CR 2003/27

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 16 December 2003, at 3 p.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 15 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

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The PRESIDENT: Please be seated. I give the floor first to Mr. Taft.

Mr. TAFT: Thank you, Mr. President.

VII. INTRODUCTION

7.1. Mr. President, Members of the Court. This morning we discussed the way in which Mexico's requests for relief in this case exceed the Court's competence. We corrected the distorted caricature of the United States criminal justice system that Mexico presented to the Court in its Memorial and yesterday. We also reviewed the text and purpose of Article 36 of the Convention, showing how Mexico's reading of its provisions is far removed from the parties' intentions. Simply put, the parties to the Convention never imagined they were undertaking to alter the administration of their criminal laws when they joined the Convention. Finally, we reviewed Mexico's failure to carry its burden of proof regarding its allegations of either systemic breaches of the Convention by the United States or breaches in the specific cases it has brought before this Court.

7.2. This afternoon, we consider what remedies may be appropriate in the event of a breach of Article 36. This is the question the Court addressed in *LaGrand*: Mexico has asked the Court to abandon its decision in that case and order extraordinary remedies, including vacating final judgments and sentences in criminal cases. Mexico has cited no precedent for an international tribunal issuing orders of this kind where the breached obligation relates, at the most, only indirectly to the result reached in the criminal case. No such precedent exists. The Court should not depart from the remedy it set out in *LaGrand*.

7.3. Thank you, Mr. President. I now ask you to call on Mr. Thessin.

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

Mr. THESSIN: Thank you, Mr President.

VIII. THE UNITED STATES PROVIDES THE "REVIEW AND RECONSIDERATION" REQUIRED UNDER ARTICLE 36 (2) IN ITS CRIMINAL JUSTICE SYSTEMS AND THROUGH EXECUTIVE CLEMENCY PROCEEDINGS

8.1. Mr. President, distinguished Members of the Court, learned counsel. It is an honour to appear again before this Court today. Just before the lunch break, Mr. Mathias described the

proper interpretation of Article 36 (2) of the Convention. I will discuss how the United States complies with what we call the remedial application of that paragraph. In so doing, the United States gives "full effect" to the "purposes for which the rights accorded under [Article 36 (1)] are intended", in accordance with this Court's decision in *LaGrand*.

8.2. When the *LaGrand* Court required that the United States provide review and reconsideration by means of its own choosing[1], the Court went far in several respects: the Court linked consular information to the criminal review process for the first time. It required the United States to review the conviction and sentence of foreign nationals in light of certain Article 36 breaches. But the Court made crystal clear that it was for the United States to provide the review and reconsideration "by means of its own choosing".

8.3. Mexico's position is fundamentally inconsistent with these principles. *LaGrand*'s holding calls for the United States to provide, in each case, "review and reconsideration" that "takes account of" the violation, not "review and reversal", not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not in the words of Professor Dupuy, "a precise, concrete, stated result: to re-establish the *status quo ante*"[2]. The words "review and reconsideration" clearly indicate a process of individualized appraisal — a process whereby the domestic entity reviews each individual's case on its own merits under municipal law.

8.4. The Court's holding also necessarily indicates that the conviction and sentence may stand if the breach resulted in no prejudice. The concept of individualized review and reconsideration would be pointless if an automatic remedy of exclusion of evidence or *vacatur* were required. In almost all instances in the United States — indeed, for most constitutional violations — a criminal conviction will not be reversed unless at a minimum the error caused prejudice to the defendant[3].

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[1] *LaGrand*, Judgment, para. 128(7).

[2] CR 2003/25, para. 470 (Dupuy).

[3] See, e.g., *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (holding that some constitutional errors could be harmless and establishing the standard which would be applied to those errors); *Arizona* v. *Fulimante*, 499 U.S. 279, 306-312 (1991) (collecting examples of constitutional violations subject to harmless error analysis). See also *Neder* v. *United States*, 527 U.S. 1, 7 (1999).

8.5. Thus *LaGrand* specified a remedy of process — it demanded a good-faith process by which the conviction and sentence could be reconsidered — not a particular substantive outcome. Moreover, consistent with other principles of international law, this Court recognized that the process for review and reconsideration must be defined and chosen by the United States in accordance with its own laws and regulations, not a process chosen by the Court and not one the sending State prefers for its nationals in foreign lands, but does not follow itself.

8.6. The United States has mechanisms in its criminal justice systems and executive clemency proceedings that allow for the review and reconsideration of any conviction and sentence in light of a failure to provide consular information or notification. The United States continues to provide this review and reconsideration, not only for Germans and Mexicans, but also for nationals of all States parties in the kinds of cases delineated by *LaGrand*.

8.7. Despite Mexico's protestations, the criminal justice systems and the clemency processes of the nine states it now challenges are fair and effective. In these states, every defendant can raise adverse effects of a breach of Article 36 in his criminal trial. Every defendant can have the fundamental fairness of his conviction and sentence reviewed in his criminal appeals and in the course of collateral review. Every defendant can again obtain review of claims of injustice, including the failure of consular notification and information, when he petitions for clemency[4]. Taken together, this overlapping system of safeguards is one in which any case involving a breach of Article 36 (1) can receive review and reconsideration of the conviction and sentence.

Review and reconsideration in the judicial process

8.8. Mexico argued in its Memorial and in its oral presentation yesterday that consular officers provide specific kinds of important assistance to persons in the United States justice systems. Mexico seeks fundamental fairness in United States courts for its nationals. It argues that consular notification and assistance constitute "a fundamental component of due process"[5], "that the deprivation of consular notification and assistance renders criminal proceedings fundamentally

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[4]See Declaration of Christopher A. Wray, Assistant Attorney General, Criminal Division, United States Department of Justice (hereinafter, this declaration will be referred to as the "Criminal Justice Declaration"), para. 75, Ann. 7 of the United States Counter-Memorial. See also the Clemency Declarations for each state, Anns. 8-17.

[5]Mexico Memorial, para. 6.

unfair"[6], and that consular notification "ensures the enforcement of . . . essential due process guarantees", including the right to protection against self-incrimination, effective assistance of counsel and the right to present a defence[7].

8.9. As Mr. Philbin described this morning, the United States criminal justice system undertakes to protect, and in fact guarantees, all of the important interests that Mexico identifies. I, in turn, will examine how these systems also provide review and reconsideration of convictions and sentences in light of any breaches of the Vienna Convention. It is crucial for this Court to understand that, if a foreign national can show that his fundamental due process rights were not respected, whether because of a failure of consular notification or otherwise, he can get relief. With these safeguards, the United States criminal systems meet the standard set forth by President Shi in *LaGrand*, to afford "[e]very possible measure . . . to prevent injustice or an error in conviction or sentencing"[8] and ensure, in the words of Judge Koroma, that "everyone, irrespective of nationality, is entitled to the benefit of fundamental judicial guarantees, including the right of appeal or review against conviction and sentence"[9].

8.10. Let us now examine more closely how the United States judicial systems provide remedies for violations of the fundamental concerns Mexico seeks to prevent. At the trial stage, every defendant has the opportunity to show how any breach of Article 36 known to him or his counsel affected his due process rights, whether or not the trial court labels this review as one invoking an "individual" or a "fundamental" Vienna Convention claim. On occasion, a defendant may decide for whatever reason, strategic or otherwise, not to raise a claim at trial even though he is aware of a breach. In fact, at least eight of the 52 Mexican nationals at issue in this case knew of

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[6] *Id.* at Section V, part A, paras. 305-308 (entitled: "The Deprivation of Consular Notification and Assistance Renders Criminal Proceedings Fundamentally Unfair").

[7] *Id.* at para. 317.

[8] *LaGrand*, Judgment, separate opinion of Vice-President Shi, para. 17.

[9] *LaGrand*, Judgment, separate opinion of Judge Koroma, para. 8.

a possible claim, but chose not to raise the issue at trial[10]. Mr. Esquivel Barrera, for example, had extensive assistance from Mexican officials during his pre-trial, trial, and sentencing phases, but raised no VCCR claim[11].

8.11. If a defendant does choose to raise such a claim, trial courts have the power to decide whether the failure to provide consular information produced an error impairing a particular right of sufficient significance to warrant a remedy. Trial courts have the power to exclude statements if the foreign national gave them involuntarily or waived his rights without understanding them. For example, in the case of Carlos Alvarez and Ramiro Hernandez, both defendants moved to suppress their statements but were unable to show that their statements were involuntarily made[12]. Trial courts can also order postponements and extensions of time to permit consular notification or even consular assistance, if offered. Trial courts have the broad power to fashion other appropriate relief, including further discovery of evidence or the replacement of unsatisfactory counsel. For example, in the case of Mendoza Garcia, although the court denied a motion to suppress statements he had made to the police, the court issued an order asking the Government of Mexico to assist in bringing defence witnesses to the United States to testify on his behalf[13].

8.12. Every foreign national has the opportunity during the appellate and collateral review processes to show how the failure of consular notification deprived him of his due process rights or in any way affected the fundamental fairness of his trial. In those cases where the defendant has alleged at trial that a failure of consular information has resulted in harm to a particular right, an appeals court can review how the lower court handled the claim . . .

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[10]#6 Covarrubias Sanchez (failed to raise VCCR claim at trial even though according to Mexico, Mexican consular officers learned of his detention shortly after his arrest and rendered assistance throughout the pre-trial and trial proceedings); #9 Hoyos (failed to raise VCCR claim at trial even though the Mexican consular officers learned of Hoyos' detention at least six months prior to trial); #14 Manriquez Jaquez (consulate learned two years prior to trial, but failed to raise VCCR claims at trial); #22 Salcido Bojorquez (failed to raise VCCR claim at trial even though Mexican consular officers assisted him throughout the pre-trial and trial proceedings); #27 Verano Cruz (failed to raise VCCR claim at trial even though Mexican consular officers learned of his arrest approximately 17 months before his trial); and #29 Zamudio Jimenez (failed to raise VCCR claim at trial even though Mexican consular officers learned of his arrest more than a year before his trial); #49 Camargo Ojeda (failed to raise VCCR claim at trial, in direct appeals, and in post-conviction proceedings, despite Mexican consulate's learning of his case four months prior to trial); #54 Reyes Camarena (failed to raise VCCR claim at trial despite Mexican consulate learning of his case seven months before trial).

[11]Mexico Memorial, Ann. 7, App. A, para. 40.

[12]Mexico Memorial, Ann. 48-49, pp. 993-998, 1035.

[13]United States Counter-Memorial, Ann. 2, App., para. 6.

The PRESIDENT: Perhaps Mr. Thessin you should take a break, and we can continue with the next speaker. Would that be all right?

The Court will recess for a short while.

Mr. TAFT: Thank you, Mr. President, we will be in touch with the Court.

The PRESIDENT: All right, thank you.

The Court adjourned from 3.20 to 3.35 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. On behalf of Members of the Court, I hope Mr. Thessin recovers very soon and wish him all the best. I now give the floor to Professor Weigend.

Mr. WEIGEND:

IX. REMEDIES — CRIMINAL JUSTICE SYSTEMS

I. Introduction

9.1. Thank you. Mr. President, Members of the Court, learned counsel. On behalf of the American group I would like to thank you for your patience with this incident. I am greatly honoured to appear before the Court today on behalf of the United States of America. My role in the presentation of the United States is to highlight a few issues of criminal procedure law, which is the field that I have studied and taught throughout my professional life.

9.2. You may ask yourselves what criminal procedure law may have to do with the issue before the Court, that is, whether the United States has complied with Article 36 and with this Court's mandate in the *LaGrand* case. The connection to criminal procedure law lies in the fact that Mexico has requested this Court to find that the United States must make far-reaching changes in its domestic criminal procedure law in order to comply with *LaGrand*. I would therefore invite the Court to consider what effect a ruling in Mexico's favour might have for the criminal justice systems not only of the United States but of all 165 States parties to the Vienna Convention.

9.3. The purpose of my statement is to show that the remedies Mexico proposes for breaches of the Vienna Convention would be in open conflict with the criminal procedure laws of most legal

systems of the world. If the radical solutions suggested by Mexico were to be adopted, this would indeed create havoc with the well-balanced ways in which legal systems deal with deviations from the proper process. In light of this fact, I submit that the Court would be well advised to follow the path it has taken in *LaGrand*, that is, not to impose on States particularized procedural adjustments that may be alien to their procedural systems but instead to leave it to each State to provide for review and reconsideration of cases by means of its own choosing[14].

2. *Restitutio in integrum* in the context of the criminal process

9.4. In its *LaGrand* decision, the Court has concluded that not only the sending State but also the individual citizen is being wronged by a breach of Article 36[15], and that in cases of serious penalties provision must be made for "review and reconsideration" of his conviction and sentence in light of the breach[16]. Mexico would now turn this proposition into an affirmative duty of the receiving State to re-establish the situation that existed before the wrongful act was committed. And Mexico further applies this concept of *restitutio in integrum* to the criminal process, demanding that the Court order the United States to introduce, in its domestic law, three distinct procedural remedies. Although Mexico has, in yesterday's presentation, paid lip service to this Court's mandate in *LaGrand* that the choice of means is with each State, it has so narrowly defined the supposed goals to be reached in remedying breaches of Article 36 that there really would be no choice but to adopt the specific procedural measures Mexico has proposed in its Counter-Memorial. These are:

— first, that any judgment and sentence must be vacated whenever the requirements of Article 36 of the Vienna Convention were not followed;

— second, that a new trial must be granted in this case even when the judgment and sentence have become final under domestic law;

— third, that at the new trial any statement the defendant had made before being given information about consular access must be suppressed.

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[14]Cf. *LaGrand*, para. 125.

[15]*LaGrand*, para. 77.

[16]*LaGrand*, para. 90.

3. Article 36 VCCR and the criminal process

9.5. I submit that Mexico is mistaken in applying the concept of *restitutio in integrum* in this fashion. Before I take a closer look at each of Mexico's propositions, it may be useful to briefly consider the relationship between Article 36 requirements and the criminal process. Yesterday, Mr. Bernal has told you that the involvement of a consular officer is essential to ensure that minimum standards of due process are upheld, and Mr. Donovan has suggested that the scope of Article 36 (1) is limited to criminal investigations. These are misconceptions which bear the risk of gravely distorting one's perspective of the critical issues of this case. As Ms Brown has already explained this morning, Article 36 of the Vienna Convention does not relate only to criminal defendants but instead applies to all nationals of sending States detained by the receiving State for any reason. The obligations of receiving States under Article 36 have the purpose of enabling the consulate, if the detainee so wishes, to assist him in dealing with this situation, for example, by informing relatives or by organizing humanitarian or legal assistance — which is useful regardless of the reason for which the individual has been taken into custody. Criminal procedure law, on the other hand, provides every suspect, regardless of nationality, with certain basic rights that put him or her in a position of "equality of arms" with the prosecution, especially by providing him with an attorney, by ensuring that he knows of the charges against him and of his rights as a participant in the process, and by granting him access to exonerating evidence. If the suspect does not sufficiently understand or speak the language in which the investigation is being conducted, he must be provided with an interpreter. In the real world, the two circles of obligations concerning consular information and notification, on the one hand, and obligations based on criminal procedure law, on the other, sometimes overlap; but while consular involvement may sometimes have the *effect* of enhancing a suspect's procedural prospects, this effect certainly is not the *purpose* of Article 36. As Mr. Philbin has explained in detail this morning, it is the purpose of *domestic* criminal process rights to guarantee fair proceedings and an equitable judgment; and that is true for suspects of all nationalities regardless of the possible intervention of consular officers. Having access to one's consulate is not by any means a legal prerequisite for obtaining a fair trial, nor does the availability of such access have any direct impact on the correctness of the judgment

or sentence. Put simply, Article 36 of the Vienna Convention does not confer criminal process rights.

9.6. It is important to keep this rather distant relationship between consular notification procedures and criminal process rights in mind when one goes about defining remedies for breaches of Article 36. Because a failure to follow the requirements of Article 36 might, in individual cases, have a *factual* influence on a foreign defendant's conviction and sentence, the Court in *LaGrand* has stated that a legal system must not categorically preclude foreign defendants from bringing a breach of Article 36 to the attention of the authorities of the receiving State before a severe sentence is carried out. Mexico, however, now requests this Court to go far beyond *LaGrand* by making the United States start the process from scratch whenever a breach of Article 36 has occurred.

4. Remedies

1. Turning back the clock?

9.7. In light of remarks made yesterday both by Mr. Donovan and Professor Dupuy, I think it is necessary that I point out, at the outset, that in the criminal process it is not possible to simply turn back the clock. In many respects, life would be easier if it were possible to ignore what has happened in the past and to start anew — which is what Mexico suggests is the appropriate resolution for the cases before you. But this is not the way the criminal process works, and I submit that even the doctrine of *restitutio in integrum* cannot make it work that way. Legal systems do provide for the case that the criminal process has been affected by legal error. But even when a trial is found to have been unfair, all an appeals court can do is vacate the judgment and order a new trial. Even an appeals court cannot erase what has happened *before* trial. Even when certain statements are excluded from trial evidence, a new trial cannot be held on a *status quo ante*. The court cannot delete information that has in the meantime become available to law enforcement agencies, and it cannot control evidence that may have been derived from this information or may have developed independently. When we look for a proper resolution of cases in which breaches of Article 36 have occurred, we should therefore dispel the naive notion of playing the film backward and starting again from zero. I am afraid that things are more complicated than that.

2. Automatic reversal

9.8. Beyond the back-to-zero solution, Mexico suggests that any judgment based on a process in which Article 36 procedures were not followed should be subject to reversal without any showing of prejudice. As I have laid out in more detail in the written declaration on file with the Court, national legal systems do in some circumstances provide for automatic reversal of a judgment upon proper appeal. But this radical solution is typically restricted to misapplications of substantive criminal law and to the absence of the most basic formal prerequisites of an orderly process. In most legal systems, criminal convictions will be reversed when they fail to comport with applicable *substantive* criminal law, for example, when the court of first instance has based the defendant's conviction on a misinterpretation of a criminal statute. Clearly, this is not the situation at issue here. Legal systems are much more restrictive in allowing the reversal of judgments on the basis of *procedural* faults. There are only very few categories of procedural violations that are almost universally recognized as leading to automatic reversal, that is, without at a minimum making it necessary for the defendant to show prejudice to his case. Such absolutely "fatal" procedural faults are typically limited to an illegal composition of the court, the absence of persons from trial whose presence is prescribed by law — which includes defence counsel when his participation is required by law — and the illegal exclusion of the public from the trial[17]. Breaches of the Vienna Convention hardly qualify as procedural error, because they do not directly interfere with a foreign national's criminal process rights. And even if one were to emphasize that *factual* impact breaches of Article 36 can have on a defendant's conviction or sentence, neglect of consular notification surely does not fit into the short list of fatal procedural errors leading to *automatic* reversal. One should bear in mind that even breaches of fundamental trial rights, such as the right to consult with an attorney or the privilege against self-incrimination, in the great majority of legal systems will lead to a new trial only if the appellant can show prejudice, that is, that the violation may have had an impact on the outcome of his case.

9.9. Mexico's position in this regard may be explained by the fact that Mexico's own law of criminal procedure deviates from the great majority of legal systems. Under Mexican law, an

[17]See Chile Code of Criminal Procedure, Art. 374; China Criminal Procedure Law, Art. 191; French Code of Criminal Procedure, Arts. 592, 593, 596; German Code of Criminal Procedure, para. 338; Japan Code of Criminal Procedure, Arts. 377, 378.

appeal is successful whenever the defendant can show that he was not informed of his right to legal counsel, that he was prevented from making contact with legal counsel, that no translator was appointed for him, or that the court declined to hear evidence properly offered by the defendant[18]. Mexico adopted these rules only in the 1990s — long after the time when the Vienna Convention was negotiated — to deal with perceived abuses in the Mexican criminal justice system. From a human rights perspective, I do not hesitate to congratulate Mexico on this courageous and forward-looking step. But Mexico's rule is exceptionally liberal when compared with the actual state of the law in the great majority of legal systems. The remedy proposed by Mexico for breaches of Article 36 would consequently deviate from most countries' legal standards on appellate review. And it would deviate from Mexico's own standard as well: even Mexico's extensive list of procedural errors leading to automatic reversal does not include a lack of consular information and notification. Hence even by its own generous standards, Mexico would not appear to guarantee a reversal of the conviction of a foreign suspect who could show nothing but a breach of the requirements of Article 36 prior to trial.

9.10. Mexico's claim that judgments must be reversed whenever Article 36 was breached suffers from yet another flaw. Several legal systems, including both those of the United States and of Mexico, limit the admissibility of appeals alleging procedural error. They impose strict requirements of early protest against defective procedural rulings or acts. For example, according to Article 386 of the Mexican Code of Criminal Procedure, an appeal for procedural error cannot be brought with respect to a decision against which the party had not taken the recourse provided by law, or, if no such recourse was possible, if the party had not protested as soon as it became aware of the error[19]. Exceptions from this strict rule of procedural default[20] apply only if there was a manifest violation leaving the defendant without a defence, or if the lack of timely protest was due only to the turpitude or negligence of defendant's legal counsel. Procedural default thus

[18]Mexico Code of Criminal Procedure, Art. 388. The disregard of substantial procedural requirements can also be challenged separately in federal courts; see Mexico Constitution, Arts. 14, 103.

[19]For similar rules, cf. Argentina Code of Criminal Procedure, Art. 170; French Code of Criminal Procedure, Arts. 595, 599.

[20]Mexico Federal Code of Criminal Procedure, Art. 387.

significantly limits a defendant's ability to raise a violation of Article 36, and this extends to the special proceedings for due process violations mentioned by Ambassador Oñate yesterday.

9.11. In sum, Mexico's assertion that "a departure from the requirements of procedural fairness renders illegitimate any conviction or sentence resulting from the flawed proceedings"[21] does not correctly describe the state of procedural law worldwide. Much less could it be said that a lack of consular information or notification would automatically invalidate any ensuing judgment. Not even Mexico itself follows the extravagant rule that it requests this Court to adopt and to impose on all States parties to the Vienna Convention. Not only is there no trace of such a rule to be found in the Vienna Convention itself, but its adoption would conflict with the established and well-considered systems of appellate review of many national legal systems.

3. Reopening the case

9.12. But Mexico goes even further and asks this Court to extend the rule of automatic reversal to cases in which the judgment and sentence have become *final* according to domestic law[22]. This would lead to an even greater intrusion into universally recognized principles of criminal procedure. Mr. Donovan was of course right when he said yesterday that retrials occur in most legal systems. But he failed to mention the fact that each and every legal system sets close limits to the reopening of criminal cases. Legal systems vary as to the temporal and other conditions they impose on parties' rights to challenge judgments in court. The United States is indeed among the most generous legal systems in this regard, offering criminal defendants additional opportunities for challenging their convictions through collateral habeas corpus proceedings after regular appeals have been exhausted. But it is important to note that all legal systems, in one form or the other, share the general concept that at some point appeals are no longer available, judgments become final, and proceedings cannot be reopened. This concept of finality is necessary in order to ensure the stability, reliability and effectiveness of the administration of criminal justice. Reopening cases years or decades after the original trial has ended would lead to mere shadow trials, with witnesses whose memories have faded, or with

[21]Mexican Memorial at #307.

[22]Mexican Memorial at #383.

secondary evidence because the original evidence has long disappeared or become worthless. In many cases, it would be impossible to do justice on such shaky evidence.

9.13. Most legal systems have therefore wisely adopted the rule that judgments that have become final can be challenged in court only under highly exceptional circumstances. To overcome finality, it is not sufficient that some error on substantive or procedural law has occurred. The defendant may have his case reopened and a new trial granted only if, for a special reason recognized by law, it would be *intolerable* for a system of justice to continue to uphold and execute the original judgment. Categories of circumstances giving rise to an extraordinary appeal against a final judgment tend to be similar worldwide. They are generally limited to two types of situations: criminal interference with the original process *(falsa)*, and the belated discovery of crucially relevant new evidence after finality has attached *(nova)*. Typical examples of the former category are cases in which a witness at the original trial has later been convicted of perjury, or a document tending to incriminate the defendant later turns out to have been forged. Examples of the "new evidence" category would be another person's credible confession to have committed the offence in question when there can be only one perpetrator, or the appearance, in good health, of the presumed murder victim. Mexican law closely follows this pattern, specifying that the convicted person bears the burden of showing that one of the extraordinary circumstances exists that can overcome finality[23].

9.14. The cases before this Court of course are a far cry from satisfying the rigorous test that I have just outlined. In the context of the criminal process, breaches of Article 36 are, at most, simple procedural errors, and such errors are not sufficient to overcome the rule of finality[24]. When Mexico requests this Court to order the United States to reopen cases long after final adjudication, it invites the Court to invent a completely new rule that is alien to national procedural systems and would dislocate basic tenets of criminal procedure law that have been recognized around the world, Mexico itself included.

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[23]Mexico Federal Code of Criminal Procedure , Art. 560.

[24]A few European States have recently introduced the possibility of reopening a criminal case when the European Court of Human Rights has determined that the State had violated the defendant's human rights (see, e.g., German Code of Criminal Procedure, para. 359 (6)). But this fact does not have any bearing on the present case: not only can a breach of Article 36 of the Vienna Convention not be likened to a violation of a basic human right, but there also does not exist as of today — and much less as of the time when the Vienna Convention was signed — any generally recognized rule that a violation even of a basic procedural right should by itself lead to the retrial of a finally adjudicated case.

4. Excluding evidence

9.15. Mr. President, please permit me now to turn to the last of Mexico's demands that fall within my portion of the presentation. Mexico wishes this Court to declare that any statement a foreign national defendant makes in advance of receiving consular information or of having contact with his consular officer must be suppressed. This claim rests on two assumptions: first, that it is illegal for law enforcement personnel to take a statement from a defendant before he or she has been informed or has made contact with the proper consulate; and second, that exclusion of illegally obtained evidence — the so-called exclusionary rule — is a general principle of law under Article 38 (1) *(c)* of this Court's Statute[25]. I submit that both assumptions are incorrect and that the broad ruling Mexico asks the Court to make would therefore be without a legal basis.

(a) ***Right to consular assistance before interrogation?***

9.16. First, I have not found any legal system that would provide in the context of the criminal process an unqualified right for a foreign national suspect to speak with a consular officer before he or she is being interrogated by the police; and in the great majority of States, suspects do not even have to be informed on consular notification prior to being interrogated. This means, of course, that the police do not act illegally if they question a suspect before contact between him and his consulate has been established. In my research on this issue, I did not find any legal system that would have expressly transferred Article 36 obligations into its criminal procedure law. Mexico's Criminal Procedure Code does make a reference to consular notification, though not in the terms foreseen by Article 36[26], and Denmark[27] as well as Brazil[28] seem to interpret existing legal or constitutional rights of criminal suspects as including a right to consular information and/or notification. In the great majority of States, however, the obligations under Article 36 are not mentioned anywhere in legal instruments relating to the criminal process; and this is true even in States such as Argentina or Chile, which have in their Codes of Criminal Procedure extensive lists

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[25]Mexico Memorial at #374.

[26]See Mexico Federal Code of Criminal Procedure Art. 128 sec. 4, 3rd sentence: "If the person is a foreigner, his detention is immediately communicated to the corresponding diplomatic or consular mission."

[27]The Danish practice of informing foreign suspects of the contents of Article 36 Vienna Convention is not based on express statutory authority but on a circular of the Danish Ministry of Justice to the national police of 12 June 2001.

[28]See Brazil Constitution Art. 5 (LXIII).

of a suspect's procedural rights[29]. Going beyond domestic statutes, it bears mentioning that the statutes of international criminal tribunals and their procedural rules, although guaranteeing an early right to counsel[30], do not make any reference to consular information or notification under Article 36.

9.17. The absence of an explicit reference to the Vienna Convention of course does not mean that States parties to the Convention do not respect and apply the requirements of that document. But given the lack of express language, one cannot expect national law enforcement agencies to go beyond the clear requirements of the text of the Convention and to refrain from questioning suspects until they have been informed of the possibility of consular notification, until contact with the suspect's consulate has been established or until a consular officer has seen fit to talk with the suspect. Such procrastination would not only seriously impede the timely clarification of critical facts but would run counter to standard practice of a large number of legal systems. For example, in several countries responsibility for consular information is vested with judicial authorities, not with investigators. Others, including China, France and Japan, permit interrogation of suspects, at least for a limited period of time, without even granting them access to legal counsel. Before this normative and factual background, I see no basis for Mexico's assumption that a police officer acts illegally unless he defers questioning of a foreign suspect until the suspect has been given consular information or has had an opportunity to talk with his or her consular officer.

(b) ***Exclusion of illegally obtained evidence***

9.18. In a similar fashion, Mexico has developed a rather extravagant legal theory claiming that the exclusion of evidence obtained illegally is a universally recognized principle in the sense of Article 38 (1) *(c)* of the Court's Statute. My argument is that a principle as proclaimed by Mexico simply does not exist. Mr. President, Members of the Court, you may be surprised by this statement because Mr. Donovan yesterday has kindly referred to my declaration in support of Mexico's claim. Like every law professor, I love to find myself cited as authority, but I am afraid that this time Mr. Donovan has misunderstood what I have written. It is true that a number of legal

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[29]See Argentina Code of Criminal Procedure Art. 298; Chile Code of Criminal Procedure Art. 94.

[30]Cf. International Criminal Court, Rules on Procedure and Evidence, Rule 117 (2); International Criminal Tribunal for the former Yugoslavia, Statute, Art. 21 (4).

systems have adopted a general rule that illegally obtained evidence shall not be admitted at trial. Examples are Brazil[31], Italy[32], Russia[33] and, with respect to certain constitutional violations, but subject to exceptions and qualifications, the United States[34]. The great majority of legal systems, however, do not suppress evidence simply because it was obtained in illegal ways. Rather, courts in most countries tend to perform an individualized analysis, weighing the nature and gravity of the violation, the inherent reliability of the evidence, the relevance of the evidence in question for finding the truth, and the seriousness of the accusation.

9.19. The way the international community has addressed the issue of excluding evidence may best be reflected by the formulations in Rule 95 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia as well as in Article 69, section 7, of the Statute of the International Criminal Court. According to both instruments, illegally obtained evidence is admissible in court unless the method by which it has been obtained casts substantial doubt on its reliability, or admission would be antithetical to *and* would seriously damage the integrity of the proceedings. If this were the test for excluding statements made without consular information or notification, such statements would undoubtedly have to be admitted: a suspect's ignorance of Article 36 requirements certainly has no impact on the reliability of his or her statement, and it cannot be said that admission would "seriously damage" the integrity of court proceedings. Even if a more restrictive test for admitting illegally obtained evidence were employed, breaches of Article 36 would not normally lead to exclusion, given their merely tangential relationship to the core values of the criminal process. I am aware of no legal system in the world that would subscribe to Mexico's proposed rule on the exclusion of evidence obtained in the absence of consular assistance, and there certainly does not exist any generally accepted customary rule in that regard. In short, international law simply does not know of a rule even remotely similar to the sweeping exclusion of evidence as suggested by Mexico.

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[31]Constitution, Art. 5 (LVI).

[32]Code of Criminal Procedure, Art. 191 (1).

[33]Constitution, Art. 50; Code of Criminal Procedure, Art. 88.

[34]See *Weeks* v. *U.S.*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); but see important exceptions recognized, e.g., in *Harris* v. *New York*, 401 U.S. 222 (1971) (impeachment possible with statements obtained in violation of *Miranda*); *U.S.* v. *Leon*, 468 U.S. 897 (1984) ("good faith" exception); *Oregon* v. *Elstad*, 470 U.S. 298 (1985) (fruits of unwarned statements admissible).

5. Conclusion

9.20. Summing up, the remedies requested by Mexico for breaches of Article 36 would drastically conflict with criminal procedure law as it is recognized and practised in the great majority of States parties to the Vienna Convention. Lack of consular information and notification cannot lead to "automatic" reversal of an ensuing judgment because a breach of Article 36 is by its nature and relevance dissimilar to any of the internationally recognized grounds of reversal for procedural error. Lack of consular information and notification can even less be a reason for disregarding the rules of finality and for reopening criminal proceedings after regular appeals have been exhausted or waived. Nor can a lack of consular access lead to the suppression of statements made by a foreign suspect in a criminal investigation, given the restrictive attitude of many legal systems toward exclusion of inherently reliable evidence.

9.21. Mr. President, if I may conclude with a personal remark. To me, the cases brought before this Court by Mexico have once again demonstrated that criminal justice invariably has to do with difficult decisions and tragic choices. Both offenders and victims are human beings, often human beings calling for our sympathy. My emotions do not necessarily side with the cold mechanism of criminal justice, and I am not a champion of capital punishment. But I have come to the conclusion that this case is not about capital punishment, and that it is not about finding a legal outcome that does individual justice to each of these 52 defendants. This cannot be the task of this Court. All the Court is requested to do is to determine the proper remedy for breaches of Article 36 of the Vienna Convention. It has been my purpose to explain that such remedies, to the extent that they interfere with the criminal process, must fit into the general context of that process. The criminal process is, in each national system, a delicate structure involving a precarious balance between individual and communal interests, between conflicting goals of individual justice and effectiveness, between stability and affinity to the facts of each case. Intrusions from the outside run the grave risk of disturbing this balance and of creating social tensions and legal conflicts that may severely impair the functionality of any individual criminal justice system. The remedies proposed by Mexico would, as I have tried to show, have exactly this effect: they would impose not only on the United States but, by implication, on all States parties to the Vienna Convention strict rules for dealing with isolated instances of error or misconduct — rules that would be grafted

upon procedural systems to which they do not belong and in which they cannot thrive. I respectfully submit that the Court should refrain from following that dangerous path but should, as it has done in *LaGrand*, leave the development of a proper and effective remedy to each State.

This concludes my presentation. Thank you for your patience. Mr. President, may I now ask you to call on Professor Zoller again.

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

Mme ZOLLER :

X. REPARATION

Monsieur le président, Madame et Messieurs les juges,

10.1. Les Etats-Unis en viennent maintenant à l'examen du bien-fondé de la demande en réparation formulée par le Mexique. Les deux Parties sont en substantiel désaccord sur les faits dans cette affaire. Des présentations faites par tous ceux qui m'ont précédée aujourd'hui à la barre, il ressort que les Etats-Unis contestent formellement avoir commis un seul acte internationalement illicite dans l'une quelconque de ces cinquante-deux affaires. Et quand bien même n'y aurait-il pas différend sur les faits en l'espèce, les extravagantes prétentions du Mexique à réparation sont dénuées de tout fondement juridique. Ce n'est donc qu'à titre subsidiaire que les Etats-Unis entendent y répondre.

10.2. La défense des Etats-Unis sur la prétendue réparation due au Mexique a été amplement expliquée dans son mémoire en défense. Nous n'insisterons ici que sur certains aspects selon un raisonnement qui sera articulé en deux temps.

10.3. Dans un premier temps, nous démontrerons que les demandes exorbitantes du Mexique n'ont aucun fondement juridique en droit international de sorte qu'il n'y a aucune raison de ne pas s'en tenir, en l'espèce, à la jurisprudence LaGrand selon laquelle :

> «[S]i des ressortissants [étrangers] [doivent] néanmoins être condamnés à une peine sévère sans que les droits qu'ils tiennent de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention aient été respectés, [l'Etat de résidence] [doit], en mettant en œuvre les moyens de [son] choix, permettre 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.»[35]

[35] *C.I.J. Recueil 2001*, par. 7 du dispositif.

10.4. Dans un deuxième temps, nous démontrerons en quoi, au regard du droit international, les modalités de réexamen et de revision des verdicts rendus et des peines prononcées telles qu'elles existent et fonctionnent aujourd'hui dans le droit interne des Etats-Unis sont conformes aux exigences susmentionnées de réexamen et de revision telles que la Cour les a définies dans l'affaire *LaGrand*.

1. Les demandes de réparation du Mexique sont sans aucun fondement juridique en droit international

10.5. Les demandes de réparation présentées par le Mexique sont au nombre de trois. Aucune n'est juridiquement fondée.

A. Sur la demande de jugement déclaratoire

10.6. Le Mexique demande d'abord à la Cour un «jugement déclaratoire» qui énoncerait, comme il l'explique dans son mémoire, «clairement et précisément les obligations juridiques internationales auxquelles sont tenus les Etats-Unis en vertu de la convention de Vienne, ainsi que les conséquences à tirer de celles-ci»[36]. Le Mexique demande à la Cour une déclaration interprétative des dispositions de l'article 36 de la convention de Vienne sur les relations consulaires.

10.7. La première demande du Mexique soulève des problèmes pratiques de grande ampleur. La convention de Vienne sur les relations consulaires est un traité multilatéral qui regroupe plus de cent soixante Etats parties. Ainsi que l'article 36, paragraphe 2, le prévoit, les dispositions de l'article 36, paragraphe 1, «doivent s'exercer dans le cadre des lois et règlements de l'Etat de résidence». Supposons un instant que la Cour fasse droit aux prétentions du demandeur, la déclaration qu'elle rendrait sur l'article 36 de la convention ne pourrait guère constituer autre chose qu'un petit régime particulier dans le grand régime général de la convention, dès lors que la requête du Mexique n'a de sens qu'en relation avec le droit des Etats-Unis. Outre la discrimination évidente que représenterait ce petit régime «sur mesure» de l'article 36 par rapport au régime appliqué aux autres Etats parties à la convention, on ne voit pas comment la Cour pourrait satisfaire la demande du Mexique sans toucher indirectement aux droits des Etats tiers.

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[36] Mémoire du Mexique, p. 101, par. 356.

10.8. Qui plus est, si le Mexique venait à obtenir une déclaration de la Cour qui lui donne ce régime de faveur auquel il prétend avoir droit dans ses rapports avec les Etats-Unis, à quel titre, pour quelle raison, lui seul en bénéficierait-il ? Sauf à bafouer le principe d'égalité souveraine des Etats, il faudrait étendre le régime privilégié obtenu par le Mexique à tous les Etats parties à la convention. Bien mieux, réciprocité obligeant, tous ces Etats seraient fondés à revendiquer ce que l'on ne tarderait point à dénommer le «privilège mexicain». On voit par-là que, si la Cour accédait à la demande du Mexique, elle ne se limiterait pas à régler le différend entre les deux Etats, elle légiférerait pour l'ensemble des Etats parties à la convention de Vienne sur les relations consulaires, y compris pour ceux qui n'ont pas ratifié le protocole facultatif de signature.

10.9. A dévider l'écheveau des conséquences inévitables de la première demande de réparation que lui soumet le Mexique, la Cour doit en conclure que la «déclaration des obligations juridiques internationales des Etats-Unis» que lui soumet le Mexique, ne peut pas être une réparation appropriée en la circonstance.

B. Sur la demande de *restitutio in integrum*

10.10. En second lieu, le Mexique demande à la Cour de prononcer la *restitutio in integrum*, c'est-à-dire d'obliger les Etats-Unis à reprendre à zéro toutes les procédures actuellement pendantes devant les juridictions américaines et de commencer pour chaque ressortissant «une nouvelle procédure»[37]. Comme l'a dit mon collègue, le professeur Dupuy, hier dans un français familier mais très exact en la circonstance : «On efface tout et on recommence.»

10.11. Le Mexique attache un grand prix au projet d'articles sur la responsabilité de l'Etat élaboré par la Commission du droit international qui a retenu la *restitutio in integrum*, c'est-à-dire la restitution en nature comme la forme de réparation la plus parfaite. Toutefois, le texte de l'article 35 de ce projet d'articles dont notre adversaire fait grand cas, indique clairement que la restitution en nature n'est pas toujours la meilleure des réparations possibles. Bien que les Etats-Unis n'acceptent pas l'interprétation mexicaine du projet d'article 35, ils estiment que cet article est hors de propos en la présente instance à partir du moment où la Commission, comme M. Mathias l'expliquera, a spécifiquement retenu dans les commentaires de son projet d'articles le

[37] Mémoire du Mexique, p. 103, par. 364 *in fine*.

réexamen et la revision comme la forme de restitution qui doit s'imposer dans des circonstances comme celles du cas d'espèce. Dans son commentaire, la Commission relève que le réexamen et la revision satisfont les droits et intérêts des Etats dans le contexte de la convention de Vienne étant ici précisé que, dans la présente espèce, les droits et intérêts des Etats-Unis concernent le droit criminel et la procédure pénale qui constituent l'un et l'autre des conditions essentielles d'exercice de la souveraineté.

10.12. Dans la présente affaire, le Mexique exige l'annulation de toutes les condamnations prononcées; il entend obtenir la nullité de tous les verdicts. M[e] Donovan nous a dit hier que ces nullités n'étaient pas «matériellement impossibles»[38]. Mais la vraie question est de savoir si elles sont juridiquement possibles.

10.13. La doctrine la plus éclairée a compris depuis longtemps que les Etats manifestent le souci bien légitime «d'éviter certains obstacles constitutionnels qui ne pourraient être surmontés qu'au prix de complications sans rapport avec l'intérêt d'une restitution en nature»[39]. Or, tel est toujours le cas lorsque l'acte illicite qui doit être modifié est un acte juridictionnel. Dans aucun pays qui se dit un Etat de droit, on ne peut retirer un jugement, c'est-à-dire un acte du pouvoir judiciaire comme on peut retirer un acte du pouvoir exécutif ou un acte du pouvoir législatif. Un décret de l'exécutif, un arrêté de l'administration peuvent être des actes relativement faciles à retirer, sous réserve toutefois des droits des tiers; une loi l'est déjà moins, mais la difficulté, quand elle existe, dépend surtout de contingences politiques. En revanche, le soubassement constitutionnel du principe de l'indépendance du pouvoir judiciaire dans tout Etat de droit fait que le retrait d'un acte juridictionnel ne peut se faire qu'au prix de complications considérables. Il peut arriver, comme Paul Reuter le disait, que le pouvoir exécutif soit compétent pour signer un compromis d'arbitrage sans autorisation (ainsi, en France), mais qu'il ne dispose d'aucun moyen pour mettre fin directement à une décision judiciaire[40].

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[38] Plaidoiries orales, M[e] Donald Donovan, 15 décembre 2003, par. 395.

[39] Paul Reuter, «La responsabilité internationale : problèmes choisis», cours de doctorat, faculté de droit de Paris (1955-1956), reproduit dans *Le développement de l'ordre juridique international, Ecrits de droit international*, Paris, Economica, 1995, p. 558.

[40] *Ibid*., p. 558. Le grand juriste ajoutait : «dans ce cas le vote d'une loi spéciale soulève des complications sans mesure avec l'intérêt que présente l'annulation du jugement illicite».

10.14. C'est pourquoi la jurisprudence internationale n'est jamais allée jusqu'à dire que l'annulation est la forme normale de réparation d'une décision judiciaire présumée internationalement illicite. Même dans l'affaire *Martini* dont le Mexique tire grand parti, le tribunal n'a pas annulé l'arrêt de la Cour de Caracas; il s'est limité à dire que le Venezuela était tenu de reconnaître l'annulation des obligations de paiement qui en résultaient. En d'autres termes, le tribunal s'est limité à exiger du Venezuela qu'il n'exécute pas les condamnations pécuniaires[41].

10.15. Dans la pratique internationale, les seuls cas dans lesquels des jugements ont été annulés en masse, comme le Mexique voudrait voir la Cour l'ordonner contre les cinquante-deux condamnations et verdicts prononcés par les cours américaines, furent ceux qui résultaient de dispositions conventionnelles précises. Et encore, même dans ces cas exceptionnels, il y eut des exceptions. Si les traités de paix de 1947-1951 imposèrent aux Etats vaincus la revision de prises non conformes au droit international, la commission de conciliation franco-italienne jugea que l'indemnisation devait être le substitut de l'obligation de reviser les jugements prononcés par les tribunaux italiens contre des ressortissants français pendant la durée des hostilités[42]. Même le droit européen des droits de l'homme ne prévoit pas le type de réparation que le Mexique demande. Lorsqu'un acte juridictionnel est incompatible avec les dispositions de la convention européenne ou l'un de ses protocoles, la Cour n'annule pas l'arrêt rendu.

10.16. Monsieur le président, Madame et Messieurs les juges, le Mexique n'a pas expliqué pourquoi, en l'espèce, il faudrait se départir de cette pratique internationale. A dire vrai, il n'en a même pas conscience, à preuve la légèreté avec laquelle il affirme : «La seule «charge» [les guillemets sont du demandeur] qu'imposerait la restitution aux Etats-Unis résiderait ici dans la nécessité d'entreprendre de nouveaux procès.»[43] Cela n'est pas sérieux. A supposer que la Cour adjuge au demandeur ses conclusions, le gouvernement fédéral ne voit pas comment, en l'état du droit constitutionnel fédéral, il pourrait mettre à exécution sa décision sans apporter des bouleversements d'une ampleur vertigineuse. Pis, à supposer qu'il puisse déclencher les mécanismes qui y parviendraient, il ne peut même pas en garantir l'aboutissement.

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[41] *UNRIAA*, vol. 2, p. 976, notamment p. 1002, point 3) du dispositif. Voir aussi annexe 23, Exhibit 163, A2778.

[42] Rousseau, *Traité de droit international public*, t. V, p. 218, par. 217.

[43] Mémoire du Mexique, p. 111, par. 389.

10.17. Par ces motifs, la demande de *restitutio in integrum* du Mexique ne peut être que rejetée.

C. Sur la demande d'assurances de non-répétition pour l'avenir

10.18. En troisième lieu, le demandeur demande à la Cour d'ordonner aux Etats-Unis la cessation de leur conduite illicite et de les condamner à lui présenter des assurances de non-répétition.

10.19. Le Mexique voudrait que les Etats-Unis soient condamnés par la Cour à promettre de «ne plus recommencer», en quelque sorte. Mais on ne voit pas très bien l'utilité d'une telle demande dans la mesure où tout cela est entendu depuis longtemps. Concrètement, l'obligation des autorités compétentes dans les divers Etats des Etats-Unis d'avertir les autorités consulaires de la détention de tout ressortissant étranger qui le demande est entendue depuis la ratification par les Etats-Unis de la convention de Vienne sur les relations consulaires et avant même que l'affaire *LaGrand* ne soit décidée, le gouvernement fédéral n'a cessé ses efforts pour faire en sorte que les autorités compétentes dans les Etats avertissent les autorités consulaires lorsque des personnes étrangères sont arrêtées et demandent à ce que leur consul soit averti.

10.20. Sur un plan plus général, le fondement juridique des prétentions mexicaines à une promesse de non-répétition de la part des Etats-Unis est des plus faibles dans la mesure où le règlement judiciaire a toujours en principe un caractère rétrospectif, non prospectif. Le juge ou l'arbitre statue sur le passé, non sur l'avenir à moins que les parties n'en décident autrement. Certes, il arrive qu'elles le sollicitent de donner des indications pour l'avenir. Mais cela ne peut se faire que par voie de compromis comme ce fut le cas dans l'affaire de la *Fonderie du Trail* dont le Mexique escompte beaucoup. Dans la présente affaire, la Cour n'est pas saisie par voie de compromis; elle est saisie par voie de requête unilatérale. Ce mode de saisine ne saurait être manipulé par le demandeur pour obtenir de la juridiction internationale des mesures qui ne pouvaient pas être raisonnablement envisagées par le défendeur lorsque celui-ci a accepté de se lier par la clause compromissoire.

2. Le réexamen et la revision des verdicts prévus par l'arrêt LaGrand constituent des modes adéquats de réparation du dommage subi par le demandeur

10.21. La réparation à laquelle le Mexique a droit est celle qui a été définie par la Cour dans l'arrêt de principe LaGrand. Dans cette affaire, la Cour a jugé :

> «[S]i des ressortissants [étrangers] [doivent] néanmoins être condamnés à une peine sévère sans que les droits qu'ils tiennent de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention aient été respectés, [l'Etat de résidence] [doit], en mettant en œuvre les moyens de [son] choix, permettre 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.»[44]

Les Etats-Unis sont d'avis que les deux termes de «réexamen» et de «revision» définissent exactement la réparation à laquelle le Mexique aurait droit.

10.22. Le Mexique refuse l'application de la jurisprudence LaGrand au cas d'espèce au motif que ses cinquante-deux ressortissants sont toujours vivants de sorte que la Cour serait obligée de considérer sa demande dans une perspective radicalement différente que dans l'affaire *LaGrand*. Les Etats-Unis contestent la prétention injustifiée du Mexique tendant à échapper à l'application du précédent *LaGrand*. *Avena* et *LaGrand* ressortent d'une seule et même nature de différends au regard du droit international. Ce qui unit les cinquante-deux affaires portées devant la Cour et l'affaire *LaGrand* au regard du droit international, le seul terme de référence pertinent en ce prétoire, c'est le fait que, dans ces cinquante-deux affaires comme dans l'affaire *LaGrand*, les autorités consulaires mexicaines n'auraient pas été averties de la détention de leurs ressortissants.

10.23. Or, comme la Cour l'a dit dans l'affaire *LaGrand*, si elle est constituée, une telle défaillance serait constitutive d'un fait internationalement illicite. Pour rétablir l'Etat lesé dans ses droits, il faudrait permettre, a dit la Cour, 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. Cette exigence n'a pas été satisfaite dans l'affaire *LaGrand*, mais elle l'a été dans toutes les affaires qui ont suivi l'affaire *LaGrand*, y compris dans celles que le Mexique défère à la Cour par le biais de la présente instance, et elle peut l'être encore. Le Mexique n'a pas démontré en quoi ces deux exigences ne lui apporteraient pas une réparation adéquate.

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[44] *C.I.J. Recueil 2001*, par. 7 du dispositif.

10.24. Que faut-il entendre par les termes «réexamen» et «revision» ? En quoi ces deux exigences constituent-elles une réparation adéquate ? Telles sont les questions vers lesquelles il faut maintenant se tourner.

A. La notion de «réexamen»

10.25. Réexamen, ou «*reconsideration*» en anglais, peut être compris comme s'appliquant généralement à des faits. L'examen des personnes ou des choses est toujours une question de fait. On examine des faits, on les considère. Concrètement, pour être conforme à l'arrêt LaGrand, il faut une procédure qui permette de répondre aux questions suivantes : Les faits ont-ils été correctement appréciés ? Est-on sûr qu'il n'y ait pas eu une erreur manifeste sur les faits ? S'est-on bien entouré de toutes les précautions nécessaires lors de l'administration des preuves ? Considérer de telles questions n'implique pas, bien entendu, de tout recommencer. Cela n'implique pas, comme le voudrait le Mexique, de remonter l'horloge dix, voire vingt ans en arrière et de faire comme si rien ne s'était passé. Non seulement une telle remise à plat de toutes les procédures ne serait pas matériellement possible, mais encore la jurisprudence LaGrand n'exige nullement pareille déconstruction et reconstruction des procès et ceci que l'on raisonne dans le cadre des systèmes de *common law* ou dans celui des systèmes de droit codifié, dits aussi de droit civil *(civil law system)*.

10.26. Dans les systèmes de *common law*, la vérité sur les faits se constitue au cours d'un procès *(trial)*. Là sont interrogés et contre interrogés les témoins et c'est à partir de ce qui est dit que le jury arrête un verdict. Ce genre de procédure pénale a des exigences qui ne supportent pas de remonter l'horloge du temps à volonté. La mémoire ne résiste que peu à l'épreuve du temps et les oublis sont inévitables. Il ne peut donc être question des années plus tard de réexaminer les faits comme ils le furent la première fois. Dans les systèmes de droit codifié, dits aussi de droit civil, qui prévalent sur le continent européen et dans une très large partie du monde, la vérité sur les faits se constitue à partir d'une instruction, c'est-à-dire avant le procès. Ici encore, il serait inconcevable de recommencer toute l'instruction sous prétexte, par exemple, que la personne condamnée à la réclusion criminelle à perpétuité avec une période de sûreté de trente ans a été interrogée lors de l'instruction sans que son consul fut présent.

10.27. Par delà la complexité et l'originalité de chaque procédure pénale nationale, l'exigence de «ré-examen» posée par l'arrêt LaGrand ne peut pas emporter les conséquences que le Mexique souhaiterait y attacher. Plus encore, en droit, l'arrêt LaGrand ne demande pas ce que le Mexique veut y voir. «Ré-examen», dit le texte français; «re-consideration», dit le texte anglais. Le préfixe «re» signifie qu'il y a eu déjà «examen» ou «consideration» des faits. Il ne s'agit donc pas de refaire ce qui a été fait, mais d'avoir la possibilité de revérifier une dernière fois que quelque chose a été correctement fait, par exemple, de s'assurer du caractère scientifique des preuves retenues. Comme M. Thessin l'expliquera tout à l'heure, les procédures actuellement existantes aux Etats-Unis satisfont les exigences de réexamen des faits posées dans l'arrêt LaGrand.

B. Le sens de «revision»

10.28. S'agissant maintenant de la deuxième exigence de l'arrêt LaGrand, le texte dit revision en français, *review* en anglais. Ces termes peuvent être compris comme se rapportant généralement à des questions de droit, et non plus à des questions de fait. La revision en français porte sur un acte juridique comme un jugement ou un contrat ou un traité. Il en va de même du terme anglais *review* qui s'applique principalement aux actes juridiques comme les jugements. A partir de là, pour chacune des affaires que le Mexique a déférées à la Cour, l'exigence de revision ou *review* peut être interprétée comme impliquant un ultime contrôle d'absence d'erreur de droit. Les faits ont-ils été juridiquement qualifiés et cette qualification est-elle juridiquement correcte ? Le verdict a-t-il une base légale ? Est-il fondé sur une loi, par exemple, conforme à la constitution de l'Etat ?

10.29. Le Mexique prétend que cette revision doit être nécessairement judiciaire. Mais si la Cour avait voulu que la revision soit effectuée par des juges, elle l'aurait dit. Or elle ne l'a pas fait; l'arrêt LaGrand ne dit pas que la revision doive être judiciaire. L'arrêt ne parle pas de *judicial review*, mais de *«review»* tout court, de sorte que la «revision» des verdicts peut être entreprise, même lorsqu'elle n'est pas judiciaire.

10.30. L'idée de revision non judiciaire est familière tant aux juristes formés dans la tradition de *common law* qu'à ceux formés dans la tradition des systèmes romano-germaniques. Les recours administratifs, gracieux ou hiérarchiques, sont partie intégrante de la tradition de l'Etat de droit et

ils forment à côté des recours contentieux les éléments de la procédure légale régulière requise dans un Etat de droit. Recours contentieux et recours administratifs sont considérés d'une égale efficacité.

10.31. Monsieur le président, Madame et Messieurs les juges, les recours qui pourraient être qualifiés d'administratifs tels qu'ils existent dans les droits des Etats de l'Union américaine sont les recours en grâce ouverts aux personnes condamnées. Ces recours satisfont aux exigences de la jurisprudence LaGrand. Ils permettent le réexamen et la revision des verdicts prononcés. Le demandeur prétend que ces recours sont administrés de manière arbitraire et qu'ils n'aboutissent jamais. Ces affirmations sont inexactes. Contrairement aux allégations du Mexique, les procédures de recours en grâce peuvent aboutir à des commutations de peine comme ce fut le cas des affaires d'Illinois, ou à un sursis à l'exécution de la condamnation prononcée qui ouvre alors de nouvelles procédures comme en témoigne l'affaire Valdez qui s'est tout récemment conclue par un accord entre le ministère public et le condamné qui a accepté la commutation de sa peine en réclusion criminelle à perpétuité. Les procédures de recours en grâce qui existent dans les lois de tous les Etats fédérés des Etats-Unis répondent aux exigences de la revision requise par la jurisprudence LaGrand.

10.32. Par ces motifs, les Etats-Unis concluent à la compatibilité de leurs procédures internes de réexamen et de revision des verdicts avec la jurisprudence LaGrand et ils vous demandent de rejeter les conclusions d'incompatibilité formulées contre elles par le demandeur.

10.33. Monsieur le président, ainsi se termine la présentation de la plaidoirie des Etats-Unis. Je vous demande de déclarer une suspension de séance.

The PRESIDENT: Thank you, Professor Zoller. The hearing is now suspended for 20 minutes and the Court will resume at 5.05 p.m.

The Court adjourned from 4.45 p.m. to 5.05 p.m.

The PRESIDENT: Please be seated. I now give the floor to Mr. Thessin.

Mr. THESSIN: Thank you, Mr. President. When one gets before the Court, one generally has one's blood pressure go up, not down. I want to reassure the Court that I am fine and I want to

thank the Court for all its courtesies and for all in the courtroom who were of assistance. On the advice of the medics, and because this Court has had enough excitement for one day, I would ask the Court to allow Mr. Taft to complete my presentation.

The PRESIDENT: Thank you, Mr. Thessin. On behalf of the Court, I wish you all the best and hope you soon return to strength. I now give the floor to Mr. Taft.

Mr. TAFT: Thank you, Mr. President. Mr. President, Members of the Court, with your indulgence I would like to briefly summarize what Mr. Thessin had covered in his presentation and then continue with it. The points made were these.

First, that the Court's decision in *LaGrand* in calling for review and reconsideration called for a process to re-examine a conviction and sentence in light of a breach of Article 36. It expressly did not demand a specific substantive outcome.

Second, in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand.

Third, that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in *LaGrand*: it seeks precisely the award of a substantive outcome that the *LaGrand* Court declined to provide. Mr. Thessin had then turned to explaining how the United States criminal justice system through both judicial review and the clemency process fully provides the review and reconsideration called for in *LaGrand*.

Addressing first the judicial process at the trial level, the basic point made was as follows. Mexico has described consular notification and assistance as important because it "ensures the enforcement of essential due process guarantees". As even that formulation acknowledges, consular information and notification are not in and of themselves essential attributes of a fair trial. Rather, they simply facilitate the exercise of fundamental rights. Given that relationship of consular notification as a facilitator of rights it should be clear that the underlying gravamen of any injury that a Mexican national asserts based upon a breach of Article 36, for example, prejudice based upon ineffective assistance of counsel, can be addressed by United States courts at trial. Any such injury can be addressed even if the courts do not address the claim under the doctrinal heading of a Vienna Convention claim but rather under the doctrinal rubric, for example, of constitutionally

ineffective assistance of counsel. And for the claim based on a breach of Article 36 to have any effect on the trial that warrants relief there must be some such underlying injury to an essential trial right.

With that recap, I would return to the point where Mr. Thessin left off, just turning to the appeals and collateral review process in the judicial system.

VIII. THE UNITED STATES PROVIDES THE "REVIEW AND RECONSIDERATION" REQUIRED UNDER ARTICLE 36 (2) IN ITS CRIMINAL JUSTICE SYSTEMS AND THROUGH EXECUTIVE CLEMENCY PROCEEDINGS
(continued)

8.12. Every foreign national has the opportunity during the appellate and collateral review processes to show how a failure of consular notification deprived him of his due process rights or affected the fundamental fairness of his trial. If the defendant alleged at trial that a failure of consular information resulted in harm to a particular right essential to a fair trial, an appeals court can review how the lower court handled that claim of prejudice. If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints on raising that particular claim in direct or collateral judicial appeals. This is not surprising. Procedural default principles are common worldwide and, as the Court said in *LaGrand*, they do not breach Article 36 (2). Absent a requirement to raise issues in a timely way, defendants would always postpone raising claims until they were found guilty and would then seek to start the trial over.

8.13. But the key is to understand what is and what is not defaulted. For example, Mexico claims that it provides competent interpreters. If the interpreter at the trial is not competent, the defendant can demand relief on appeal about the inadequate interpretation services. Whatever label he places on his claim, his right to competent interpretation must and will be vindicated if it is raised in some form at trial. In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently

asserting a claim that he was prejudiced because he lacked this critical protection needed for a fair trial[45].

8.14. Let us put this issue in perspective. By Mexico's own concession[46], in only eight out of the 52 cases has a court determined that Vienna Convention claims were procedurally defaulted due to the defendant's failure to raise the claim at trial. And in most of these eight cases, the courts evaluated consular-related harm to the foreign national either by reviewing the Convention claim for prejudice despite the default or by reviewing other, related claims on their merits[47]. For example, Mr. Plata Estrada did not raise a Vienna Convention claim at trial, but he did do so on appeal. Although the appeals court noted that he was procedurally barred from bringing such a claim at that stage, it also noted that he did not claim or show that he was discriminated against; or that his trial counsel was not experienced in the area of capital litigation; or that his trial counsel was otherwise deficient in the representation[48]. Plata Estrada did, however, argue that his guilty plea was coerced and two different appellate courts reviewed this issue in considerable detail[49]. This careful review process occurred also in the case of *Valdez* v. *Oklahoma*[50]. Although Valdez's claim under the Convention was procedurally defaulted, the Oklahoma court vacated the capital sentence and ordered a new sentencing procedure because Valdez's trial counsel was ineffective in failing to uncover significant mitigating evidence that was subsequently discovered through the intervention and assistance of the Mexican consulate.

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[45]See, e.g., *Valdez* v. *State*, 46 P.3d 703 (Okla. Crim. App. 2002), Annex 23, Exhibit 58; see also *Barrow* v. *State*, 749 A.2d 1230 (Del. 2000) (notwithstanding defendant's failure to raise Vienna Convention claim at trial, it could be reviewable for plain error if the defendant made an adequate showing how due process rights or fundamental fairness of the trial were affected by the breach); *State* v. *Issa*, 752 N.E.2d 904 (Ohio 2001) (same); *United States* v. *Chanthadra*, 230 F.3d 1237, 1255-1256, 1265 (10th Cir. 2000); *Gomez* v. *United States*, 100 F. Supp. 2d. 1038, 1043-1049 (DSD 2000); *United States* v. *Arrango*, 1999 WL 1495422, *3-4 (EDNY 1999).

[46]CR 2003/24, para. 241. In yesterday's argument, Mexico used the number ten, Mexico counts two of the cases twice.

[47]See, e.g., #48 Fong Soto (who raised 35 claims on appeal, several of which related to the adequacy of mitigation evidence, which were fully reviewed by the court in *State v. Soto-Fong*, No. Cr-39599 (Ariz. Super. Ct. 2002), Mexico Memorial, Annex 42); #53 Torres Aguilera (the court reviewed on the merits Torres Aguilera's claim that his trial counsel's failure to investigate numerous avenues of mitigation evidence equated to ineffective assistance of counsel in *Torres* v. *Gibson*, No. CIV-99-155-R (W.D. Okla. 2000), Mexico Memorial, Annex 46); #36 Leal Garcia (the court considered a large number of issues on appeal, including whether Leal Garcia's counsel was ineffective for having failed to develop and present other mitigating evidence to the court at trial and sentencing in *Ex Parte Leal*, No. 94-CR-4696-W1 (186th Dist. Tex.), Mexico Memorial, Annex 51); #38 Medellin Rojas (the court reviewed Medellin Rojas's claim that his counsel was ineffective in *Ex Parte Medellin*, No. 675430-A (339th Dist. Tex. 2001), Mexico Memorial, Annex 55); #40 Plata Estrada (discussed in detail above).

[48]Mexico Memorial, Ann. 56, pp. 1220-1221.

[49]*Id*. at 1216-1220; Mexico Memorial, Ann. 58, pp. 1247-1264.

[50]*Valdez* v. *State*, 46 P.3d 703 (Okla. Crim. App. 2002), Annex 23, Exhibit 58.

8.15. The lesson from this is clear: Do not be misled by Mexico's assertion that US courts fail to provide review and reconsideration if they do not label a claim as a Vienna Convention claim. Even if a US court will not consider the failure of consular information as an issue in its own right, courts will consider properly preserved independent claims that the due process rights of a foreign national were unacceptably compromised in prior proceedings[51]. And, certainly, the defendant may amplify this claim by explaining how the failure of consular notification contributed to this unacceptable result. And they have done so.

8.16. In summary, when violations occur that prejudice the fundamental fairness of convictions, United States courts can act, whether at trial or at appellate or habeas levels, and whether or not the foreign national raised the failure of consular notification at trial.

Review and reconsideration in the clemency process

8.17. Mr. President, Members of the Court, the United States also gives "full effect" to the "purposes for which the rights accorded under [Article 36 (1)] are intended" through executive clemency proceedings. The clemency process with its deep roots within the common law system is well suited to the task of providing review and reconsideration.

8.18. Clemency procedures supplement review in the judicial stages. They also function alone. Even in a case where judicial remedies have been exhausted without review and reconsideration of a Vienna Convention claim, or where review and reconsideration were given but the court did not order a remedy, the clemency process is still available to review and reconsider convictions and sentences in light of any violations of Article 36 (1). The United States Supreme Court has said that clemency functions in the United States as the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted"[52].

8.19. Clemency therefore is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process. Clemency procedures are an integral part of the existing "laws and regulations" of the United States through which errors are addressed. In every state, clemency processes are established under state constitutions and function in accordance with

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[51] *United States* v. *Lawal*, 231 F.3d 1045 (7th Cir. 2000); *United States* v. *Ortiz*, 315 F.3d 873 (8th Cir. 2002).

[52] *Herrera* v. *Collins*, 506 U.S. 390, 412 (1993).

state laws and regulations. In every state, clemency procedures provide a comprehensive mechanism for review and reconsideration in cases where breaches of Article 36 (1) have occurred as in other cases.

8.20. Every state where a Mexican faces capital punishment has careful procedures that give each individual a full opportunity to have his clemency application fairly heard[53]. Applications raising significant claims are thoroughly investigated. This includes: reviewing information received from interested parties; some states permit public hearings where both proponents and opponents of clemency can make their arguments[54]; the clemency authority will then make a decision, with the Governor often receiving a written recommendation from the administrative board responsible for investigating and considering clemency applications[55].

8.21. Two points are particularly noteworthy. First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer[56]. Indeed, participation is not limited to the consular officer. The President of Mexico, in several instances, and even Pope John Paul II in the case of a non-Mexican in Missouri have personally made successful clemency pleas to state Governors on behalf of defendants convicted of capital crimes. Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review[57]. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims.

8.22. Mexico attacks unfairly the integrity of the decision-makers in this process. The state legislatures that created these processes, and the Governors and clemency boards that implement them, are properly established institutions under the laws of the United States. They, and the processes they oversee, are entitled to the presumption that they operate in good faith and on a

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[53]See Clemency Declarations, United States Counter-Memorial, Anns. 8-17, pp. A.439 ff.

[54]See Counter-Memorial Ann. 8 (Arizona Clemency Declaration); Ann. 9 (Arkansas Clemency Declaration); Ann. 12 (Illinois Clemency Declaration); Ann. 13 (Nevada Clemency Declaration); Ann. 14 (Ohio Clemency Declaration); Ann. 15 (Oklahoma Clemency Declaration).

[55]See United States Counter-Memorial, Ann. 9 (Arkansas Clemency Declaration) Ann. 12 (Illinois Clemency Declaration); Ann. 15 (Oklahoma Clemency Declaration); cf. Ann. 10 (California Clemency Declaration) at p. A.465 (decision of Governor Davis in clemency case referencing recommendation from California Board of Prison Terms).

[56]Criminal Justice Declaration, *supra* note 3 at paras. 71-72.

[57]*Id.* at para. 75.

regular basis according to United States law. Mexico has provided no basis for this Court to find otherwise, even if this Court were accustomed to assess the merits of State legal systems, which it is not.

8.23. Nor, as Mexico claims, can clemency fairly be said to be a process that reviews only sentences, but not convictions. Even ignoring Mexico's concession that these 52 individuals in the cases before the Court "committed abominable crimes"[58], clemency in fact results in pardons of convictions as well as commutations of sentences. Within the last year, for example, one Governor pardoned 38 individuals convicted of non-capital crimes[59], and this occurred in Texas, a state whose process of clemency Mexico has disparaged.

8.24. But, unlike Mexico, we do not believe that the merit of a process of "review and reconsideration" is a function of the result that it reaches. Clemency review supplements judicial review. State sentencing schemes were rewritten after a 1972 Supreme Court decision striking down state death penalty laws. These new schemes, which significantly restricted the circumstances in which a death sentence could be imposed, relieved much of the pressure previously on the clemency process[60]. Since 1976, when capital punishment was reinstated, 223 death row inmates, US citizens and foreign citizens alike, have been granted clemency[61]. That different results are reached in different cases strongly suggests that each case is being looked at carefully and on its own facts. Mexico's assertion that review and reconsideration in the clemency process is inadequate because clemency is granted less frequently therefore has no probative value.

8.25. Although you would not know it from Mexico's presentation, clemency is a process that works carefully, fairly, and successfully to review and reconsider breaches of Article 36. Since this Court's decision in *LaGrand,* we are aware of seven foreign nationals sentenced to death whose Vienna Convention claims were reviewed and reconsidered in clemency[62]. Of these seven, the sentences of five were commuted in clemency[63]. In a sixth case, the Governor's concerns for

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[58]CR 2003/24, para. 19 (Gómez-Robledo).

[59]United States Counter-Memorial, Ann. 7, para. 78, at pp. A.435-436.

[60]Criminal Justice Declaration, *supra* note 3 at para. 80.

[61]See the Death Penalty Information Center's website, www.deathpenaltyinfo.org, last visited 11 Dec. 2003.

[62]United States Counter-Memorial, paras. 7.22-7.23.

[63]*Id*. at para. 7.22.

the Vienna Convention claims set in motion a series of events that, as you heard yesterday, resulted in the imposition of a sentence of life imprisonment in lieu of the death penalty. And in one case, clemency was denied.

8.26. As I now describe these seven cases, ask yourself whether or not the clemency process, in Mexico's words, "rarely, if ever, includes a review and reconsideration of the effect of a violation of the Vienna Convention"[64]. Ask yourself also whether "violations of the Vienna Convention are given no weight in clemency review"[65].

8.27. In January of 2003, the Governor of Illinois granted clemency in capital cases to five foreign nationals, including three Mexican nationals who are the subject of this case[66]. In announcing his decision, the Illinois Governor made clear that he was influenced by what he understood to be violations of Article 36. As the Governor put it:

> "Another issue that came up in my individual, case-by-case review was the issue of international law. The Vienna Convention protects US citizens abroad and foreign nationals in the United States. It provides that if you are arrested, you should be afforded the opportunity to contact your consulate. There are five men on death row who were denied" — in the less precise language of the Governor — "that internationally recognized human right. Mexico's President Vicente Fox contacted me to express his deep concern for the Vienna Convention violations."[67]

8.28. The Governor's decision followed an established process. The Illinois Prisoner Review Board thoroughly reviewed all claims and considered all materials collected in connection with the applications, including letters of support from the Mexican Government presenting its views on the *LaGrand* decision[68]. The Board held extensive hearings in each case except one, where the defendant chose not to file a petition for clemency. After the hearings, the Board made non-binding and confidential recommendations to the Governor.

8.29. In a sixth case, in August of 2002, the Texas Board of Pardons and Paroles, recommended against clemency for Javier Suarez Medina[69]. The Governor followed that

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[64]Mexico Memorial, para. 210.

[65]Mexico Memorial, para. 270 and accompanying notes.

[66]The five are Juan Caballero Hernandez, Mario Flores Urban, Gabriel Solache Romero, Gregory Madej from Poland, and Evan Griffith from Belize.

[67]Illinois Clemency Declaration, United States Counter-Memorial, Ann. 12, para. 9.

[68]*Id*. at para. 6.

[69]United States Counter-Memorial, para. 7.27.

recommendation as he was required to do by law. But before the Board made its recommendation, several actions ensured full review and reconsideration. When Mexico brought the case to the attention of the Department of State, he contacted the Governor and the Board, drawing attention to the failure to provide consular information and inviting consideration of that fact and of this Court's decision in *LaGrand* during the clemency proceedings[70]. The Chairman of the Board met personally with Mexican officials to discuss the petition and Mexico's views regarding the failure to provide consular information[71]. All Board members received Mexico's written synopsis of its presentation along with copies of all the materials that Mexico supplied[72]. To allow adequate time to review and consider the materials submitted on the consular information issue, the Board extended the deadline for its consideration. The letter from the Board Chairman, which this Court has before it at tab 8[73] in the judges' book, describes in detail the process the Board followed and leaves no doubt that the Board fully considered all the information submitted by Mexico and on behalf of Mr. Suarez Medina.

8.30. Mexico quarrels with the outcome, but it provides no basis for the Court to conclude that the Board either failed to review and reconsider carefully the conviction and sentence or decided unreasonably that the Vienna Convention claim did not require setting them aside. In front of witnesses, Suarez Medina shot an undercover police officer eight times[74]. He confessed to the killing, but clearly would have been convicted regardless of his confession. The sufficiency of the evidence of his guilt was never in doubt, and the fundamental fairness of his trial was examined at multiple stages of post-conviction review. He was not unreasonably or unfairly barred from raising his claim under the Convention on appeal — in fact he and Mexico knew of the claim from June 1989, but between then and 2002, 13 years later, neither he nor Mexico raised the issue at all as a basis for challenging his conviction or sentence on direct appeal or in collateral challenges[75].

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[70]See Mexican Memorial, Ann. 25, pp. A.300-A 303.

[71]United States Counter-Memorial, Ann. 23, Exhibit 195, Letter of Gerald Garrett to William H. Taft, IV, 14 August 2002, pp. A.2471-A.2472.

[72]*Id.*

[73]*Id.*

[74]Brief in Opposition to Petition for Writ of *Certiorari* and Application for Stay of Execution, *Medina* v. *Texas*, Case No. 02-5752, p. 13, *cert. denied*, 536 U.S. 981 (2002), Ann. 23, Exhibit 146.

[75]*Id.*

8.31. In the final case, the Governor of Oklahoma in July of 2001 denied clemency for Gerardo Valdez Maltos, after receiving a favourable recommendation for clemency from the Oklahoma Pardon and Parole Board[76]. The Governor, however, then granted a stay of execution to allow for further judicial appeals on, among other issues, the consular notification claim and its effects[77]. As these proceedings progressed, the sentence of Valdez Maltos was reduced to life imprisonment[78].

8.32. The Governor's decision followed full review and reconsideration of the case. The Department of State in early June 2001 wrote first to the Pardon and Parole Board and then to the Governor requesting that they give careful consideration to Valdez Maltos's pending clemency request. Indeed, the Mexican Government thanked the Department for its letters and acknowledged their value[79]. The Board recommended commutation after reviewing extensive mitigation evidence bearing on the appropriate sentence that had been gathered with the assistance of the Mexican consular officers. After discussing the matter with the Mexican President, the Oklahoma Governor granted a 30-day stay of execution to allow himself time to consider the recommendation further.

8.33. In the interim, this Court decided the *LaGrand* case. And then the Department wrote again to the Governor. This second letter focused the Governor's attention particularly on the *LaGrand* decision and requested that he specifically consider the impact of any Vienna Convention violation on either the conviction or sentence in the case.

8.34. There can be no doubt that the Governor took the *LaGrand* decision into account, and independently reviewed and reconsidered Valdez Maltos's conviction and sentence. In addition to meeting with Valdez Maltos's defence attorneys and senior officials of the Mexican Government, including the Mexican Legal Adviser, the Governor spoke directly with President Fox about the case. The Governor and his advisers reviewed at length the facts, the procedural and legal questions, and the particular issues related to the breach of Article 36.

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[76]United States Counter-Memorial, paras. 7.30-7.31.

[77]*Id.* at 7.32.

[78]See http://us.cnn.com/2003/LAW/11/21/execution.oklahoma.reut/, last visited 14 Dec. 2003.

[79]Note of the Embassy of Mexico, 5 July 2001, Mexico Memorial, Ann. 25, Vol. 1, pp. A348, A352.

8.35. Based on the review of all the evidence, including the failure to give consular information, the Governor ultimately concluded that clemency was not warranted. As is reflected in the letter before you in the judges' book at tab 9 from the Governor to President Fox[80], the Governor's review was careful, probing, and thorough. His letter makes clear that he took account of Article 36 in evaluating the clemency petition.

8.36. So what does this review of the clemency process that Mexico so disparages show us? There have been seven cases in which violations of the Vienna Convention's requirements have been raised. Seven times the claims of violation have been reviewed and reconsidered. The results of the review and reconsideration have varied, depending on the facts of each case. This process is not the charade Mexico has portrayed for the Court. It plainly provides an effective form of review and reconsideration that fully satisfies this Court's decision in *LaGrand*.

8.37. In conclusion, the United States has in place criminal justice systems that allow for the review and reconsideration of failures to provide consular information. Its courts and executive branch officials unquestionably provide careful, meaningful and fair review and reconsideration of either the consular violations themselves or the effects of any Article 36 violation on the fundamental fairness of the proceeding, which is the very principle Mexico seeks to protect. Each Mexican national, indeed each foreign national, can have his case fully reviewed and reconsidered for a breach of Article 36 at one or more of these levels.

8.38. Obviously, Mexico would prefer that judicial relief or clemency be granted in every case. That is why it demands an automatic nullification, even when no actual prejudice resulted, or where the claim has already been reviewed by a US court or where it was knowingly defaulted. But the obligation set out in *LaGrand* is a fair review and reconsideration, not an automatic reversal in every case. One would not expect that, at the end of a process where each defendant may have had the fundamental fairness of his trial and his claims of actual innocence reviewed by perhaps dozens of state and federal judges, miscarriages of justice would frequently remain that require clemency.

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[80]Mexico Memorial, Annex 26, pp. A.358-A.361.

8.39. Mr. President, that concludes Mr. Thessin's presentation and I would ask you to call on Mr. Mathias.

The PRESIDENT: Thank you, Mr. Taft, for reading the text on behalf of Mr. Thessin. I now give the floor to Mr. Mathias.

Mr. MATHIAS: Thank you, Mr. President.

XI. REVIEW AND RECONSIDERATION IS THE APPROPRIATE REMEDY FOR A BREACH OF ARTICLE 36 OF THE CONVENTION

11.1. Mr. President, Members of the Court, before the break Professor Zoller described a number of respects in which Mexico's requested remedy for the alleged breaches of the United States is without a basis in this Court's jurisprudence or in general international law. Recognizing that, my task this afternoon is to confirm that the review and reconsideration remedy identified by this Court in *LaGrand* constitutes an appropriate remedy, as a matter of international law, for a breach of Article 36 of the Convention. In the event the Court finds a remedy is needed for a breach of the Convention, it should look no further.

A. The Court decided the appropriate remedy for a breach of Article 36 in *LaGrand*

11.2. Mexico apparently wants to persuade the Court, contrary to the record in the case and the judgment itself, that the Court in *LaGrand* did not already decide upon the appropriate remedy for prospective breaches of the Convention. Thus, in its Memorial, Mexico makes the assertion that:

> "In *LaGrand*, this Court had the opportunity to provide a definitive interpretation of the rights of the sending State and its nationals and the corresponding obligations of the receiving State under Article 36 of the Vienna Convention. The Court, however, did not have the same opportunity with respect to remedies, for the simple reason that the German nationals who were the subject of that case had been executed at the time that the Court rendered its judgment."[81]

Mexico reiterated this theme several times yesterday.

11.3. Mexico's description of *LaGrand* is, at best, incomplete, in that it fails to mention that Germany specifically sought assurances in *LaGrand* with respect to "any future cases of detention

[81] Memorial, paras. 346-347.

or of criminal proceedings against German nationals"[82]. There is no suggestion that this referred only to future cases in which executions had taken place. On the contrary, it certainly included future cases involving persons still incarcerated. In other words, persons in the same position as the Mexican nationals in this case. And in response to Germany's request in *LaGrand*, this Court — as is well known — in the seventh paragraph of its *dispositif* found that

> "should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America, by means of its own choosing, shall allow . . . review and reconsideration . . ."[83].

The Court was specifically addressing itself to the obligation of the United States in the event of future cases involving breach of its obligations. This had *nothing* to do with the LaGrand brothers; it had only to do with the remedy in the event of future breaches of the Convention. And, as has been noted previously, the President of the Court made it clear in his declaration that there was no possibility of an *a contrario* interpretation of paragraph 128 (7) of the *dispositif* in subsequent proceedings. He did not limit this declaration in any way. He did not say that the remedy set out in paragraph 128 (7) of the *dispositif* would apply *unless* an applicant State requested *restitutio in integrum*. He said there was no possibility of an *a contrario* interpretation.

11.4. It is understandable that Mexico would prefer to insist that the Court never reached the question of remedy in *LaGrand*. After all, otherwise Mexico must concede that it is seeking to overturn a recent judgment of this Court joined in by 14 of its Members. The Court, however, must be clear on the consequences of adopting the course that Mexico advocates. For the Court to turn away in this case from the review and reconsideration remedy that it fashioned just two years ago would signal an inconstancy that would bring disrespect to the Court and to international judicial dispute resolution generally.

B. Review and reconsideration is the appropriate remedy for a breach of Article 36

11.5. Thus, in light of *LaGrand*, the review and reconsideration remedy, with the choice of means left to the United States, is the appropriate remedy for a breach of Article 36 of the Convention in cases like those raised by Mexico. The Court required, in *LaGrand*, that the

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[82] *LaGrand*, para. 125.

[83] *LaGrand*, para. 128.

receiving State exercise its sovereign authority to provide a process through which, in an appropriate case, relief can be accorded to an individual foreign national in respect of a breach of the Convention. Through this individualized process, the situation, with respect to each foreign national, can be established that "would, in all probability, have existed"[84] if the breach of the Convention had not occurred. This "review and reconsideration" remedy has been applauded or endorsed by commentators[85] and by the International Law Commission.

11.6. Mexico has emphasized the primacy of *restitutio in integrum* as a form of reparation and cited the International Law Commission's draft Articles on State Responsibility as authority for the remedy that it seeks[86]. It is notable, however, that Mexico did not even refer to the International Law Commission's specific analysis of reparation in the context of a case like this one. In fact, the International Law Commission's conclusions do not support the view that *restitutio in integrum* in a theoretically pure form is appropriate in a case like this. Indeed, the Commission's work generally and specifically endorses the approach of this Court in *LaGrand*.

11.7. Members of the Court, you have before you at tab 7 the text of Draft Article 34 of the Articles on State Responsibility and the Commentary thereto. In the highlighted passage in the Commentary, the Commission states that

> "[t]he primary obligation breached may . . . play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of the State."[87]

The obligations set forth in Article 36 of the Convention are procedural obligations of precisely the character described by the Commission.

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[84] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Merits, Judgment, I.C.J. Reports 2002*, para. 76 (quoting and applying *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47).

[85] See, e.g., Christian J. Tams, "Consular Assistance and Rights and Remedies: Comments on the ICJ's Judgment in the *LaGrand* Case" in *European Journal of International Law*, Vol. 13, No. 5, 2002, Nov., n.74 and accompanying text available at http://www.ejil.oupjournals.org, Ann. 23, Exhibit 157 (review and reconsideration "represent[ed] a wise compromise". Court "would have gone too far had [it] found [in *LaGrand*] that all judgments impaired by the failure to notify the defendant . . . per se had to be reversed, irrespective of whether the absence of consular assistance had actually had a negative impact on the defence of the foreigner.").

[86] See, e.g., Memorial, para. 357.

[87] ILC Commentaries, Art. 34.

11.8. The Commission continued its discussion in a footnote, which is also highlighted at that tab. It specifically and approvingly addressed the Court's decision in *LaGrand*. The Commission stated:

> "in the *LaGrand* case, the Court indicated that a breach of the notification requirement in [Article] 36 of the Vienna Convention on Consular Relations . . . leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction 'by taking account of the violation of the rights set forth in the Convention' . . . This would be a form of restitution which took into account the limited character of the rights in issue."[88]

Thus the Court need not speculate about how the International Law Commission would analyse the reparation question in a case like this one. The Commission's views are clear.

11.9. As it was in *LaGrand*, the Court's task in this case is to balance the respective rights of the Parties taking into account the nature of the procedural obligation owed to Mexico and the related substantive rights of the United States.

11.10. With respect to the rights of the United States, the Members of the Court well understand the fundamental character of a State's criminal justice system. It is a touchstone of State sovereignty. Its smooth operation is essential to the maintenance of public order, one of a State's primary responsibilities to its citizens. In *LaGrand*, while the Court went far, the review and reconsideration remedy that it fashioned did not compromise the effectiveness of the domestic criminal justice system. On the contrary, the Court left it to the State to determine how best to implement a review and reconsideration mechanism in the overall context of its domestic legal system. By contrast, Mexico's proposed remedy would intrude deeply into the criminal justice system, because, even in the revised form previewed by counsel for Mexico yesterday, it would have the Court impose new rules on US courts with respect to issues such as the exclusion of evidence and procedural default.

11.11. In its Memorial, Mexico heedlessly suggested that its proposed remedy "would impose no burden here at all"[89]. As with its erroneous assertion that the remedy in *LaGrand* took into account only the LaGrand brothers and not future German nationals, Mexico here departs from the realm of legal argument and engages in legal fantasy. The intrusion into State sovereignty that

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[88]ILC Commentaries, Art. 34, n. 518.

[89]Memorial, para. 389.

Mexico invites this Court to undertake would be truly unprecedented. The Members of the Court can no doubt imagine the implications for their own national criminal justice systems if final convictions and sentences in an entire category of cases were declared invalid and an international tribunal were to insert itself into ongoing criminal cases. Mexico may trivialize this, but the Court's action in *LaGrand* suggests that the Court will not.

11.12. To be sure, the procedural rights protected by Article 36 are important ones. But it does not serve the interests of the States parties to the Convention or of the law to misstate the character of those rights. As the Court is aware, those rights are secured to States parties to facilitate the provision of consular functions by the "sending State" and do not address the fundamental fairness of criminal proceedings. Counsel for Mexico yesterday referred to the interest of its nationals in "a fair trial". And this is an interest of great significance. It is, as Mr. Philbin explained this morning, protected by US courts. But it is not the purpose of Article 36 to guarantee fair trials.

11.13. Nor can it be assumed that the breach of the consular information obligation has any effect on the outcome of the criminal justice process. Professor Crawford addressed this aspect of the issue in his Third Report on State Responsibility,

> "[i]t could well have been the case that the subsequent trial was entirely proper and fair and the failure of notification had no effect on the conviction . . . Only if a sufficient causal connection could be established between the United States' failure to notify and the outcome of the trial could the question of restitution arise at all."[90]

Review and reconsideration permit an individualized assessment of, *inter alia*, the impact of the alleged breach on the fairness of the conviction and sentence. Mexico's remedy would have the Court annul all cases in which a breach of consular information occurred, irrespective of any assessment of such impact.

11.14. Mexico has discussed at length, in its Memorial and in its presentation yesterday, US domestic law and its alleged shortcomings with respect to the implementation of the review and reconsideration remedy. Even if Mexico's inaccurate analysis of US domestic law were accurate, however — which it is not —, it relates only to the ways in which the United States is implementing the international law obligation stated by the Court in *LaGrand*. Mexico has offered

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[90] Third Report, para. 141.

no argument based on principles of international law addressing the Court's careful balancing of the respective rights of the two States in *LaGrand*. Whatever the Court concludes with respect to Mexico's assertions concerning US domestic implementation of the review and reconsideration remedy, Mexico has not given the Court any basis, as a matter of international law, to reconsider the remedy itself.

11.15. Thus far, we have briefly considered this Court's decision to adopt a review and reconsideration remedy in the *LaGrand* case, for application prospectively, in future cases, including, if weight is to be given to the President's declaration, to cases involving Mexican nationals. We have noted the necessity of balancing the respective rights of the parties in applying restitution in cases other than a simple return of property, persons, or territory, and we have noted the International Law Commission's considered conclusion that the remedy fashioned by the Court in *LaGrand* reflects such a balancing in the context of an intersection between a State's substantive and sovereign responsibility to operate its criminal justice system on the one hand, and its procedural obligations under the Convention on the other. We have also observed that the review and reconsideration remedy permits an individualized assessment to be made of the impact of the alleged breach of the Convention on the fairness of the criminal proceedings.

C. The review and reconsideration remedy is better in accord with the proper role of the Court

11.16. Review and reconsideration of a conviction and sentence, by means of a State's own choosing, is also an appropriate remedy because it is better in accord with the proper judicial role of the Court in resolving disputes like the one presently before it, for two independent reasons, one practical and one fundamental.

11.17. First, as a practical matter, because the Convention is so widely adhered to, and because of the varied manner in which States implement their obligations thereunder as well as the diverse ways that States have established and operate their criminal justice systems, the Court should interpret the Convention and prescribe remedies that are meaningful and applicable across the diverse legal systems of all the States parties. While this case is between Mexico and the United States, the instrument on the basis of which the Court is acting creates international legal obligations for States on every continent representing all the principal legal systems of the world,

including common law States and civil law States, unitary States and federal States. Review and reconsideration, by means of a State's own choosing, is the only remedy capable of general application across legal systems and cultures. It provides a way forward for all State parties. And it avoids the complications that would ensue were the Court in this case to decide, as Mexico requests, for example, that application of the exclusionary rule, a rule of evidence that Professor Weigend has shown is unknown in many legal systems, is somehow required by the Convention.

11.18. The more fundamental advantage of the review and reconsideration remedy over the remedy proposed by Mexico is that "review and reconsideration" does not involve the Court in fashioning an order for the prospective operation of a domestic criminal justice system, a function that is beyond the Court's proper role. The Court is mindful of its role in a case under a compromissory clause: here, to decide a dispute concerning the interpretation or application of the Convention. The Court's role is limited to its assessment of the international legal obligations of the parties and does not extend to a determination of the means by which the parties implement their obligations in their domestic legal systems[91]. In an appropriate case, the Court may determine the remedy for a breach of an obligation, but its determination of that remedy, too, is limited to a statement of what international law requires. Here, it is not for the Court to determine prospectively how the review and reconsideration remedy is to be implemented by the United States, or by any other State[92].

11.19. Members of the Court have before them Mexico's submissions in respect of remedies, as they now stand. Those submissions would, *inter alia*, have the Court determine that the United States is under an obligation, presumably an international law obligation since that is the only kind of obligation properly before the Court, to take legislative, executive, and judicial steps with respect to such quintessentially domestic law matters as the appropriateness of procedural penalties for failure timely to raise a claim at trial, the exclusion of evidence, and the requirement of a

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[91]See, e.*g.*, *Oppenheim's International Law*, 9th ed., pp. 82-83 ("From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.").

[92]See, e.g., *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 79.

showing of individual prejudice. The only basis on which such submissions could conceivably lie would be a determination by the Court that application of such doctrines constituted a breach of the Convention in all cases. But Mexico does not specifically seek a judgment of unlawfulness from the Court with respect to each of these various domestic law doctrines the application of which it asks the Court to enjoin. This is understandable, since there is no colourable basis on which the Convention could be interpreted to preclude the application of these doctrines, particularly since, as I explained this morning, Article 36, paragraph 2, of the Convention expressly contemplates the implementation of the requirements of the Convention within the context of existing laws and regulations. The Court expressly declined to find one of these doctrines — procedural default — unlawful in the *LaGrand* case.

11.20. I conclude. Mr. President, Members of the Court, if there has been a breach by the United States of the Convention, the Court already has at hand the appropriate remedy to be applied. The Court should reaffirm its decision that, in cases of foreign nationals being sentenced to severe penalties without the requirements of the Convention having been observed, the United States shall, by means of its own choosing, allow the review and reconsideration of the conviction and sentence by taking account of the breach. This remedy would provide Mexico with the relief to which it would be entitled, would respect the respective rights of the Parties, and would be consistent with the role of the Court as well as its very recent Judgment in *LaGrand*.

11.21. Mr. President, Members of the Court, that ends my presentation. Thank you for your attention. Mr. President, I ask that you call upon Mr. Taft, who will conclude the first round presentation of the United States.

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

Mr. TAFT: Thank you, Mr. President.

XII. CONCLUSION

12.1. Mr. President, Members of the Court, we have heard a great deal over the past two days about the many issues raised by Mexico's Application — issues raised both by the complexity and diversity of the facts underlying the separate cases Mexico has brought to the Court and by the novel extensions in the law — and in this Court's authority — that Mexico proposes. Mexico's

arguments raise issues, among other things, about the proper scope of this Court's jurisdiction; about the correct interpretation of Article 36; and about whether the Court should, so soon after *LaGrand*, abandon its decision in that case that a proper remedy for a breach of Article 36 is review and reconsideration of a conviction and sentence by means of the receiving State's own choosing. I will conclude the presentation of the United States in this first round by focusing the Court's attention on just three points.

12.2. First, the relief Mexico requests in this case cannot be reconciled with this Court's carefully constructed judgment in *LaGrand*. There, the Court was exceedingly careful to limit its intrusion into the operations of domestic criminal justice systems, which lie at the core of national sovereignty. In specifying a remedy of review and reconsideration, the Court made clear that the choice of means for conducting this review was to be left to the United States. While Mexico claims to have no quarrel with that critical limitation, in fact it seeks to prescribe the means for providing the review itself. And the relief it seeks manifestly would require the Court to abandon entirely the wise limitation it adopted in *LaGrand* and dictate substantive outcomes in particular cases by vacating convictions and sentences and requiring new trials. As I stated this morning, the Court already travelled a long way in *LaGrand* in interpreting the obligations imposed by the Convention. In cases that in their essential attributes are no different from *LaGrand*, Mexico has provided no justification for so quickly abandoning that decision and adopting instead a remedy that requires a specific outcome in a case. Such an approach could well put the Court in the position of dictating results that the existing domestic law of the United States (and other States implementing the Vienna Convention) could not accommodate.

12.3. Secondly, the relief that Mexico seeks rests upon an incorrect and unworkable interpretation of Article 36 (1). Mexico claims that Article 36 requires the provision of consular information immediately upon arrest and that there can be no interrogation after a request for consular notification until a consular officer is present. Recognizing the intolerable effect such a rule would have in halting investigations, Mr. Donovan yesterday modified Mexico's position, suggesting that a receiving State would only have to wait for a "reasonably prompt" response from a consular official. But there could hardly be a more unworkable system than the varying standard of "reasonably prompt" that Mr. Donovan proposed. In determining what is reasonable the police

would have to consider the seriousness of the offence, the circumstances of the particular investigation, and the capacity of the consular offices of the particular sending State. Moreover, for some period of days or weeks, the criminal investigation would still be stymied under this rule, and evidence would be lost as law enforcement authorities were powerless to proceed. No signatory to the Convention understood itself to be undertaking such an obligation upon ratifying the Convention and this Court should reject such a reading.

12.4. Thirdly, Mexico sometimes equates consular assistance with a fundamental due process right of criminal defendants. This, of course, cannot be. Otherwise, Mexico itself would violate the defendant's due process rights if it declined to provide consular assistance, and yet it agrees it may do that in any case. Instead, Mexico argues that consular assistance ensures the protection of generally recognized fundamental rights. Mexico has referred the Court yesterday regularly to three such rights, which it states broadly: the right to due process, to the effective assistance of counsel, and to a fair trial. But as we have shown, the US system of criminal justice already guarantees these rights — in these 52 cases as in all others — during the investigation of the crime, during the trial, and in rigorous and multiple levels of judicial review. Mexico points only to the absence of consular assistance and invites the Court to speculate about the most ominous consequence — a defendant denied a fair trial. It has not, however, identified a single case among those included in its Application where this consequence has materialized. Nor could it. Because in each and every case the courts of the United States protect against the very consequences Mexico claims to fear and provide due process, effective assistance of counsel, and a fair trial.

12.5. Mr. President, Members of the Court, we thank you for your attentiveness to our presentation today. I thank you particularly for your courtesy to the United States and to Mr. Thessin. We will be back with Mr. Thessin in good health Thursday, and we look forward to seeing you again. Thank you very much, Mr. President.

The PRESIDENT: Thank you, Mr. Taft. This statement of Mr. Taft brings to a conclusion the first round of oral arguments for the United States. The second round of oral arguments will begin on Thursday 18 December. On that day, the United Mexican States will present its reply

from 10 a.m. to 12 noon. The United States will present its oral reply on Friday 19 December at 3 p.m. and they will also have a session of two hours. As the Court has no other business before it today, the sitting is closed.

The Court rose at 6.15 p.m.

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