International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 16 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 mardi 16 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,

as Counsellors and Advocates;

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

Mr. Erasmo A. Lara Cabrera, Head of the International Law Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

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

Ms Catherine Amirfar, Esq., Attorney at Law, Debevoise & Plimpton, New York,

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,

as Advisers;

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

as Assistant.

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

S. Exc. M. Juan Manuel Gómez-Robledo, ambassadeur, conseiller juridique du ministère des affaires étrangères, Mexico,

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

comme agents;

M. Pierre–Marie Dupuy, professeur de droit international public à l'Université de Paris II (Panthéon-Assas) et à l'Institut universitaire européen de Florence,

M. Donald Francis Donovan, Esq., avocat au cabinet Debevoise & Plimpton, New York,

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

M. Carlos Bernal, avocat au cabinet Noriega y Escobedo, président de la Commission du droit international de l'association du barreau mexicain, Mexico,

Mme Katherine Birmingham Wilmore, Esq., avocate au cabinet Debevoise & Plimpton, Londres,

M. Dietmar W. Prager, Esq., avocat au cabinet Debevoise & Plimpton, New York,

Mme Socorro Flores Liera, chef de cabinet, sous-secrétariat des affaires internationales et des droits de l'homme du ministère des affaires étrangères, Mexico,

M. Víctor Manuel Uribe Aviña, chef du service du contentieux international au bureau du conseiller juridique du ministère des affaires étrangères, Mexico,

comme conseils et avocats;

Mme Maria del Refugio González Domínguez, chef du service de coordination juridique du ministère des affaires étrangères, Mexico,

M. Erasmo A. Lara Cabrera, chef du service du droit international au bureau du conseiller juridique du ministère des affaires étrangères, Mexico,

Mme Natalie Klein, Esq., avocate au cabinet Debevoise & Plimpton, New York,

Mme Catherine Amirfar, Esq., avocate au cabinet Debevoise & Plimpton, New York,

M. Thomas Bollyky, Esq., avocat au cabinet Debevoise & Plimpton, New York,

Mme Cristina Hoss, assistante de recherche à l'Institut Max Plank pour le droit public comparé et le droit international, Heidelberg,

M. Mark Warren, chercheur en droit international, Ottawa,

comme conseillers;

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

comme assistant.

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

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

as Agent;

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

as Co-Agent;

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

Mr. 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),

as Counsel and Advocates;

Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,

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,

Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State,

as Counsel;

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

Ms Marianne Hata, United States Department of State,

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

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

comme agent;

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

comme coagent;

Mme Catherine W. Brown, 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,

M. Patrick F. Philbin, vice-*Attorney-General* adjoint du département de la justice des Etats-Unis,

M. John Byron Sandage, avocat-conseiller chargé des questions concernant les Nations Unies du département d'Etat des Etats-Unis,

M. Thomas Weigend, professeur de droit et directeur de l'Institut de droit pénal étranger et international à l'Université de Cologne,

Mme Elisabeth Zoller, professeur de droit public à l'Université de Paris II (Panthéon-Assas),

comme conseils et avocats;

M. Jacob Katz Cogan, avocat-conseiller chargé des questions concernant les Nations Unies du département d'Etat des Etats-Unis,

Mme Sara Criscitelli, membre du barreau de l'Etat de New York,

M. Robert J. Erickson, chef principal adjoint à la section des recours en matière pénale du département de la justice des Etats-Unis,

M. Noel J. Francisco, conseiller juridique adjoint auprès de l'*Attorney-General*, bureau du conseiller juridique du département de la justice des Etats-Unis,

M. Steven Hill, avocat-conseiller chargé des affaires économiques et commerciales du département d'Etat des Etats-Unis,

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

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

M. Peter W. Mason, avocat-conseiller chargé des affaires consulaires du département d'Etat des Etats-Unis,

comme conseils;

Mme Barbara Barrett-Spencer, département d'Etat des Etats-Unis,

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,

as Administrative Staff.

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 sitting is now open.

As scheduled, the Court will hear the first round of oral arguments for the United States of America. I now give the floor to the Honourable Mr. William Taft, IV, the Agent of the United States of America.

Mr. TAFT: Thank you, Mr. President.

I. INTRODUCTION

1.1. Mr. President, Members of the Court, learned counsel, I am honoured to appear before the Court again as Agent of the United States. With me today are representatives of the United States Departments of State and Justice. In addition, Professor Elisabeth Zoller of the University of Paris II and Professor Thomas Weigend of the University of Cologne will be presenting argument on our behalf.

1.2. Mr. President, this Court recently considered the Vienna Convention on Consular Relations in the *LaGrand* case. The Court's decision there stands for the principle that where there has been a failure to provide consular information and notification as required by Article 36 (1) of the Convention and a foreign national is subsequently convicted of a crime and sentenced to a severe penalty, the State in breach should by means of its own choosing provide review and reconsideration of the conviction and sentence, taking into account the breach.

1.3. The *LaGrand* Judgment broke new ground in two respects. First, the Court called for the United States to take actions to implement its obligations under the Vienna Convention on Consular Relations by reviewing and reconsidering the results of a criminal proceeding. This was striking because no State party had previously understood that it was required to take account of a failure to carry out its obligations under the treaty in the administration of its criminal laws. As far as is known, with the possible exception of two isolated cases that did not turn directly on a failure to comply with Article 36, no State had ever done so.

1.4. In a second respect the Court went even further. It undertook to direct a sovereign State to include a specific new procedural step within its domestic legal system — namely, a targeted review and reconsideration of a criminal conviction and sentence in certain cases. In doing this the

Court expressly left it to the United States to carry out this obligation in its domestic law by means of its own choosing.

1.5. The United States has conformed its conduct to the Court's interpretation of the treaty in *LaGrand*. This has been possible only because the Court has left to us the choice of the proper means. Moreover, the United States has conformed its conduct with respect not only to German nationals, but with respect to all foreign nationals. There has been for us, in the words of President Guillaume, no question of taking an *a contrario* interpretation of the holding in *LaGrand* in cases involving defendants from other States, including Mexico.

1.6. The Court travelled a considerable distance in *LaGrand*; now, less than three years later, Mexico asks it to go further, much further. In disregard of basic principles of State sovereignty and the Convention's specific object and purpose to regulate consular relations between States, Mexico asks the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals. Mexico asks the Court to find in this Convention a requirement that consular officers may intervene in an ongoing criminal investigation, including in the interrogation process, and participate in the foreign national's defence like an attorney. With regard to remedies, Mexico would have the Court intrude even more deeply into the United States criminal justice system. Mexico asks the Court to decide that the Convention requires not review and reconsideration, as *LaGrand* provided, but automatic exclusions of evidence and the voiding of convictions and sentences in cases of breach. Mexico seeks a set of remedies given by no national court for a breach of Article 36, and mandated by no State's statutes.

1.7. In fact, the Convention sets out particular obligations and rights that are not nearly as expansive as Mexico suggests. The obligations are to inform a detained person that his consular officer will be notified of his detention if he so wishes and, if the detained person says that he does wish it, to notify the consular officer of the detention. The sending State's consular officer thereafter may give assistance consistent with the domestic law of the receiving State.

1.8. Significantly, however, the Convention does not confer a right on the detained person to any assistance from his consular officer. Nor may a detained person complain in the domestic courts of the receiving State if he has not received consular assistance after requesting it.

1.9. And since there is no obligation on the sending State to provide assistance either promptly or at all, there cannot possibly be a rule requiring the receiving State to suspend its investigation and the orderly operation of its criminal justice system until the consular officer arrives. Such a rule would hold the administration of justice in receiving States hostage to the calendars of consular officers. Mexico has identified not a single State party to the Convention that applies such a rule, and its unprecedented claim that the Convention imposes such a requirement must be rejected.

1.10. This case rests at the sensitive intersection between international legal obligations regarding the conduct of consular relations, and a sovereign State's domestic criminal law. Mr. President, Members of the Court, this Court in *LaGrand* traversed that intersection carefully. It left it to the United States to carry out its treaty obligation in its domestic criminal justice system as it deemed appropriate — by means of its own choosing.

1.11. The role of the Court in this case is to interpret the Convention. It has no authority to create, revise, or implement a State's domestic law. The line separating these functions is a sharp one that the Court has always respected. When the Court fashions remedies for breaches of international law, it does not attempt to penetrate the sovereignty of a State and itself reconfigure State systems to meet the international obligation. Instead, it assumes that States, having voluntarily undertaken the obligations contained in the treaty, may be counted on to carry them out. This assumption concerning the bona fides of a sovereign State and its elected or appointed public officials is, indeed, essential to the Court's authority and the Court's effectiveness.

1.12. Mr. President, Members of the Court, the facts of the 52 cases now before this Court are many. Mexico's presentation of these facts is often incomplete, and Mexico has generally failed to carry its burden of proof to show a breach of the United States obligations under the treaty. For the Court to determine the facts in each case, as Mexico asks it to do, it would have to function as a court of first instance in some cases and as a court of criminal appeal in others — a role this Court has already wisely disclaimed. Even if it were to find that breaches have occurred in some cases, however, the Court has already identified a remedy in *LaGrand* that is available in each instance. The question for the Court here is whether there is any reason to go beyond what it decided in *LaGrand*. There is not.

1.13. Before the Court even reaches that question, however, it will need to determine whether Mexico's claims are within its jurisdiction. Yesterday, Mexico objected to the Court's consideration of the jurisdiction and admissibility arguments raised by the United States, citing a recent amendment to Article 79 of the Rules of Court. The United States notes that it specifically reserved its right to make jurisdictional arguments during the provisional measures proceedings in this case[1]. Following this, the Parties agreed to a single round of pleadings. Article 79 regulates the filing of preliminary objections, that is, those "the decision upon which is requested before any further proceedings on the merits". The amendment to it was designed to accelerate the proceedings of the Court where there are to be more than one round of pleadings[2]. It was not intended to change the schedule of pleadings in cases in which the parties have agreed, as here, to proceed on the basis of a single round of pleadings[3].

1.14. In regard to jurisdiction and admissibility, Mexico's submission greatly overreaches this Court's responsibilities under the Convention and Protocol. This is particularly striking in connection with Mexico's submissions seeking remedies. It asks the Court to order the United States to apply specific rules of evidence in its criminal trials, to vacate criminal convictions and sentences, and to conduct its law enforcement interrogations in a particular manner. Each of these measures is beyond this Court's competence.

1.15. Mexico's claim is also, in significant respects, inadmissible. Mexico asks the Court to hand down a final judgment under international law regarding cases that are still in active litigation in the municipal criminal justice system, to reopen others and to dictate specific outcomes in those cases. Mexico's own courts and laws do not themselves offer foreign nations presenting claims of breaches under the Convention these same remedies.

1.16. Even though the United States did not agree with the Court's judgment in *LaGrand*, it has conformed its conduct to that judgment. It has continued its extraordinary efforts to improve

---

[1] *Avena, Provisional Measures*, CR 2003/2 at 13 ("The United States does not propose to make an issue now of whether the Court possesses prima facie jurisdiction, although this is without prejudice to its right to contest the Court's jurisdiction at the appropriate stage later in the case.").

[2] Report of the International Court of Justice to the General Assembly, 1 August 2000-31 July 2001, paras. 360-361 ("On 5 December 2000 the Court decided to amend two Articles of its 1978 Rules. Both concern incidental proceedings . . . The amendments . . . aim at shortening the duration of these proceedings . . .").

[3] See The M. V. "Saiga" (No. 2) (*Saint Vincent and the Grenadines* v. *Guinea*) (Merits), International Tribunal for the Law of the Sea, 1 July 1999, para. 53.

compliance throughout the United States with the requirements of Article 36 (1), and it provides review and reconsideration of convictions and sentences consistent with the Court's interpretation of Article 36 (2) in cases in which a breach of Article 36 (1) has occurred. We comply with Article 36 (2) through the combined operations of our judicial and our executive clemency proceedings.

1.17. Mexico has focused particularly critical attention on the clemency process in its Memorial. The gist of Mexico's complaint is that in most cases clemency is not granted. This is true, but it in no way supports Mexico's claim that convictions and sentences are not and cannot be reviewed in the clemency process taking account of any treaty breach. They can be reviewed there, and they have been reviewed there.

1.18. In its Memorial, Mexico maligns the elected governors and other officials who administer the clemency process. These people perform their functions conscientiously and according to law. In this connection, I would invite the Court's specific attention to the case of Gerardo Valdez Maltos, one of the cases that Mexico has highlighted in its attack on the clemency process. The process in that case was thorough, careful, probing. The Mexican Agent himself presented argument to the Governor and his staff. The Governor spoke directly with the Mexican President. While the Governor did not grant clemency, both the parole board, which voted to recommend clemency, and the Governor clearly took specific account of the Convention breach and undertook the review and reconsideration described in *LaGrand*.

1.19. Mexico has also failed to provide the Court with any basis for concluding that our judicial system does not provide fair trials to foreign nationals in accordance with the highest standards of due process of law. That system too is capable of remedying the consequences of any breaches of the Convention that have been properly raised, and both our trial and appellate courts are required to assure that, in Judge Koroma's words in his separate opinion in *LaGrand*, "the judicial process must be fair and regular".

1.20. Finally, the Court should not depart from the remedy it prescribed for breaches of Article 36 in *LaGrand* — review and reconsideration by means of the receiving State's own choosing. This remedy fully satisfies the purpose of reparations, providing a mechanism through

which the situation may be established that would have existed absent the breach. It also strikes the appropriate balance between the rights and interests of both States parties.

1.21. The Court should in no event grant the unprecedented and intrusive relief Mexico has demanded — the *vacatur* of convictions and sentences, the exclusion of probative evidence in subsequent legal proceedings, orders of cessation and sweeping guarantees of non-repetition. Mexico asserts that a pure form of *restitutio in integrum* should be applied by the Court. But, as the Court is aware, restitution in this sense sought by Mexico is appropriate only in certain types of situations, such as the return of property. This is not such a case. In addition, the remedy sought by Mexico is not predicated on proof of prejudice and is divorced from any requirement of showing that an injury has actually been caused by the breach of a treaty obligation. It finds no support in the practice of any State.

1.22. The Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for "must be left" to the United States. "Must be left." Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case. But if the result is known, why review the cases at all?

1.23. This Court went far in *LaGrand*. Mexico says it didn't go far enough. The United States respectfully but vigorously urges that it go no further.

*

* *

1.24. Mr. President, Members of the Court, the course of our oral presentations today will be as follows.

1.25. Professor Zoller will begin our presentation by addressing the subjects of jurisdiction and admissibility. She will show that the Court does not have the competence to order the unprecedented remedies that Mexico seeks.

1.26. Following Professor Zoller, we will take up the merits of Mexico's case, which is premised on a grossly distorted picture of the United States criminal justice system. Mr. Philbin of

the United States Department of Justice will provide the Court with an accurate picture. Specifically, he will show that the US assures fundamental fairness in its criminal process for US citizens and foreign nationals alike. Consular assistance is important and welcome, but even if it is not provided, US courts assure that foreign national defendants in a criminal case receive all the procedural and substantive rights Mexico says consular assistance is intended to protect. These are the same protections accorded to our own nationals. They have set the standard for fairness the world over for many years.

1.27. Mr. Sandage of the United States Department of State will then address Mexico's failure to carry its burden of proof in establishing facts that are essential to its case, both with respect to the 52 cases and with respect to Mexico's sweeping and unfounded allegations of systematic violations of Article 36. He will show that the findings Mexico proposes to the Court are unsupported by reliable evidence.

1.28. Ms Brown of the United States Department of State will speak next and be followed by Mr. Mathias, also of the State Department. Together, Ms Brown and Mr. Mathias will explain the meaning of Article 36 in light of the Vienna Convention's object and purpose. Mexico's presentation yesterday left the impression that the Convention was intended to regulate the treatment of foreign nationals in the criminal justice systems of the receiving State. In fact, the Convention was intended to facilitate the activity of the consul within the existing State systems of criminal justice, not to change those systems.

1.29. In the afternoon session, our presentations will focus on remedies.

1.30. First Mr. Thessin will describe the ways in which US courts and the executive clemency process combine to allow the review and reconsideration of convictions and sentences as called for in *LaGrand*.

1.31. Professor Weigend will review the remedies Mexico has proposed to the Court and show that they are generally inconsistent with the operation of national criminal justice systems of the States parties to the Convention.

1.32. Following Professor Weigend, the Court will again hear from Professor Zoller. She will consider specifically Mexico's request for a remedy of *restitutio in integrum*. Mexico has misunderstood both the circumstances in which this remedy is properly applied and its purposes.

Professor Zoller will also address the proper understanding of the concept of review and reconsideration.

1.33. Finally, Mr. Mathias will discuss the remedy the Court ordered in *LaGrand* and show that "review and reconsideration" by means of the receiving State's own choosing is both an appropriate remedy and sufficient to cure any breach of treaty obligations that may occur in future or may have occurred in the cases before the Court here.

1.34. I will briefly introduce the afternoon session and conclude our oral presentation this evening.

1.35. Thank you, Mr. President, I ask that you now call on Professor Zoller.

The PRESIDENT: Thank you, Mr. Taft. I now give the floor to Professor Zoller.

Mme ZOLLER :

II. COMPETENCE ET RECEVABILITE

Monsieur le président, Madame et Messieurs les juges,

2.1. La présente affaire interpelle notre conscience sur «la puissance de juger, si terrible parmi les hommes» dont parlait Montesquieu. Mais elle l'interpelle à travers le règlement d'un différend entre Etats. C'est à ce différend que la Cour doit exclusivement s'intéresser comme l'exige l'article 38, alinéa 1, de son Statut, et c'est sur ce différend que les Etats-Unis m'ont donné l'insigne honneur de parler devant elle.

2.2. Le différend entre les deux Etats porte sur les conséquences d'un présumé manquement par les Etats-Unis à l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires dans l'interprétation que la Cour en a fait dans l'arrêt LaGrand. Dans cette affaire, la Cour a jugé que lorsque des ressortissants d'un Etat partie sont condamnés à des peines sévères sans que les droits qu'ils tiennent de la disposition précitée, aient été respectés, l'Etat de résidence doit permettre «en mettant en œuvre les moyens de [son] choix, … le réexamen et la revision du verdict de culpabilité et de la peine en tenant compte de la violation des droits prévus par la convention».

2.3. Bien avant le jugement LaGrand, le Gouvernement fédéral des Etats-Unis avait déployé auprès des cinquante Etats fédérés de l'Union d'extraordinaires efforts pour mettre en œuvre et

faire appliquer les obligations internationales qui découlent de la convention de Vienne. Depuis l'arrêt LaGrand, il n'a cessé de redoubler ses efforts pour former et instruire la police, les procureurs et les juges sur l'importance des obligations de notification consulaire dans toutes les procédures pénales concernant les détenus de nationalité étrangère. De plus, il est intervenu auprès des Etats pour faire en sorte qu'en cas de manquements à la convention, leurs autorités compétentes mettent dans la balance de tous les éléments qui contribuent à former la décision sur un recours en grâce, le fait que le condamné n'ait pas bénéficié d'une assistance consulaire au début de la procédure et, depuis l'arrêt LaGrand, il n'est pas une affaire qui n'ait fait l'objet des mesures de réexamen et de revision énoncées dans cet arrêt.

2.4. La difficulté est que le Mexique ne se satisfait point de ces efforts. Il ne veut pas des mesures de réexamen et de revision que les Etats-Unis ont déjà prises et continuent de mettre en œuvre avec les pouvoirs qui sont les leurs. Il veut remonter l'horloge dix, voire vingt ans en arrière et il vous demande de condamner les Etats-Unis à refaire tous les procès.

2.5. Monsieur le président, de telles prétentions ne peuvent être que rejetées. Outre le fait que la demande du Mexique est irrecevable, les Etats-Unis estiment, d'abord et en tout premier lieu, que la Cour n'a pas compétence pour satisfaire la demande en justice du Mexique. Je parlerai d'abord de l'incompétence de la Cour.

*

* *

1. Incompétence de la Cour

2.6. L'objet de la demande en justice du Mexique est d'inviter la Cour à excéder ses pouvoirs juridictionnels. Ce que le Mexique demande à la Cour, ce n'est pas de dire le droit — que, de toute façon, elle a déjà dit dans l'arrêt LaGrand —; ce n'est pas non plus de réparer par équivalent un dommage qui ne peut pas être réparé en nature, le demandeur ne formulant pas, même à titre subsidiaire, de demande en indemnité. Ce que le Mexique demande à la Cour dans les conclusions de son mémoire, c'est de «dire et juger» que les Etats-Unis ont l'obligation : 1) «d'annuler les déclarations de culpabilité et les condamnations prononcées», et 2) «de prendre

toutes mesures nécessaires sur les plans législatif, exécutif et judiciaire» pour écarter l'application de règles de droit interne, procédurales et de fond. Les Etats-Unis contestent la compétence de la Cour pour leur imposer l'une ou l'autre de ces obligations dans la présente instance.

A. S'agissant des prétendus pouvoirs de la Cour d'ordonner aux Etats-Unis de déclarer la nullité des jugements et verdicts rendus conformément à leur droit pénal interne

2.7. Les Etats-Unis contestent la compétence de la Cour pour déclarer la nullité de jugements et de verdicts rendus conformément au droit pénal interne, fédéral et fédéré, des Etats-Unis. Ils ne cherchent ni à «faire peur» ni à «intimider» la Cour. Les Etats-Unis entendent seulement rappeler qu'il n'existe ni dans le droit conventionnel ni dans le droit général une quelconque base juridique qui serait de nature à fonder cette compétence que le Mexique semble considérer comme allant de soi.

2.8. En premier lieu, aucune disposition de la convention de Vienne sur les relations consulaires ne permet de porter devant la Cour le type de demande en justice que le Mexique lui soumet. La relation qui unit les jugements contestés à la convention de Vienne est des plus faibles, si ce n'est inexistante. De plus, aucune disposition de ce texte ne permet d'envisager qu'il ait été dans l'intention des parties au protocole facultatif de signature à la convention de faire venir devant la Cour les jugements de leurs cours et tribunaux.

2.9. En second lieu, aucune disposition du Statut de la Cour ne l'autorise à devenir juge d'appel ou juge de cassation des jugements rendus par les cours souveraines des Etats parties au Statut. Le Mexique se défend de vouloir faire de la Cour un juge d'appel ou de cassation. Mais c'est vers ses conclusions qu'il faut se tourner pour mesurer que c'est bien là ce qu'il demande à la Cour. Encore une fois, le Mexique demande à la Cour d'ordonner l'annulation de condamnations et de verdicts rendus par des cours pénales internes. Or, c'est le rôle de ces cours de se prononcer sur la culpabilité des accusés et de fixer la nature de la peine encourue et ce n'est pas celui de la Cour que de devenir juge de l'excès de pouvoir des décisions qu'elles rendent. S'il devait en aller autrement, la Cour ne serait plus juge de droit international; elle deviendrait une cour de droit interne, ce qui constituerait une dénaturation complète de sa place dans le système des Nations Unies. Il faut bien comprendre qu'en lui demandant de prononcer la nullité de jugements rendus par des cours des Etats-Unis, le Mexique invite la Cour à intervenir dans «des affaires qui

relèvent essentiellement de la compétence nationale d'un Etat» en violation de l'article 2, paragraphe 7, de la Charte des Nations Unies. Il l'invite à devenir la cour suprême d'un Etat mondial en violation absolue de ce que la Cour avait dit de l'Organisation des Nations Unies[4] dont elle reste un des «organes principaux» aux termes de l'article 7, paragraphe 1, et «l'organe judiciaire principal» aux termes de l'article 92 de la Charte. Bien mieux, à la lumière de l'analyse que le professeur Weigend fera cet après-midi, le Mexique cherche même à faire de la Cour une super Cour suprême des Etats-Unis dans la mesure où il lui demande d'imposer aux Etats-Unis des obligations qui sont propres au système américain de justice criminelle et qui ne pourraient pas être appliquées dans de nombreux systèmes juridiques des Etats parties à la convention.

B. S'agissant du pouvoir de la Cour d'enjoindre aux Etats d'adopter un comportement requis

2.10. Les Etats-Unis ont reconnu que la Cour peut avoir, dans les limites du droit international et dans certaines circonstances, le pouvoir d'enjoindre aux Etats d'adopter le comportement requis par le droit international. Les Etats-Unis rappellent qu'en 1980, ils en ont eux-mêmes tiré avantage lorsque, dans l'affaire de leur personnel diplomatique et consulaire à Téhéran, ils ont obtenu de la Cour un arrêt qui ordonnait à l'Iran de «faire cesser immédiatement» les actes illicites qui lui étaient imputables[5]. Mais — et c'est toute la différence avec la présente affaire — il s'agissait alors d'ordonner à l'Etat l'exécution d'une obligation internationale dont il était tenu, purement et simplement, ne disposant en aucune manière de pouvoir discrétionnaire pour l'exécuter. Sa compétence était, comme l'on dit en français, «liée», liée par le droit international objectif.

2.11. Monsieur le président, lorsque la compétence de l'Etat est, comme dans l'affaire des otages américains à Téhéran liée par le droit international objectif, c'est-à-dire lorsqu'il existe une manière et une seule pour l'Etat de se conformer à ses obligations internationales, il est bien naturel, il est même normal que la Cour ait le pouvoir d'enjoindre aux Etats d'adopter le comportement requis par le droit international. Ne l'eût-elle pas qu'elle ne pourrait pas remplir sa

---

[4] Voir l'avis consultatif, *Réparation des dommages subis au service des Nations Unies*, dans lequel la Cour a dit que l'Organisation n'est pas «un «super-Etat», quel que soit le sens de cette expression», *C.I.J. Recueil 1949*, p. 179.

[5] *C.I.J. Recueil 1980*, p. 44.

mission puisque à défaut, elle ne pourrait pas indiquer aux parties les moyens de sortir d'un différend et d'y mettre fin.

2.12. En revanche, lorsque la compétence de l'Etat est discrétionnaire, lorsque l'Etat dispose, comme la Cour l'a reconnu dans l'affaire *LaGrand*, du pouvoir de satisfaire à ses obligations internationales «en mettant en œuvre les moyens de [son] choix», les pouvoirs de direction de la Cour ne peuvent plus être les mêmes. Lorsque la Cour fixe un résultat à atteindre comme, par exemple, le «réexamen et la revision» des verdicts dans l'affaire *LaGrand*, il appartient à l'Etat d'atteindre le résultat indiqué en mettant en œuvre les moyens de son choix.

2.13. Si l'Etat a, de l'arrêt même de la Cour, «le libre choix des moyens», on ne voit pas que la Cour puisse, sans se déjuger, lui enjoindre, comme le voudrait le Mexique, «de prendre toutes mesures nécessaires sur les plans législatif, exécutif et judiciaire» pour écarter l'application de règles de droit interne, procédurales et de fond. Dans des circonstances de ce genre, la Cour n'a aucune compétence pour ordonner à un Etat de légiférer, d'exécuter la loi ou de juger dans tel ou tel sens. La Cour n'a pas compétence pour obliger un Etat à modifier des règles de procédures. Plus précisément, à propos de la règle dite de la carence procédurale, la Cour n'a pas compétence pour obliger les Etats-Unis à donner un caractère d'ordre public à un moyen soulevé par les plaideurs devant les juges internes, ce qui permettrait à ce moyen d'être invoqué à n'importe quel stade de la procédure. Une fois encore, de telles demandes aboutissent à dénaturer complètement le système des Nations Unies. Le Mexique demande à la Cour ce que l'on demande à un juge de droit interne. Mais la Cour est incompétente pour condamner un Etat à agir d'une certaine manière quand il est parfaitement licite d'agir d'une autre. L'exécution forcée par la voie judiciaire, ce que les juristes de *common law* connaissent sous le nom de *specific performance*, n'a pas sa place en droit international public.

2.14. Par ces motifs, les Etats-Unis demandent à la Cour de dire et juger qu'elle n'a pas compétence pour leur ordonner d'annuler les jugements et verdicts rendus par leurs cours d'Etat et leurs cours fédérales et pour leur ordonner de prendre toutes mesures nécessaires sur les plans législatif, exécutif et judiciaire pour appliquer la jurisprudence *LaGrand*.

2. Irrecevabilité de la demande du Mexique

2.15. La demande du Mexique est irrecevable à plusieurs chefs qui ont été développés dans le mémoire en défense des Etats-Unis. Le plus important de tous est la précipitation avec laquelle le Mexique a agi dans cette affaire. La règle de l'épuisement des voies de recours internes n'est pas satisfaite.

2.16. Le Mexique soumet à la Cour cinquante-deux affaires dont, à l'exception de trois d'entre elles où les condamnations à mort ont été écartées, aucune n'est terminée; toutes les autres sont en cours; mieux encore, un grand nombre d'entre elles en sont seulement à leur premier recours en appel.

2.17. Les voies de recours internes ne sont donc manifestement pas épuisées. Or, comme la Cour l'a dit par la voix de la Chambre constituée en l'affaire *Elettronica Sicula S.p.A (ELSI)* : «[P]our qu'une demande internationale soit recevable, il suffit qu'on ait soumis la substance de la demande aux juridictions compétentes et qu'on ait persévéré aussi loin que le permettent les lois et les procédures locales, et ce sans succès.»[6] On est loin dans ces affaires d'avoir persévéré aussi loin que les lois des Etats-Unis le permettent.

2.18. Pour le Mexique, toutefois, point n'est besoin d'attendre. Attendre ne sert à rien car, selon lui, les moyens choisis par les autorités fédérales et fédérées des Etats-Unis pour assurer le réexamen et la révision des verdicts sont inefficaces.

2.19. La charge de l'inefficacité vise, en premier lieu, le fait que, lorsque le moyen tiré de l'absence de notification consulaire est soulevé en première instance, le juge ni ne déclare irrecevables les déclarations faites par l'accusé dans de telles conditions, ni n'accorde d'autre réparation adéquate. Mais ce fait ne prouve nullement que le moyen soit inefficace; il prouve seulement que le moyen est inopérant à produire le résultat recherché par le Mexique.

2.20. La charge de l'inefficacité vise, en second lieu, l'irrecevabilité de moyens nouveaux en appel qui frappe le moyen tiré du défaut de notification consulaire. Si l'inculpé et son conseil ne soulèvent pas en première instance l'irrégularité qui peut résulter de l'absence de notification de la poursuite à l'autorité consulaire, ils sont irrecevables à exciper de ce moyen plus tard en appel. Le Mexique prétend que cette règle de procédure prive *ipso facto* de toute efficacité l'épuisement des

---

[6] *C.I.J. Recueil 1989*, p. 46, par. 59.

voies de recours internes. Pour que cette conclusion fût fondée, encore aurait-il fallu au moins démontrer que, sans elle, les condamnations prononcées auraient été différentes. Mais le Mexique ne peut pas rapporter cette preuve pour l'une quelconque des affaires qu'il soumet à la Cour. Il procède par généralisations, ce qui est une façon bien sommaire de juger des procédures de réexamen et de révision ouvertes aux condamnés.

2.21. La charge de l'inefficacité vise, en troisième lieu, les procédures de recours en grâce sur lesquels statuent les gouverneurs des Etats concernés, le plus souvent avec l'assistance de commissions consultatives. Le Mexique estime ces procédés d'une inefficacité totale. De fait, ils le sont si l'on admet, comme le Mexique le prétend, que le test de la parfaite efficacité est de déboucher dans tous les cas sur une commutation de la peine capitale en réclusion criminelle à perpétuité. Mais, pour que de telles conclusions fussent fondées, il faudrait accepter le présupposé auquel s'adosse la demande du Mexique, à savoir que la condamnation à la peine capitale en temps de paix enfreint le droit international général. De quelque côté que l'on prenne la question, le droit international positif ne ratifie pas les aspirations du demandeur. Les procédés de recours en grâce prévus par le droit américain ne peuvent donc pas être *ipso facto* qualifiées d'arbitraires.

2.22. Aux termes des lois applicables dans les Etats concernés, chaque ressortissant mexicain impliqué dans la présente affaire dispose du droit de déposer un recours en grâce et du droit à ce que soit examiné son grief relatif à la violation présumée par les Etats-Unis de leurs obligations aux termes de la convention. Dans son mémoire comme dans ses plaidoiries, le Mexique a longuement insisté sur le caractère arbitraire de ces procédures. Toutefois, à l'exception de trois ressortissants mexicains qui ont été déjà graciés, aucun autre parmi les cinquante-deux restants dans la présente affaire n'a encore formé un recours en grâce. Dans ces conditions, le Mexique n'a aucune base de fait ou de droit pour prouver ses allégations. Aussi graves soient-elles, ses allégations demeurent non vérifiées. Il y a plusieurs raisons de douter de leur véracité. Car, sur les sept cas de condamnations à la peine capitale prononcées après l'arrêt *LaGrand* et en violation présumée de la convention de Vienne, six ont été commuées.

2.23. En quatrième lieu, la requête du Mexique est irrecevable en ce que le demandeur accuse les Etats-Unis de violation présumée de la convention de Vienne dont il était averti depuis très longtemps, mais sur lesquelles il a manqué d'attirer l'attention du gouvernement fédéral en

temps utile ou ne l'a fait qu'avec un retard considérable. Ce faisant, il faut admettre que le Mexique a renoncé tant à se prévaloir de son droit à contester lesdites violations qu'à en demander réparation[7]. En tout état de cause, le Mexique n'a pas attiré l'attention des Etats-Unis immédiatement, de telle manière que ceux-ci auraient pu agir. C'est peut-être parce que, à l'époque où il en eut connaissance, le Mexique ne pensait pas que de telles violations seraient de nature à lui accorder les réparations auxquelles il prétend aujourd'hui.

2.24. Enfin et en cinquième lieu, la requête du Mexique est irrecevable dans la mesure où le demandeur ne saurait être fondé à exiger du défendeur qu'il respecte des règles de comportement qu'il ne respecte pas lui-même. Le Mexique est irrecevable à exiger des Etats-Unis qu'ils appliquent des standards qu'il n'applique pas dans son propre droit interne. En effet, non seulement le droit pénal mexicain ne contient pas les règles réparatrices que le Mexique veut imposer aux Etats-Unis mais encore ses autorités ne respectent pas elles-mêmes les obligations qu'ils exigent des Etats-Unis. En la circonstance, la Cour doit reconnaître qu'elle est utilisée par le Mexique dans un combat politique — et elle ne doit pas céder à ces pressions.

2.25. Par ces motifs, les Etats-Unis demandent à la Cour de déclarer irrecevables les demandes du Mexique, ses ressortissants n'ayant pas épuisé les procédures de réexamen et de revision existantes dans le droit des Etats-Unis.

2.26. Je vous prie, Monsieur le président, de bien vouloir donner la parole à M. Philbin.

The PRESIDENT: Thank you, Professor Zoller. I now give the floor to Mr. Philbin.

Mr. PHILBIN:

III. THE US CRIMINAL JUSTICE SYSTEM PROVIDES GUARANTEES TO ENSURE A FAIR TRIAL FOR EVERY DEFENDANT, REGARDLESS OF NATIONALITY, WITHOUT RELYING ON CONSULAR ASSISTANCE

3.1. Mr. President, distinguished Members of the Court, it is an honour to appear before you on behalf of the United States. As a representative of the United States Department of Justice, I am

[7] Voir l'affaire de l'*Indemnité russe (Russie c. Turquie)* (Accord du 22 juillet–4 août 1910), *UNRIAA*, vol. 11, p. 431, 444–446 (1912) (à propos de la perte du droit du demandeur d'invoquer l'illicéité d'un acte); affaire *Savarkar (France c. Royaume-Uni)* (Accord du 25 octobre 1910), *UNRIAA*, vol. 11, p. 252, 255 (à propos d'un demandeur qui a consenti à l'acte illicite).

particularly pleased to have the opportunity to present an overview of the United States criminal justice system.

3.2. In its Memorial, Mexico has, unfortunately, presented an inaccurate and distorted account of that justice system. That account was intended to show that a Mexican national cannot possibly receive a fair trial in the United States without consular assistance. According to Mexico, this is because Mexican nationals face language and cultural barriers that make them unable to understand statements explaining their rights; because they cannot obtain investigative and expert assistance or evidence located abroad; and because their court-appointed lawyers are inadequate and their court-provided interpreters are incompetent. Similarly, Mexico's representatives yesterday sought to present the Court with anecdotal evidence from their own experience in other cases to suggest that the assistance of consular officials is indispensable for a fair trial.

3.3. Today, I will show you that Mexico's picture of the American criminal justice system is wrong. I will do so by walking through the essential events in a criminal proceeding, focusing on the issues that Mexico says its consular officers would focus on. And I will illustrate my points using the facts of the very cases that Mexico has brought before the Court. For further information about our system, which is complex and would require many hours to describe fully, I refer the Court to the description submitted as Annex 7 to the Counter-Memorial.

A. The criminal justice system could not, as a practical matter, rely on consular assistance to ensure fairness

3.4. Let me preface this discussion with our full acknowledgment that the interests that Mexico asserts in seeing that its nationals receive fair treatment in the criminal justice system are completely legitimate. However, the truth is that, like every State, the United States must provide a fair trial to every defendant, regardless of his nationality and regardless of whether he has the good fortune to receive consular assistance. As a practical matter, moreover, it would be wholly unreasonable to assume that non-US citizens will routinely receive consular assistance — given the fact that neither the Convention nor international law requires that consular officers assist their nationals, and the reality that resource constraints can severely limit the actual assistance consular officers provide. Many nations, we remind the Court, maintain only a limited number of consular officers in the United States, often located only in Washington, D.C. With millions of foreign

nationals in the United States, and a significant number arrested each year, even with perfect provision of consular information and notification, many persons would receive no consular assistance whatsoever. Our justice system thus could not, and does not rely on consular assistance as the guarantor of fairness to non-US nationals.

3.5. In saying that, I am not disparaging the efforts of consular officers, or suggesting that compliance with Article 36 is not important. But at the same time one must acknowledge the realities that result from the numbers of foreign-national defendants involved in the criminal justice systems across the United States, the consular resources available to assist them, and the fact that the Convention leaves it solely to the discretion of the sending State whether to provide assistance at all.

B. The criminal justice system already provides full guarantees to secure all rights Mexico claims its consular officials are needed to protect

3.6. As I said, our Constitution and laws are expressly designed to ensure fair trials to all persons regardless of nationality. Let me now turn to showing the Court how we do that.

1. Rights in custodial interrogations — *Miranda* warnings

3.7. Generally speaking, the criminal process against a person will begin when the person is arrested. The United States criminal justice system, like many legal systems, bars the use of coerced confessions. To protect against the possibility of coercion, our law provides that a person taken into custody in the United States cannot be questioned unless the authorities first give him what are colloquially known as *Miranda* warnings explaining his rights. The standard text of these warnings as given by the FBI is in the judges' book at tab 1. It provides as follows:

— Before we ask you any questions, you must understand your rights.

— You have the right to remain silent.

— Anything you say can be used against you in court.

— You have the right to talk to a lawyer for advice before we ask you any questions.

— You have the right to have a lawyer with you during questioning.

— If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

— If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time[8].

3.8. Questioning may not continue if the person says either (1) that he does not understand these *Miranda* warnings, or (2) that he does not want to speak to the police. If the person asks for a lawyer, questioning must stop unless and until his lawyer is present. If questioning does continue despite the person's invocation of his rights, no statements the person gives can be introduced in the prosecution's case against the person at trial.

3.9. Mexico acknowledges the requirement of *Miranda* but asserts that the warnings are difficult to understand and do not adequately convey to Mexican nationals the substance of the rights to silence and to an attorney. Mexico contends that the person needs a consular officer at his side to explain the import of *Miranda*. An expert opinion that Mexico offers cites studies that conclude, among other things, that even US–born defendants without some college education cannot fully understand the *Miranda* warnings, that Mexican nationals and other Spanish-speaking defendants generally do not comprehend them, and that translations are commonly inadequate.

3.10. To our knowledge, no judge in the United States has accepted such conclusions. Not one judge has agreed with the view that the *Miranda* litany is too complicated for foreign nationals, or even all but the well-educated native-born American defendant, to comprehend. Rather, our courts uniformly have recognized that the clear and simple *Miranda* warnings I just recited are fully sufficient to notify a defendant of his rights. Nor is there any evidence that Spanish translations of *Miranda* warnings are routinely deficient.

3.11. But more importantly for this proceeding, the varying facts of the 52 cases that are now before the Court in themselves show the effectiveness of *Miranda* warnings. The variety of responses in the cases illustrates that Mexican nationals did not confess because they felt coerced. Instead, the responses show that these defendants were fully capable of understanding these warnings and asserting their rights without the presence of a consular officer.

3.12. We can set aside three of the cases at the outset. In these, the defendants gave voluntary statements before they were detained or during the administrative booking process and

---

[8]This is the verbatim text of *Miranda* warnings appearing on the form used by the Federal Bureau of Investigation.

thus the cases did not involve custodial questioning[9]. Of the remaining 49 cases, 17 defendants — more than one-third — apparently declined to answer questions or make statements[10]. Within that group are persons who came to the United States as adults, who did not speak fluent English, or who were not well-educated — precisely the people Mexico categorically claims are unable to understand the *Miranda* warnings[11]. This group includes, for example, Hector Garcia Torres, case No. 32, who despite having had only three years of schooling in Mexico understood his *Miranda* warnings well enough not to give a statement. Of the remaining 33 defendants, nine denied criminal responsibility altogether[12]; and four confessed but gave exculpatory explanations[13]. In sum, only about one-third of the defendants in the cases Mexico raises fully confessed their guilt. This appears to be consistent with the confession rates for all arrested persons in the United States[14].

3.13. Nor can it be assumed that each of the 20 defendants who fully confessed, and each of the four defendants who confessed in part, did so because he succumbed to coercion or, without a consular officer to advise him, was unable to appreciate the consequences of making a statement. Numerous criminal defendants, citizens and non-citizens alike, confess though not compelled to do so, fully understanding their rights and voluntarily choosing not to exercise them. We would cite the confession, for example, of defendant Salcido Bojorquez, case No. 22, who gave his statement before a Mexican judge. Similarly, defendant Perez Gutierrez, case No. 51, stated repeatedly during his recorded confession that he felt better for having confessed. Neither of these men was coerced and neither misunderstood the consequences of making a confession. They confessed because, as each expressly stated, they felt remorse for their terrible crimes. Underlying Mexico's argument is the unstated assumption that any time an individual confesses the protections of the criminal justice system must have failed and the individual must not have understood his rights.

---

[9]Cases Nos. 8, 36, and 51.

[10]Cases Nos. 2, 4, 5, 7, 9, 12, 13, 15, 16, 21, 29, 32, 35, 37, 42, 48, and 53.

[11]Cases Nos. 9, 12, 15, 32, 35, 37, 42, and 48.

[12]Cases Nos. 18, 19, 20, 25, 26, 30, 39, 43, and 46.

[13]Cases No. 24, 38, 41, 42.

[14]E.g. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 *NWL Rev.* 1084, 1092 (1996); Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millenium*, 34 J. Marshall L. Rev. 637 (Spring 2001).

But that is not an assumption that the law can permit. As the Supreme Court of the United States has explained, it is only *coerced* confessions that the law forbids; voluntary and reliable confessions "far from being prohibited . . . are inherently desirable"[15]. Indeed, "they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[16]

3.14. Finally, of course, if a detained foreign national did not comprehend the *Miranda* warnings, on account of language or other deficiencies and, because of his misunderstanding, inadvertently waived his rights, he can move to exclude his statement from evidence in his criminal case. As Professor Weigend will explain, the US system is unusual in the extent to which it excludes statements at trial. Merely because a defendant later says that his confession was coerced, however, does not make it so. When a defendant makes such a motion, the trial court examines in detail the circumstances surrounding the giving of the statement and makes an independent determination whether the *Miranda* warnings were given and whether they were sufficient, whether the person understood them, and whether the person invoked his rights. The court's findings on those matters will be subject to review by other courts. Thus, the adequacy of *Miranda* warnings and claims of coercion in any given situation can be fully considered.

2. Monitoring interrogations

3.15. Mexico also claims that its consular officers must be present during interrogations to guard against abuse by the police. But the US justice system flatly prohibits such abuse — during interrogation or otherwise — and indeed we will vigorously prosecute persons who violate that prohibition. As a safeguard to ensure compliance, moreover, many departments routinely tape interrogations to preserve a record that will both expose and deter any wrongdoing and refute unsupported allegations of mistreatment.

3.16. Finally, neither we nor any other country has interpreted Article 36 to obligate the police to permit the consular officer to be present during interrogations. Moreover, from the perspective of the administration of justice, that would be totally impracticable. For example, in the case of defendant Ramiro Hernandez Llanos, case No. 24, the Mexican consular officer first

---

[15] *Oregon v. Elstad*, 470 US 298, 305 (1985).

[16] *Moran v. Burbine*, 475 US 412, 426 (1986).

visited the defendant *nine* days after learning of his detention. A consular officer visited defendant Solache Romero, case No. 47, *one month* after learning of his detention[17]. In citing these cases, I do not mean to suggest that Mexico acted wrongly or delayed. My point is merely that even if notice is given immediately, there is no basis to assume that the consular officer will respond promptly, and indeed he has no obligation to do so. Mexico's proposed rule that interrogations must stop until the consular officer arrives would prohibit States parties from conducting interrogations for the days or weeks that it could take for consular assistance to be provided — assuming that there is, in fact, a limit placed upon how long the wait would be based upon Mexico's newly found rule requiring a reasonably prompt response from the consulate. This is an impossible proposition for any criminal justice system.

3. Ensuring adequate interpretation services for non-English speakers

3.17. From the moment of arrest, a person not conversant in English may also need an interpreter in order to communicate with counsel, the court, the authorities, and to understand the testimony of witnesses at his trial. Mexico claims that it can provide competent interpretation services for its nationals who do not speak English. Here again, consular assistance is not necessary to address this need, because it is fully addressed in the ordinary operation of the criminal justice system. If the defendant cannot communicate in or understand English, an interpreter is provided. If an interpreter cannot be located, the proceedings — including questioning the defendant — are delayed until an interpreter is present. One good example of this is provided by a case Mexico called to the Court's attention as an example of our alleged systematic non-compliance with Article 36[18]. Matilde Perez-Merino, a Mexican national arrested in Oregon, spoke a native dialect and did not understand either Spanish or English. Notably, she was not questioned or given *Miranda* warnings because no one could communicate with her. A Mexican consular officer was present when she was brought before a judge three days after her arrest, but it was the trial court that obtained the interpreter from Mexico[19]. To this day, we do not

[17]See Memorial, Ann. 70, App. 37, at A.1687; see also Counter-Memorial, Ann. 2, App. 34, para. 4, at A.214-215; App. 47, para. 5, at A.251.

[18]See Mexico Memorial, Ann. 7, Exhibit B, at para. 151.

[19]See Counter-Memorial, Ann. I, Appendix 4, at A40.

know if the consular officer could communicate with her, but we do know that it was the court, not the consular officer, that ensured the competent interpretation service. What happened in that case is completely consistent with the ordinary process in the United States and led to a fair result.

4. Ensuring legal representation

3.18. The next step after arrest may be the bringing of criminal charges. In the United States, all defendants — US or foreign national — facing charges that may lead to imprisonment are entitled to be represented by lawyers who are duly licensed and qualified to practise law. The Constitution requires that lawyers be provided at government expense to those who cannot afford to hire their own counsel. Most states and the federal government provide *two* lawyers for persons charged with a capital offence.

3.19. The constitutional requirement that a defendant have access to the assistance of counsel includes a requirement that the assistance be competent. Unlike many legal systems, courts in the United States will review the actual performance of an attorney and will vacate a conviction of a defendant represented by a lawyer who, though admitted to practise law, nonetheless provided incompetent legal representation at trial[20]. We do not, however, recognize a further legal right to be represented by the most qualified lawyer in the community. Nor does any other State.

3.20. Mexico claims that lawyers provided to Mexican nationals are often inadequate, not in the sense that they are incompetent, but rather that they are not as good as some other lawyers might be. Similarly, the Court heard anecdotal accounts yesterday suggesting that Mexico has obtained highly qualified counsel for Mexican nationals in numerous cases. But I would draw the Court's attention to the specific cases that Mexico has brought before this Court. Mexico did not obtain a trial lawyer for *any* of the 21 defendants whose cases they raise before this Court and about whom Mexico knew in advance of their trials[21]. Nor did they provide alternative lawyers even for the four defendants, cases Nos. 7, 10, 20, and 50, whose trials took place after September 2000 when Mexico established the Mexican Capital Legal Assistance Programme. In

[20]We cited this principle in the Criminal Justice Declaration, at Ann. 7, para. 15, on p. A.416.

[21]These are defendants Benavides Figueroa (#3), Covarrubias Sanchez (#6), Esquivel Barrera (#7), Gomez Perez (#8), Hoyos (#9), Juarez Suarez (#10), Manriquez Jaquez (#14), Mendoza Garcia (#17), Ramirez Villa (#20), Salcido Bojorquez (#22), Sanchez Ramirez (#23), Verano Cruz (#27), Zamudio Jimenez (#29), Hernandez Llanas (#34), Ramirez Cardenas (#41), Rocha Diaz (#42), Tamayo (#44), Solache Romero (#47), Camargo Ojeda (#49), Hernandez Alberto (#50), and Reyes Camarena (#54).

all these cases, Mexico was content to have its nationals represented by court-appointed lawyers paid by the state.

3.21. Mexico states that its consular officers frequently negotiate with the charging authorities on behalf of its nationals in an effort to persuade the authorities to charge a lesser crime or accept a guilty plea in exchange for a lesser sentence. But this is a principal function of the defence lawyer — who is already provided to all defendants, regardless of nationality, at the latest upon the formal initiation of criminal charges. All defence attorneys will pursue any possibility for such a plea bargain, for it is part of the routine process in criminal cases, with which they are intimately familiar. And there is certainly no evidence or reason to believe that a prosecutor is more likely to accede to requests for lesser charges when made by consular officers rather than defence attorneys. Finally, Mexico would like to take credit for a number of cases in which non-capital charges were brought and in which a Mexican official was involved early in the process. Here again, Mexico relies on anecdotal accounts that include no specific information at all to demonstrate what role the consular officer played and certainly no specific evidence showing that it was the consular officer's intervention that secured a plea agreement.

3.22. Mexico states that its consular officers frequently spend more time with a defendant facing a capital sentence than does the defendant's attorney and cites as examples two of these defendants who never met the lawyers who represented them in post-conviction proceedings. It is not at all clear what Mexico's claim is. If the concern is that the lawyer's lack of personal contact has rendered his service ineffective, the consular officer's visits will not remedy that deficiency, and the defendant will have a remedy under the law for the ineffective legal assistance in any event.

5. Ensuring expert and investigative assistance

3.23. Mexico also states that its consular officers help in obtaining expert and investigative assistance. Again, however, the US criminal justice system already provides for this. If a defendant, particularly in a capital case, needs the assistance of an investigator or expert witness and cannot afford to pay for this assistance, the investigator or expert will be retained and paid by the Government. For example, even after defendant Fong Soto, case No. 48, had been convicted and sentenced, the court funded an extensive defence investigation to try to develop additional

mitigating evidence. And denial of essential assistance to the prejudice of the defendant will result in the reversal of a conviction. Notably, moreover, to again return the focus to the case before the Court, Mexico has not complained that any one of the 52 defendants whose cases are presented here requested, but was denied, investigative assistance.

6. Securing evidence from abroad

3.24. Mexico also states that consular officers can assist in obtaining evidence from Mexico on behalf of a charged national. But it could occur in any case that a defendant might need evidence from abroad, and a Mexican defendant may need evidence from a country other than Mexico. The United States justice process already accommodates those needs. All defendants are already able to request assistance from the authorities of another country through the use of a letter rogatory, which is a request to a judge of another country for assistance in obtaining evidence. In fact, even when the evidence is located in a defendant's country of nationality and the defendant has the assistance of a consular official a letter rogatory may still be necessary — for example, where the custodian of the evidence refuses to produce it without a court order. But the essential point is that a process is available to all defendants to meet this need. The defendant is not dependent on the assistance of his consular officer in obtaining necessary evidence from his native country.

7. Identifying claims of mental impairment

3.25. Mexico next claims that many of its nationals convicted of capital crimes have brain or other cognitive damage and that its consular officers are trained to recognize such mental impairments.

3.26. We agree that some persons — of all nationalities — who commit senseless and brutal acts of violence may be found to suffer from mental impairment. In recognition of this fact, the United States justice system bars trials from going forward where the person is incompetent — that is, unable to understand the proceedings or to assist in his defence — and the State will pay for necessary mental health experts for competency determinations and to assist the defence at trial and sentencing. For example, in case No. 50 in Mexico's original filing — a case, I note, that Mexico withdrew because the defendant was, in fact, offered the opportunity to contact his consular

officer — the court ordered repeated psychiatric evaluations by multiple mental health experts. Mexico also acknowledges in its case write-up that the authorities identified the condition of and treated Juan Manuel Lopez, case No. 11. Moreover, raising issues of mental incompetence or reduced responsibility due to mental impairment is again a classic function of the defendant's lawyer. Through counsel, all defendants are thus assured an advocate who will be on the lookout for evidence that might contribute to such a frequently raised defence.

8. Monitoring trials

3.27. Mexico states that consular officers attend the trial and monitor the proceedings to ensure that their nationals are treated fairly. But all criminal trials in the United States are open to the public, including the press, and a verbatim record of those proceedings is prepared and publicly filed. Given this great openness to public scrutiny, it is difficult to see what a consular official would accomplish at trial, where he has no official role and is simply another spectator in the courtroom.

3.28. Mexico states that its consular officers are sensitive to bias in proceedings and are trained to raise their concerns about an "atmosphere of bias" with the appropriate authorities. We strongly disagree with Mexico's unsubstantiated suggestion that the United States justice system is biased against Mexicans. There is simply no proof of that, much less that defence lawyers, judges, prosecutors, and members of the public and the press are insensitive to bias or unable or unwilling to raise concerns if they believe that a particular defendant is facing bias. And if there are statements or evidence reflecting prejudicial bias, the defendant has the unquestioned right to complain at trial and, if necessary, to raise his claim on appeal.

9. Clemency proceedings

3.29. Finally, Mexico states that its consular officers can make presentations to clemency officials on behalf of convicted nationals. In making that claim in its Memorial, Mexico specifically notes that Illinois's Governor Ryan commuted the death sentences of three Mexican nationals after consular officers intervened on their behalf. We agree that consular officers can usefully serve that function, but that provides no support for Mexico's claims before this Court for

one simple reason: Mexican consular officials remain able to fulfil this role in clemency proceedings in each of the remaining 49 cases where clemency has not already been considered.

Conclusion

3.30. Mr. President, it should by now be clear that the consular services Mexico provides cannot be deemed to be essential to a fair trial. We in no way belittle the importance of these consular services or question Mexico's decision to provide them to its citizens. However, the fairness of the United States justice system does not and could not depend on the willingness of a consular officer to provide assistance.

3.31. Instead, the system is designed to provide fundamental rights equally to United States citizens and foreign nationals alike. If the defendant is a foreign national, the system protects his rights whether or not he asks that his consular officer be notified and whether or not the consular officer is inclined or able to provide substantial assistance. And as one of my colleagues will demonstrate this afternoon, if a defendant is deprived of effective assistance of counsel, competent interpreters, essential investigative or expert assistance, or some other component of fundamental fairness, the criminal justice systems in the United States provide ample mechanisms for redress.

3.32. Thank you, Mr. President. I ask that you now call on Mr. Sandage.

The PRESIDENT: Thank you, Mr. Philbin. I now give the floor to Mr. Sandage.

Mr. SANDAGE:

IV. FACTS RELATING TO THE 52 CASES AND ALLEGATIONS OF SYSTEMATIC BREACHES

A. Introduction

4.1. Thank you Mr. President, distinguished Members, I am deeply honoured to represent the United States of America today before this Court. It is my responsibility to address the 52 cases now put at issue by Mexico, and Mexico's allegations of continuing and systematic breaches of Article 36. In doing so, I will also address Mexico's burden of proof in this case, and describe the significant steps the United States has taken to ensure its compliance with its obligations under the Convention.

4.2. Mr. President, every criminal case turns on its own, distinct facts. The 52 cases Mexico has brought before you have only one point in common: each involves a heinous murder for which a Mexican national has been found guilty in a court of law and given a capital sentence. The cases are otherwise all quite distinct, and extraordinarily complex, both from the perspective of criminal law and of the Vienna Convention.

4.3. This Court has made clear it will not attempt to act as a court of criminal appeal of last resort for individual criminal cases[22]. The judges and the juries in United States domestic courts at trial have carefully viewed the physical evidence, assessed the credibility of live witness testimony, weighed the relative merits of the arguments of counsel, applied the law to the facts, and reached decisions according to law on culpability and penalty. Direct appellate and collateral habeas corpus litigation is ongoing in all but four of these cases. Most have not yet petitioned for clemency.

4.4. This Court need not attempt to make specific determinations whether Article 36 (1) has been breached in these individual cases because, even were any such breach to be established, the remedy of review and reconsideration remains available, as provided for in the Court's decision in *LaGrand*. This point will be elaborated upon further by Mr. Mathias and Mr. Thessin later today.

4.5. However, were the Court to conclude that the remedy of review and reconsideration required by *LaGrand* does *not* cure any asserted breach of Article 36 (1), and that it must decide whether there has been a breach of Article 36 (1) in each specific case, then the Court would have to determine whether Mexico has proven all of the elements establishing a breach before deciding whether Mexico has proven its entitlement to the extreme remedies that it seeks. In Professor Dupuy's presentation yesterday afternoon, Mexico attempted to meet this burden with a broad and simplistic solution, asking the Court to declare undifferentiated breaches of the Convention in all cases because, as he said, "the facts are identical 52 times"[23], and to order a sweeping remedy that would apply without regard to those facts. But such an approach cannot be

---

[22]See *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 9 April 1988, I.C.J. Reports 1998*, p. 257, para. 38; *LaGrand (Germany* v. *United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 15, para. 24.

[23]CR 2003/25, p. 54, para. 429 (Dupuy).

reconciled with the Convention and would lead to absurd results. And, needless to say, the facts are anything but "identical 52 times" as even Ms Babcock granted yesterday morning[24].

4.6. We have set forth in Annex 2 to our Counter-Memorial, in a necessarily very summarized format, the facts of the 54 cases that were in issue when we filed our Counter-Memorial, to the extent possible as found by our juries and judges, and supplemented by our own investigations. The records of our courts underlying these summaries are well in excess of 150,000 pages. Mexico in many instances has given the Court no more than self-serving factual assertions, often ones considered and rejected by our domestic courts. Since filing this case, Mexico has already withdrawn three specific cases because their facts did not support Mexico's claims. That it has done so points to a larger problem — that this Court could only at great risk of error attempt to draw conclusions about the Vienna Convention issues in cases with such unsettled factual foundations. By contrast, Mexico throughout its presentation yesterday persisted in highlighting the facts of two cases this Court has specifically ruled are not at issue here, because they were added too late.

B. Mexico must prove its case by conclusive evidence

4.7. Let us first consider the standard of proof that must be applied in this case. It is of course well settled that a litigant seeking to establish the existence of a fact bears the burden of proving it[25]. Because of the exceptional nature of the allegations Mexico makes, and the extraordinary remedies it seeks, the standard of proof here must be a high one. The Court recognized in the *Corfu Channel* case that, where the applicant brings charges of "exceptional gravity" against a sovereign State, the proof must rise to "a degree of certainty" that can be characterized as "conclusive evidence"[26].

---

[24]CR 2003/24, p. 26, para. 80 (Babcock).

[25]See *Frontier Dispute, Judgment, I.C.J. Reports 1986*, pp. 587-588, para. 65. As Judge Guillaume has put it, "there is no obligation for the parties to prove their 'claims', but only to prove the facts on which these claims are based". C. Amerasinghe, Rapporteur, Fifteenth Commission, "Principles of Evidence in International Litigation", in *Annuaire de L'Institut de Droit International*, Vol. 70-1, 2002-2003, p. 313 (Reply of Mr. Gilbert Guillaume) (hereinafter this report will be cited as "Principles of Evidence").

[26]See *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 17; see also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, pp. 126-127 (1986) ("charges of exceptional gravity against a sovereign state or its Government require to be established by conclusive evidence involving a high degree of certainty").

4.8. Although that case involved questions of use of force we submit that, because Mexico is seeking to have this Court undertake unprecedented steps intruding upon the heart of our national sovereignty — the ways and means by which the United States and its states ensure public order and safety — the same rigorous standards of proof should apply for all elements of Mexico's claim. Questions of this type, just as questions about use of force, implicate the fundamental order of the State. Moreover, the highly intrusive remedy that Mexico has demanded — one that, as Mr. Taft has said, would "penetrate the sovereignty of a State and [require the Court] itself [to] reconfigure State systems to meet the international obligation" — corresponds to the conditions of exceptional gravity that the Court in *Corfu Channel* and other cases has found warrants a high standard of proof.

C. Mexico has not and cannot prove conclusively the relevant elements of an Article 36 (1) breach

4.9. Were the Court to examine these cases individually, against that standard, it would discover that Mexico has established some but not all of the elements of proof it must in order to make out a claim of breaches under Article 36, paragraphs 1 and 2. Ms Babcock sought to boil these elements down to a mere two, but in fact there are six, as I will explain. First, Mexico must prove that in each of the 52 cases currently before this Court, the individual was a national of the sending State — Mexico — for purposes of Article 36.

4.10. Secondly, it must be established that the person was not also a citizen of the receiving State — the United States — at the time of arrest or detention. No obligation is owed, and no breach can occur, in a case where the person is a United States citizen. Mexico has conceded this point and withdrawn the Zambrano case (No. 28), because he was a United States citizen at the time of his arrest. But there are a number of others among the 52 remaining who present strong indicators on the present record of United States citizenship as well. Included in this category are Mr. Avena himself (No. 1), and Mr. Ayala (No. 2), both of whom had a United States citizen parent, and Mr. Salazar (No. 21), who came to the United States as an infant, as well as to a number of others[27].

[27]These cases are specified in footnote 334 of the United States Counter-Memorial.

4.11. Contrary to Ms Babcock's suggestion yesterday, we are not arguing that Mexico has the burden of proof on this second element, but we are arguing that Mexico has the burden of evidence[28] — that the critical evidence that can resolve this point is largely available only from Mexican sources and, hence, that Mexico must come forward with such evidence before the burden of proof can be discharged. Whether these 52 individuals acquired United States citizenship by operation of law depends primarily upon facts which Mexico is far better placed than the United States to educe — the parents' names, dates and place of birth, places of residency, marital status at the time of the child's birth, and the like — because it is primarily personal and biographical information about the parents that would provide the answer to the question. Virtually all such information is in the hands of Mexico through the now 52 individuals it represents. This important but technical issue is addressed both in our Counter-Memorial[29] and in our supplemental filing of 10 December.

4.12. The affidavits Mexico has lately tendered, in which some of these defendants state that they are not United States citizens, do not meet Mexico's burden of evidence. Even assuming the affiants believe they are testifying truthfully in these *ex parte* statements, these 52 individuals could be United States citizens by operation of law, without their knowledge, due to the circumstances of their birth or to legal actions taken by their parents.

4.13. But even if we assume *arguendo* that each person arrested was a Mexican and not also a United States citizen, Mexico must show a third element, in its own words: that the arresting officer "knew or had reason to know" that, at the time of arrest or detention, the suspect was a Mexican citizen[30]. Mexico incorrectly attempts to shift the burden of proof on this element to the United States, but that burden rests squarely on Mexico. The United States cannot, as Ms Babcock demanded yesterday, "demonstrate . . . that it failed to discover" that an individual was a Mexican[31]. In any event, this burden cannot be met in cases such as that of Mr. Salcido Bojorquez

---

[28]See, e.g., Principles of Evidence, p. 171 ("if in order to prove its case [the first party] relies on documents which are in the sole possession of the [second party], then the [first party] carries the burden of proof but the burden of presenting evidence is on the [second party]").

[29]United States Counter-Memorial, para. 7.4.

[30]See Memorial of Mexico, para. 11.

[31]CR 2003/24, p. 36, para. 114 (Babcock).

(No. 22), in which defendants affirmatively misrepresented or simply concealed their nationality[32], and Mexico appears to concede that the arresting officers are under no obligation, without more, to inform a Mexican national who misrepresents his nationality.

4.14. Nor can the burden be met in cases where it is clear that the person may well have appeared to the arresting officials to be a United States citizen. In the case of Mr. Ramirez Villa (No. 20), for example, it is difficult to see why the arresting officer would have reason to know he was dealing with a non-United States citizen. Mr. Ramirez Villa had lived in the United States since he was one or two years old. He had completed US high school, and enrolled in a US junior college. The same would be true of Mr. Flores Urban (No. 46), who came to the United States at the age of seven and had been a star athlete and prize-winning science student at the high school of the town where he was arrested[33].

4.15. Mexico has offered scanty proof on this important element. It typically simply asserted that the officer should have known, without attempting any individualized showing as to why this is so. But the reality is that the United States is an extraordinarily large and diverse country. Our officers cannot assume foreign citizenship based simply upon surname, appearance, or speech patterns. Unlike many countries, the United States does not have a national identity card system. It would be quite reasonable for an officer who is questioning an individual who has a United States citizen parent or spouse, or who has been living since childhood in the United States, or who has attended school here, to think he is dealing with a United States citizen. There would in such cases be no "reason to know", to use Mexico's own standard.

4.16. In each of the 52 remaining cases, Mexico, fourthly, must show not only that the competent authorities knew or should have known the person's true nationality, but also must pinpoint when that happened so that the Court can determine when the obligation to provide consular information arose. This could have been well along into the criminal justice process. In the case of Mr. Caballero Hernandez (No. 45), for example, it appears that even during trial he was thought to be a United States citizen. His Mexican nationality was unexpectedly revealed only by a statement by his mother during cross-examination, to the considerable surprise both of the

[32]These cases are specified in footnote 336 of the United States Counter-Memorial.

[33]These cases are specified in footnote 338 of the United States Counter-Memorial.

prosecution and the defence lawyers. Mexico has simply asserted, as to each of these 52 remaining cases, that the officer knew or should have known of Mexican nationality immediately upon arrest. This type of bald assertion does not establish this critical element. It is simply part of Mexico's effort to lead the Court to the erroneous conclusion that a one-size-fits-all remedy is appropriate.

4.17. If the Court were to conclude that the obligation to inform arose, then it would have to determine whether Mexico has shown the fifth element — that the defendant did not get consular information without delay. This is an element that both Parties agree that Mexico must prove[34]. But this element cannot be proved, as Mexico has attempted, simply by pointing to the fact that Mexico did not receive notification of the detention, because the arrestee may have been informed but have declined consular notification[35]. Mexico concedes that this was true in the Hernandez Alberto case (No. 50), which it has withdrawn — but it was also true in a number of others, such as the case of Mr. Juárez Suárez (No. 10), in which he was given consular information at arraignment, 48 hours after his arrest. After consulting with his lawyer, he specifically declined consular notification.

4.18. Beyond its concession in this one case, Mexico apparently otherwise asks the Court to believe that every one of the 52 defendants would unquestionably have requested consular notification if given consular information. Mexico offered no proof for this bald assertion in its Memorial. We noted Mexico's failure of proof on this point in our Counter-Memorial[36], and Mexico only recently came forward with a number of affidavits attempting to cure the defect. These obviously self-serving affidavits, most of which were signed by the criminal defendants *after* the United States filed its Counter-Memorial, cannot satisfy Mexico's high burden of proof in these cases. Moreover, the United States has not, in the short time available to us, been able to contact the arresting officers to address the truth or falsity of these affidavits. Thus these affidavits must be viewed as *ex parte* evidence with great scepticism. Even with respect to those cases in which findings of breaches were stipulated to or made by our courts, such findings and stipulations could have reflected a prosecutorial decision to assume *arguendo* a failure of notification because, for

---

[34]CR 2003/24, p. 27, para. 83 (Babcock).

[35]See, for example, United States Counter-Memorial, paras. 7.13-7.14.

[36]United States Counter-Memorial, paras. 7.6-7.7

example, it was clear that the defendant could not in that particular case show that he would be entitled to relief regardless of a breach. They likewise could be based on erroneous understandings of fact or law. Each case must be reviewed carefully with these issues in mind. In any event, Mexico's current assertion is flatly inconsistent with our own experience in the United States, where only a small fraction of those Mexican and other foreign nationals who are given consular information actually request notification[37].

4.19. If a failure to provide consular information were to be established, there may still have been no harm to Mexico's interests. Such prejudice could only be established if Mexico proved the sixth element: that if consular notification occurred in fact, then that notification did not occur in time to permit Mexico to render meaningful assistance notwithstanding the failure to give consular information. Cases such as that of Mr. Hernandez Llanas (No. 34), in which his detention was made known to Mexico within 48 hours of his arrest, cast doubt on any finding Mexico would have the Court make that there is always prejudice resulting from a failure to follow the specific requirements of Article 36 (1) *(b)*. Mexico apparently would have the Court believe that there was unavoidable prejudice here because Mr. Hernandez Llanas confessed to his crime. Ms Babcock argued generally that prejudice follows inevitably because any confession "can and will" be used by the prosecutor as the centrepiece of the case[38]. In fact, Mr. Hernandez Llanas beat his victim to death, he raped the victim's wife several times, and then fell asleep beside her in her bed, and was found by the police there. His DNA was all over the crime scene. There was no doubt he would have been convicted even without his statement to police[39]. With all the physical and eyewitness evidence, it is simply preposterous for Mexico to argue that it was in every case prejudiced by the fact that the defendant gave a statement to the police.

---

[37]See Declaration of Ambassador Maura A. Harty Regarding United States Compliance with Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, para. 54, United States Counter-Memorial, Ann. 1 (hereinafter "Compliance Declaration").

[38]CR 2003/24, para. 139 (Babcock).

[39]Declaration of Peter Mason concerning the 54 cases, United States Counter-Memorial, Ann. 2, App. 34.

D. Mexico has not and cannot prove conclusively the relevant elements of an Article 36 (2) breach

4.20. This Court, in *LaGrand*, expressly anticipated that no State could assure that all detained foreign nationals would receive consular information[40]; accordingly, it identified a remedy for these inevitable situations — review and reconsideration of the conviction and sentence. Where review and reconsideration either has occurred or can occur, any breach of Article 36 (1) is cured, and Article 36 (2) inherently cannot be breached.

4.21. A particularized examination against the standard of proof that I have referenced would also show that Mexico has failed conclusively to prove breaches of Article 36 (2) with respect to the 52 remaining cases.

4.22. When we turn to the facts relevant to Article 36 (2), we find a familiar mix of circumstances inconsistent with Mexico's one-size-fits-all claim that the courts of the United States have impermissibly failed to address the alleged breaches of Article 36 (1). In a number of these cases, the Vienna Convention issues have been extensively litigated in United States courts. In 11 cases, our courts concluded that a failure of information occurred, but no prejudice resulted[41]. In other cases, consular officers learned of the case so quickly that there was no possibility of prejudice. Mexico in many cases has no legitimate complaint, and instead focuses solely on the fact that a statement was taken from the defendant prior to providing him with consular information. But that cannot possibly be prejudice, since Article 36 (1) does not have any implications whatever for the interrogation of criminal suspects, as we will explain later today. In those cases, the court decided, and correctly in our view, that there was no reason to exclude these statements from evidence. In other cases, the alleged failure to comply with Article 36 (1) could have been litigated, but the defendants chose not to raise the claim. Only in some of the cases did consular notification occur too late for the claim to be considered by our courts. And, as Mr. Thessin will explain this afternoon, in those cases clemency remains available for full review and reconsideration.

---

[40] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, para. 124.

[41] Mr. Ayala (No. 2); Mr. Sanchez Ramirez (No. 23); Mr. Vargas (No. 26); Mr. Maldonado (No. 37); Mr. Medellin Rojas (No. 38); Mr. Plata Estrada (No. 40); Mr. Ramirez Cardenas (No. 41); Mr. Regalado Soriano (No. 43); Mr. Caballero Hernandez (No. 45); Fong Soto (No. 48); Mr. Torres Aguilera (No. 53).

4.23. More importantly, Mexico has failed to prove breaches of Article 36 (2) because it has not shown, and cannot show, that the United States does not provide for review and reconsideration of any conviction and sentence. This is because — with the notable exception of the three cases in which clemency has already been granted — none is yet in the posture where all available remedies with respect to the capital sentence in United States domestic law are exhausted. In fact, many are still awaiting the hearing of their first direct appeal[42].

4.24. Mexico asks the Court to find that the review and reconsideration available in the United States is ineffective, and the evidence it presents on this point is *completely* inadequate to support any such determination. Mexico certainly has not presented conclusive evidence that the United States and its states do not provide effective review and reconsideration to the courts and the clemency process. Indeed, as to several of the nine US states now at issue[43], Mexico has advanced no proof at all. Such proof as it has tendered has been little more than indirect and unsupported accusations upon the bona fides of state officials and the systems that they administer in accordance with the law.

E. Mexico has not and cannot prove conclusively its allegations of systematic non-compliance by the United States

4.25. I will now respond to Mexico's assertions of systematic non-compliance by the United States with its obligations under the Convention. We have in prior cases, and in our Counter-Memorial[44], described to the Court the very substantial efforts undertaken by the United States to comply with its obligations. The United States has put into circulation more than 100,000 copies of a compliance manual on consular information and notification for law enforcement personnel, and more than 600,000 pocket cards setting out the requirements of the Convention. Both of these are in the record before the Court[45], and the pocket card is included in your judges' book at tab 2. The United States has worked closely with our friends and neighbours,

---

[42]See, e.g., United States Counter-Memorial, para. 7.3, notes 326-329 and accompanying text.

[43]Mexico's original submission included cases drawn from ten of the states of the United States. With Mexico's withdrawal of the case of Mr. Hernandez Alberto (No. 50), the only case from Florida, that state's legal system is no longer at issue in this case.

[44]See United States Counter-Memorial, paras. 2.27-2.33.

[45]See Compliance Declaration, Ann. 1, Exhibit 1 (pocket card); United States Department of State, Office of the Legal Adviser, document 10518, 1998, Jan., United States Counter-Memorial, Ann. 21 (compliance manual).

including Mexico, on other training tools, videos and outreach efforts. We continue to co-operate closely with Mexican authorities to carry out our own commitments under the Convention, and to facilitate Mexico's efforts to provide assistance to its nationals in the United States. These are further documented in our Counter-Memorial and its annexes[46].

4.26. These efforts, of which this Court has taken specific judicial notice[47], have been commended by other States as setting the standard for compliance with the Convention. Our efforts even prompted Mexican authorities to express their concern that they would be overwhelmed by the volume of notifications being generated[48].

4.27. It is thus both surprising and indeed disappointing that Mexico, both in its presentation yesterday and in its Memorial, accuses the United States of committing systematic breaches of Article 36, even today. We do not. Mexico attempts to use 102 new cases that it has put in issue toward this end, painting with a broad brush, with the evident hope that thereby the Court will be swept past the defects in its arguments, and the holes in its proof.

4.28. To begin, 102 cases represent but a tiny fraction of the thousands of cases of Mexican nationals accused of serious crimes moving through the criminal justice systems of the United States every day and, as Mexico has conceded, in only six of these cases is a capital sentence even a remote possibility[49]. Viewed in context, 102 alleged instances of non-compliance in a wide variety of criminal cases simply cannot speak to the question of systematic breaches in the context of this case. Moreover, it has been difficult for us to investigate these cases, as they are often lacking even accurate names, dates of birth, docket numbers and other basic identifying information about the defendants (leaving aside their lack of family details). What we have been able to find thus far, however, does not support Mexico's assertions of systematic breaches. Quite the contrary.

4.29. We have, once again, found persons claiming to be United States citizens, dual nationals, and persons given consular information who elected not to ask for consular notification.

---

[46]See United States Counter-Memorial, paras. 2.27-2.23; Compliance Declaration.

[47]*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, paras. 123-124.

[48]Compliance Declaration, paras. 47-48, Ann. 1.

[49]CR 2003/24, p. 37, para. 120 (Babcock).

We have also found many individuals who in fact did request consular notification, which request was honoured well in advance of trial, often the same day as the request was made. There are some instances in which we cannot at this point determine whether consular information was given and, if not, why not. This is due largely to the inaccuracy and incompleteness of the information Mexico has provided to us. What can be said of these cases, however, is that they do not support Mexico's assertions of systemic problems with United States compliance with Article 36[50].

4.30. Mexico's complaint seems to be that the United States breaches its obligations under the Convention at will, and that these obligations are not taken seriously. The evidence Mexico has produced does not support such assertions and is, in any event, contradicted by the evidence we have offered of our extensive compliance efforts. And, in the end, such breaches as do occur can be subjected to review and reconsideration in accordance with the principles of *LaGrand*, as we will elaborate later today.

F. Conclusion

4.31. Mr. President, in sum, and notwithstanding Professor Dupuy's broad rhetoric of last evening, these 52 remaining cases are not one dimensional and they are not susceptible to gross generalizations. The case today is in a vastly different factual posture from that presented to this Court in *LaGrand*. Mexico tells the Court none of this. Mexico has every incentive to portray the tasks facing the Court on the factual questions as easy. They are not. Working through each of the 52 remaining cases in a methodical and careful way would be impossible on the basis of the evidence Mexico has provided. But, as we have suggested, the Court need not undertake such probing review because the United States nonetheless provides for review and reconsideration consistent with *LaGrand*.

4.32. Mr. President, this concludes my portion of the presentation of the United States. I thank the Court for its kind attention and ask that, after the coffee break, you call on Ms Catherine Brown.

---

[50]See Compliance Declaration, App. 4 (Response to Allegations of Continuing Violations of Article 36 in paras. 159-168 of the Memorial (The "102 Cases" of Alleged Violations)).

The PRESIDENT: Thank you, Mr. Sandage. The hearing is now suspended for 15 minutes and will be resumed at 11.55 a.m.

The Court adjourned from 11.40 to 11.55 a.m.

The PRESIDENT: Please, be seated. I now give the floor to Ms Catherine Brown

Ms BROWN: Thank you, Mr. President.

V. INTERPRETATION OF ARTICLE 36 (1)

5.1. Mr. President, Members of the Court, it is an honour to appear before you again today on behalf of the United States. This morning I am going address the proper interpretation of Article 36 (1), which is the "new" issue in the case — that is, it is an issue that this Court did not fully address in the *LaGrand* case. It is also an important issue because Mexico's requested remedy, that the Court order the suppression of statements taken before a national is provided with consular information, in other words, by the use of such statements at trial, depends upon how the Court resolves this issue.

5.2. Mr. President, Members of the Court, if the Court interprets Article 36 (1) in good faith, in accordance with its ordinary meaning in context and in light of the object and purpose, and taking appropriate account of the subsequent practice of States in implementing Article 36[51], it can reach only one conclusion: and that is that "without delay" as used in Article 36 (1) does not mean "immediately and before interrogation", as Mexico contends. In fact, Article 36 (1) has no implications for the interrogation of a foreign national. It does not require that an interrogation cease while Article 36 (1) procedures are completed. And it does not give the obligation to provide a foreign national with consular information, or even the obligation to provide consular notification, the significance that Mexico attributes to it.

The text of Article 36 (1)

5.3. Mr. President, I am going to address first the question of "without delay" and then the question of the significance of the obligation to provide consular information and notification. It

[51] See Counter-Memorial of the United States of America ("Counter-Memorial") at pp. 81-89.

goes without saying that we should start with the text, as Mr. Donovan purported to do yesterday. The Court should have before it in the judges' book that we have provided a tab 3, the actual text of Article 36 (1). We now know subparagraph *(b)* uses the phrase "without delay" three times. First, it states that the consular post must be notified, upon request, "if, . . ., a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner". We have called this the obligation of "consular notification" in our Counter-Memorial[52] and have used that in this case in order to preserve the distinction between this obligation and the obligation to inform the individual, which I will get to momentarily. Subparagraph *(b)* then provides that communications from a detained foreign national must be forwarded "without delay" to his consular officer. And finally, it provides, in the concluding sentence, that "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph". And, as I have just mentioned, to avoid confusion with the obligation to provide consular notification, we have tried to consistently call this the obligation to provide "consular information"[53]. This obligation requires that the detainee be told that his consular officer will be notified without delay of his detention, if he wishes, and that any communication from him to his consular officer will be forwarded without delay.

5.4. The text I have just reviewed of course does not say "immediately", and it does not say anything about interrogation nor does it use the word "before" to suggest that the required procedures must occur in relation to any other action.

5.5. To further understand why Mexico's argument is wrong, I would ask you also to look at subparagraph *(c)*, which addresses consular access to a detained person. It says, in particular, that "consular officers shall have the right to visit a national . . ., to converse and correspond with him and to arrange for his legal representation". Note — because it is very significant — that subparagraph *(c)* does not say that the consular officer shall be entitled to exercise any of these rights "without delay"[54]. Mr. Donovan said yesterday that this is merely because subparagraph *(c)* sets forth rights, not obligations, and attempted to contrast it with subparagraph *(b)* but I think it is

---

[52] *Id.* at p. 75.

[53] *Id.*

[54] *Id.* at p. 77, n. 154.

readily apparent to everyone that in fact there is no meaningful distinction between stating that a consular officer shall have the right to visit, or stating that the receiving State shall have the obligation to permit a visit. In neither case must the visit occur "without delay".

"Without delay" is not defined

5.6. As the Court knows, the words "without delay" are not defined in the Convention. In the 36 years since the Convention entered into force, States parties have therefore enjoyed a degree of discretion in how they have implemented the provisions of Article 36 (1) *(b)* in the context of their own domestic legal systems. And, in fact, they have implemented subparagraph *(b)* in a variety of ways. For the United States, we have provided the guidance that is before you in the judges' book at tab 4[55]. And as you can see there, we have said that "*There should be no deliberate delay*", with respect to either consular information or notification, and that the required action should be taken *"as soon as reasonably possible under the circumstances"*[56]. We have also said that we *"would normally expect notification to consular officers to have been made within 24 to 72 hours of the arrest or detention"*[57] ¾ in each case indicating a certain degree of discretion in light of the circumstances. But other States have taken significantly different approaches, as I will discuss in further detail a bit later.

Mexico's proposed definition

5.7. As you heard yesterday, Mexico would have the Court limit the discretion of States under the Convention. In fact, as I will show, Mexico would call the practice of virtually every State party to the Convention into question, by giving the words "without delay" a special and highly restrictive meaning. Specifically, by contending that the words "without delay" must effectively be replaced with the words "immediately and prior to interrogation"[58], Mexico is essentially arguing that subparagraphs *(b)* and *(c)* together should be revised to read as follows: "the said authorities shall ask the person concerned immediately upon his arrest and before he is

---

[55]*Id.* at pp. 79-80. Annex 21, *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 Officials to Assist Them*, US Department of State, Office of the Legal Adviser, document 10518, Jan. 1998 at p. A525.

[56]Annex 21 at p. A552.

[57]*Id.*

[58]Memorial of Mexico ("Memorial") at pp. 70-83.

interrogated whether he would like his consular officers notified of his detention and, if he says yes, they shall cease all questioning until the consular officer has been notified and had an opportunity to speak to the person".

5.8. Clearly there is a vast gulf between this that I have just read and the actual text before you. And in fact, there is no legal, logical, or practical basis to get from the text of Article 36 to the reading that Mexico is advancing.

The context and object and purpose do not support Mexico's interpretation

5.9. Keeping in mind the obvious textual points that I have just noted, let us turn to the context in which the obligations of subparagraph *(b)* are stated, and their object and purpose. The purpose of the Convention as a whole, of course we know, is to promote and regulate consular relations between States[59]. It is not to regulate criminal justice systems. To the extent that it regulates anything, the Convention regulates the treatment and status of consular officers, and defines their permissible functions, primarily in Article 5, but also to some extent in Article 36. Those functions, broadly speaking, include assisting nationals of the sending State. But they do not include protecting the foreign national from a criminal investigation. They do not include participating in or stopping the questioning of a foreign national in the course of a criminal investigation. Nor do they include acting as an attorney for a foreign national. And in fact, consular officers not only are not permitted to act as attorneys — they have no fiduciary duties to their nationals, and they may act contrary to their national's interests[60]. For example, a foreign national may be detained precisely because a consular officer has asked that he be detained — for example, by requesting the national's provisional arrest in connection with an extradition.

5.10. If we focus just on Article 36, we see that its title is, significantly, "Communication And Contact With Nationals Of The Sending State". Its purpose is clearly stated in the chapeau: "to facilitat[e] the exercise of consular functions". Thus, when subparagraph *(a)* sets forth the basic principle that consular officers and their nationals shall be free to communicate, it does so consistent with the title of Article 36 and for the purpose of facilitating the exercise of consular

---

[59]Counter-Memorial at p. 69, citing Vienna Convention on Consular Relations ("VCCR"), fourth preambular paragraph, Annex 23, Exhibit 1.

[60]Counter-Memorial at pp. 74-75.

functions by consular officers. Similarly, when subparagraphs *(b)* and *(c)* then address the special circumstance of a national who is detained, they do so to ensure that consular communication and contact — again, the words used in the title — can continue in the context of a detention, and again to facilitate the exercise of consular functions by a consular officer[61]. They add only the additional provision, that the consular officer may arrange legal representation.

5.11. Mr. President, Members of the Court, you should note carefully that Article 36 is not addressed specifically to a criminal prosecution, or to a criminal investigation. Its title is not "Criminal Investigations of Nationals of the Sending State". The obligations of Article 36 are not triggered by the initiation of a criminal investigation, they are not triggered by the interrogation of a foreign national, by the bringing of criminal charges, or even by the commencement of a criminal trial[62]. All of these things could happen without a person being detained. If they do happen without a detention, only the obligations of subparagraph *(a)*, to allow free communication, apply. If a foreign national is facing a criminal investigation or prosecution but is not detained, the receiving State has no obligation to inform him of anything under the Convention.

5.12. Mr. Donovan attempted to obscure this fact yesterday by noting that Article 36 (1) *(b)* is triggered by an arrest, which connotes a criminal proceeding. This is true that it refers to an arrest, but its true only because an arrest in that context leads to a detention. The obligations of subparagraph *(b)*, moreover, will also be triggered by a detention for other purposes, such as for immigration purposes, or as part of a public health quarantine, or perhaps even in some legal systems in connection with a civil matter[63].

No right to insist on the provision of assistance

5.13. The Court should also note that nothing in Article 36 or in Article 5 or in any other provision of the Convention requires that the sending State assist its nationals. This is true even in the context of a criminal proceeding. Nor does the Convention establish any standards for the provision of consular assistance. The question of whether and how to assist one's nationals is entirely within the discretion of the sending State. No prosecutor, no criminal investigator, no

[61] *Id.* at pp. 72-75.

[62] *Id.* at p. 85.

[63] *Id.* at pp. 81-82.

police officer, and no detaining officer in the receiving State can compel a consular officer to visit, to communicate with, or in any way to assist a foreign national. Nor can the individual concerned or his defence lawyer do anything to compel a response. And, of course, no court in the receiving State can compel a response, either on its own initiative, or at the request of the individual concerned. The Convention simply gives the foreign national no right to consular assistance if the sending State declines to provide it[64].

The appropriate definition in light of the text, the context, and the object and purpose

5.14. The clause "without delay" must be interpreted in light of these limited purposes of the Convention and Article 36, as well as its text. For the purposes of this case, should the Court feel compelled to adopt a definition of "without delay", rather than simply to reject Mexico's, we have suggested that the most appropriate interpretation of "without delay" would be that it requires action in the ordinary course of business and without procrastination or deliberate inaction[65]. Interpreting "without delay" in this way is consistent with what the text says and it yields sensible results each time of the three times "without delay" is used[66]. In contrast, Mexico's reading adds significant new content to the text, and it would create numerous anomalies throughout the Convention, which uses the words "without delay" and other temporal words in a variety of contexts[67].

5.15. Our interpretation is also consistent with what the text does not say. It is consistent with the fact that Article 36 does not address a criminal investigation and does not specify the method by which notification must be given.

5.16. Our reading is consistent with the fact that a detention will not necessarily relate to a criminal prosecution. But even in the context of a criminal arrest, our reading fully addresses the wide range of circumstances that may arise: an arrest of someone who claims, for example, falsely, to be a national of the receiving State, or whose nationality cannot readily be determined, or the arrest of many people at once, or the arrest that occurs in exigent circumstances.

---

[64] *Id.* at pp. 99-100.

[65] Counter-Memorial at pp. 78-104.

[66] *Id.* at n. 163.

[67] *Id.*

5.17. And, finally, our reading furthers the purpose of Article 36 by facilitating consular communication and contact and making possible the provision of consular assistance while leaving a proper degree of discretion to the receiving State in implementation.

State practice shows that Mexico's interpretation is wrong

5.18. If any doubt that Mexico's reading is wrong remains, the Court will see plainly that it is resolved by the practice of States, which we have documented in an Annex to the Counter-Memorial[68]. Mexico has consistently failed to recognize the importance of State practice to the interpretation of Article 36. Yesterday it even suggested that the evidence we submitted is irrelevant. It is not. What is at issue here is not State practice regarding remedies in unusual cases; we are talking about how the affirmative obligations of Article 36 (1) are understood. Those obligations arise in all cases of detentions of foreign nationals. State practice is therefore plentiful and it is highly probative. And contrary to Mr. Donovan's assertion yesterday, it is "concordant, common, and consistent". Given my time limitations, I will highlight just a few key points. And as I do so, the Court may wish to refer to the charts we have provided in the judges' book (tab 5), and perhaps also to the summary of Mexico's practice (tab 6).

5.19. First, with respect to the provision of consular information, neither Mexico's laws nor its actual implementation of its laws suggests that Mexico has ever thought that it must ensure that consular information is provided to a detained foreign national prior to interrogation[69]. In fact, Mexico's federal statute on consular notification does not even provide for giving information to the foreign national; it simply provides for notifying consular officers[70]. And, notwithstanding its observation yesterday that Article 36 is incorporated into Mexican law, Mexico does not in practice provide consular information prior to interrogation. In most other States, as in the United States, consular information might or might not be provided prior to the interrogation. In only eight States

---

[68] *Id.* at pp. 89-100. Annex 4 to the Counter-Memorial, declaration of Ambassador Maura A. Harty concerning State Practice in implementing Article 36 (1) of the Vienna Convention on Consular Relations ("State Practice Declaration") at pp. A.377-389. See also Annex 3 to the Counter-Memorial, Declaration of Professor Thomas Weigend concerning the compatibility of Mexico's submissions with rules of criminal procedure followed by national and international criminal courts ("Weigend declaration") at pp. A.361-373.

[69] Counter-Memorial at pp. 89, 91-92; State Practice Declaration at pp. A387-A388.

[70] Counter-Memorial at pp. 91-92, citing Article 128, Section IV of Mexico's Federal Code of Criminal Procedure.

does it appear to be fairly standard practice to provide consular information prior to interrogation, but, contrary to Mr. Donovan's characterization yesterday, these States — with only one possible exception — do not appear to provide consular information prior to interrogation out of any sense of legal obligation[71]. Moreover, a number of States officially follow practices incompatible with the interpretation that Mexico has advanced. For example, in Argentina, consular information is provided to detainees at their preliminary hearing by a judge. That hearing follows a period of up to three days of *incommunicado* detention, during which the foreign national may be interrogated[72].

5.20. Second, with respect to consular notification, in Mexico, no law requires that notification be given prior to interrogation. In practice, it may or may not be given prior to interrogation[73]. We also find that, in part because States use a variety of means to provide notification, including the ordinary mail[74], notification can take some time to be received. When States have wanted to ensure notification within a specific time period, they have done so through bilateral consular conventions which typically provide for notification within periods ranging from one to four days; the clear understanding here is that the Vienna Convention does not require notification in any less time. Yesterday, Mr. Donovan erroneously stated that our survey covered less than a third of States parties. But in fact, it covered over 80 per cent and attempted to isolate practice under the Vienna Convention from practice under these bilateral conventions. If the practice of States implementing both the Vienna Convention and a bilateral convention is considered, it is even clearer that no State understands Article 36 to require notification prior to interrogation. States do not even understand the more protective bilateral conventions in this way.

5.21. Third, with respect to consular access, consistent with the fact that Article 36 (1) *(c)* does not specify that access must be provided "without delay", in many countries consular access during the investigative phase of a criminal case is either barred altogether or tightly controlled. Argentina, Belgium, France, Spain, China, Italy, and several other States permit a certain period of *incommunicado* detention during the investigative phase of a case[75]. In other States, such as

---

[71]State Practice Declaration at p. A.380-381.

[72]*Id.* at p. A.380.

[73]*Id.* at p. 91.

[74]State Practice Declaration, at p. A385.

[75]*Id.* at pp. A385-A386.

Germany, consular officers generally need to obtain written permission before they can conduct a pretrial visit, and this usually takes a couple of days[76]. Consular access is less strictly controlled in many other countries, in which case it might or might not be permitted to happen prior to an interrogation[77]. But the sequence would be a function of the timing of two entirely independent and separate events.

Mexico's interpretation would lead to absurd results and be impracticable

5.22. Mr. President, Members of the Court, the fact that no State has understood Article 36 (1) to require consular access before interrogation should come as no surprise, because it would lead to absurd results to do so, as Mr. Philbin explained in part this morning. We have already noted that the consular officer has no obligation to visit, to communicate with, or to assist his national. Holding an interrogation in abeyance pending a consular response could jeopardize an investigation or threaten public safety; but to hold it in abeyance when a consular officer has no obligation to respond, and may never do so, would effectively hold the receiving State's criminal investigation hostage to the resource limitations and consular priorities of the sending State[78]. Mexico yesterday suggested that this fundamental problem could be addressed by the Court articulating an elaborate rule allowing a reasonable time for access depending on the severity of the crime and the proximity of the consular post. Leaving aside the obvious fact that this proposal would effectively have the Court rewrite the Convention, it would yield even more absurd results. Instead of a single rule for all States parties, authorities in each State would make subjective determinations about the seriousness of the crime and the relative availability of consular officers from a 165 different countries to respond. The result would be hundreds of different rules delaying investigations for varying and unpredictable lengths of time.

5.23. Leaving aside these absurdities, as a practical matter, States could not have intended such a result. When police officers arrest persons their focus is on protecting the public and solving a crime. The arrest may occur in exigent circumstances, or it may involve numerous people. Often the fact that the arrested person is a foreign national becomes known only in the

[76] *Id.* at p. A385.

[77] *Id.*

[78] Counter-Memorial at pp. 99-100.

course of an interrogation itself, or even later. Once it is confirmed that a detained person is a foreign national, some orderly process must be followed to ascertain and comply with the relevant requirements[79]. The Court should recall that not all arrests will be governed by the Vienna Convention. Thus complying with consular information and notification requirements is not necessarily a function that can be done "immediately", as Mexico uses the word, or even a function that a State would think could be done effectively in connection with an interrogation. This undoubtedly is why a number of States have reasonably concluded that it is best done at other times and in other ways, including in judicial appearances subsequent to interrogation[80].

The *travaux* do not support Mexico's interpretation

5.24. Finally, I will just spend a moment on the *travaux*, which Mexico has claimed support its interpretation. In fact, the *travaux* show that the Court should be extremely wary of providing any definition to the words "without delay", and that the negotiators could not have intended Mexico's proposed interpretation. It is true that the words "without undue delay" were rejected early on for fear that they might encourage deliberate delay. But they were not rejected in favour of "immediately and prior to interrogation." Rather, the final text used "without delay" because all attempts to further define the requirement of consular notification failed[81]. Moreover, the *entire* discussion of "without delay" pertained *only* to the obligation to provide consular notification. It had nothing to do with providing information to the detained national without delay. That provision was added as part of a last-minute compromise and without any discussion of its meaning or application. Not a single government suggested that consular information should be provided before interrogation[82]. So, to recapitulate on that issue, Article 36 (1) *(b)* does not require the provision of consular information immediately before interrogation and Article 36 (1) as a whole does not create any obligations relevant to the interrogation of a foreign national.

---

[79] *Id.* at pp. 81-83.

[80] State Practice Declaration at pp. A380-A381, A385.

[81] Counter-Memorial at pp. 100-104.

[82] *Id.* at pp. 101-103.

Mexico has exaggerated the importance of the procedural provisions of Article 36 (1) *(b)*

5.25. I would like now to turn to my final point. I have noted that Mexico has strained to find support for its interpretation of "without delay" in an effort to establish a legal foundation for asking the Court to order the suppression of statements taken before consular information is provided. But it is also making another mistake in reading Article 36 (1) that relates to its request for remedies. It overstates the significance of the obligation to provide a foreign national with information, and even of the requirement to provide formal notification[83]. Mexico suggests that all failures to provide consular information, and all failures to provide formal notification, are of equal significance. In Mexico's view, it is legally irrelevant whether the consular officer learns of a detention within a short period of time or does not — if the detained person was not given consular information without delay everything — according to Mexico — that follows is legally flawed. Mr. President, Members of the Court, this argument is inconsistent with reality, as the Court will readily see when it reviews the facts of the now 52 cases.

5.26. It is also based on an unsustainable effort to transform the obligations to provide consular information and notification into "human rights" or rights "fundamental to due process". We have addressed in detail in the Counter-Memorial why that effort should be rejected[84]. But I would like to address the issue now simply in the context of the proper interpretation of Article 36 (1).

5.27. We have seen that the purpose of Article 36 is to facilitate the exercise of consular functions by a consular officer[85]. The exercise of consular functions depends on the consular officer knowing of the detention, not necessarily on the individual being informed of the possibility of notification, and not on formal notification by the receiving State. While failures to provide consular information, and officially to provide consular notification, are always regrettable, they cannot be viewed as equally significant for purposes of Article 36 regardless of whether and when notice occurs in fact.

5.28. The significance of giving consular information to the foreign national is thus limited, it is a procedural device. It is a procedural device that allows the foreign national to trigger the

---

[83]Counter-Memorial at pp. 76-78.

[84]*Id.* at pp. 121-140.

[85]*Id.* at p. 73.

related process of notification. This is clear even in Mexico's own federal legislation, which provides only for consular notification, and not for the provision of consular information[86]. And if a consular officer receives notice in fact of a detention within essentially the same period of time as it would have received notification if consular information had been provided "without delay", a failure to provide consular information or even formal notification, cannot cause any real harm to the sending State. The Court recognized this in *LaGrand*, when it found violations of Article 36 (1) *(a)* and (1) *(c)* because actual notice to Germany did not occur until after the LaGrand brothers were sentenced and the procedural default rule became effective. The Court made clear that Article 36 (1) *(a)* and *(c)* are not necessarily violated simply because the specific requirements of Article 36 (1) *(b)* are not followed[87]. And when it ordered review and reconsideration "taking account of the violation," the Court similarly recognized that not all violations are the same. We have also seen this morning that Article 36 (1) imposes no obligation whatever on a consular officer to exercise consular functions for the benefit of a detained national.

5.29. Consistent with this, the obligation to provide consular information is not an obligation to provide information about any substantive right, including the right to consular assistance, because no such right exists. Nor is it an obligation to provide information relevant to the criminal process. The obligation is fully satisfied by telling the detained foreign national nothing more than that he may request consular notification and have his communications forwarded. A procedural requirement of this limited nature, triggered by a detention, not by a criminal prosecution, cannot possibly be fundamental to the criminal justice process.

Summary

5.30. Mr. President, Members of the Court, the Court should reject Mexico's efforts to define "without delay" to require consular information, and consequent notification and access, "immediately and prior to interrogation". It should also reject Mexico's effort to elevate the importance of the procedural provisions of Article 36 to substantive rights integral to the criminal process. The linkage to the criminal process that Mexico seeks is not supported by the plain

---

[86] *Id.* at pp. 91-92.

[87] *LaGrand*, para. 73.

language of Article 36; it is not supported by the object and purpose of Article 36; and it is plainly inconsistent with the practice of States. No State party to the Vienna Convention has ever understood Article 36 (1) the way Mexico has asked the Court to interpret it. Adopting Mexico's reading would constitute nothing less than a wholesale rewriting of the Convention, which this Court has properly said is not its function[88].

5.31. Mr. President, that concludes my presentation and I ask that you now call upon Mr. Mathias.

The PRESIDENT: Thank you, Ms Brown. I now give the floor to Mr. Mathias.

Mr. MATHIAS:

VI. Interpretation of Article 36, paragraph 2

6.1. Thank you, Mr. President. It is an honour for me to appear again before this Court on behalf of the United States.

6.2. Mr. President, Members of the Court, it falls to me this morning to provide an analysis of Article 36, paragraph 2, of the Convention. I shall first examine the bifurcated text of the provision and suggest the meaning of both parts of the text and the provision when read as a whole. I shall then explain that the provision has two distinct applications. First, it regulates and qualifies the implementation of the obligations undertaken in Article 36, paragraph 1. Second, it speaks to remedying breaches of an obligation undertaken in Article 36, paragraph 1, when they occur. The latter application, the remedial application, was the primary focus of the Court's analysis of this provision in *LaGrand*, and it is at issue in this case as well. Finally, I shall address the question of the appropriate scope of the Court's review with respect to alleged breaches of Article 36, paragraph 2.

[88]Counter-Memorial, at pp. 142-144.

A. Article 36, paragraph 2, states the general rule that the obligations undertaken in Article 36, paragraph 1, are to be implemented in accordance with existing laws and regulations

6.3. Members of the Court, you have the text of Article 36, paragraph 2, in front of you at tab 3 of the judges' book. Its structure is bifurcated; it states a general rule in its main clause and then limits that general rule in the proviso.

6.4. The first part of the paragraph, the main clause, provides that "the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State . . .". This articulates the general rule: the "rights referred to in paragraph 1" are to be exercised in broad accordance with the receiving State's own laws, which include the laws and regulations governing the operation of its criminal justice system. In other words, States parties are not required to implement the obligations undertaken in paragraph 1 by enacting new laws or by creating new procedures or new judicial doctrines. Nor are they required to create wholesale exceptions from their normal laws and regulations. None of that. The obligations are to be implemented in conformity with the laws and regulations of the receiving State. That is the general rule: existing laws and regulations apply.

6.5. In its Memorial, Mexico did not discuss this "general rule" at all. Yesterday, it was dismissive of it. You might be wondering whether it has any relevance to this proceeding. In fact, it is of enormous significance. The general rule is an insurmountable obstacle to Mexico's position.

6.6. The very same Article of the Convention upon which Mexico relies for the creation of the obligations at issue in this proceeding establishes a rule that the existing laws and regulations of the receiving States parties provide the context within which the obligations are to be exercised. The import is clear: one cannot interpret these obligations in a way that would lead to the conclusion that the existing laws and regulations of the various States parties would *generally* be found inadequate. Such an interpretation would be inconsistent with the context in which the obligations were created and with the express terms of the general rule I have just described. If the drafters of the Convention had understood it to require broad changes in the domestic legal systems of all States parties — and certainly Mexico's proposed interpretation would require broad changes

in the laws and regulations of *every* State party — then this provision would not have been included in the Convention at all.

6.7. Ms Brown has just noted, and Professor Weigend will explain further this afternoon, that the vast majority of States parties permit law enforcement interrogation of suspects before consular information or notification can be provided. In addition Professor Weigend will review this afternoon, that virtually all States have rules concerning the need to raise certain arguments at trial, and no State appears to order new trials merely upon a showing of a failure of consular notification where a defendant has at a minimum failed to show some sort of prejudice. These points are fully elaborated in our Counter-Memorial and are unrebutted by Mexico. Yet the implication of Mexico's position is that innumerable provisions of these sorts in the domestic laws of States parties generally are inconsistent with the requirements of the Convention and would have to be changed in order to bring States parties into compliance with their obligations.

6.8. This brings us to the proviso, which constitutes a limitation to the general rule. It states that this general rule is subject to the proviso that the laws and regulations of the receiving State "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

6.9. What are these purposes and what is their effect on the issue before us?

6.10. As Ms Brown explained a few moments ago, the Convention itself gives the answer to the first part of the question. It includes in paragraph 1 of Article 36 an express statement of purpose: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State." That is the only relevant statement of purpose that can be found in the Convention. Article 36 (1) is intended to facilitate the exercise of consular functions relating to nationals of the sending State and not for any other purpose. The Convention is clear on this point.

6.11. In its Memorial, Mexico misstates the purpose of Article 36. Mexico asserts that its object is "to guarantee to a sending State the opportunity to ensure fair proceedings for its individuals subject to trial before the criminal authorities of a foreign State"[89]. There is no legal analysis to support Mexico's substitution of "guarantee" for "facilitate", the word that appears in

[89]Memorial, para. 303.

the Convention, or to explain the substitution of the phrase "the opportunity to ensure fair proceedings" for "the exercise of consular functions", the phrase that appears in the Convention. This is assertion, nothing more.

6.12. Mr. President, Members of the Court, let me summarize our discussion thus far: Article 36 (2) states the general rule that "the rights referred to in paragraph 1" are to be exercised consistent with the existing laws and regulations of States. Paragraph 2's proviso is in the nature of an exception to this general rule. It is an important part of Article 36 (2) and should be applied consistent with its proper interpretation. But that interpretation must take into account the presumption embodied in the general rule — that the existing laws and regulations must be accepted as the governing framework and that only in the exceptional case would the proviso be applicable. As Professor Weigend will explain this afternoon, no State party has laws and regulations consistent with Mexico's proposed interpretation of Article 36 (2) — *none*. It follows from this that Mexico's interpretation *cannot* be correct. The drafters of the Convention evinced a clear intent through Article 36 (2) to preserve their existing laws and regulations and to ensure that in any but the most exceptional cases it would be clear that obligations undertaken in the Convention must be understood to fit *within* existing laws and regulations. Since no State party has laws consistent with Mexico's interpretation of Article 36, it simply *cannot be* the correct reading of the Convention.

B. Article 36 (2) has two applications, basic and remedial; Mexico has inaccurately described the Court's requirements for the remedial process

6.13. Having considered the meaning of Article 36 (2) it remains to consider the two different contexts in which it might be applied.

6.14. The basic function of this paragraph applies in connection with the ongoing implementation of the obligations undertaken in paragraph 1. For example, if a consular officer wishes to visit a detained national, he or she must do so in conformity with the laws and regulations of the receiving State, as long as those laws and regulations give full effect to the purpose of facilitating the provision of consular assistance. Thus, as a practical matter, if a consular officer wishes to visit a detainee he or she must do so during visiting hours, but visiting hours must be

frequent and lengthy enough to facilitate the exercise of consular functions. We can all agree to this.

6.15. The second application of the provision is remedial. In *LaGrand*, the Court decided that the procedural default rule, as applied to the LaGrand brothers, prevented "full effect [from being] given to the purposes for which the rights accorded . . . are intended", by

> "prevent[ing] [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 them and otherwise assisting in their defence as provided for by the Convention"[90].

Thus, the Court in *LaGrand* decided that where a breach of Article 36 (1) has taken place, Article 36 (2) requires that there be an opportunity for the significance of the breach to be assessed; elsewhere in the Court's Judgment, this is referred to as review and reconsideration of the conviction and sentence by means of a State's own choosing taking account of the violation[91].

6.16. Now, much of what Mexico has said about the legal requirements for this remedial function — the review and reconsideration process that is at the heart of *LaGrand* — is simply in error.

6.17. Thus, Mexico has asserted that "the Court determined in *LaGrand* that clemency review alone did not constitute the required review and reconsideration"[92]. No basis for this statement is given, nor could it be, as the Court made no such determination. The clemency processes in respect of the LaGrand brothers were not part of the Court's *dispositif* in *LaGrand*, nor did the Court expressly discuss clemency in its reasoning. Moreover, as the United States has conformed its conduct subsequently to *LaGrand*, the clemency process is now informed by the review and reconsideration requirement.

6.18. Mexico has also asserted that "it is clear that the Court's direction to the United States in *LaGrand* clearly contemplates that 'review and reconsideration' would be carried out by judicial procedures"[93]. No basis for this statement is provided either, and for the same reason. The Court's Judgment in *LaGrand* provides no support for Mexico's position. The Court in *LaGrand* did note

---

[90] *LaGrand*, para. 91.

[91] *LaGrand*, para. 125.

[92] Memorial, para. 246.

[93] Memorial, para. 245.

that Germany had argued for a result that "where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing"[94]. That was what Germany argued. So it was only Germany's argument. Notably, there is no reference to appellate proceedings in the Court's discussion of its review and reconsideration remedy, and no such thing in the *dispositif*. In its place is the Court's express conclusion that the review and reconsideration "obligation can be carried out in various ways. The choice of means must be left to the United States."[95] The Court pointedly *did not* approve Germany's requested remedy of appellate review.

6.19. Mexico does make one assertion with respect to the legal sufficiency of review and reconsideration with which the United States agrees. It says, in its Memorial, that:

> "The precise manner by which the United States seeks to fulfil its obligations is a matter of domestic law. What domestic law mechanisms are utilized is not relevant, provided that those mechanisms uphold the international legal obligations of the United States."[96]

This at last is common ground between the Parties: so long as the means by which the United States provides review and reconsideration comply with the requirements articulated by this Court in *LaGrand*, there is no breach of Article 36 (2). And, in considering United States compliance with the review and reconsideration requirement, the Court should bear in mind my initial point: Article 36 establishes the general rule that obligations created thereunder are to be implemented in conformity with existing laws and regulations.

6.20. Mr. President, Members of the Court, we have seen that Article 36 (2) of the Convention has two applications, a basic application in connection with the routine ongoing implementation of the obligations undertaken in paragraph 1 and a remedial application where a breach of those obligations has occurred. With respect to each of those applications, the general rule remains the same: the existing laws and regulations of the receiving State should apply, subject only to the proviso in an exceptional case. Consistent with the respect that the Convention dictates for the domestic laws and regulations of States parties, as well as with considerations

---

[94] *LaGrand*, para. 118.

[95] *LaGrand*, para. 125.

[96] Memorial, para. 285.

relating to its own role, the Court in *LaGrand* did not require a particular mechanism for the review and reconsideration requirement that it articulated, but rather left the choice of means to the State party to the Convention. If the means chosen by the State satisfy the requirement of the review and reconsideration process as articulated by the Court, there is no breach of Article 36 (2). Mr. Thessin will demonstrate this afternoon that the means chosen by the United States within its existing laws and regulations — those related to judicial review and executive clemency — fully satisfy these requirements. There is no breach of Article 36 (2).

C. There is no basis for a case-by-case review of compliance with Article 36 (2)

6.21. One additional point relates to the nature of the review to be carried out by the Court in this case. In the *LaGrand* case, as the Court is aware, it found that the breach of Article 36 (2), "was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such"[97]. In that case, the record before the Court fully documented the proceedings related to the LaGrand brothers. There was an uncontested factual basis upon which the Court could rest its conclusion with respect to Article 36 (2). Here, even as lately supplemented by Mexico, the evidence it has submitted is far from providing a basis on which the Court could assess the compliance of the United States with its obligations under this provision with respect to the 52 named Mexican nationals.

6.22. In addition, with respect to the 52 individual cases, a final assessment of United States compliance could not in any case be undertaken by the Court because the cases remain ongoing. It is for this reason that none of these 52 cases is admissible, and Mexico's claims concerning them must be rejected. At most, therefore, in these proceedings, the appropriate assessment by the Court should be limited to the relevant laws and regulations as such, and the Court's judgment should not include 52 separate assessments addressing the compliance of the United States with the obligation set forth in Article 36 (2) in respect of each of the named Mexican nationals.

6.23. There is an additional, independent reason why the Court should go no further in this case than to review the relevant laws and regulations of the United States as such. It would have

---

[97] *LaGrand*, para. 125.

the advantage of corresponding more closely to the nature of the obligation undertaken by the States parties in the proviso to Article 36 (2). That obligation, after all, is stated generally: that the laws and regulations of a State party must enable full effect to be given to the purposes for which Article 36 (1) was intended. It is an undertaking by a State as to the nature of its laws and regulations, it is not a guarantee with respect to the application of those laws and regulations in any particular case[98]. Mexico's claims with respect to Article 36 (2) in this case should be dismissed because the laws and regulations of the United States *are* structured so as to provide for the review and reconsideration required by the Court. The Court should not, as a matter of law, make any finding with respect to the compliance of the United States with the obligation set forth in Article 36 (2) in the cases of individual Mexican nationals. At most, the question is the laws and regulations of the United States as such.

6.24. Mr. President, this concludes my presentation and the presentation of the United States for this morning. Thank you for your attention. When we reconvene this afternoon, I ask that you call upon Mr. Taft.

The PRESIDENT: Thank you, Mr. Mathias.

This statement of Mr. Mathias brings this morning's session to an end. The Court will resume the hearings of the first round of oral arguments for the United States at 3 o'clock this afternoon.

The Court rose at 1 p.m.

---

[98]See *Dispute Concerning Access to Information Under Article 9 of the Ospar Convention (Ireland* v. *United Kingdom)*, Final Award, 2 July 2003, Permanent Court of Arbitration (Declaration of Mr. Reisman), para. 14 ("the only international claim that lies is that the respondent State failed to ensure that its municipal law was created or structured in such a way as to accomplish the objectives prescribed by the Convention. A direct claim for failure to accomplish those objectives in a specific case . . . does not lie because that is not how the specific obligation imposed by the relevant treaty provision is framed.").