaGrand*. At the provisional measures hearing in January of this year, counsel for the United States argued 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"[34]. Following that hearing, and before filing its Memorial, Mexico solicited information from each of its 45 consulates to ascertain the number of cases in which Mexican nationals had been detained and charged with serious felonies after the *LaGrand* Judgment was issued, without being notified of their rights to consular notification and access. Through this investigation, which involved interviews of consular officers, review of documentary evidence, and, where possible, interviews of defence counsel, Mexico discovered 102 such cases. These cases are summarized in Appendix B of Annex 7 to Mexico's Memorial.

118. Not surprisingly, the United States refuses to concede most of these violations. Mexico stands on the facts presented in the Memorial. Nevertheless, merely for the sake of argument, and in the interests of brevity, let us assume here that the United States rendition of facts is correct.

119. In 46 cases of violations cited by Mexico, the United States effectively does not dispute the violation: in six, the United States explicitly concedes that there was no notification; in 15, the United States concedes that there is no record in the files that the nationals were notified; in 23, the United States makes no individual showing of compliance, but simply points to generalized procedures that were in place within the jurisdiction in which the national was arrested; and in two, the United States only asserts that the national did not mention his Mexican nationality. In one of these cases, the United States simply claims that there was a poster describing consular rights in the room where the Mexican national was interrogated. The United States does not state whether the poster was brought to the attention of the individual nor what language it was in. It should come as no surprise that the national in question does not speak any English: and, needless to say, the United States obligations under Article 36 cannot be discharged by a poster on a wall.

120. Setting aside the remaining cases for a moment, and basing our conclusions on just those cases — those 46 cases I just described — we have here evidence of 46 additional violations

[34]Oral Argument 21 Jan. 2003, case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America),* Rebuttal, at 10-11 (argument of Catherine Brown).

of Article 36 in cases involving serious felonies. Of the 46 cases, at least six still face the potential imposition of the death penalty. These figures do not, by the way, include the cases of Tonatiuh Aguilar Saucedo and Victor Miranda Guerrero, two Mexican nationals Mexico had sought to include in its Application.

121. Based on this record, even resolving every factual dispute in favour of the United States, it is plain that violations of Article 36 (1) remain widespread after *LaGrand*, even in cases involving the potential imposition of the death penalty.

Mr. President, this concludes my presentation.

THE PRESIDENT: Thank you, Ms Babcock. I now give the floor to Mr. Victor Manuel Uribe.

Mr. URIBE AVIÑA:

III. THE BREADTH AND DEPTH OF MEXICAN CONSULAR ASSISTANCE IN CAPITAL CASES

A. Introduction

122. Mr. President, Members of the Court, it is a great honour to appear before you this morning. As Ambassador Gómez-Robledo mentioned, I was posted as a consular officer in Texas and Louisiana. For nearly five years, I worked in the protection department of the Mexican consulates in those states.

123. With the Court's permission, I will address the crucial role played by Mexican consular officers in capital cases.

124. As explained in Mexico's Memorial, the protection of Mexican nationals abroad has been one of my country's priorities almost since we became an independent nation. The obligation of Mexican consular officers to provide this protection is found in the very first law governing the Mexican foreign service, enacted in 1829. Subsequent legislation has maintained the primary obligation of protecting the fundamental rights of Mexicans abroad.

125. For obvious reasons, cases where the life or the liberty of a Mexican national is at risk have always been a central concern of our consular service. For nearly two centuries, Mexican consular protection has been unwavering. By the early 1900s, consular officers in the United

States were protecting the rights of Mexican nationals by assisting them in serious criminal cases. At present, there are 45 Mexican consulates across the United States, the most extensive consular presence of any country in the world.

B. The vulnerability of Mexican nationals facing capital charges in the United States

126. Mr. President, before I proceed, let me assure the Court that Mexican consuls do not stand in judgment of the legal systems within which they work. Our sole task is to provide the protection to which our fellow nationals are entitled. We recognize that the United States criminal justice system provides procedural safeguards intended to ensure equal treatment and fair trials. However, in our experience, Mexican nationals arrested in the United States confront barriers of culture, language or competence that often prevent them from receiving an effective defence. Many are also victims of ethnic stereotypes that can influence their cases at each step of the judicial process. This is the real context within which the United States criminal justice system functions. It is the difference between procedural theory and daily reality — a distinction that the United States Counter-Memorial fails to convey.

127. The vulnerability of Mexican nationals facing serious criminal proceedings in the United States cannot be emphasized too strongly. The experience of Mexico, drawn from daily consular work, demonstrates that the vast majority of Mexican nationals facing capital charges are desperately poor. Many are barely able to read and write. Some of them are victims of malnutrition or other factors which affect their mental capacity. Many speak little or no English, even if they have lived in the United States for many years. Some do not even speak Spanish, but rather one of Mexico's indigenous languages. On top of this, the majority are undocumented migrant workers who, even after a long residence in the United States, remain excluded from the mainstream of that society.

C. Mexican consular protection during the first stage of death penalty cases

128. Because our nationals face unique obstacles to fair proceedings from the first moment of their detentions, Mexico's consular protection emphasizes early intervention. First, a timely consular presence ensures that the existing procedural safeguards have their intended effect. Second, early involvement guarantees that the defendant receives truly equal treatment. Allow me

to briefly describe a few aspects of consular protection that Mexico provides at the initial stages of capital cases.

129. Many Mexican defendants experience profound confusion and distrust when exposed to the United States system of justice. For example, sentencing by negotiation, known as plea bargaining, which is a standard practice in the United States, is completely foreign to most Mexicans. For this reason, our consular officers work to ensure that our nationals understand the advantages of accepting a negotiated settlement, in cases where the evidence of guilt is clear and the prosecutor has offered to forego the death penalty. Our consular officers also intervene with local prosecutors to facilitate plea agreements and to assist the defence in obtaining mitigating evidence, as Ms Babcock will explain shortly.

130. Mexican consular officers also work to resolve other obstacles to fair proceedings, such as inadequate translation services. They can determine whether the interpreter provided by the police or the courts is truly competent. Along with the ability to convey the meaning of complex legal terms, a capable translator must also be familiar with Mexican idioms and vocabulary. As the honourable Members of this Court can fully appreciate, effective translation requires far more than a passing familiarity with a language — particularly so when life or death may depend on complete comprehension.

131. Our protection officers routinely encounter grossly inadequate translation services. I know this from personal experience. While serving as a consular officer in Louisiana, I encountered an appointed translator, in the death penalty case of a Mexican national, who was incapable of carrying on even a simple conversation in Spanish. After the trial court refused to appoint a replacement, the Mexican consulate itself provided a competent interpreter throughout the proceedings.

132. In many cases, the role of the consular officer as a cultural bridge can be crucial in identifying mental impairments. Far too often, many symptoms of mental illnesses in Mexican nationals are dismissed by the police or by defence attorneys as cultural attributes, if they are noticed at all. The close rapport that consular officers develop with defendants, family members and defence attorneys is uniquely effective in detecting these disabilities.

133. Moreover, and as our Memorial explains, Mexican nationals are often vulnerable to interrogations that can result in false confessions[35]. This is precisely what happened in the case of Omar Aguirre, who was wrongly convicted of murder and sentenced to 55 years in prison. In 1997, he was interrogated over the course of three days by police in Chicago, without the benefit of consular assistance. He spoke little English and believed the confession that he eventually signed, which was written in English, of course, was a release for him to go home. In December 2002 — five years after his arrest — prosecutors freed Mr. Aguirre, who was entirely innocent[36]. The crucial role of immediate consular protection in these circumstances is surely beyond question.

134. The United States concedes that Mexico's consular assistance in serious cases is "extraordinary". The examples I have provided are but illustrations of the wide-ranging services that Mexico routinely provides in the first stage of capital cases.

135. In the past three years alone, our consulates in the United States have intervened in 45 capital cases where prosecutors were persuaded not to seek the death penalty. In ten other cases, the death penalty was excluded as a legal matter before trial, or judges and juries imposed lesser sentences after trial.

136. Thus, for those 55 Mexican nationals facing the death penalty, timely consular interventions contributed to fair proceedings in which their lives were spared. As it happens, it is virtually the same number of individuals whose cases have been presented to this Court. Many variables may have influenced the outcomes in these two groups of equally serious cases. But in the collective experience of our consulates, one determining factor remains constant in the capital cases of Mexican nationals. When consular protection is permitted to function as Article 36 intended, life sentences are the likely outcome. Whenever this assistance is delayed or denied, the death penalty is more likely to result.

Thank you very much, Mr. President.

The PRESIDENT: Thank you, Mr. Uribe. I now give the floor to Ms Babcock.

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[35]Memorial of Mexico, pp. 20-25; see also Ann. 4 to the Memorial of Mexico.

[36]Memorial of Mexico, Ann. 4, p. A29.

Ms BABCOCK: Thank you, Mr. President.

IV. THE EFFECT OF CONSULAR ASSISTANCE IN CAPITAL PROCEEDINGS

A. Introduction

137. I have been representing foreign nationals in death penalty cases for the last 12 years. For the last three of those years, my practice has been devoted to assisting Mexican nationals facing the death penalty, as lead counsel for Mexico in the Mexican Capital Legal Assistance Program. Through my work, I have been involved in over 100 death penalty cases involving foreign nationals in state and federal courts, in trials and on appeal, and in habeas corpus and clemency proceedings. I should also mention that I have met 30 of the Mexican nationals named in these proceedings.

138. Mr. President, the United States recognizes Mexico's deep commitment to the defence of its nationals facing the death penalty, but disparages the significance of that protection. In large part, the United States argues that consular involvement is superfluous — even in death penalty cases — since its criminal justice system already provides a panoply of procedural rights and protections in each and every case[37]. The United States spins a seductive tale of a system that functions perfectly in nearly every case to preserve and protect the rights of all defendants, regardless of national origin. Where the system fails in some regard, according to the United States, the appellate process will step in and correct any error. This argument, however, understates the value of consular assistance in capital cases, and, at the same time, overstates the capacity of the United States criminal justice system to protect the rights of foreign defendants facing the death penalty. Moreover, it fails to account for the highly specialized and subjective nature of capital murder prosecutions in the United States. So to provide some context for Mr. Uribe's comments, and to balance the idealized description of the criminal justice system contained in the United States Counter-Memorial, allow me to share some of the practical realities of death penalty litigation in the United States. In particular, I would like to focus on three features

[37]Counter-Memorial at para. 1.4.

of capital proceedings that are particularly relevant to the issues before this Court: the interrogation process, pre-trial negotiations, and the quality of legal representation.

B. The interrogation process

139. I begin with interrogation. Perhaps the most critical decision a detained foreign national will ever make is whether to give a statement to the police. Shortly after his arrest, the police will sit him down in a room, and will begin asking him questions. If he remains silent, as is his constitutional right, the police will not be able to use his silence against him. If he speaks, however, the prosecution can and will use his statement as the centrepiece of its case — particularly if he confesses to a crime. This, in fact, is precisely what happened to at least a dozen Mexican nationals in these proceedings.

140. There are several unique problems that foreign nationals face in the interrogation room. First, as Mr. Uribe already implied, cultural barriers impede their ability to understand their legal rights. Growing up in the United States, with its infinite variety of television shows featuring detectives and prosecutors, every child knows that when a person is arrested, he has the right to remain silent. Foreign nationals who don't grow up watching American television shows will obviously not necessarily know this fact.

141. Second, language barriers can prevent them from understanding their rights. As the United States has explained in its Counter-Memorial, the police are required to advise a detained foreign national of his so-called *Miranda* warnings, which include: you have the right to remain silent, everything you say can and will be used against you in a court of law, you have the right to a lawyer and to have your lawyer present during questioning, and if you cannot afford a lawyer, one will be appointed for you. In theory, this should compensate for any misunderstanding of the criminal justice system. In practice, however, police will often read the *Miranda* warnings at a rate of speed that is much too fast to understand, if English is not your native language[38]. Experience has taught us that many foreign nationals, when asked if they understand their rights, simply nod in acquiescence — when in reality, they don't understand, they are just trying to be co-operative.

[38]See Declaration of Dr. Roseann Duenas Gonzalez, Memorial, Ann. 4, at A27-A28.

142. The United States claims that every person who does not speak English is provided with an interpreter. In theory, this is what should happen. In practice, the police make subjective judgments about who speaks "enough" English to be interrogated without the presence of an interpreter. Or, in many jurisdictions, a police officer will serve as an "unofficial" interpreter — perhaps someone whose parents were Puerto Rican or Dominican or Cuban, and whose Spanish is less than fluent and who, needless to say, is not a certified interpreter. In one recent murder case in California, a Mexican national who spoke only Náhuatl, one of the 56 official indigenous languages spoken in Mexico, was interrogated in Spanish, because the police assumed, since he was Mexican, that he spoke Spanish. The police, who were not native Spanish speakers, interrogated him in their broken Spanish, and he answered them in his broken Spanish as best he could. They later claimed that he confessed. Needless to say, the defence is challenging the reliability of his alleged statements, using a Náhuatl interpreter who was located by the Mexican consulate.

143. Finally, language barriers can cause foreign nationals to unwittingly say things they don't mean, or to sign statements in English when they do not understand the language. Ignacio Gomez, for example, one of the Mexican nationals whose case is before the Court, signed a confession that was written in English and contained legal terminology and advanced vocabulary, even though just two years before his arrest, as the United States conceded in its Counter-Memorial, Mr. Gomez was unable to speak or write in English, even after attending school in the United States for nine years[39].

144. It is in this context that Mr. Uribe's observations take on greater significance. The purpose of consular access before interrogation is not to obstruct law enforcement operations, but rather to ensure that foreign nationals are treated fairly at this most critical juncture of the investigation.

C. Pre-trial negotiations

145. I would now like to spend a few moments discussing another early, critical phase of the proceedings, one that involves the prosecutor's discretion to refrain from seeking the death penalty.

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[39]Counter-Memorial, Ann. 2, at A213.

As you may know the death penalty in the United States is never mandatory. Even for the most aggravated homicides, both state and federal prosecutors have wide discretion in deciding whether the death penalty is the appropriate penalty. Prosecutors usually make this decision very early in the course of the proceedings, before they have invested a great deal of time and resources in preparing the case for trial. For this reason, competent defence counsel must make every effort, from the moment he or she is first appointed to represent a criminal defendant in a capital case, to seek a negotiated settlement to the case — also known as a "plea bargain".

146. It is here, as Mr. Uribe observed, that consular assistance is vital. Simply by sending a letter, or requesting a personal meeting to express Mexico's views on the case, consular officials have been able to persuade prosecutors not to seek the death penalty in literally dozen of cases. But the assistance takes other forms, as well. Consular officials can assist in developing what is called "mitigating evidence" regarding the defendant's background, mental health, and other personal characteristics. Mitigating evidence serves both to humanize the defendant and to explain why he was driven to commit a terrible crime. For example, an individual who was sadistically beaten as a child may develop a host of mental disorders as a result of that abuse. While this does not provide a legal excuse for any crime, it may well inspire empathy and compassion that is sufficient to spare the defendant's life.

147. Mitigating evidence can influence prosecutors as well as judges and juries. And for that reason, a good defence lawyer will begin to develop mitigating evidence at the very earliest stage of the proceedings, so that she can present that evidence before a prosecutor has made an irrevocable decision to seek the death penalty. But poor people in the United States — including the Mexican nationals named in these proceedings — are often represented by court-appointed lawyers who are overworked and underfunded[40]. Contrary to the United States claim, these lawyers often lack the resources to retain investigators and experts, and therefore do not adequately develop mitigating evidence[41] — particularly when that evidence is located far away in a foreign country. In the last three years alone, Mexico has provided funding for bilingual psychologists,

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[40]See J. Liebman, The Overproduction of Death, 100 *Columbia Law Review* (2000) pp. 2102-06; S. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But For the Worst Lawyer, *Yale Law Journal* (1994) pp. 1835-1883.

[41]S. Bright, *supra*, at 1843-1848.

neuropsychologists, and investigators in literally dozens of cases where funding was not available through the courts.

D. Quality of legal representation

148. Let me now say just a few words in response to the United States claim that "a lawyer assigned to represent a detainee must be an effective one"[42]. There is no question that of all the legal rights provided to a defendant facing a capital trial, the most important one is the right to counsel. As United States Supreme Court Justice Ruth Bader Ginsburg has observed, "[p]eople who are well represented at trial do not get the death penalty"[43]. Yet, as I implied a moment ago, for poor people charged with capital crimes, quality legal representation is the exception, rather than the norm. And to say that a court has found counsel's performance to be constitutionally sufficient, is not to say that the attorney was competent, prepared, and experienced[44].

149. In the face of this reality, Mexico has successfully petitioned courts to appoint new lawyers to replace those who are inexperienced or incompetent. One of those cases is discussed in the declaration of Michael Iaria, submitted as Annex 6 to Mexico's Memorial. In other cases, Mexico has recruited counsel to represent its nationals on a pro bono basis, or has retained counsel to assist in their defence. Through these efforts, Mexico has been able to raise the level of legal representation for its nationals in case after case, which, in turn, has had a decisive impact on the outcome of the proceedings.

150. Finally, it is no longer true that the legal system is willing and able to correct these deficiencies through the appellate process. Over the last decade, the United States Congress, state legislatures and the courts have increasingly limited the availability of appellate remedies to death row inmates. As a result of these restrictions, for example, the federal courts have refused to review new evidence in the case of Cesar Roberto Fierro, even though a Texas court concluded that there was "a strong likelihood" his confession was coerced[45].

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[42]Counter-Memorial, para. 1.4.

[43]Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, *Associated Press*, 9 April 2001.

[44]See *LaGrand*, Verbatim Record of Proceedings, 13 November 2000, 10 a.m., CR 2000/26, para. 6; *Riles v. McCotter*, 799 F.2d 947, 954 (5th Cir. 1986) (Rubin, J., concurring).

[45]See Memorial, Ann. 7, at A87-90.

E. The case of Gerardo Valdez

151. For a concrete example of the principles that Mr. Uribe and I have just been discussing, we need look no further than the case of Gerardo Valdez. The history of Mexico's involvement in the case of Mr. Valdez is already well known to this Court, as it was described by both Mexico and the United States in our respective pleadings[46]. Gerardo Valdez was arrested in Oklahoma in 1989. He received all of the protections to which he was entitled under the United States legal system. He was advised of his *Miranda* rights. An attorney qualified under the laws of Oklahoma was appointed to represent him. He was then convicted and sentenced to death. At least six courts reviewed his case over the course of the appellate process, and yet none found any legal defect in the proceedings, and all upheld his conviction and sentence.

152. Gerardo Valdez was only weeks away from execution, and there is no doubt he *would* have been executed, had Mexico not intervened. By sheer force of will, the involvement of Mexican President Vicente Fox, and the investment of substantial resources, Mexico pulled him back from the abyss, and convinced an Oklahoma court to vacate his death sentence. Now, the United States holds up the Valdez case as an example of how the courts provide "careful, meaningful", and "fair" review that is consistent with the principles set forth in *LaGrand*[47]. But this conclusion ignores two critical facts. First, the court that finally reversed Mr. Valdez's death sentence found the Article 36 claim to be procedurally defaulted. Second, the Oklahoma court's decision was extraordinary, unprecedented, and unlikely ever to be repeated. As evidence of this, we need only look at the case of Javier Suarez Medina, who was executed in Texas only months after the Oklahoma court reversed Mr. Valdez's sentence. In that case, Mexico made every effort, just as it had in the case of Mr. Valdez, to no avail.

153. The real lesson of Valdez is that Mexico's consular assistance *matters*. By gathering and presenting mitigating evidence, Mexico managed to convince an Oklahoma court that the execution of Gerardo Valdez would have been a grave miscarriage of justice. But Mexico did not stop there. When the Oklahoma court vacated Mr. Valdez's death sentence and ordered a resentencing hearing, Mexico recruited a large law firm in Washington D. C. to represent him at

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[46]See Memorial of Mexico at paras. 150-153; Counter-Memorial at paras. 7.28-7.32.

[47]Counter-Memorial at para. 7.32.

trial, and then vigorously lobbied the prosecutor to waive the death penalty. Two weeks ago, Gerardo Valdez entered a plea of guilty, and in exchange, the prosecution agreed to the imposition of a life sentence.

154. Mr. President, this concludes my presentation.

The PRESIDENT: Thank you, Ms Babcock. The hearing is now suspended for 15 minutes. The Court will resume the hearings at 12.05 p.m.

The Court adjourned from 11.50 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. I give the floor to Mr. Donald Francis Donovan.

Mr. DONOVAN:

V. THE UNITED STATES HAS VIOLATED ARTICLE 36 (1) OF THE VIENNA CONVENTION

A. Introduction

155. Mr. President, Members of the Court, I am deeply grateful for the opportunity once again to address the Court.

156. Mexico turns now to the legal principles to be applied to the facts summarized by Ms Babcock and Mr. Uribe.

157. Mexico submits that Article 36 (1) requires the United States to provide consular notification and an opportunity to receive consular assistance immediately upon the arrest or detention of a foreign national and prior to any interrogation. It submits further that the United States has violated Article 36 (1) in each of the 52 cases that are the subject of its Application.

158. The United States takes a different view. It submits that it is required to provide Article 36 (1) rights, and I quote, "in the ordinary course of business without procrastination or deliberate inaction". It submits further that Mexico has not proven a violation of Article 36 in *any* of the cases before the Court.

159. To present Mexico's position, I'd like to proceed in two steps.

160. *First*, I'd like to proceed on the *United States* version of the law. Applying the United States *own* interpretation of Article 36 (1) and this Court's Judgment in *LaGrand* — no part of

which, of course, the United States challenges — the Court should conclude that the United States has violated Mexico's rights and those of its nationals in each of the 52 cases.

161. *Second*, I'd like to address the United States proposed interpretation of Article 36 (1) for purposes of its future application in cases of Mexican nationals detained in the United States. Because Mexico agrees with the United States that, quite apart from the 52 cases, the Parties here have a fundamental dispute about the interpretation of Article 36 (1).

B. The Article 36 (1) violations in the 52 cases

1. The Article 36 (1) *(b)* violations

162. So to the 52 cases. In *LaGrand*, the Court noted that Article 36 (1) *(b)* imposes three specific obligations on the receiving State: *first*, to inform a detained foreign national "without delay" of the right to have his or her consulate contacted; *second*, to inform the consular post of the request of the detained national of the individual's detention "without delay"; and *finally*, to forward any communication by the detained national to the consular post, again, "without delay"[48].

163. At both the provisional measures stage of the *Breard* case and the merits stage of *LaGrand*, the United States conceded that it had violated Article 36 (1) *(b)* by failing to provide timely notification to the detained national. Those concessions followed from the United States own interpretation of the provision, because even the United States acknowledges that notification "within the ordinary course of business" would normally call for notification within 24 to 72 hours of arrest or detention[49]. Obviously a complete failure to notify, or the failure to notify until after arrest, trial, conviction, sentencing, and the completion of state post-trial proceedings, as in *Breard* and *LaGrand*, would not meet that standard.

164. As my colleague Ms Babcock has shown, on the basis of uncontested factual evidence submitted by Mexico, there are 50 cases in which the Mexican national was never informed by competent authorities of the United States of his right to have the consulate contacted, including

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[48] *LaGrand*, para. 77.

[49] US Counter-Memorial, para. 6.19.

nine in which United States courts found a violation and another three in which competent authorities conceded a violation[50].

165. In other words, in 50 of the cases before the Court, the undisputed facts are precisely the same as those that led the United States to concede in *Breard* and *LaGrand*, and the Court to hold in *LaGrand*, that the United States had violated Article 36 (1) *(b)*. It follows that the Court should hold that the United States violated Article 36 (1) *(b)* in those 50 cases here too.

166. In the fifty-first case, that of Mr. Esquivel Barrera, the undisputed facts show that the competent authorities provided notification some 18 months after the arrest[51]. That period does not meet the United States standard either.

167. Finally, in the fifty-second case, that of Mr. Juárez Suárez, the competent authorities provided notification some 40 hours after arrest[52]. In that case, a United States court found a violation of Article 36 (1) *(b)*, a finding that the United States now tries to disavow. Mexico believes that the United States should not be permitted to impeach its own court. If so, then, on the basis of the United States own interpretation of Article 36 (1) *(b)*, the Court should uphold Mexico's submission that the United States violated that provision in each of the 52 cases.

2. The Article 36 (1) *(a)* and *(c)* violations

168. On the same undisputed record, the Court should also uphold Mexico's submission that there was also a violation of Article 36 (1) *(a)* and *(c)* in at least 48 of the 52 cases.

169. The Court examined the relationship between these provisions in *LaGrand*, where it held that Article 36 (1) "establishes an interrelated régime designed to facilitate the implementation of the system of consular protection". Specifically, the Court held in *LaGrand* that under that régime, the United States violations of paragraph (1) *(b)* had led to consequential violations of

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[50]For judgments, see Vargas (#26), Ann. 35, at A699; see also A81, para. 139; Hernández Llanas (#34), Ann. 50 at A1037; see also at A94, para. 200; Sánchez Ramírez (#23), Ann. 64, at A1325; see also at A77, para. 121; Ignacio Gómez (#33), Ann. 61, at A1297; see also at A93, para. 195; Félix Rocha Díaz (#42), Ann. 41, at A764; see also at A110, para. 271; Ramiro Ibarra (#35), Ann. 62, at A1306; see also A96, para. 210; Humberto Leal García (#36), Anns. 51-52, at A1072 and A1156; see also at A98, para. 218; Virgilio Maldonado (#37), Ann. 53, at A1183; see also at A98, para. 226; José Trinidad Loza (#52), Ann. 44, at A868; see also at A131, para. 348. For stipulation, see Villa Ramírez (#20), Mexico Memorial, Ann. 65, at A1329; see also at A74, para. 106. For diplomatic note, see Carlos Rene Perez Gutierrez, US Counter-Memorial, Ann. 2, A344. For concession, see Raphael Cargo Ojeda, Ann. 2, A315.

[51]See Mexico Memorial, Ann. 7 at A59; see also US Counter-Memorial, Ann. 2, A102.

[52]See Mexico Memorial, Ann. 7 at A61-A62; A706; see also US Counter-Memorial, Ann. 2, A109.

paragraphs (1) *(a)* and (1) *(c)*, because the violation of (1) *(b)* had deprived Germany as the sending State of its (1) *(c)* rights to communicate and provide assistance[53].

170. In 29 of the 52 cases here, there is no dispute that Mexico did not learn of the detention of its nationals until after verdicts of death had been rendered[54]. There can be no dispute, therefore, that those cases are on all fours with *LaGrand*, and that again the Court's holding there that the United States violated Article 36 (1) *(a)* and *(c)* requires the same holding here.

171. In the 23 remaining cases, the Mexican national was put in contact with the consulate through means other than notification by the competent US authorities at some point before the imposition of the death sentences[55]. In only four[56] of those cases, however, does the United States contend that contact occurred within the period the United States urges as the benchmark. As my colleagues have explained, events that are pivotal to a death penalty prosecution, including interrogation and plea bargaining, occur at the earliest stages.

172. It follows that for a critical period in all but four of those prosecutions, even if for not as long a period as in the 29 cases, Mexico was deprived of its right to have access and provide assistance to its detained nationals, and those nationals were deprived of their corresponding right to have access and receive the assistance Mexico provides. Hence, just as with Article 36 (1) *(b)*, the Court's holding in *LaGrand* that the United States violated Article 36 (1) *(a)* and *(c)* in that case compels the same holding here.

173. I have proceeded thus far, as I said I would, solely on the basis of the United States own interpretation of Article 36 and the unchallenged rulings of *LaGrand*. On that basis alone, Mexico

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[53]*LaGrand*, para. 73.

[54]Avena Guillen, Carlos (#1); Ayala, Hector Juan (#2); Carrera Montenegro, Constantino (#4); Contreras Lopez, Jorge (#5); Gomez Perez, Ruben (#8); Lopez, Juan Manuel (#11); Lupercio Casares, Jose (#12); Maciel Hernandez, Luis Alberto (#13); Martinez Sanchez, Miguel Angel (#16); Ochoa Tamayo, Sergio (#18); Parra Duenas, Enrique (#19); Salazar, Magdaleno (#21); Tafoya Arriola, Ignacio (#24); Valdez Reyes, Alfredo (#25); Vargas, Eduardo David (#26); Alvarez, Juan Carlos (#30); Fierro Reyna, Cesar Roberto (#31); Garcia Torres, Hector (#32); Ibarra, Ramiro Rubi (#35); Leal Garcia, Humberto (#36); Medellin Rojas, Jose Ernesto (#38); Plata Estrada, Daniel Angel (#40); Regalado Soriano, Oswaldo (#43); Caballero Hernandez, Juan (#45); Flores Urban, Mario (#46); Fong Soto, Martin Raul (#48); Perez Gutierrez, Carlos Rene (#51); Loza, José Trinidad (#52); Torres Aguilera, Osvaldo Netzahualcóyotl (#53).

[55]Benavides Figueroa (#3); Covarrubias Sanchez (#6); Esquivel Barrera (#7); Hoyos (#9); Juarez Suarez (#10); Manriquez Jaquez (#14); Fuentes Martinez (#15); Mendoza Garcia (#17); Ramirez Villa (#20); Salcido Bojorquez (#22); Sanchez Ramirez (#23); Verano Cruz (#27); Zamudio Jiminez (#29); Gomez (#33); Hernández Llanas (#34); Maldonado (#37); Moreno Ramos (#39); Ramirez Cardenas (#41); Rocha Diaz (#42); Tamayo (#44); Solache Romero(#47); Camargo Ojeda (#49); Reyes Camarena (#54).

[56]Hernandez Llanas (#34); Solache Romero (#47); Esquival Barrera (#7); Juarez Suarez (#10).

respectfully submits that this Court should rule that the United States has violated Article 36 (1) *(b)* in all 52 cases and Article 36 (1) *(a)* and *(c)* in 48 of those cases setting aside for this purpose only the four cases in which the result could turn on the Parties' competing interpretations of "without delay".

174. Given those competing interpretations, the Court should not stop there. Because it needs to resolve for the future the Parties' disagreement about *when* and *how* the Article 36 (1) rights of Mexico and its nationals come into play. And of course if Mexico is right it becomes even easier to find the violations I have just described in the 52 cases. So it is to that dispute that, with the Court's permission, I will turn.

C. The United States Article 36 (1) obligations

175. Mr. President, Mexico contends that Article 36 (1) obligates a receiving State to provide consular notification "without delay" in order to facilitate consular protection. It contends further that the phrase "without delay" was intended as a functional expression of immediacy, meaning prior to any interrogation. To hold otherwise, particularly in a capital case, would deprive the foreign national of the benefits of consular assistance at the very point at which that assistance is most critical.

176. The United States, however, repeatedly accuses Mexico of "overstating" the importance of Article 36 (1)[57]. Because it attaches so much less importance to Article 36 (1) — or, perhaps to be more precise, attaches so much less importance when it speaks, as it does here, in its capacity as *receiving* State — the United States takes a much more relaxed view of the receiving State's obligations under Article 36 (1). According to the United States, the receiving State must provide notification only, as I have said, "in the ordinary course of business," and "without procrastination or deliberate delay"[58]. In other words, instead of interpreting Article 36 (1) to impose obligations that can be objectively measured by reference to their purpose, the United States introduces an element of subjective intent into the interpretation.

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[57]US Counter-Memorial, paras. 6.3-6.4; 6.12; 6.81.

[58]US Counter-Memorial, paras. 6.16-6.17.

177. The United States agrees that the standard means of treaty interpretation set forth in the Vienna Convention on the Law of Treaties are applicable here. I propose to test the Parties' competing interpretations by those means: the ordinary meaning of the language, in its context, and in the light of the object and purpose of the provision in which it appears, as well as, where appropriate, the *travaux*.

1. Ordinary meaning

178. To ascertain the ordinary meaning of "without delay", the United States places its greatest reliance on dictionaries[59]. With the greatest respect, we believe that reliance is misplaced. As Sinclair has noted and endless authorities confirm, "there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted"[60]. But since the United States looks to dictionaries, we are happy to examine them.

179. The United States cites dictionary definitions of "delay" to mean "the action of delaying; the putting off or deferring of action"[61]. It should be obvious that if delay means to put off or to defer action, then "without delay" means the opposite. Not surprisingly then, dictionaries actually define "without delay" as a synonym of "immediately".

180. The only definition that the United States cites for the actual phrase at issue, "without delay," is from the *Oxford English Dictionary*. As the United States acknowledges, the *OED* defines "without delay" to mean "without waiting, immediately, at once"[62]. Conversely, *Black's Law Dictionary*, the most commonly cited source for the meaning of legal terms in the United States tells us that "immediate" means "at once; without delay"[63]. The *Concise Oxford* is to the same effect[64].

181. The United States own usage in the context of consular notification tells us the same thing. In its instructions to law enforcement officers relating to bilateral treaties, the State

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[59]US Counter-Memorial, paras. 6.23.

[60]I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984, 2nd ed) p. 121.

[61]US Counter-Memorial, para. 6.23 (citing *The Oxford English Dictionary*).

[62]US Counter-Memorial, para. 6.23, fn. 164.

[63]*Black's Law Dictionary*, (1990, 6th ed), p. 750.

[64]*Concise Oxford Dictionary of Current English*, (1990, 8th ed), p. 589 (defining "immediate" to mean "occurring or done at once or without delay").

Department addresses, and I quote, "formulations such as 'without delay' and 'immediately'". Though we disagree with the meaning the State Department gives those formulations in the instructions, the important thing here is that the formulations are defined to mean *the same thing*[65].

182. The United States also asked the Court to compare Article 36 with the usage of "without delay", "immediately" and similar terms in certain other provisions of the Vienna Convention and then argues that where the term is different the meaning must be different. But that does not necessarily follow. If, as we have just demonstrated, "without delay" and "immediately" mean the same thing, these comparisons prove nothing — except, perhaps, that we need to consult context, object, and purpose. Were there any doubt on the point, we would get complete comfort from the *travaux*: because the Official Records reflect no comparison by the delegates of the "without delay" language in Article 36 with the language of any of those other articles, all of which were adopted later.

183. But to get a full and complete lesson from a comparison of the various articles, the United States should have pushed the enquiry further, to include the other authentic language texts of the Convention. In fact, those texts do not systematically use different terms in a manner that would track the English terms "without delay" and "immediately". To the contrary, they often use the same terms in places where the English text uses different terms. For example, the Chinese text uses the same term, "xun ji", where the English text uses "promptly" in Article 42 and "without delay" in Article 36. And the Spanish text uses the same term, "sin dilación", where the English text uses "immediately" in Article 14 and "without delay" in Article 36.

184. So, if textual exegesis tells us anything, it tells us that "without delay" means exactly what Mexico says it means: "immediately".

D. Context, object, and purpose of Article 36 (1)

185. Mexico recognizes, however, that it is not enough to examine the terms of Article 36 in isolation. Instead, the meaning of the provision must be drawn from the text as a whole, in the light

[65]Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them, US Counter-Memorial, Ann. 21, A552.

of its context and of its object and purpose[66]. So let us look at the text in that light. What do we learn?

186. *First*, the text tells us that the drafters understood that these rights would come into play in the context of a criminal proceeding. Article 36 (1) *(b)* expressly states that a foreign national must be informed of his or her rights to consular notification if "arrested or committed to prison or to custody pending trial or detained in any other manner". Article 36 (1) *(c)*, meanwhile, expressly recognizes that a consular officer will visit the foreign national in "prison, custody or detention". Article 36 (1) *(c)* also expressly states that among the help the officer might provide is, "to arrange for . . . legal representation". The mandate to provide notification "without delay" must therefore be read in the specific context of a criminal investigation and prosecution leading to a "trial" and hence implicating an individual's legal rights.

187. Now, the United States suggests that Article 36 (1) is not expressly linked to any particular step in a criminal investigation[67]. With all respect, that is just not true. The provision is expressly linked to arrest because it is upon that even that its requirements come into play "without delay". And arrest is a very concrete, specific step in a criminal investigation. The context, therefore, tells us that, upon arrest, notification must be provided before anything else happens.

188. *Second*, as to object and purpose, the text is again instructive. The very first phrase of Article 36 (1) tells us expressly that its purpose is "to facilitat[e] the exercise of consular functions". The Court reiterated that point in *LaGrand* when it stated that the purpose of Article 36 (1) is to "facilitate the implementation of the system of consular protection"[68].

189. In light of that very specific guidance, it is hard to understand how the United States can insist that the "overarching purpose of Article 36 (1) is clearly to protect against secret detention"[69]. If that were true, then Article 36 (1) could contain nothing more than an obligation to notify the consultate whenever a foreign national is detained.

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[66]Vienna Convention on the Law of Treaties (1969), Article 31 (1).

[67]US Counter-Memorial, para. 6.24.

[68]*LaGrand*, para. 74.

[69]US Counter-Memorial, para. 6.61; see also para. 6.7.

190. *Third*, there is no disagreement between the United States and Mexico on how consular protection is actually brought to bear in the context of criminal prosecutions, such as those at issue here, involving the possible application of the death penalty. Echoing Mexico's own account, the United States explains in its Counter-Memorial that consular officials may offer detainees the "wide-ranging" consular assistance described by Ms Babcock and Mr. Uribe[70]. The United States also acknowledges that consular officials may serve as a "cultural bridge" by providing important information to detainees who are unfamiliar with the legal system of the United States[71]. In other words, as Mexico explained in its Memorial, consular assistance addresses the objective differences between a foreign national detained in a given jurisdiction and a national detained in his or her own jurisdiction. It's not a matter of conferring "extra" rights on foreign nationals; to the contrary, Article 36 levels the playing field by allowing the sending State to ensure that its nationals understand and can meaningfully exercise their rights.

191. Putting all these indications together, what have we learned? We can conclude with confidence that the drafters of the Vienna Convention wanted Article 36 (1) to count. In order for the right to receive consular assistance to count, the foreign national *must* be informed of his or her right to consular assistance and access, and be able to *invoke* that right, prior to the moment of his or her greatest vulnerability — interrogation. In OC-16, to which you have heard reference and which my colleague Professor Bernard will discuss in greater detail later today, the Inter-American Court of Human Rights came to that very conclusion[72].

192. In *LaGrand*, this Court, too, recognized the need for a functional interpretation of Article 36. There the Court held that the rights accorded by Article 36 (1) are "interrelated" and that, together, they have the single purpose of facilitating consular protection. In other words, the Court recognized that the rights and obligations delineated in subparagraphs *(a)*, *(b)*, and *(c)* are functionally interdependent.

193. The whole purpose of the obligation to provide consular notification in (1) *(b)* is to facilitate the sending State's right to provide consular assistance under (1) *(c)*. It would make no

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[70]US Counter-Memorial, para. 6.5.

[71]US Counter-Memorial, para. 6.6.

[72]*The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law Id.*, Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16, para. 106 (emphasis added).

sense to require the receiving State to inform the foreign national of his or her right to consular notification without delay, and to require that the national have the opportunity to exercise that right without delay, if the receiving State is not also required to give the sending State the opportunity, if it so chooses, to render the consular assistance without delay or before interrogation.

194. But the United States responds, "no, the receiving State does not have to allow for the immediate provision of consular assistance, because the phrase 'without delay' does not appear in Article 36(1) *(c)*". Well, of course not. While Article 36 (1) imposes *obligations* on the receiving State, it confers *rights* on the sending State and its nationals. Article 36 (1) does not impose an obligation on Mexico as the sending State to provide any consular assistance *at all*, let alone to provide consular assistance without delay. But that does not mean that the receiving State is not obligated to facilitate consular assistance without delay when the sending State is prepared to render it.

195. Let us put it simply. The United States is trying to use the sending State's rights to diminish the receiving State's obligations. That just cannot be.

1. The *travaux* confirm the ordinary meaning of Article 36 (1)

196. I move therefore to the *travaux*, which can be examined to confirm the interpretation otherwise derived from the text.

197. The single most important development during the negotiations over Article 36 (1) was the adoption of the term "without delay" and the rejection of the alternative "without *undue* delay". Mexico went through this development in its Memorial, so I will be brief here[73]. The original text proposed by the International Law Commission used the phrase "without *undue* delay". Representative Evans from the United Kingdom proposed an amendment to delete the word "undue" in order to avoid the implication that "some delay was permissible"[74]. The USSR and Japanese representatives expressed the understanding that the result of the amendment would be to require notification "immediately", and no delegate disagreed. The UK amendment ultimately succeeded[75].

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[73]Mexico Memorial, paras. 178-184.

[74]*Travaux*, at 340, para. 20.

[75]*Id*. at 37, para. 14 (USSR representative); *Id*. at 343, para. 2 (Japanese representative).

198. In the Counter-Memorial, the United States can hardly bring itself to acknowledge this development. It is understandable why. By asking this Court to adopt a standard of "ordinary course of business, without procrastination or deliberate inaction", the United States is asking this Court to water down the command of Article 36 (1) in *precisely* the manner that the delegates rejected when they rejected the formulation "without undue delay".

2. The relevance of subsequent State practice

199. Next: State practice. The United States attacks Mexico's interpretation of "without delay" on the ground that Mexico has failed to show that the practice of other States parties under Article 36 (1) is consistent with Mexico's interpretation[76].

200. But reference to State practice is not a necessary element of treaty interpretation, and Mexico has no obligation to demonstrate that State practice is consistent with its interpretation of "without delay"[77]. If the United States wants this Court to use State practice, *it* must demonstrate subsequent practice that is, in Sinclair's words, "concordant, common and consistent" among all parties[78].

201. Instead of meeting that high threshold, the United States presents a survey that, *by its own account*, shows exactly the opposite. I quote the opening lines of Ambassador Harty's declaration presenting the survey results: "It is difficult to summarize state practice with respect to Article 36 (1). States parties to the VCCR *vary enormously* in how — and to what extent — they comply with their Article 36 (1) obligations."[79] Mr. President, that statement is sufficient *in and of itself* to render the survey utterly irrelevant to the interpretation of Article 36 (1) *(b)*.

202. Further, while time does not permit me to review the details of the survey, a simple exercise of arithmetic tells us that when you subtract from the sample the States for which the

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[76]US Counter-Memorial, para. 6.32.

[77]Vienna Convention on the Law of Treaties (1969), Art. 31 (1).

[78]I. Sinclair, *The Vienna Convention on the Law of Treaties*, (1984, 2nd ed) 137. See also Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 *Recueil des Cours* 1 at 48; *Appellate Body Report on Japan - Taxes on Alcoholic Beverages*, (1996) WT/DS8, 10, 11/AB/R, p. 8; *Appellate Body Report on Chile ¾ Price Brand System and Safeguard Measures Relating to Certain Agricultural Products*, 2002 WL 31106010 (WTO), paras. 213 and 272; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) I.C.J. Reports 1971*, p. 22, para. 22.

[79]US Counter-Memorial, Ann. 4, para. 11 (emphasis added).

United States provides no information and those that the United States reports do not comply, the survey accounts for less than a third of the States party. So for the independent reason that its sample is too limited, the survey does not qualify as a means of interpretation.

203. In fact, the survey does not tell us much at all. But if it tells us anything, it tells us that this Court would serve the international community well by providing a definitive interpretation of the obligation to act "without delay" imposed by Article 36 (1).

E. Summary

204. Now, the United States argues that Mexico's interpretation of Article 36 (1) should be rejected because it would lead to "absurd results"[80]. The United States would have you believe that its entire law enforcement and criminal justice systems would come to a screeching halt if Mexico's interpretation of Article 36 (1) controlled. So I would like to finish my discussion by summarizing just what Mexico believes Article 36 (1) requires and how it should operate in practice.

1. Provision of consular information

205. Consular information first.

206. Mexico contends that "without delay" means immediate, and in any event, prior to interrogation. That is a simple, objective standard. Law enforcement officials can easily understand it, and courts can easily apply it.

207. By contrast, the United States interpretation converts an objective obligation into a discretionary standard, which would be subject to the will and whim of each arresting officer, and which would require an enforcing court to determine whether the competent authorities "procrastinated" or "deliberately" put off notifying the consulate. In fact, the United States interpretation actually creates a *disincentive* to good faith compliance, because busy hard-working and diligent law enforcement officers will always be able to convince themselves that they are not procrastinating, or deliberately delaying, even though, in the ordinary course of business, they have identified many other tasks they have to take care of first.

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[80] US Counter-Memorial, paras. 6.44-6.47.

208. I want to turn now to the identification of the persons to whom the obligation is owed, that is foreign nationals. Mexico contends that when Article 36 (1) says that the obligation arises when "a national of the [sending] State" is arrested or otherwise detained, it means exactly that. If the arrestee is a foreign national, the authorities must inform and notify. The onus to identify the foreign national is on the receiving State. Article 36 (1) does not mean, as the United States urges, that the competent authorities must provide that notification only after they "are aware that they have arrested a foreign national"[81].

209. Again, Mexico's standard is simple, objective, easy to understand, and easy to apply, even in the face of the diversity of the United States that is referred to in the Counter-Memorial.

210. Let me be clear. The diversity of the United States, cultural and otherwise, is one of the great gifts of life in the United States. But that diversity cannot be used to diminish rights that are accorded to foreign nationals precisely *because* they are foreign nationals, precisely *because* that is, there are objective differences between a national arrested in his own country and someone arrested in a foreign country.

211. In any event, we know from actual practice that the difficulties that the United States tries to conjure simply do not exist — and that if the United States wanted to provide the required notification to every detained foreign national, it would have at least two ways in which to do so.

212. One option would be for the United States to do what the State Department currently advises law enforcement officials to do, which is to take steps to determine whether someone is a foreign national whenever there are objective indications so suggesting, such as unfamiliarity with English, or identification documents indicating a place of birth outside the United States[82]. In addition to these indications, the arresting officers will have access to a great deal of information that would routinely be checked as part of the processing of an arrestee.

213. There would be a second, even more reliable option. The arresting officers could simply provide the same warning to everyone: "if you are a foreign national, then you have these rights". The model for this approach of course would be the *Miranda* warnings that, as

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[81]US Counter-Memorial, para. 7.5; see also para. 7.9.

[82]US Counter-Memorial, Ann. 21, A550.

Ms Babcock explained, law enforcement officers must give to anyone arrested[83]. In fact, in a recent majority opinion of the US Supreme Court, Chief Justice Rehnquist, hardly a judge who might be considered unsympathetic to law enforcement concerns, observed that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture"[84].

214. So if the United States wanted to ensure compliance with Article 36, it could just add an Article 36 statement to the *Miranda* warnings. In fact, as the United States advises the Court[85], that is the solution already adopted by several jurisdictions in the United States. Mexico is not saying, of course, that this Court should tell the United States that it *has* to adopt that specific means to ensure compliance. What Mexico *is* saying however, is that the *Miranda* warnings show that it would not be impracticable for the United States to ensure that it provided Article 36 notification to every foreign national arrested or detained.

215. I note, too, that the United States survey of State practice identifies eight States — a diverse group comprised of Brazil, Korea, Iceland, Ireland, Kenya, Denmark, Spain and Turkey — that have come to the same conclusion. According to the United States, those States apply Mexico's interpretation of "without delay" — that is, notification before interrogation — which they must consider workable[86].

216. I want to address one final point on this topic. The United States objects that the obligation to provide consular information should not attach where a foreign national misrepresents that he is a US national. Mexico has no quarrel with that proposition. If, upon arrest, a foreign national misrepresents his nationality and affirmatively claims US citizenship, the arresting officers would surely be excused from immediate compliance by ordinary principles of law, such as estoppel and the like.

217. But the risk of mischief does not provide an excuse for non-compliance that goes beyond the mischief. In other words, the excuse for non-compliance would end if and when the

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[83]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[84]*Dickerson v. United States*, 530 U.S. 428, 430 (2000).

[85]US Counter-Memorial, para. 2.33.

[86]US Counter-Memorial, Ann. 4, A381, para. 19, ftn 2 and 3.

competent authorities received objective indications of foreign nationality. The Inter-American Court recognized that point in OC-16[87], and so does the United States. The State Department advises law enforcement authorities that when an arrestee claims to be a United States citizen, they may rely on that assertion, but once there are any indications of foreign nationality, they should investigate further[88]. Mexico agrees.

2. Consular notification and facilitation of access

218. Now I would like to address notification and access. Mexico asserts that in light of the context, object and purpose of Article 36, consular notification must occur and consular access be provided as soon as requested by the foreign national and certainly before interrogation.

219. In light of the Counter-Memorial, though, I want to make clear that Mexico is not advocating a rigid standard. Specifically, Mexico did not argue and does not argue that all interrogations must be postponed indefinitely while a consular officer decides whether or not to visit.

220. As I have explained, Article 36 (1) *(c)* provides a right of consular assistance that is inextricably intertwined to the obligation of the receiving State to provide notification without delay. At the same time, it does not prescribe a time-limit within which the right to provide consular assistance must be exercised. So the basic principles of good faith and reasonableness that inform treaty interpretation would dictate that the right must be exercised within a reasonable period of time[89]. What that means here is that the receiving State must give the sending State a reasonable period in which to respond to the consular notification before starting interrogation.

221. Mexico would respectfully suggest that the reasonableness of that period would depend on two factors: the severity of the crime and the availability of the consul.

222. Just as this Court in *LaGrand* determined the obligations owed under Article 36 (2) by reference to the severity of the penalty imposed[90], so too is it appropriate in interpreting

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[87]OC-16, paras. 95-96.

[88]US Counter-Memorial, Ann. 21, A550.

[89]See, e.g., R. Jennings and A. Watts, *Oppenheim's International Law* (1996, 9th ed.) 1272 and fn 7; *Military and Paramilitary Activities, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 420, para. 63; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 96, para. 49; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997, 7th ed) 142.

[90]*LaGrand*, para. 123; see also para. 63.

Article 36 (1) to consider the severity of the charges on which the foreign national is arrested and of the potential penalty he or she faces. In cases that involve serious crimes, and the attendant risk of prolonged detention or severe penalties, the consular officer must be given a longer period of time in which to render assistance prior to the commencement of interrogation than the officer would be given in the case of a minor offense.

223. As to the availability of the consul, in some cases, such as in an area with a large Mexican population and an active Mexican consulate, there will be an ongoing relationship between law enforcement and consular officers and a readily available line of communication. In those cases, law enforcement officers will know who to call and will be able to get a reasonably quick response as to whether and how the consular officer will get involved. There may also be differences in the means of facilitating consular access between, for example, jurisdictions in Texas and those in Alaska. In more remote areas, where consulates are distant, it may be sufficient, for another example, for the consulate to give advice to foreign nationals over the phone rather than in person.

224. Again, the practice of other States shows that this interpretation is a practical one. The United States survey shows that ten States have adopted rules or practice to the effect that interrogation should be delayed where foreign nationals invoke their consular rights[91]. I have identified those States as I have identified all the references during the course of this submission in the written version of this submission.

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225. In short, Mr. President, Mexico asks this Court to order the United States to take Article 36 rights seriously. Notwithstanding the United States attempt to sensationalize the issue by referring to "tender lives" and "ticking time bombs"[92], Mexico's interpretation will not hinder

[91]Australia, New Zealand, Bosnia-Herzegovina, Dominican Republic, Kenya, Madagascar, Denmark, Ghana, Guyana and Mozambique. See US Counter-Memorial, Ann. 4, A384, fn 7.

[92]US Counter-Memorial, para. 6.44.

effective law enforcement. Legal systems routinely strike a balance between the protection of individual rights and considerations of public safety.

226. Again a comparison with *Miranda* is helpful. In 1966, when the decision was handed down, many law enforcement groups raised the same arguments the United States raises here about how, in practice, such warnings would be impossible to give, and how, in practice, they would impede the efforts of law enforcement officers to prevent crime. Yet 40 years later, as I said a moment ago, *Miranda* warnings are not only an accepted part of the United States criminal justice system, but of US culture.

227. To say it once again, the diversity of the United States population is a cause for celebration by Mexican nationals and United States nationals alike. But in light of that diversity, and particularly in light of the interests of Mexican nationals protected by the Vienna Convention, Mexico asks this Court to require that the United States, by whatever means it chooses, achieve the same degree of acceptance for Article 36 rights. Mr. President, I request that you call upon my colleague Ms Birmingham who will address the command of Article 36 (2).

The PRESIDENT: Thank you, Mr. Donovan. I now give the floor to Ms Katherine Birmingham Wilmore.

Ms. BIRMINGHAM WILMORE:

VI. THE UNITED STATES HAS VIOLATED ARTICLE 36 (2) OF THE VIENNA CONVENTION

A. Introduction

228. Mr. President, Members of the Court, good afternoon. It is a true honour and privilege to appear before you and on behalf of Mexico.

229. I will be arguing that in addition to its violations of Article 36 (1), the United States has also independently violated Article 36 (2) of the Vienna Convention. As Mr. Donovan has just discussed, the purpose of the rights in Article 36 (1) is to facilitate meaningful consular assistance to foreign nationals, particularly those detained by the receiving State. The proviso of Article 36 (2) specifically protects and enables Mexico's *right* to offer such consular protection by requiring the United States first, to accommodate Article 36 (1) rights within its municipal law and,

second, to provide an effective remedy in the event of a breach. This second aspect is arguably more important than the first for, as the United States is well aware, a right without a remedy is no right at all.

230.Yet, that is precisely how the United States treats the consular rights of Article 36: as no rights at all. As Mexico has shown in its Memorial, the United States provides *no* remedy for violations of Article 36 (1), in any procedural posture at any level of the criminal proceedings. The United States does not attach *any* legal significance to such violations and does not permit Mexican nationals to bring effective legal challenges in their criminal proceedings based on violations of Article 36 (1).

231. Mexico is not asking this Court to interpret or apply US law. Indeed, you do not even have to resolve any factual disputes about US law because there is no disagreement between the Parties about the law applied by US courts to violations of Article 36 (1). The Parties disagree only about the legal consequences of the application of such laws.

B. Article 36 (2) as interpreted in *LaGrand*

232. In *LaGrand*, this Court had the opportunity to analyse the obligations of Article 36 (2) quite closely, and gave a clear, authoritative interpretation of those obligations; how they had been breached by the United States; and how the United States was required to change its laws, or the application of those laws, so as to avoid future breaches. The United States has embraced the holdings of *LaGrand* unequivocally in its Counter-Memorial. Mexico does also. The decision and its central importance to our current dispute are common ground between the Parties. So, if the Court will indulge me for a moment, I would like to review the Court's teaching in *LaGrand* with respect to Article 36 (2) of the Vienna Convention.

233. In considering Germany's second submission at the oral proceedings[93], the Court determined that the United States had violated Article 36 (2) because the procedural default doctrine prevented the LaGrands from "effectively challenging their convictions and sentences" on

[93] *LaGrand*, para. 12 (2).

the basis of US violations of Article 36 (1)[94]. The Court elaborated that it was a violation of Article 36 (2) for this municipal law doctrine to prevent

> "US Courts . . . from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion from retaining private counsel for the LaGrands and otherwise assisting in their defence as provided for in the Convention"[95].

As a result, the Court granted Germany's second submission and declared the US to have breached Article 36 (2) "by not permitting the review and reconsideration" of the convictions and sentences of the LaGrand brothers[96].

234. In its fourth submission, Germany requested the Court to order the United States to make general assurances "that it will not repeat its unlawful acts" and in particular, with regard to Article 36 (2), Germany requested that in cases involving the death penalty the United States provide "*effective review of and remedies for* criminal convictions impaired by a violation of the rights of Article 36"[97].

235. In paragraph (6) of its *dispositif*, the Court accepted the United States in-court assurances of its commitment to better compliance with Article 36 (1) as sufficient for "Germany's request for a general assurance of non-repetition"[98].

236. However, in paragraph (7) of the *dispositif* this Court ordered specific relief on Germany's request for assurances with respect to Article 36 (2), holding that where foreign nationals are sentenced to severe penalties without having had the benefit of their rights under Article 36 (1), the United States "shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth" in the Vienna Convention[99].

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[94] *LaGrand*, para. 91.

[95] *Id.*

[96] *LaGrand*, para. 128 (4).

[97] *LaGrand*, para. 12.

[98] *LaGrand*, para. 128 (6).

[99] *LaGrand*, para. 128 (7).

C. The US judicial system does not provide the review and reconsideration mandated by *LaGrand*

237. The United States Counter-Memorial echoes with the refrain that the Court stated that the "obligation" to permit review and reconsideration "could be carried out in various ways" and left the "choice of means" to the United States[100]. The trouble is, the United States has fixated on a label: "review and reconsideration", but this Court articulated a standard with content.

238. Mexico has amply described in its Memorial the many municipal law doctrines the United States employs to deny review and reconsideration to Mexican nationals for violations of Article 36 (1). But, let me be perfectly clear, contrary to what the United States would have this Court believe, Mexico does not assert that the procedural default rule or other doctrines of criminal procedure are "inherently inconsistent" with the obligations of the US under the Vienna Convention[101]. Mexico's position, instead, is perfectly in line with this Court's reasoning in *LaGrand* that "[t]he problem arises when the procedural default rule [or other doctrines] does [do] not allow the detained individual to challenge a conviction and sentence" on the ground of violations of his rights under Article 36 (1)[102].

239. The United States denies any violation of Article 36 (2) in this case, and at least goes through the motions of claiming to give full effect to the rights of Article 36, in the first instance, through the workings of its judicial system. It is a half-hearted argument. The United States barely defends its compliance with Article 36 (2) and this Court's Judgment in *LaGrand*. In paragraphs 6.64 and 6.65 of the Counter-Memorial, the United States admits that its courts will not grant relief on a Vienna Convention claim either at the trial level or subsequently, and will apply procedural default doctrines at the state and federal level to bar any claims based on violations of Article 36 (1) that were not raised at the trial court. These are the very facts on which Mexico has based its claim for relief under Article 36 (2). I shall begin with the United States continued application of the procedural default doctrine.

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[100] *Id*.

[101] Counter-Memorial, para. 5.9.

[102] *LaGrand*, para. 90.

1. Procedural default

240. From the *LaGrand* and *Breard* cases, this Court is already well acquainted with the procedural default doctrine. Put simply, this Court will recall that, as applied to a Vienna Convention claim, the doctrines of procedural default amount to this: if a Mexican national did not raise a claim at trial relating to the United States violation of his rights under Article 36 (1), he will not be permitted to raise it on direct appeal or in any post-conviction proceedings, notably as this Court has seen, in federal *habeas corpus* proceedings.

241. Prior to the *LaGrand* Judgment, all US courts to have considered the issue — including courts in seven cases of Mexican nationals as described in Mexico's Memorial[103] — applied the doctrine of procedural default to bar claims based on the US failure to provide the consular rights contained in Article 36 (1). Since *LaGrand*, US courts continue unabashedly to apply procedural default in the very same manner, and have done so specifically in three cases of Mexican nationals[104]. The United States has not changed its default doctrines or their application one iota since *LaGrand*. Thus, the "circumstances" which led this Court to conclude that the US application of this doctrine in the cases of the LaGrand brothers violated Article 36 (2) by preventing courts from attaching "legal significance" to the breaches of Article 36 (1) remain unchanged.

242. Nowhere in its Counter-Memorial does the United States challenge Mexico's account of this doctrine — either its content or its application in cases of Article 36 (1) violations. To the contrary, the United States merely asserts that "its judicial system can deal with any claim arising from Article 36 (1), *if it is timely raised*"[105]. But if not, the United States admits that "procedural default rules will possibly preclude such claims on direct appeal or collateral review, unless the court finds there is cause for the default and prejudice as a result of the alleged breach"[106]. As Mexico has explained in its Memorial, no US court has ever found there to be cause for the default or any resulting prejudice in the case of a Vienna Convention claim.

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[103]Ibarra #35, page A95, Leal #36, p. A98, Medellin #38, p. A103, Plata #40, p. A106, Torres, #53, p. A132, Reyes, #54, p. A134, Fierro, #31 (see US Ann. 2, p. A180, para. 8)

[104]Fong Soto, #48, p. A123; Medellin Rojas #38, p. A103; *Torres* #53, *Torres v. Mullin*, 540 US __ (2003).

[105]Counter-Memorial, para. 6.64.

[106]Counter-Memorial, para. 6.65.

243. The Supreme Court of the United States was recently presented with the opportunity to reconsider this issue in the case of Osbaldo Torres, one of the Mexican nationals subject of this Court's Order of Provisional Measures. Although the Supreme Court declined to grant *certiorari* to hear the case, the separate opinion of Mr. Justice Stevens is nevertheless informative.

244. Justice Stevens explained that he now believes he should have dissented from the substance of that court's holding in *Breard v. Green* that Mr. Breard had procedurally defaulted his Article 36 (1) claim. Citing paragraphs 90 and 91 of this Court's judgment in *LaGrand* as the "authoritative interpretation" of the Convention, Justice Stevens observed that:

> "[a]pplying the procedural default rule to Article 36 claims, is not only in direct violation of the Vienna Convention, but it is also manifestly unfair. The ICJ's decision in *LaGrand* underscores that a foreign national who is presumptively ignorant of his right to notification should not be deemed to have waived the Article 36 protections simply because he failed to assert that right in a state criminal proceeding."[107]

245. While Mexico can hope that US courts will heed Justice Stevens's opinion, in the meanwhile, the issue is clear for this Court. Ten Mexican nationals are in situations indistinguishable from the LaGrand brothers in that their ability to challenge their convictions and sentences on the basis of violations of Article 36 (1) has been barred by application of the procedural default doctrine[108]. Moreover, Mexico submits that under the same default doctrines, 18 additional Mexican nationals, who also did not raise their Vienna Convention claims at trial, will also be barred from challenging their convictions and sentences on this basis, once they attempt to raise the claim on appeal or in post-conviction proceedings that are still ongoing[109]. Under *LaGrand*, this constitutes an unequivocal breach of the United States international legal obligation to Mexico to give "full effect" to the purposes of the rights of Article 36.

2. Individual rights

246. I will add, though it should go without saying, that the United States also violates Article 36 (2), and runs directly afoul of this Court's Judgment in *LaGrand*, when US courts bar a

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[107] *Torres v. Mullin*, 540 *US* — (2003) (Opinion of Stevens, J.).

[108] See, *supra*, footnotes 11 et 12.

[109] Contreras, #5; Corarrubias, #6; Gomez #8; Hoyds, #9; Lopez #11; Lupercio, 12; Maciel, #13; Marriquez, #14; Martinez, #16; Parra, #19; Salazar, #21; Salcido, #22; Tafoya, #24; Vevano, #27; Zamvolio, #29; Valdez, #25; Regalado, #43; Caballero, #45; Avena, #1; Carrera, #4; Flores, #46; Ochoa, #18; Camargo, #49; Perez, #51.

remedy to Mexican nationals on the ground that Article 36 (1) does not create individual rights. On this point, the *LaGrand* Judgment could not have been more explicit, holding that the "clarity" of the provisions of Article 36 (1) "admits of no doubt" that Article 36 (1) "creates individual rights"[110]. Yet, in the cases of six Mexican nationals, US courts have refused a remedy on this basis[111].

3. No remedies

247. While the *LaGrand* case dealt only with the particular municipal law doctrine of procedural default presented to it, the principles articulated in this Court's Judgment apply more broadly to require the United States to permit effective challenges of convictions and sentences within its municipal laws. This is significant because in addition to its continued application of procedural default, United States courts have robbed Article 36 (1) of any independent content, of any meaningful substance, of any "legal significance" by holding in every context that a violation of Article 36 (1) does not entitle a Mexican national to a remedy.

248. As my colleague, Mr. Donovan has explained, Mexico and the United States have fundamentally different views about the content of the rights articulated in Article 36 (1). This undoubtedly explains why we also differ fundamentally on the consequences of their violation. Whereas Mexico finds Article 36 (1) rights to be essential and their deprivation critical, particularly where serious criminal penalties are at stake, the United States considers the violation of Article 36 (1) to be trivial and due process to have been fully respected where the United States Constitution has not been violated. As a result, US courts refuse to provide remedies for the breach, finding that Mexican nationals could not have been prejudiced or harmed by the deprivation of consular information, notification and assistance. In this manner, at trial, on appeal and in post-conviction proceedings, US courts prevent Mexican nationals from, in the words of the *LaGrand* Judgment, "effectively challeng[ing] their convictions and sentences" on anything "*other than on United States constitutional grounds*"[112].

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[110] *LaGrand*, para. 77.

[111] Hernandez Llanas, #34; Loza, #52; Maldonado, #37; Medellin, #38; Plata, #40; Solache, #47.

[112] *LaGrand*, para. 91 (emphasis added).

249. In order to explore the consequences of this jurisprudence, I ask you Mr. President and Members of the Court, to indulge me for a moment in a hypothetical exercise. I ask you to try to imagine yourselves in the shoes of someone very different. Imagine yourselves not eminent jurists, not Members of the International Court of Justice, but rather poor, uneducated, non-English speaking nationals of your own countries, like all of those subject to Mexico's Application. Imagine, if you can, going through an arrest, a trial and a sentencing for a capital crime all without the aid of someone like Mr. Uribe or Ms Babcock or anyone else from the consular service. Imagine, if you will, that after a time on death row in Texas, for instance, you finally learn — by chance — that you had a right to have your consulate contacted at the time your arrest. And, you learn that as a routine matter, your consular officials assist nationals who have been arrested for capital crimes. You learn that they would have assisted you if they had been notified about you. They would have negotiated with the prosecutor from the very outset — in all likelihood preventing that prosecutor from seeking the death penalty in your case at all. Failing that, they would have found you an attorney who handles death penalty cases routinely, unlike the attorney assigned to you by the court who most likely was not so talented or experienced. They would have helped you hire expert witnesses for your trial. They would have helped you gather and find mitigating evidence for your sentencing hearing. But, you were deprived of all of this protective assistance, simply because in violation of Article 36 (1) of the Vienna Convention, no US authority told you that you had a right to have the consulate contacted on your behalf. Mr. President, Members of the Court, I ask you, upon learning all of this, wouldn't you feel your rights had been prejudiced by the US violation?

250. US courts insist that you would *not* have been prejudiced in such a circumstance. Why? For the simple reason that Article 36 rights are not constitutional due process rights. Accordingly, a violation of that right is inconsequential — and requires no remedy. In the words of one US federal judge: "Prejudice has never been — nor could reasonably be — found in a case where a foreign national was given, understood, and waived his or her Miranda rights"[113].

[113] *US* v. *Rodriguez*, 68 F. Supp. 2d 178, 183-84 (EDNY 1999); Counter-Memorial, para. 6.81.

251. This doctrine has led to severe consequences for Mexican nationals. One of those consequences is that state courts — like their federal counterparts — deny post-conviction relief to Mexican nationals who raise Vienna Convention claims, thereby ensuring that the federal default rules will also apply. As the Ohio State Appellate Court said when denying such relief to José Loza: "even if the Vienna Convention on Consular Relations could be said to create individual rights . . . it certainly does not create Constitutional rights"[114].

252. This judicial attitude leads to profound consequences at the trial level as well. For, even at the trial level — where the United States insists all Vienna Convention claims must be raised lest they be defaulted in subsequent proceedings — courts refuse to provide any relief for a Vienna Convention violation. For just one example, in seven cases of Mexican nationals described in the Memorial, courts have refused to suppress inculpatory statements obtained in violation of the US obligation to provide consular information without delay[115]; this is the same result, I should add, courts have reached in every other case presented to them by a foreign national. As a federal court noted in the recent case of a Mexican national charged with a federal drug offence who sought to have his confession suppressed because the authorities did not inform him of his Vienna Convention rights, "every circuit to address the question has determined that suppression is not the appropriate remedy for violations of Article 36"[116]. In summarizing its reasoning as to why a remedy was not available in this case, the court continued: "The Vienna Convention does not purport to create rights on par with those guaranteed in the Fourth, Fifth, and Sixth Amendments of the United States Constitution." Relief is available for the constitutional violation, not for a Vienna Convention violation.

253. The United States argues that "it is wrong to suggest that the 'laws and regulations' of the United States must give Article 36 (1) *(b)* the status of a constitutional protection in order to comply with the proviso of Article 36 (2)"[117]. Mexico does not so suggest. Indeed, the United States misses the point. It is not an issue of nomenclature; it is an issue of what the Vienna

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[114]*Ohio* v. *Loza*, 1997 WL 634348 (Ohio. App. 12 Dist. October 13, 1997) (quoting *Murphy v. Netherland*, F.3d 97, 100 (4th Cir. 1997) (denying habeas corpus relief to Mexican national Mario Murphy).

[115]Juárez Suárez, #10; Mendoza, #17; Hernandez, #34; Solache, #47; Alvarez, #30; Gomez, #33; Ramirez Villa, #20.

[116]*United States* v. *Mandujano*, No. CR-03-178(2) JRTFLN (D. Minn. Aug. 22, 2003).

[117]Counter-Memorial, para. 82.

Convention, as interpreted by *LaGrand*, requires. The Vienna Convention does not require the United States to add consular information rights to its Constitution. Article 36 (2) *does* require the United States to permit "effective challenges to the convictions and sentences" of foreign nationals, by attaching "legal significance" to the violation of Article 36 (1).

D. The US cannot rely on its municipal law as an excuse

254. All of this unchanged — and the United States has admitted, unchanging — judicial non-compliance with the requirements of Article 36 (2) reveals one simple truth: The United States simply still does not accept the import of the Article 36 (2) proviso. It still elevates its municipal law over and above its international obligation to give full effect to Article 36 and to provide effective review and reconsideration, as mandated by this Court in *LaGrand.*

255. In paragraph 1.9 of its Counter-Memorial, the United States asserts that since this Court's Judgment in *LaGrand*: "in cases where Article 36 has not been observed, the United States has undertaken within the context of its municipal laws to allow review and reconsideration of the conviction and sentence taking account of this fact"[118].

256. Mr. President, Members of the Court, Mexico submits that the US reliance on this one phrase "within the context of its municipal laws" is the principal reason for the United States continuing violation of Article 36 (2). The United States would have you believe that its failure to remedy Vienna Convention violations is the inevitable consequence of its municipal laws and its federal structure. But it is axiomatic that the United States is not entitled to elevate its municipal law doctrines and federal system of government above its international legal obligations to Mexico under the Vienna Convention. That is the whole point of the proviso.

257. In fact, remarkably, the United States insists yet again that the basic purpose of Article 36 (2) was to require deference to the laws and regulations of the receiving State, and it did not countenance interference with the receiving State's criminal law and procedure[119].

258. In the final analysis, the United States has admitted all of the relevant facts —the domestic legal treatment of the Mexican nationals specifically, and the past and prospective

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[118]See also transcript of oral proceedings, 21 January 2003, at 6.00 p.m., at 25.

[119]Counter-Memorial, paras. 6.97 and 6.98.

treatment of such claims generally. These uncontested and incontestable facts demonstrate conclusively that in the post-*LaGrand* world United States courts still do not "attach legal significance" to the violations of Article 36 (1) and still refuse to permit Mexican nationals to "effectively challenge their convictions and sentences" on the basis of violations of Article 36 (1). Mr. President, the United States is *not* conducting review and reconsideration through its judicial system. Instead, as Mr. Taft informed the Court in response to its question at the provisional measures hearing last February, the United States "have made a conscious choice to focus its efforts on clemency proceedings"[120].

259. While the United States clearly so hopes to immunize its non-compliant judicial system, as Ms Babcock will discuss after our lunch break, clemency is no solution.

E. Conclusion

260. Mr. President, this concludes my presentation.

The PRESIDENT: Thank you, Ms Wilmore. This marks the end of this morning's session. The Court will resume the hearing at 3 o'clock this afternoon. The Court rises.

The Court rose at 1.15 p.m.

[120]Transcript of oral proceedings, 21 January 2003, at 6 p.m., at 25.