CR 2003/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Thursday 18 December 2003, at 10 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le jeudi 18 décembre 2003, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

as Agents;

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

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

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comme personnel administratif.

The PRESIDENT: Please be seated. The sitting is now open.

The Court meets today to hear the second round of oral argument of the United Mexican States, who will take the floor for two hours this morning.

Thus, I shall now give the floor to Ambassador Gómez-Robledo, the Agent of the United Mexican States.

M. GÓMEZ-ROBLEDO : Merci beaucoup, Monsieur le président.

I. PRÉSENTATION DE L'AFFAIRE

1. Monsieur le président, Madame et Messieurs les Membres de la Cour, c'est un honneur, toujours renouvelé, de pouvoir comparaître devant la Cour en ce deuxième tour des plaidoiries du Mexique en cette instance.

2. Le Mexique a, avant-hier, pris note avec la plus grande attention des plaidoiries des Etats-Unis, au cours desquelles un strident *leitmotiv* a servi de relais continu à un seul argument : *toutes les prétentions du Mexique seraient fausses, quant aux faits et quant aux droits invoqués*. Je ne m'attarderai pas là-dessus; nous aurons l'occasion d'y revenir et la Cour détient les preuves fournies par le Mexique en appui aux faits de cette espèce.

3. Pourtant, les arguments des Etats-Unis avaient pour seuls destinataires vous, Madame et Messieurs les juges, tant ils voulaient obscurcir votre raisonnement et vous acculer dans des retranchements hors de propos. A l'éternel dilemme *«Qui suis-je ?»*, la Cour préférera sans doute la maxime *«Connais-toi toi même !»* et, cela, elle le sait depuis longtemps et peut se passer de leçons à ce sujet.

4. Je doute fort que cette rhétorique ait ébranlé, d'une quelconque manière, la connaissance que vous avez du *ius gentium* et me fait plutôt penser au mot de Talleyrand, quand il disait que «tout ce qui est excessif est sans portée».

5. Une chose est certaine. Les deux Parties sont d'accord sur un point qui n'est pas mineur. L'arrêt *LaGrand* est la référence par excellence pour résoudre les questions de droit international qui nous divisent. Mais, je vous ferai remarquer que ce n'est pas tout à fait pareil de proclamer, d'un côté, les bontés de la jurisprudence de la Cour et de dire, de l'autre, pour reprendre les mots de

M. William Taft, que «This Court went far in *LaGrand*» et «went even further»[1], en intimant l'ordre à «a sovereign State to include a new procedural step within its domestic legal system — namely, a targeted review and reconsideration of a criminal conviction and sentence in certain cases»[2]. Qui plus est, «The United States did not agree with the Court's judgment in *LaGrand*, [even though] it has conformed its conduct to that judgment»[3]. Et pour finir, «The role of the Court in this case is to interpret the Convention. It has no authority to create, revise, or implement a State's domestic law.»[4]

6. Enfin, dans ses conclusions, M. l'agent Taft fit allusion à la façon extrêmement prudente employée par la Cour dans l'arrêt *LaGrand* afin de «limit its intrusion into the operation of domestic criminal justice systems»[5].

7. Comment les Etats-Unis peuvent-ils prétendre qu'ils respectent la jurisprudence *LaGrand*, alors même qu'ils la qualifient de la sorte ? Qu'est-ce à dire ? *LaGrand* oui ou *LaGrand* non ? Ou plutôt, quelle partie de *LaGrand* plait-elle aux Etats-Unis et laquelle est encore contestée ?

8. C'est donc, encore une fois, de vous qu'il s'agit ici, Monsieur le président, car ces arguments allaient tout droit au but de vouloir nier la compétence de la Cour pour connaître de cette affaire.

9. A partir de là, les Etats-Unis développent leurs arguments et concluent que la Cour ne peut aller plus loin. Les Etats-Unis nous laissent penser qu'ils ne seraient pas enclins à se conformer à autre chose qu'à l'arrêt *LaGrand interprété tel que nous l'avons entendu de la part de son agent et de ses conseils*.

10. Avons-nous besoin de rappeler à la Cour que le Mexique l'a saisie précisément parce que les Etats-Unis ne se sont pas conformés à la jurisprudence *LaGrand*, ce que confirment tous leurs arguments qui partent de l'hypothèse que le choix des moyens laissé par la Cour leur donnerait entière liberté ? De fait, il semblerait plutôt que les Etats-Unis n'aient pas adapté leur conduite à la jurisprudence *LaGrand* mais qu'ils aient davantage adapté *LaGrand* à leur conduite.

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[1] Exposé de M. William H. Taft IV, CR 2003/26, par. 1.23.

[2] *Ibid.*, par. 1.4.

[3] *Ibid.*, par. 1.16.

[4] *Ibid.*, par. 1.11.

[5] Exposé de M. William H. Taft IV, CR 2003/27, par. 12.2.

11. Quelques mots concernant les exceptions préliminaires que les Etats-Unis ont soulevées pour la première fois dans leur contre-mémoire. Comme le Mexique vous l'a déjà expliqué, ces exceptions doivent être rejetées, parce que les Etats-Unis ont manqué de les soulever dans les délais prévus au paragraphe 1 de l'article 79 du Règlement de la Cour, selon lequel des exceptions préliminaires doivent être soulevées «dès que possible, et au plus tard trois mois après le dépôt du mémoire». Toute exception à cette règle claire exige le consentement exprès et inéquivoque des parties.

12. Les Etats-Unis, en conséquence, ont tort quand ils suggèrent que l'accord des Parties d'avoir un seul tour de plaidoiries écrites entraînait aussi celui de trancher des exceptions préliminaires lors de l'examen au fond. Le Mexique et les Etats-Unis ont seulement agréé à limiter la procédure écrite *sur le fond* à une seule série de pièces écrites, c'est tout. Ils n'ont certainement pas donné leur assentiment à trancher les exceptions lors de l'examen au fond, en vertu du paragraphe 10 de l'article 79. En fait, et pour être encore plus clair, la question des exceptions préliminaires n'a même pas été soulevée par les Etats-Unis lors de la réunion des Parties avec le président de la Cour concernant la procédure dans cette affaire. En définitive, si les Parties étaient parvenues à un tel accord, la Cour, suivant sa pratique habituelle en la matière, aurait pris note d'un tel accord dans la deuxième ordonnance du 5 février 2003, fixant les délais des pièces écrites[6].

13. J'ajouterai que le fait que les Etats-Unis, lors de la procédure sur les mesures conservatoires, se soient réservé le droit de présenter des exceptions préliminaires ne les dispensait pas du strict respect des obligations procédurales de l'article 79 du Règlement de la Cour. Le Mexique demande donc respectueusement à la Cour, dans l'intérêt d'une bonne administration de la justice, de bien vouloir appliquer son Règlement dans toute sa rigueur et de rejeter ainsi les exceptions des Etats-Unis.

14. Monsieur le président, comme ils l'ont plaidé dans les affaires *Breard* et *LaGrand*, les Etats-Unis persistent à vouloir faire dire à la Cour que les demandes du Mexique ne sont pas

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[6] Voir, par exemple, *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, ordonnance du 13 décembre 2000 :

> «Considérant que, au cours d'une réunion que le président de la Cour a tenue avec les agents des Parties le 8 décembre 2000, celles-ci sont convenues que les pièces de procédure comprendraient en l'espèce, dans l'ordre, un mémoire de la République démocratique du Congo et un contre-mémoire du Royaume de Belgique, et que ces pièces traiteraient à la fois des questions de compétence et de recevabilité et du fond.»

recevables. D'après Mme le professeur Zoller, le Mexique invite la Cour «à devenir la cour suprême d'un Etat mondial en violation absolue de ce que la Cour avait dit de l'Organisation des Nations Unies...», et «une super Cour suprême des Etats-Unis»[7]. Ces propos sont à l'exact opposé de ce que le Mexique cherche en cette instance. Les principes de base du droit international ne nous sont pas inconnus.

15. Reprenant, si vous le voulez bien, les propres mots du conseil des Etats-Unis, ce sont les arguments du professeur Zoller qui «se détache[nt] du champ de l'argumentaire juridique et se projette[nt] dans une fantaisie juridique»[8].

16. Il ne fait pas de doute qu'en l'espèce un différend juridique existe entre le Mexique et les Etats-Unis quant à l'interprétation et l'application de la convention de Vienne et sur les conséquences des violations de cette convention. Ce différend fait appel, pour être résolu, à l'application pure et simple du droit international positif. Rien de plus, mais rien de moins non plus.

17. La Cour a rejeté de semblables arguments dans des affaires précédentes, en particulier les affaires *Breard* et *LaGrand*. Dans cette dernière, la Cour a dit qu'elle avait été priée

> «exclusivement ... d'appliquer les règles pertinentes de droit international aux questions litigieuses opposant les Parties à l'instance. L'exercice de cette fonction, expressément prévue par l'article 38 de son Statut, ne fait pas de cette Cour une juridiction en appel sur des questions pénales soumises aux tribunaux internes.»[9]

18. Le fait que le Mexique demande la réparation, dans le respect absolu du droit international, pour les violations commises à la convention de Vienne, ne change pas la nature du différend, ni la fonction de cette Cour. Nous demandons donc que la Cour ne retienne pas cet argument des Etats-Unis.

19. Cela est aussi vrai en ce qui concerne les objections des Etats-Unis quant à la recevabilité de nos autres demandes. Je m'occuperai en particulier de la question de l'épuisement des recours internes, car elle fut mentionnée à maintes reprises par les Etats-Unis. Mais avant de poursuivre, je dois signaler que cette affaire n'a pas trait uniquement aux demandes du Mexique pour les

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[7] Exposé du professeur Elisabeth Zoller, CR 2003/26, par. 2.9.

[8] Exposé de M. S. Mathias, CR 2003/27, par. 11.11.

[9] *LaGrand*, par. 52.

violations des droits de ses ressortissants, mais aussi pour ce qui est des violations des obligations qu'avaient les Etats-Unis vis-à-vis du Mexique conformément à la convention de Vienne. Dans ce dernier cas, la règle de l'épuisement des recours internes n'est pas pertinente.

20. Les Etats-Unis prétendent, du fait que certaines juridictions internes sont encore saisies d'un nombre de cas qui font l'objet de cette instance, que la condition de l'épuisement des recours internes n'a pas été respectée. Chacun sait que cette règle ne se réfère pas à la simple existence formelle de tels recours, comme l'a dit d'ailleurs, et très bien, la Commission du droit international. («Le simple fait que le droit interne d'un Etat prévoit sur le papier des recours n'oblige pas à utiliser ces recours dans chaque cas.»[10])

21. Dans cette instance, le Mexique a fourni la preuve que les juridictions internes des Etats-Unis appliquent des règles de droit les empêchant «d'attacher des conséquences juridiques au fait» de la violation du paragraphe 1 de l'article 36 et qui font obstacle à «la pleine réalisations des fins pour lesquels les droits sont accordés en vertu du présent article».

22. Ces mêmes cours ne permettent pas de faire valoir les violations à l'article 36 quand le prévenu n'a appris qu'il détenait ces droits qu'après la conclusion du jugement, c'est-à-dire, la majorité des cas de la présente affaire. Dans ce contexte, il est clair que les recours internes ne sont pas efficaces. (Et comme le faisait remarquer le juge Schwebel, «local remedies need not to be exhausted where there are no effective remedies to exhaust»[11].)

23. Monsieur le président, je suis sûr que la Cour n'a pas manqué de remarquer que, dans leur plaidoirie, les Etats-Unis ont soigneusement évité une quelconque allusion au caractère extrêmement grave des cinquante-deux cas de cette instance. M. Philbin, lorsqu'il nous a décrit le système de justice pénale des Etats-Unis, n'a pas prononcé les mots «peine de mort» ou «peine capitale». Cela ne nous surprend guère, car, en effet, la nature des peines alourdit considérablement la gravité de cette affaire. Encore une fois, il ne s'agit pas ici de mettre en cause la peine de mort, comme je l'ai rappelé une nouvelle fois lundi dernier. Mais tout comme le Paraguay, et puis l'Allemagne, nous avons saisi la Cour, poussés par l'obligation première de tout Etat souverain de venir en aide à ses ressortissants, dans l'exercice le plus classique de sa

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[10] CDI, articles sur la responsabilité des Etats, commentaire à l'article 44.

[11] *Elettronica Sicula S.p.A. (ELSI), C.I.J. Recueil 1989*, opinion dissidente du juge Schwebel, p. 94.

compétence personnelle. Cette affaire n'est pas, comme le suggère l'agent des Etats-Unis au sujet de la demande en réparation du Mexique, une affaire qui ait trait à «certain types of situations, such as the return of property»[12]. C'est le sort de cinquante-deux personnes qui en dépend.

24. Les Etats-Unis tentent de vous faire croire qu'une violation manifeste des obligations de la convention — à laquelle les Etats-Unis ont volontairement adhéré — et la détermination de la réparation appropriée qui s'ensuit, seraient en réalité quelque chose qui ne peut être résolu qu'en faisant référence au système pénal des Etats-Unis, comme l'a avancé son conseil[13].

25. Les Etats-Unis dénaturent l'affaire portée devant cette Cour et tentent de précipiter la Cour dans des conclusions qui ont pour base des arguments spécieux. Parmi ceux-là, on peut citer les suivants :

— Premièrement, les Etats-Unis utilisent le principe de la *bona fide* et leur souveraineté pour justifier les limites qu'ils posent aux réparations qui nous sont dues[14]. N'est-il pas évident que les violations au droit international donnent lieu à des réparations qui se doivent d'être efficaces, donc suivies d'effets ?

— Deuxièmement, un rapide examen du système judiciaire des Etats-Unis nous montre à quel point les Etats-Unis ne prennent pas au sérieux leurs obligations internationales et renforce ce sentiment de fatalité évoqué par M[e] Birmingham d'après lequel les Etats-Unis «aimeraient nous faire croire que leur impossibilité de remédier aux violations de la convention de Vienne est l'inévitable conséquence de leurs lois internes et de leur structure fédérale, toujours cette fatalité»[15].

— Troisièmement, l'analyse savante de la procédure criminelle comparative du professeur Weigend est, au demeurant, sans rapport avec la présente affaire[16].

26. Monsieur le président, ceci conclut cette première partie de la plaidoirie du Mexique et je vous demande d'appeler à la barre M[e] Sandra Babcock.

Je vous remercie, Monsieur le président.

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[12] Exposé de M. William H. Taft IV, CR 2003/26, par. 1.21.

[13] Exposé de M. Thomas Weigend, CR 2003/27, par. 9.21.

[14] Exposé de M. William H. Taft, CR 2003/26, par. 1.111.

[15] Exposé de Mme Katherine Birmingham Wilmore, CR 2003/24, par. 256.

[16] Exposé de M. Thomas Weigend, CR 2003/27, par. 9.21.

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

Ms BABCOCK: Mr. President, Members of the Court, good morning.

II. FACTS, CAUSATION AND CLEMENCY

A. Introduction

27. My presentation this morning will focus on three areas. First, I will establish that Mexico has met its burden of proof with regard to the violations of Article 36 (1). Second, I will respond to the United States claims that in the cases of the 52 nationals, there is no causal link between the violation of Article 36 and the outcome of their capital proceedings, because of the procedural protections already in place in the United States criminal justice system. Finally, I will explain why, using the definition of review and reconsideration provided by Professor Zoller in the United States pleadings on Tuesday, that clemency review cannot satisfy this Court's Judgment in *LaGrand*.

B. Violations of Article 36 (1) *(b)*

28. Mr. President, Mexico has the burden of proof on two issues: nationality, and the existence of violations in each of the 52 cases. On Monday I explained in detail the manner in which Mexico has proven the Mexican nationality of each of the 52 individuals before this Court. The United States has not presented any evidence to refute this showing.

29. Mexico has likewise established that none of the 52 nationals were notified, without delay, of their rights to consular notification and access. On Tuesday, Mr. Sandage tried to argue that "in a number" of cases, Mexico failed to prove the existence of a violation. But the only case he could point to was that of Arturo Juárez Suárez. And you will remember that in this case, a court of competent jurisdiction in the United States determined that his rights to consular notification *were* violated. In short, we heard nothing new yesterday from the United States on this point. Mexico has met its burden of proof on the two required elements, and we ask the Court to conclude that the competent authorities violated Article 36 (1) *(b)* in the 52 cases by failing to notify each individual, without delay, of his right to consular notification and access.

30. The United States argues that Mexico should also be required to prove a host of additional facts, including the state of mind of the competent authorities who arrested the

52 nationals, the state of mind of the detainee at the time of his arrest, the state of mind of the jail guards, prison officials, prosecutors, and other competent authorities, and finally, the lack of United States nationality for each of the nationals and their parents. The United States further argues that Mexico should meet a heightened standard of proof in this case.

31. We disagree on both points. First, the *Corfu Channel* case does not support the United States arguments as to burden of proof[17]. Only disputes involving exceptionally grave acts, such as the use of armed force, the mistreatment of prisoners of war, and intentional violations of the territorial sovereignty of another State — as this Court is well aware —, require proof by conclusive evidence. The present case, by contrast, requires the Court to determine the existence of breaches of international law based on ordinary principles of State responsibility. The possibility that these breaches would implicate individual criminal proceedings does not change the international law rules to be applied or transform the burden of proof[18].

32. As to whether the Mexican nationals themselves would have requested consular assistance if they had been notified, it is irrelevant. The Court already addressed this issue squarely in paragraph 74 of the *LaGrand* Judgment, which I will discuss in more detail in just a moment. Nonetheless, Mexico has provided declarations from 42 nationals, in which they affirm that they *would* have exercised their right to seek the consulate's assistance, had they been so informed.

33. As for dual nationality and the remaining questions, they are all affirmative defences to the violations of Article 36. The United States now concedes that it bears the burden of proof on dual nationality, but alleges that Mexico has the "burden of evidence" which must be satisfied before the United States can discharge its burden of proof. With all due respect, this argument is utterly nonsensical. Dual nationality is not an element of any claim before this Court. Even if Mexico, and not the United States, had *exclusive* control over documents establishing United States nationality, Mexico does not bear the burden of resolving the evidentiary basis for any affirmative defence the United States chooses to raise.

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[17] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 18.

[18] *Eritrea-Ethiopia Claims Commission (EECC): Partial Awards on Prisoners of War between the State of Eritrea and the Federal Democratic Republic of Ethiopia: Ethiopia's Claim 4; Eritrea's Claim* 17 (1 July 2003), para. 38 (discussing the possible implication of individual's criminal liability).

34. But in fact, it *is* the United States, not Mexico, which has access to the documents and witnesses necessary to carry its burden on its affirmative defences. Let's look at what the United States presented in *LaGrand*, by way of illustration. In *LaGrand*, the United States interviewed law enforcement agents, prison officials, and others, and presented this Court with a detailed report summarizing the results. The United States has reproduced this report in these proceedings, and attached it as Annex 23, Exhibit 79, to the Counter-Memorial. Here, the United States has provided no evidence in support of its claims.

35. In the ten months this case has been pending, the United States has had not only the vast resources of the federal government at its disposal, but it has called upon state and federal prosecutors around the country to assist in its investigation of these cases. Nevertheless, the United States complains that it has not had time to interview police officers and other witnesses in order to refute Mexico's showing. The Court should not entertain these excuses, for they are unacceptable. If the United States Government had just made a telephone call to any of the police departments involved in these cases, there is no question that they would have co-operated fully. If no declarations from those witnesses have been attached to the United States pleadings, it is either because these witnesses could not provide helpful information, or the United States simply did not make the effort to contact them.

C. Violations of Article 36 (1) *(c)*

36. As for the facts relating to the violations of Article 36 (1) *(c)*, the United States has not challenged Mexico's proof as to when its consular officials learned of each individual's detention. Mr. Donovan will address the legal consequences of these undisputed facts.

37. To summarize, Mr. President, Mexico has provided ample proof of both the Mexican nationality of the 52 individuals, and the existence of the violations.

D. Ongoing violations of Article 36 (1)

38. I now turn to the evidence that violations of Article 36 remain widespread in the United States, even after *LaGrand*. The United States dismisses Mexico's showing of 102 continuing violations as statistically insignificant, considering the "thousands of cases of Mexican nationals

accused of serious crimes moving through the criminal justice systems of the United States every day".

39. In its Memorial, however, Mexico made clear that its survey was limited to *serious* felony offences that might potentially result in death sentences or lengthy terms of imprisonment. Had Mexico undertaken an investigation of all criminal cases in which its nationals were deprived of their Article 36 rights, it would have documented thousands of violations.

40. The United States has not seriously challenged Mexico's proof of these violations, particularly in the 46 cases I mentioned on Monday. Based on this group of cases alone, there is ample evidence that the authorities continue to violate Article 36, even in cases involving the potential imposition of the death penalty.

E. Causation

41. Mr. President, I would now like to turn to the United States argument that there is no causal link between the violations of Article 36 (1) *(b)*, and the remedies Mexico seeks.

42. In its pleadings on Tuesday, the United States tried to persuade you that the right to seek consular assistance is an inconsequential procedural formality that has no real effect on the outcome of death penalty proceedings in the United States. To this end, Mr. Philbin stood before you and recited a laundry list of procedural rights to which defendants are entitled in the United States criminal justice system. The United States has completely missed the point. Mexico does not claim that foreign nationals can never receive a fair trial in the United States, nor does Mexico stand in judgment of the United States criminal justice system. Rather, Mexico has consistently stated that its nationals suffer disadvantages of culture and language that impede their ability to understand and exercise their rights, and that consular protection can remedy this inherent inequality. Mexico has also emphasized, by reference to the cases named in these proceedings, the particular importance of consular protection in death penalty proceedings — a point the United States has repeatedly glossed over.

43. Before I address the causation arguments on their merits, allow me to make a preliminary observation regarding the burden of proof on the issue of causation. Mexico has demonstrated that the United States authorities violated their international legal obligations in the 52 cases. It should

not fall to Mexico, as the injured party, to prove that the outcome of the proceedings would have been different if each national had been timely notified of his rights to seek consular assistance. Fairness demands that the United States, as the violator, bear the burden of proving the absence of prejudice.

44. Nevertheless, review of the record before this Court reveals ample evidence of prejudice. In each of the 52 death penalty cases before this Court, the United States failed to provide timely notification of the defendants' rights to consular notification and access. Given the finality of the death penalty, and the need to ensure strict adherence with procedural fairness in capital proceedings, Mexico believes that all of the Article 36 (1) *(b)* violations were inherently prejudicial and require redress. But to delve a bit deeper on this point, I will describe the 52 cases before the Court by reference to the *LaGrand* Judgment, and by examining the point at which Mexico learned of its nationals' detentions.

F. Twenty-nine cases cannot be distinguished from *LaGrand*

45. In 29 of the 52 cases before this Court, Mexico did not learn of the detention of its nationals until after the jury had returned a death sentence[19]. The United States has not disputed these facts. For your convenience, we have provided you with a list of the 29 cases in your folders. The prejudice these 29 individuals have suffered is cumulative and, in light of this Court's decision in *LaGrand*, undeniable.

46. If you recall, each of the parties in *LaGrand* made arguments as to causation. Germany argued that if it had been aware of the LaGrands' detention, it would have been able to present persuasive mitigating evidence that likely would have saved the lives of the two brothers. In response, the United States argued that Germany's assistance would have had no effect on the outcome of the cases. In support of its argument, the United States attempted to show that in other capital proceedings, Germany had failed to provide significant consular assistance. Specifically, it

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

accused Germany of failing to provide lawyers to another German national facing the death penalty in Arizona[20], just as the United States accused Mexico on Tuesday of failing to replace lawyers who represented some of the nationals in these proceedings.

47. In its Judgment, however, the Court rejected the United States arguments, and determined that Germany was not required to establish a particularized showing of causation and prejudice. In paragraph 74 of the Judgment, the Court explained:

> "when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen."[21]

48. In the 29 cases here, as in *LaGrand*, there can be no question that Mexico and its nationals were prevented from exercising their Article 36 rights, due to the United States breach of its obligations. As in *LaGrand*, consular officials were unable to gather mitigating evidence that could have had an impact on the trial, were prevented from participating in the plea bargaining process, had no opportunity to advise the defendants of their rights prior to interrogation, and were prevented even from attending the trials.

49. And, as in *LaGrand*, it is important that we provide you with some context to frame the causation analysis in these 29 cases. We have already spoken of plea bargaining and interrogations, but I would now like to describe the ways in which consular assistance can affect the subjective calculus by which juries decide whether to impose a death sentence.

50. Death penalty trials are divided into two phases: one in which the jury evaluates the guilt or innocence of the defendant, and a second in which the jury assesses punishment. Just as a United States prosecutor has wide discretion to refrain from seeking the death penalty, a jury has wide latitude in deciding the appropriate sentence. At the penalty phase of a death penalty trial, prosecutors will try to persuade the jury to sentence the defendant to death by presenting what is called "aggravating evidence". The defence, in turn, presents "mitigating" evidence, which I

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[20] *LaGrand*, CR 2000/28, para. 2.53.

[21] *LaGrand*, p. 492, para. 74.

described earlier this week. Although the jury's life or death decision is guided by instructions from the court, a juror can base his or her decision on any number of factors, from the evidence that is presented by the prosecutor or the defence, to highly subjective assessments about the defendant's appearance. Needless to say, it is more difficult for jurors to relate to a defendant who does not look like they do and who does not speak their language.

51. It is difficult for me to convey to you the atmosphere of a capital murder trial, or to find the words to describe the infinite variety of factors that can affect the jury's assessment of the appropriate penalty. So if you will indulge me for a moment in another hypothetical exercise, I would ask you to pretend for a moment that you are all jurors in a United States courtroom sitting in judgment of a Mexican national, who has just been convicted of a terrible murder. With his permission, we will pretend that Ambassador Gómez-Robledo is the convicted national, that I am his lawyer, and that Mr. Mathias is the prosecutor. You have just heard Mr. Mathias give a thundering, powerful closing argument, in which he described the gruesome details of the crime, and recalled the suffering of the victims. He has urged you to impose the ultimate penalty of death. I have argued, in turn, that you should spare my client's life. You have heard evidence that the defendant committed other crimes in his past, but you have also heard that he is married and has two children, who will be left without a father if he is executed. How will you decide? How will you determine whether this defendant is a monster who deserves to be exterminated from the human race, or a deeply flawed human being who committed a terrible crime, but is capable of redemption?

52. You receive instructions from the judge that you should consider all mitigating evidence. But you have heard only from the defendant's siblings. And after all, the victim had a family, too. What else do you have upon which to base your judgment? Do you look at whether the defendant has people in the courtroom who love and respect him? Do you look at whether he interacts with his attorney on a human level? Would it change your view if you heard testimony from the defendant's mother, who lives in Mexico, and who says that when the defendant was a child, his father beat him to the point of unconsciousness? But assume that the defendant's mother lives in rural Mexico, and that I have not been able to locate her. I cannot tell you then, without a witness,

about the father's abuse. Will her absence make the difference between life and death? How do you decide the value of a human life?

53. When you think about it this way, it's easy to see how difficult it is to say how, precisely, the involvement of Mexican consular officers would have changed the outcome of any of these 29 cases. But it is simply ludicrous to suggest that because a defendant received all of his due process rights, that the involvement of consular officials would have had no effect at all on the penalty phase of a capital murder trial. We know that Mexican consular officials routinely obtain visas, make travel plans, and provide escorts to family members from rural Mexico so that they can testify in support of the defence. And it is certainly no exaggeration to say that the testimony of a single witness can provide the critical information that the jury needs to impose a life sentence. In the vast majority of United States jurisdictions with capital punishment, the vote of a single juror is enough to prevent the imposition of a death sentence[22]. Even if 11 out of 12 jurors want to sentence the defendant to death, one juror can override them all.

G. The remaining 23 cases

54. Let me turn to the 23 remaining cases, where Mexico learned of its nationals' detention before a death sentence was imposed, through means other than notification by the competent US authorities[23]. I will address them in order of the magnitude of the deprivations. In five cases, Mexico learned of the nationals' detention on the eve of trial, or after the death penalty trials had already begun. In 15 cases, Mexico learned of the detentions after the police had obtained an incriminating statement, or the window of opportunity had passed for Mexico to influence the prosecutor's decision to seek the death penalty early in the proceedings. There are only three cases in which consular officials learned of the nationals' detention shortly after their arrest, and where the defendants did not give statements in response to custodial interrogation. These cases also are listed in your folders.

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[22]See *Jones* v. *United States*, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) (citing Acker & Lanier, Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform, 32 Crim. L. Bull. 134, 169 (1996); see also *Sattazahn* v. *Pennsylvania*, 537 U.S. 101 (2003); *State* v. *Hochstein*, 632 N.W.2d 273 (2001).

[23]Benavides Figueroa, Vicente; Covarrubias Sanchez; Hoyos; Juarez Suarez; Fuentes Martinez; Mendoza Garcia; Ramirez Villa; Salcido Bojorquez; Sanchez Ramirez; Verano Cruz; Zamudio Jiminez; Gomez; Hernández Llanas, Ramiro; Maldonado; Moreno Ramos; Ramirez Cardenas; Rocha Diaz; Tamayo; Solache Romero; Camargo Ojeda; Reyes Camarena; Rocha Diaz; Esquivel Barrera; Manriquez Jaquez, Abelino.

55. In these 23 cases, as in the 29 I already discussed, there is a very real prospect that consular assistance would have changed the outcome of the proceedings. As you have already heard, consular assistance can have a critical impact at the earliest stages of a death penalty case — both before interrogation, and before a prosecutor has made an irrevocable decision to seek the death penalty. Once these events have passed, a national who has been deprived of his Article 36 rights has already suffered incalculable prejudice.

H. In five cases, Mexico learned of the detention of its national either during trial or on the eve of trial[24]

56. You have also heard how consular officers can and do raise the quality of legal representation in capital cases. We explained that in addition to seeking plea bargains, Mexican consular officers routinely assist in gathering mitigating evidence to present at the penalty phase of trial. It takes time, however, to gather records and locate witnesses in Mexico. Similarly, consular officials cannot hope to affect the quality of legal representation if they learn of their national's detention on the *eve* of his trial. Yet in five cases, Mexico learned of the detention of its nationals either during trial or on the eve of trial, far too late to provide assistance that could affect the quality of the defence.

57. The case of Virgilio Maldonado illustrates how late notification, even if it takes place before a death sentence is imposed, prevents Mexico from providing consular assistance and prejudices the rights of its nationals. Mr. Maldonado, who has the cognitive abilities of a seven-year old child, was arrested in April 1997. He confessed in response to interrogation. Consular officers learned of his detention in August 1997(?), nearly one year after his arrest, and after trial had already begun. The consulate informed Mr. Maldonado's lawyers about the Vienna Convention violation, but by that time it was too late for the lawyers to file a motion to suppress Mr. Maldonado's confession. When the lawyers tried to ask the interrogating officer, who was testifying in front of the jury, whether he had advised Mr. Maldonado of his Article 36 rights, the prosecution objected. They said, "[T]he Geneva Convention . . . is not something that's commonly

[24]Martinez Fuentes, Omar; Maldonado, Virgilio; Moreno Ramos, Roberto; Camargo Ojeda, Rafael; and Tamayo, Edgar Arias.

known to everyone, which is not required by Texas law. Apart from that, irrelevant. Not required by Texas law in order to make this confession admissible." The judge upheld the objection.

58. The consulate was unable to help defence counsel identify Mr. Maldonado's mental retardation before trial and, as a result, the jury never heard about it. In post-conviction proceedings, however, Mexico alerted Mr. Maldonado's lawyers to his mental impairments, and identified competent bilingual experts and investigators. With the consulate's assistance, the defence discovered that Mr. Maldonado was chronically malnourished as a child due to parental neglect, and was raised by a mother who was a prostitute. He was unable to finish even one year of school in Mexico, because of his mental retardation. There was simply no time to develop this evidence prior to trial.

59. On appeal, the reviewing court found that Mr. Maldonado's lawyers had failed to file a motion to suppress his confession, and that the Article 36 claim was therefore procedurally defaulted — this was a review that occurred in post-conviction proceedings. In the alternative, the court found that Article 36 gave rise to no individual rights, that Mr. Maldonado was not harmed by the violation and that in any event suppression was not an available remedy under the Vienna Convention.

I. In 15 additional cases, Mexico learned of the detention of its national only after the national had given a statement in response to interrogation which was used at trial[25]

60. In 15 cases, Mexico only learned of the detention of its national after he had given a statement in response to interrogation, which was used against him at trial. In these cases, as well, Mexico was prevented from assisting in plea negotiations at the earliest stages of the proceedings.

61. As I mentioned earlier this week, foreign nationals face special barriers that impede their ability to understand their legal rights in the interrogation room. In response, Mr. Philbin disparaged Mexico's assertions that its nationals often do not understand the *Miranda* warnings, stating that "no judge in the United States has accepted such conclusions"[26]. This is incorrect.

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[25]Hoyos, Jaime Armando; Mendoza Garcia, Martin; Ramirez Villa, Juan de Dios; Salcido Boroquez, Ramon; Sanchez Ramirez, Juan Ramon; Verano Cruz, Tomas; Hernandez Llanas, Ramiro; Ramirez Cardenas, Ruben; Rocha Diaz, Felix; Solache Romero, Gabriel; Reyes Camarena, Horacio Alberto; Juarez Suarez, Arturo; Benavides Figueroa, Vicente; Manriquez Jaquez, Avelino; Gomez, Ignacio.

[26]CR 2003/26, para. 3.9 (Philbin).

Several courts and commentators have found that *Miranda* warnings can be difficult for foreign nationals to understand in the absence of a qualified interpreter[27]. Indeed, the United States included several such cases in its annexes to its Counter-Memorial. Mexico has never claimed that the *Miranda* warnings themselves are improper; quite the contrary. Mexico's point is that foreign nationals are inherently disadvantaged in their ability to understand them, a point that is fully explained in the declaration of Dr. Dueñas Gonzalez, attached as Annex 4 to Mexico's Memorial.

62. Mr. Philbin also stated that "if an interpreter cannot be located, the proceedings — including questioning the defendant — are delayed until an interpreter is present"[28]. This, too, is incorrect. Only two states — Minnesota, by statute, and Delaware, by court order — require that a neutral, qualified interpreter be provided during interrogation. Other states routinely rely on police officers to serve this purpose, and there is no requirement that they pass any type of language proficiency examination before they may serve as unofficial "interpreters". This is precisely what happened in the case of Gabriel Solache, one of the nationals in these proceedings, who did not speak English at the time of his arrest, but nevertheless signed a confession that was written in English and translated for him by a police officer who was not a certified interpreter.

63. Even if a defendant gives a statement that is exculpatory, that statement can be used against him at the penalty phase of his trial. On Tuesday, Mr. Philbin mentioned the case of Ramiro Hernandez Llanas, who confessed in response to police questioning. Mr. Philbin expressed scepticism that his confession would have had any impact on his trial, focusing on the overwhelming evidence of his guilt. What Mr. Philbin did not tell you is that the prosecution introduced Mr. Hernandez Llanas's statement at the penalty phase of his trial, and that the jury considered those statements in deciding whether to impose a death sentence. And Mr. Hernandez Llanas, who also suffers from mental retardation, probably because he grew up on a toxic waste dump in Nuevo Laredo, could certainly have benefited from the assistance of the consulate prior to interrogation.

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[27]See, e.g., *United States* v. *Short*, 720 F.2d 464, 469 (6th Cir. 1986) (noting that German defendant, whose English was limited, "apparently had no knowledge of the American criminal justice system" and had not knowingly and voluntarily waived her legal rights at the time of interrogation); *Reyes-Perez* v. *State*, 45 S.W.3d 312, 319-320 (Tex. App. 2001).

[28]CR 2003/26, para. 3.17 (Philbin).

J. In three cases, Mexico learned of the detention shortly after the arrest

64. In three cases where nationals did not provide an incriminating statement in response to custodial interrogation, Mexico learned of their detention shortly after arrest. But, as I explained on Monday, the decision to seek the death penalty is usually made early in the course of a death penalty case. Mr. Uribe also told you that Mexico has had substantial success in convincing prosecutors to forego the pursuit of potential death sentences. This is particularly true where the detained national has no criminal record, as in the case of Samuel Zamudio.

65. Mr. President, in *Artico* v. *Italy*, the European Court held that it was sufficient to establish a plausible link between a due process violation and the remedy sought, in order to justify reparations — this is a case that Mr. Donovan referred to on Monday. Here, there is more than a plausible link between the violation of Article 36 and the outcome of the 52 individual capital murder proceedings. There is good reason to believe that timely consular notification would have affected the outcome of all of the cases. And this is sufficient, as Mr. Donovan explained, to entitle Mexico to the remedy it seeks.

K. Clemency

66. I turn now to clemency. On Tuesday, Professor Zoller conceded that "review and reconsideration" must include review of questions of law, not merely questions of fact. In her words, the term "review," or "*revision"* in French, relates generally to questions of law, not questions of fact. As an example, she said, "review" would encompass an analysis of whether the verdict is based on law, and whether that law conforms to the constitution of the State[29].

67. Mr. President, Members of the Court, this is precisely why clemency could never constitute "review and reconsideration". Clemency boards and governors are not required to have any legal training whatsoever. They are not judges, they do not adhere to rules of evidence, they do not apply legal precedents, and they do not routinely determine whether a conviction and sentence was reached in conformity with state and federal law. The California and Texas governors, for example, have repeatedly stated that they will not review legal errors. The Texas Board of Pardons and Paroles typically considers only whether the defendant is innocent in

[29]CR 2003/27, para. 10.28.

deciding whether to commute his death sentence to life imprisonment. As I stated on Monday — and I will repeat again — a clemency board could lawfully adopt a policy under which they would never consider legal errors, including violations of Article 36. This policy would be immune from judicial review.

68. The United States insists on characterizing clemency as part of the judicial process, but this is just not true. In a 1998 opinion regarding the clemency process, the Chief Justice of the United States Supreme Court observed that "the heart of executive clemency . . . is to grant clemency as a matter of grace"[30]. Justice Rehnquist continued, "A death row inmate's petition for clemency is . . . a unilateral hope. The defendant in effect accepts the *finality* of the death sentence for purposes of *adjudication*, and appeals for clemency as a matter of *grace*."[31] The petitioner in that case had asked the Supreme Court to hold that clemency was an integral part of Ohio's system for adjudicating the guilt or innocence of the defendant, and the petitioner argued that he was therefore entitled to due process protection in clemency proceedings. The Court rejected his arguments. And Justice Rehnquist concluded, "Clemency proceedings are not part of the trial — or even of the adjudicatory process."[32]

69. Let me now address the United States contention that death sentences have been commuted in six out of seven cases involving Article 36 violations in the post-*LaGrand* world. This, too, is an incorrect statement. There have been only five commutations, and each and every one was granted by the Governor of Illinois as part of his decision to commute the death sentences of every person on that state's death row, a total of 167 death sentences were commuted. Governor Ryan granted clemency to even those prisoners who had not asked for it. Each of the five foreign nationals would have received clemency whether Article 36 had been violated or not, or even if they had not applied for clemency at all.

70. In the case of Mr. Valdez, by contrast, the final clemency decision was made by the Governor of Oklahoma, a staunch supporter of capital punishment. Governor Keating, like the monarchs who once held the power to pardon their subjects, granted Mexico an audience. We

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[30] *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 280 (1998).

[31] *Id.* at 282 (emphasis in original).

[32] *Id.* at 284.

begged him to follow the recommendation of the Oklahoma Pardons Board — but as is his unfettered right, he refused.

71. Which leaves us with just one case out of the seven to consider. In the case of Javier Suarez Medina, Mexico developed significant new mitigating evidence previously unheard by any court, just as it did in the Valdez case. Mexico presented this new information to the Texas Board of Pardons and Paroles, just as it did for Mr. Valdez in Oklahoma. President Fox called the Texas Governor, just as he had called Governor Keating. But, the outcomes in the process in these two cases could not have been more different. Unlike Oklahoma, Texas clemency authorities did not even respond to Mr. Suarez Medina's request for a hearing. The chairman of the Board granted an audience to Mexican consular officials, and claimed to have circulated information to each Board member regarding the violation of the Vienna Convention, but you should not assume from this that the Board members considered the information. They did not meet to discuss the case, and there is simply no way of knowing what weight each member of the Texas clemency board gave to Mexico's submissions, or even if it was considered. Although Mr. Taft had encouraged the Board to provide reasons for their decision to deny clemency, they did not. In other words, there is no way of determining what "legal effect", if any, was given to the Article 36 violation. The members of the Board voted 17-0 to deny clemency, and voted 17-1 to deny a reprieve. The United States characterized this, in its Counter-Memorial, as a "divided vote".

72. In this regard, it is helpful to bear in mind the observations of a federal district judge in Texas, who had the opportunity to review the Texas Board's procedures and to hear testimony from the Board members in another case involving a Canadian national who was petitioning for clemency. The court noted in that case,

> "It is abundantly clear that the Texas clemency procedure is extremely poor and certainly minimal. Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system."[33]

73. The court went on to note that a flip of the coin would provide a more merciful means of deciding clemency applications than the Board's unwavering denial of such requests[34].

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[33] *Faulder* v. *Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, slip op. at 15 (W.D. Tex. December 28, 1998) (Counter-Memorial, Ann. 23, Exhibit 144, at A.2068).

[34] *Id.* at 16.

74. Finally, allow me to address the United States contention that its focus on clemency proceedings represents a new procedural step within its domestic legal system and that it has conscientiously adapted or conformed its conduct to the Court's judgment in *LaGrand.* In fact, the United States interventions with clemency authorities began long before the *LaGrand* Judgment. And in at least one case prior to *LaGrand*, the United States spent considerably more time and energy in an attempt to convince a clemency board to commute a death sentence.

75. In November 1998, Canadian national Stanley Faulder faced imminent execution in Texas. Responding to interventions by Canada, Secretary of State Madeleine Albright wrote personally to both the Governor of Texas and the chairman of the Pardons Board. Secretary Albright carefully outlined the significance of Article 36 for the protection of United States citizens abroad, explained that Texas had unquestionably violated Mr. Faulder's consular rights and stressed the potential effect of that violation on the fairness of the criminal proceedings in his case. She included an 11-page legal analysis of the Faulder case from the perspective of the Vienna Convention violation. Her letter was included as an Annex to Mexico's Memorial. She offered to send a State Department expert to meet with and advise the Board. And finally, she suggested that the violation of Article 36 in the Faulder case was so troubling that it might merit clemency. Despite her intervention, the Board denied clemency and Mr. Faulder was executed.

76. Let us now turn the clock forward four years, to August 2002. Mexican national Javier Suarez Medina faced imminent execution in Texas. In response to interventions by Mexico, the State Department Legal Adviser sent a letter to Texas clemency authorities. The letter failed to provide a detailed legal analysis of the possible repercussions of the violation in that case, unlike the letter sent by Madeline Albright in the Faulder case. No offer was made to send State Department officials to Texas in order to brief the Board on the issue, nor was it even suggested that clemency would be the appropriate remedy. These are all matters of public record, supported by the annexes of both parties.

77. Now while we do not dispute that the State Department has written these letters, what Mexico believes is that by claiming "review and reconsideration" is accomplished by clemency review, what the United States has done, as Ambassador Gómez-Robledo observed, is "not to conform its conduct to *LaGrand*" — but rather to conform *LaGrand* to its conduct.

78. Mr. President, this concludes my presentation. I ask you to call on Mr. Donovan.

The PRESIDENT: Thank you, Ms Babcock. I now call on Mr. Donovan.

Mr. DONOVAN: Thank you, Mr. President.

III. INTERPRETATION AND APPLICATION OF ARTICLE 36 (1) AND ARTICLE 36 (2)

79. I would like to address the requirements of Article 36 (1) and (2) and then make two points about remedies before Professor Dupuy addresses that topic.

A. The 52 cases

80. Ms Brown referred to the definition of "without delay" as the "new issue" in this case[35]. As she said, the Court didn't need to resolve that issue in *LaGrand*. Ms Brown's remark reinforces what I said on Monday, which is that this Court can grant Mexico relief in either all or virtually all of the 52 cases on the basis of *LaGrand* and the United States own interpretation of Article 36[36].

81. Now Ms Babcock has just explained why that is so. If the Court applies its ruling as to Article 36 (1) *(b)* and its further ruling with respect to the implications of the violation of Article 36 (1) *(b)* as to Article 36 (1) *(c)* and then considers the impact of deprivation of the opportunity to receive consular assistance with respect first to the body of 29 cases which Ms Babcock has identified and then with respect to the further 23 cases as to which she has described the specific circumstances of each sub-category, the Court will appreciate that, simply applying its own holding in *LaGrand* and the principles that one derives from that holding particularly with respect to the opportunity lost with respect to Article 36 (1) *(c)*, the point I made on Monday with respect to the nature of this case and its complete identity with *LaGrand* stands unrebutted by the relatively minor points and wholly immature points that the United States attempted to raise on Tuesday.

82. Given Ms Babcock's thorough explanation of the nature of the case and the context of the Court's holding in *LaGrand* as to Article 36 (1) *(b)* and 36 (1) *(a)* and *(c)*, we are going to rest on that showing. But the critical point, Mr. President, Members of the Court, is that with respect to

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[35]CR 2003/26, para. 5.1 (Brown).

[36]CR 2003/24, para. 160 (Donovan).

the 52 cases, this case is on all fours with *LaGrand* without regard to the Parties' dispute about the meaning of "without delay" and specifically when that obligation, the obligations encompassed by "without delay", comes into play.

B. Article 36 (1)

83. Now with respect to the dispute about "without delay", I don't think there should be any question left that "without delay" and "immediately" are synonymous or, at the very least, can easily be understood as synonyms in a specific context in which they are used.

84. We did not hear on Tuesday that the purpose of Article 36 (1) was to prevent secret detentions. We did hear, however, that the title somehow excludes Mexico's interpretation[37]. But the title says only "Communication and Contact With Nationals of the Sending State". So we need to determine what is the *purpose* of the communication and contact. To what end were the rights of communication and contact granted?

85. The United States tells us repeatedly that Article 36 has nothing to do with criminal investigation and prosecution.

86. Let's test that position against *LaGrand*. As Ms Brown mentioned, the chapeau tells us expressly that the purpose of Article 36 is "to facilitat[e] the exercise of consular functions". Ms Brown did not mention that *LaGrand* expressly explained that Article 36 is "designed to facilitate the implementation of the system of consular protection"[38]. *LaGrand* also told us that Article 36 confers individual rights, and those are individual rights to which full effect must be given in the municipal legal system. And it told us in addition that the assistance that may be provided can include, and again I use the words of the Court's Judgment, "retaining private counsel . . . and *otherwise assisting* in [the] defence" of the foreign national[39]. So the United States account of the purpose of Article 36 is flatly inconsistent with the teaching of *LaGrand*.

87. So is the United States account of the context. Article 36 (1) expressly provides that its obligations are triggered upon arrest. Those textual references are the elephant in the corner that the United States asks the Court to ignore, because they make clear the connection of Article 36

[37]CR 2003/26, para. 5.11 (Brown).

[38]*LaGrand*, para. 74.

[39]*LaGrand*, para. 91.

rights to the threat to one's rights that is caused by arrest and possible prosecution. In fact the Court may note that the United States Supreme Court made the same choice as to the triggering event when it rendered the *Miranda* decision, because *Miranda* rights are also, like Article 36 rights, triggered only when the suspect is taken into custody.

88. So I move to Article 36 (1) *(c)*, and again I go back to *LaGrand.*

89. Ms Brown has pointed, as had the United States in the Counter-Memorial, to the fact that the obligations of paragraph (1) *(b)* must be performed "without delay", whereas the text of paragraph (1) *(c)* does not include the phrase. It is true that "without delay" does not appear in 1 *(c)*, but nor does any other time frame. We must therefore determine the scope of the obligation of the receiving State to facilitate the sending State's to render assistance. And that question must be answered by reference to Article 36 (1) as a whole.

90. The Court taught in *LaGrand* that the rights of consular information, notification, communication, and access are interrelated, together forming a régime of consular protection[40]. As I said on Monday, it would make no sense to require the information, notification, and communication without delay, but not require the receiving State to facilitate access so as to make the exercise of those rights effective[41].

91. Ms Brown also pointed out that the sending State has no obligation to render assistance to its nationals[42]. That is true. But that doesn't say anything about the receiving State's obligation to facilitate access when, as is crystal clear in the case of Mexico, the sending State wants to render such assistance.

92. Finally, Ms Brown suggested that a rule of reasonableness as to the consul's response that took account of the severity of the crime on suspicion of which the arrestee had been detained and the availability of the consul would not be workable[43]. But US courts apply reasonableness requirements in a wide range of circumstances, and so do international courts. There is no reason

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[40] *LaGrand*, para. 74.

[41] CR 2003/24, para. 193 (Donovan).

[42] CR 2003/26, para. 5.22 (Brown).

[43] *Id.*

why it couldn't be applied here[44], and there is no reason why a slow-moving consul could in fact hold hostage a legitimate investigation.

93. Mr. President, on Tuesday, the United States presented the Court with various pie charts intended to pictorially represent its State practice survey and extensively relied on the survey for its interpretation of Article 36 (1). Needless to say, the nature of oral submissions allows for only the briefest response to the survey. That's not a problem here, however, because the Court can disregard the survey as a matter of law.

94. First, I gave Sinclair's standard[45] with respect to the use of State practice of treaty interpretation on Monday, and the United States did not take issue with that standard[46]. Presumably the United States agrees.

95. *Second*, I said that Ambassador's Harty's account, by its own terms, demonstrated there wasn't sufficient concordance to qualify[47] and again, Ms Brown's account of the differences between various State practices confirmed that statement.

96. *Finally*, I said that the sample was too narrow. Ms Brown chastized me for saying that the coverage was one third of the States parties to the Vienna Convention when it was really 80 per cent.

97. So let's do the map out of the pie charts which I forbore from doing on Monday on the mistaken assumption that it would be unnecessary.

98. If you take the 165 States parties minus the 57 parties in which the survey encompassed bilateral treaties — not the Convention — and you take the 28 States that are not included in the survey and you then exclude the 34 States that Ambassador Harty purported do not comply with the Convention, you are left with 46 examples of State practice, or just what I said: less than one third of the States parties to the Convention.

99. That's no basis on which to do treaty interpretation.

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[44]Olivier Corten, *L'utilisation du "raisonnable" par le juge international* (1997).

[45]I. Sinclair, *The Vienna Convention on the Law of Treaties*, (1984, 2nd ed) 137-138. See also A. Aust, *Modern Treaty Law and Practice*, 195 (2000) ("if a clear difference of opinion between the parties exists, the practice may not be relied upon as a supplementary means of interpretation").

[46]CR 2003/26, para. 5.18 (Brown).

[47]State Practice Declaration, US Annexes, Annex 4, para. 11 ("It is difficult to summarize State practice with respect to Article 36 (1). States parties to the VCCR *vary enormously* in how — and to what extent — they comply with their Article 36 (1) obligations.") (Emphasis added.)

C. Article 36 (2)

100. I turn to Article 36 (2). Quite apart from Mexico's request for annulment, the Court must determine two issues concerning the obligation to review and consider under Article 36 (2).

101. First, clemency, and second, meaningful and effective review and reconsideration. And those, Mr. President, are distinct issues.

102. Ms Babcock having addressed clemency, I'll address the second issue concerning review and reconsideration, which is whether the United States can satisfy its obligation to "attach legal significance" to Article 36 (2) violations if it does not treat them as such. By their pleadings, the Parties have very narrowly, and very precisely, defined this issue for the Court.

103. Ms Birmingham said on Monday that there was no dispute between the Parties relevant to this issue as to the operation or import of United States law[48]. She explained that United States courts continue to apply the procedural default doctrine in precisely the circumstances in which this Court in *LaGrand*[49] held that it violated Article 36 (2), that they continue to refuse to give independent recognition to Article 36 (2) rights on the ground that they are not constitutional rights[50]. And, the courts continue to hold even that Article 36 does not create individual rights[51].

104. For instances of each of these holdings, I respectfully refer the Court to the folder we have provided.

105. On Tuesday, the United States did not take issue with any of this. The United States acknowledged that the procedural default doctrine operated in eight of these cases in exactly the same way it operated in *LaGrand*[52], and it acknowledged also that the United States legal system does not address Article 36 claims as such[53], but may do so under a different rubric, or a different label.

106. So, while the United States does not take issue with Mexico's account of United States law, it does effectively take issue with this Court's Judgment in *LaGrand*. In paragraph 91 of that Judgment, the Court held that the application of the procedural default rule had breached

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[48]CR 2003/24, para. 231 (Birmingham).

[49]CR 2003/24, para. 241 (Birmingham).

[50]CR 2003/24, para. 250 (Birmingham).

[51]CR 2003/24, para. 246 (Birmingham).

[52]CR 2003/24, para. 8.10 (Thessin/Taft).

[53]CR 2003/24, para. 8.10 and p. 37 (Thessin/Taft).

Article 36 (2) in that case precisely because it had prevented the LaGrands — now these are the Court's words — from "effectively challeng[ing] their convictions and sentences other than on United States constitutional grounds". The very next sentence makes the point even clearer, because the Court recognized expressly that, even though United States courts had considered United States constitutional claims in that case based on ineffective assistance of counsel, the procedural default rule had — and again I use the Court's words — "prevented [the courts] from attaching any legal significance" to the Article 36 violations.

107. So when the United States says here that it gives full effect to Article 36 because, even though you cannot make an Article 36 claim on its own terms, you can do it if you put a "different label" on it, it is admitting that it is breaching the express holding of *LaGrand*[54].

108. One more brief point about Article 36 (2). The United States carefully explained on Tuesday its view of the relationship between what it called the "general rule" of Article 36 (2) and the "limitation" represented by the proviso, which would come into effect only in "the exceptional case"[55]. Again, though it cannot admit it, the United States is asking the Court to disavow *LaGrand*.

109. In *LaGrand*, as you can tell by paragraph 86, the United States made exactly the same argument about the supposed primacy of the general rule, but this Court made clear that the proviso requires that international law be given priority. It is not an exaggeration to say that there is not a single sentence in the *LaGrand* Court's treatment of Article 36 (2) that would make any sense if the United States account on Tuesday of the proviso on the general rule were in fact the law.

D. State practice

110. Mr. President, I would like to turn to the State practice that Professor Weigend reviewed. He suggested that Mexico was proposing "extravagant" remedies and revolutionary theories of repair.

111. In fact, Professor Weigend confirmed that the results that Mexico contends flow here on the international level in the specific circumstances of this case from the obligation to make

[54]See, e.g., CR 2003/27, para. 8.13 (Thessin/Taft).

[55]CR 2003/27, paras. 6.3-6.12 (Mathias).

repair — specifically, retrials, and the exclusion of tainted evidence — are results that regularly flow from the application of domestic law principles in a wide range of legal systems[56].

112. Specifically, Professor Weigend has again demonstrated that there are a large number of States, as well as international tribunals, that allow for evidence obtained in a manner that violates certain due process obligations to be excluded in subsequent proceedings[57].

113. Now Professor Weigend expressed some concern that he had been miscited, surely a source of distress. But since citation is just a form of quotation, we all have an interest in being accurately quoted. So I would like to point out that in fact we did not cite Professor Weigend in support of an argument that the exclusionary rule constituted a general principle of law in the sense of Article 38 (1) *(c)*, although his work might provide a strong starting point for such an argument. What we did say, in fact, was that that question was irrelevant. What is relevant about his work for purposes of this case is that it shows that the rule is widely used as a tool in municipal legal systems.

114. Nothing Professor Weigend said on Tuesday changes that. Professor Weigend's disagreement is about whether Article 36 is a sufficiently substantial right to warrant invocation of the exclusionary rule. But, of course, that is the very the question before the Court.

115. Likewise, with respect to retrial. Professor Weigend acknowledged on Tuesday that "retrials occur in most legal systems"[58], presumably without creating havoc in the administration of justice[59]. Again, Professor Weigend simply believes that Article 36 rights are not among those that would warrant a remedy of retrial.

116. But with the greatest respect to Professor Weigend, those questions are questions of international law — the question as to what the content of the Article 36 right is and what is the proper remedy as a matter of international law that flows from its violation.

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[56]See CR 2003/27, para. 9.3 (Weigend).

[57]CR 2003/27, paras. 9.18 and 9.19 (Weigend).

[58]CR 2003/27, para. 9.12 (Weigend) ("Mr. Donovan was of course right when he said yesterday that retrials occur in most legal systems.").

[59]CR 2003/27, paras. 9.7-9.8, 9.12 (Weigend).

E. Remedies

117. With that, Mr. President, I should like to turn to the two points on remedies. The question before the Court is not one of comparative criminal procedure, but of international law. The question is whether the remedy of *restitutio* in the form of annulment is the appropriate form of reparation for violations of Article 36 in capital cases. For the reasons that Ms Babcock has illustrated this morning, Mexico respectfully suggests that they are, for two simple reasons. First, the Article 36 right counts and the drafters intended it to count. Secondly, the jurisprudence on which we relied and which the United States did not specifically address on Tuesday — a wide range of international jurisprudence — demonstrates that the prospect of a chance, the loss of an opportunity to exercise an important right, itself suffices to show causation, itself suffices to show the loss of a valuable right requiring remedy. In fact, as I said, Ms Babcock has illustrated that point. Moreover, the United States also failed to address the extensive international jurisprudence on which Mexico relies, which says that in cases concerning the death penalty, the talent for error must be severely restricted, if tolerated at all. Again, Ms Babcock has illustrated why that is the case. Therefore the United States has not addressed on the international level the extensive jurisprudence that demonstrates that annulment is the accepted form of remedy for the deprivation of an important procedural right, particularly in the death penalty context[60].

118. In fact, the United States only cited one international law authority in response to that showing — Professor Crawford[61]. But, Professor Crawford speculated on the causation question before this Court had rendered judgment in *LaGrand*, and with the greatest respect to Professor Crawford, we would suggest that the analysis of this Court, in paragraph 74, is simply contradictory to his suppositions about how causation should be treated.

119. Finally, I want to focus for a minute on the key factor in this case, which Professor Weigend did not address. Indeed, Professor Weigend did not mention the death penalty

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[60]Speech of Mr. Donovan, CR 2003/25, paras. 347-367 (referring to *Arrest Warrant* case, *Martini*, and the jurisprudence of the Inter-American Court, the Human Rights Committee and European State practice in implementing the decisions of the European Court of Human Rights) and para. 377 (referring the Court to the jurisprudence of international courts, including the European Court's standard of a "prospect" or "plausibility" of injury caused by procedural violations in the *Artico* and *John Murray* decisions).

[61]Speech of Mr. Mathias, CR 2003/27, para. 11.13 (citing Third Report, para. 141).

until he gave his personal statement at the conclusion of his argument. And yet we know from the European Court that death penalty proceedings require "the most rigorous standards of fairness"[62].

120. In fact, Mr. President, there is authority in this Court for that proposition, because the President said in his separate opinion in *LaGrand* with respect to paragraph 128 (7), that the assurance provided in that paragraph "is of particular significance in a case where a sentence of death is imposed". And President Shi continued that in that context, "[e]very possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing". That is the teaching of the international practice and international jurisprudence on which Mexico relies.

F. Review and reconsideration under *LaGrand*

121. My second remedy's point has to do with *LaGrand.* Mr. President, the United States distorts *LaGrand* in yet another respect, and it is a very important one. On Monday, I addressed briefly the United States position that in *LaGrand*, this Court held that review and reconsideration was the sole remedy available for a breach of Article 36, even though it would not have been possible to give restitution in that case and Germany did not ask for restitution.

122. The United States responds that Mexico misunderstands *LaGrand*, because when the Court addressed Germany's request for assurances and held that review and reconsideration would be necessary to ensure future compliance with Article 36 (2), it was addressing itself to future conduct. That is absolutely right, but it leads to *precisely the opposite conclusion* from the one the United States draws.

123. To explain, I'd like to go back to the origin of *LaGrand*'s requirement to provide review and reconsideration. And because I want to adhere *very closely* to what the Court actually *did* and *said* in *LaGrand*, I invite the Court, if it would find it convenient, to refer to the folder that we have provided, which actually includes the relevant passages in the order in which I am going to address them.

124. The Court will recall that Germany's second submission sought a declaration that the United States had breached Article 36 *(2)* by applying the procedural default rule in the circumstances of that case.

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[62]Speech of Mr. Donovan, CR 2003/25, paras. 381-382.

125. The Court upheld that submission. In paragraph 128 (4) of the *dispositif*, the Court set forth that holding by stating that, "by not permitting the review and reconsideration", of the LaGrands' convictions and sentences, the United States had breached Article 36 (2).

126. The Court then referred to review and reconsideration again when it upheld Germany's request for assurances of non-repetition of the breach of Article 36 (2).

127. Paragraph 119 of the Judgment makes it clear that both the Court and the United States understood that the general assurance sought was addressed to the Article 36 (1) duty to inform and notify without delay, and what the Court called the other assurances were addressed to the Article 36 (2) obligation to afford full effect. You can tell that, among other reasons, because in paragraph 119 the Court quotes the United States statement that — I am quoting the Court quoting the United States — "with respect to the alleged breach of Article 36, *paragraph 2*, Germany seeks", and then the United States, and the Court, quote from what the Court called the other assurances, that is the assurances that came about after the middle of the first sentence of the fourth submission.

128. Now the Court did not require the United States to give the general assurance directed at Article 36 (1). If you look at paragraph 128 (6) of the dispositif, the Court found a sufficient assurance in the United States references and representations concerning its education and training programme. But the Court did require the *other* assurances, that is those that were directed to Article 36 (2). In the last part of paragraph 125, and then again in paragraph 128 (7) — which of course is the *dispositif* —, the Court directed, and here is the phrase on which the Parties have spent an enormous amount of time during this proceeding: in 128 (7), the Court directed that in cases involving Article 36 claims and either prolonged detention or serious penalties, the United States would have to provide review and reconsideration of the convictions and sentences.

129. So it's crystal clear that the obligation to provide review and reconsideration is a *primary obligation* under Article 36 (2) of the Convention. Why? Because the Court issued a declaration that the United States had *breached* that primary obligation, and it also required the United States to give assurances that it would not *breach* that obligation in the future.

130. The obligation happens to be an express obligation to provide effective remedies within the domestic legal system. But that remedial obligation — and I here use a phrase that is echoed by

the United States — is a *primary* obligation of the receiving State: a primary obligation under Article 36 (2) to provide review and reconsideration within its own legal system of convictions and sentences impaired by an Article 36 (1) violation. *And if it's a primary obligation, it doesn't displace the secondary rules of State responsibility that come into play when a primary obligation is breached.*

131. So I return to the United States position that *LaGrand* must have settled future remedies because an assurance of non-repetition is directed to future conduct. Of course the assurance itself is an international law remedy and a remedy of course that is directed to future conduct. But when the Court requires an assurance of non-repetition, it requires an assurance that the breach will *not* be repeated in the future. In other words, it provides guidance on how the primary obligation can be respected. The Court *does not* assume that there *will* be a breach and then start telling the state what kinds of remedies it would impose if there were a breach. The United States is confusing an international law obligation to give domestic effect to international law rights with an international law remedy for breach of those rights.

132. To make that clear, let's consider the consequences of the United States position. By Article 92 of the Charter, the United States committed itself to comply fully with the judgment of the Court in the *LaGrand* case. While strictly speaking that obligation applies only to the parties to the dispute, President Guillaume's declaration makes clear that surely, in cases involving foreign nationals from countries other than Germany, an *a contrario* interpretation could not be given to the United States obligation to provide review and reconsideration. The United States unequivocally endorsed that declaration on Tuesday, and so does Mexico. So what does that mean?

133. It means that this Court would certainly have accorded the United States the respect a party before this Court is due by assuming that the United States would comply with *LaGrand* in any case involving a foreign national from a Vienna Convention party, not that it would disregard that judgment. And it also means that the Court would certainly *not* have decided in *LaGrand* what international law remedies would be appropriate if, the Court held, as Mexico has proven here, that the United States *did* breach Article 36 (1), in a case where the foreign nationals were still alive.

134. So, with apologies, Mr. President, for taking the Court on a walk through its own

decision, I respectfully submit that once again it is Mexico that is faithfully reading *LaGrand*, while what the United States is actually telling the Court is that in that judgment the Court went beyond the case that was actually before it in order to settle some future case that had not yet even been filed.

135. Now on Tuesday, in order to tell the Court what it meant in *LaGrand*, the United States read a two-sentence footnote to the ILC Commentary[63]. That footnote doesn't set forth the analysis by which the ILC reached its understanding of review and reconsideration, so I can't address the reasoning.

136. But in any event, the footnote purports to interpret a holding of *this Court*. The ILC Articles represent an enormous achievement. But Mexico is confident that this Court is fully able to interpret its own judgment, by reference to its own careful analysis, and will not feel bound to alter that analysis on the basis of anyone else's footnote, not even the ILC's.

137. One final point on review and reconsideration. When the United States says that review and reconsideration is the only remedy Mexico can get, what it is really saying, yet again, is that, although the Vienna Convention sets forth international obligations, a breach gives rise to no right to international remedies. Because as we have seen, review and reconsideration is a requirement a primary obligation to give remedies on a municipal law level. The Court has been hearing that argument since the provisional measures hearing in the *Breard* case, in which the United States argued that although the Vienna Convention set forth international obligations, it didn't itself include any international law remedies and therefore none could be provided. The Court rejected in the *Breard* case and it has rejected that argument every time it has heard it since.

138. With that, Mr. President, I request that you call upon Professor Dupuy.

The PRESIDENT: Thank you, Mr. Donovan. I now give the floor to Professor Dupuy.

[63]CR 2003/27, para. 11.8 (Mathias).

M. DUPUY :

IV. REPARATIONS

139. Monsieur le président, Madame et Messieurs les juges, il me revient de clarifier pour la Cour, aussi exactement que possible, les données du débat qui oppose les deux Parties à propos de la réparation. Mardi après-midi, les conseils des Etats-Unis ont rejeté en bloc toutes les conclusions du Mexique à cet égard. Ils l'ont fait en plaidant qu'il n'y avait pas de raison de réparer, puisqu'ils nient dans cette affaire toute méconnaissance de leurs obligations. Et plus particulièrement, le professeur Elisabeth Zoller, mardi après-midi, a affirmé avec grande conviction que les trois éléments de la demande en réparation articulés par la requête mexicaine étaient extravagants, dénués de tout fondement juridique, comme elle l'avait fait, le matin même, en niant la compétence de la Cour pour en connaître. Ainsi rudoyé par les arguments tranchants d'une collègue pour laquelle j'ai tant d'estime, je repensais en l'écoutant à la célèbre supplique : «Dieu me garde de mes amis… !»

140. Mais, gardons-nous en tout cas de personnaliser le débat, et reprenons plutôt, en autant de parties structurant cette plaidoirie, les trois termes de la requête en réparation articulée par le Mexique à l'adresse de la Cour : satisfaction, restitution, cessation et garantie de non-répétition.

A. Satisfaction

141. Pour citer les propos du conseil précité des Etats-Unis, le Mexique demanderait un «jugement déclaratoire» dont le prononcé présenterait de «grandes difficultés» en raison du fait que la convention de Vienne qu'il s'agit d'interpréter est un traité multilatéral.

142. Alors, répondons tout simplement. Le Mexique ne demande nullement à proprement parler un «jugement déclaratoire» au sens où la Cour en avait ouvert à la fois la possibilité théorique et conclu en l'espèce à son exclusion, dans son arrêt sur le Cameroun oriental[64].

143. Il s'agit simplement ici, comme dans le cadre de tout procès international en responsabilité, de commencer par le commencement.

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[64] Affaire du *Cameroun septentrional, C.I.J. Recueil 1963*, p. 15 (37) : [il] «est incontestable que la Cour peut, dans les cas appropriés, prononcer un jugement déclaratoire».

144. Pour établir la responsabilité d'un Etat, la Cour doit d'abord constater que cet Etat a manqué à ses obligations. Et, l'ayant constaté, nous la prions de l'énoncer dans son dispositif, pour y établir le fondement de cette responsabilité. Ce faisant, la Cour fait en quelque sorte «d'une pierre deux coups», si j'ose dire. Elle vérifie la violation de l'obligation primaire à laquelle était tenu l'Etat défendeur; et, par la même occasion, elle apporte déjà une première réparation à l'Etat victime, appliquant ici une règle secondaire d'*«adjudication»* dans le sens de Herbert Hart ou de Roberto Ago, c'est-à-dire consécutive à la violation constatée. C'est ainsi que de longue date la Cour procéda, par exemple, en 1949, dès son premier arrêt dans l'affaire du *Détroit de Corfou*, en constatant à l'unanimité que «le Royaume-Uni a violé la souveraineté de la République populaire d'Albanie, cette constatation par la Cour constituant en elle-même une satisfaction appropriée»[65]. Dans votre propre jurisprudence, on retrouve des déclarations de ce type dans l'affaire relative au *Personnel diplomatique*[66], notamment, ou dans la décision de 1997 dans l'affaire relative au *Projet de Gabèíkovo-Nagymaros*[67] ou bien encore de votre arrêt très récent dans l'affaire relative au *Mandat d'arrêt* dans laquelle la Cour, répondant favorablement à la demande de la République du Congo de «constat[er] solennelle[ment] … le caractère illicite [de l'émission et de la diffusion internationale du mandat…]»[68[1]] lui adjuge cette conclusion dans son dispositif en concluant que «l'émission … du mandat d'arrêt du 11 avril 2000 et sa diffusion … ont constitué des violations … du Royaume de Belgique à l'égard de la République démocratique du Congo…»[69]. Exemple à la fois typique et récent d'une «satisfaction judiciaire», consentie par cette même Cour, au sens exact où l'entend le Mexique dans la présente affaire.

145. Le fait qu'en allouant cette conclusion au demandeur, comme la Cour, du reste, le fit exactement aussi dans l'arrêt *LaGrand* lui-même, par quatorze voix contre une, à propos du même

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[65] Affaire du *Détroit de Corfou*, *C.I.J. Recueil 1949*, p. 36

[66] Affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, *C.I.J. Recueil 1981*, p. 442, par. 90.

[67] Affaire relative au *Projet Gabèíkovo-Nagymaros*, par. 1 du dispositif.

[68] Affaire relative au *Mandat d'arrêt du 11 avril 2000 (République du Congo c. Belgique)* 14 février 2002, p. 30, par. 72.

[69] *Ibid*., p. 33, par. 78 D 2).

défendeur et des mêmes faits illicites[70], ne pose évidemment aucun problème eu égard au caractère multilatéral de la convention de Vienne sur les relations consulaires.

146. Mme Zoller a parlé l'autre jour de «privilège mexicain» un peu comme elle l'aurait fait de la «grippe espagnole», mais il n'y aura pas plus de privilège mexicain dans cette affaire qu'il n'y a eu de «privilège allemand» dans l'affaire *LaGrand*.

147. C'est en application du protocole additionnel à la convention de Vienne sur les relations consulaires que la Cour détient la compétence d'interpréter ou d'appliquer cette convention multilatérale et il découle directement de cet instrument que lorsqu'elle est ainsi amenée à le faire, elle renseigne les autres parties à la convention sur les obligations auxquelles elles ont souscrit. La déclaration du président Guillaume à la suite de l'arrêt *LaGrand*, formulée à propos de la portée des obligations des Etats-Unis, va du reste dans le même sens qui consiste à souligner que le caractère relatif de chose jugée n'a pas pour autant pour effet d'engendrer un «privilège» pour l'Etat au bénéfice duquel la convention se voit et se verra ainsi appliquée. Il n'y a donc pas lieu de s'étendre davantage sur ce point. Passons, sans plus attendre, au second élément de la requête mexicaine qui, après la satisfaction, est la «restitution».

B. *Restitutio in integrum*

148. Je pense qu'il faut tout d'abord vous rappeler ce que je vous ai dit lundi dernier, Madame et Messieurs de la Cour. Non pas que je doute de la fidélité de votre mémoire, mais parce que comme cela arrive trop souvent, la Partie adverse a fait ce qu'elle a cru pouvoir faire pour déformer la thèse du requérant.

149. Contrairement à ce qu'ont affirmé les Etats-Unis, le Mexique ne cherche pas à vous détourner de l'arrêt *LaGrand*, dont les Etats-Unis continuent à trouver quant à eux qu'il est allé trop loin. Le Mexique va tout au contraire chercher dans l'arrêt *LaGrand* les moyens de la réparation appropriée; avec, inévitablement, cette différence que l'Allemagne ne pouvait demander la *restitutio* là où les titulaires individuels des droits qu'elle protégeait avaient disparu.

150. Il en résulte que le Mexique, comme vous le décidiez pour l'avenir dans l'arrêt *LaGrand*, vous demande, mais cette fois pour le passé, d'ordonner au titre de la remise des choses

[70] Arrêt *LaGrand*, dispositif, par. 128 3).

en l'état, le «réexamen et la revision des jugements et des condamnations» des cinquante-deux ressortissants mexicains condamnés sans avoir pu exercer les droits qu'ils détenaient individuellement au titre de l'article 36 de la convention de Vienne. Le fait que l'obligation de réexaminer et de reviser puisse être interprétée comme une règle primaire — un devoir de faire — en relation avec la prévention des violations futures de l'article 36, paragraphe 2, n'empêche nullement, s'agissant d'une règle posant une opération à procédure, qu'elle fournisse un remède au sens d'un instrument réparatoire, et donc en même temps, une règle secondaire de mise en œuvre de la réparation prenant place, cette fois, dans le cadre de l'exercice de la restitution. Et, pour reviser efficacement, il faut reviser à fond, et donc, en principe, d'abord annuler le jugement condamnant la personne concernée. Ce que vous demande en plus de la restauration — et j'y reviendrai — le Mexique, c'est tout simplement de compléter en amont par le constat de la violation, et en aval, par l'ordonnance de la cessation des faits illicites et la garantie de non-répétition.

151. A propos de la restitution, la thèse des Etats-Unis, du moins telle qu'elle vous a été présentée à cette barre mardi dernier, se présente essentiellement ainsi : sans plus contester vraiment, quand ils en viennent à la réparation, l'applicabilité du principe de la *«restitutio in integrum»*, les Etats-Unis affirment cependant qu'elle n'est pas applicable en la matière, notamment lorsqu'elle consiste en l'annulation d'un acte juridictionnel interne, parce que cela heurterait de front la substance du droit pénal américain. C'est ce qu'a brillamment soutenu à l'échelle comparative le professeur Weigand mardi après-midi. Et qui plus est, toujours selon les Etats-Unis, la structure fédérale des Etats-Unis interdirait la mise en œuvre d'une telle réparation.

152. De tels propos, à vrai dire, ne sont pas faits vraiment pour nous surprendre. L'invocation des obstacles tirés de leur droit interne constitue, pour les Etats-Unis, une parade à laquelle ils restent à vrai dire très attachés. Ils ont en effet été tentés de l'utiliser à tous les stades de la procédure, y compris ceux relatifs à l'examen d'une demande d'indication de mesures conservatoires, dans les trois affaires que leur manquement persistant à l'article 36 de la convention de Vienne a déjà suscitées, qu'il s'agisse de l'affaire *Breard*, de l'affaire *LaGrand*, ou, aujourd'hui, de l'affaire *Avena*. Dans notre affaire, en vertu des mêmes arguments, les Etats-Unis voulaient vous appeler à ne pas ordonner ces mesures. Vous ne les avez pas écoutés, et ils ont, cette fois,

obéi, apportant ainsi la preuve que lorsqu'ils veulent, ils peuvent appliquer une décision judiciaire internationale dans leur ordre interne.

153. Quoi qu'il en soit, cette constance dans l'invocation du droit interne dressé comme un épouvantail fait elle-même peu de cas du droit que vous êtes compétents pour appliquer. Elle va en effet directement à l'encontre d'un principe particulièrement bien établi dans le droit international de la responsabilité des Etats. A ce titre, on le trouve codifié dans l'article 32 du projet définitif de la Commission du droit international. J'entends bien que ce texte n'est pas forcément à prendre comme parole révélée; mais enfin, tout de même il constitue l'aboutissement de plus de quarante ans de travail, menés par des experts éminents et en consultation étroite avec tous les Etats Membres des Nations Unies.

154. Or, vous connaissez l'article 32. Il s'intitule : «Non-pertinence du droit interne». Et il dispose : «L'Etat responsable ne peut pas se prévaloir des dispositions de son droit interne pour justifier un manquement aux obligations qui lui incombent en vertu de la présente partie.» (C'est-à-dire celle relative à la mise en œuvre, au contenu de la responsabilité.) Dans le commentaire qu'il en fait, James Crawford rappelle que cette disposition, «est calqué[e] sur l'article 27 de la convention de Vienne de 1969 sur le droit des traités»[71]. Il précise bien qu'il s'agit là d'un «principe général» qui découle des règles de la responsabilité des Etats. Parmi elle, on peut également compter celle qui est codifiée à l'article 3 du même texte, selon lequel «la qualification du fait d'un Etat comme internationalement illicite relève du droit international» et non «du droit interne».

155. Ces deux règles, celle de l'article 32 et celle de l'article 3, distinctes, j'en conviens, mais complémentaires, illustrent ce principe familier à tous les internationalistes; celui selon lequel, au regard du droit international, le droit interne est *un simple fait*. Principe particulièrement bien établi. Il remonte à la célèbre affaire de l'*Alabama*, laquelle est tout de même une espèce

[71]J. Crawford, «Les articles de la CDI sur la responsabilité de l'Etat», Introduction, texte et commentaires, Paris, Pedone, 2003, p. 249.

respectable, puisqu'elle fête allègrement cette année ses … cent trente et un ans[72] ! Mais on aurait pu tout aussi bien citer dans le même sens le premier arrêt rendu par la Cour permanente dans l'affaire du *Vapeur* Wimbledon. La Cour permanente y rejeta l'argument évoqué par l'Allemagne d'après lequel la décision administrative de refuser au *Wimbledon* le droit d'emprunter le canal de Kiel aurait prévalu sur les prescriptions du traité de Versailles. Entre ces deux affaires, une jurisprudence arbitrale nourrie avait, du reste, déjà illustré la même règle d'indifférence du droit international à l'égard des qualifications opérées par le droit interne[73]. Par conséquent, en écoutant, certes, avec un vif intérêt la disposition très savante du professeur Weigend, je dois dire que j'étais un peu surpris qu'un principe d'une telle autorité ne fût pas pris en compte, comme si le droit interne, désormais reconnu comme tel, l'emportait à présent sur le droit international ! Argument que Triepel ou Jellinek auraient eux-mêmes été les premiers à repousser avec dédain sinon indignation.

156. J'entends bien que les propos du conseil des Etats-Unis visaient également à illustrer la difficulté qu'il y aurait, en l'espèce, à ce que la Cour ordonnât à l'Etat défendeur d'annuler les jugements et les sentences condamnant les cinquante-deux ressortissants mexicains à mort. C'était également là le sens d'autres interventions effectuées de l'autre coté de la barre mardi.

157. Toutefois, là encore, l'aboutissement récent de l'énorme travail de codification permet de cerner les contours exacts de la question.

158. Il se trouve, en effet, que, pour les besoins de la codification du droit de la responsabilité par restitution, les rapporteurs spéciaux successifs se sont penchés sur la question de savoir dans quels cas on devrait se résoudre à renoncer à la «restitutio in kind»; étant entendu, comme le rappelle le dernier d'entre eux, que «la restitution est le mode de réparation le plus conforme au principe général selon lequel l'Etat responsable est tenu d' «effacer» les conséquences juridiques et matérielles de son fait illicite…»[74].

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[72]Dans celle-ci, le Royaume-Uni avait tenté de justifier sa méconnaissance de l'«obligation de surveillance diligente de son territoire afin d'éviter des dommages aux autres Etats» en arguant de l'insuffisance des moyens juridiques dont il disposait en droit interne. Le tribunal a considéré en retour «que le gouvernement de Sa Majesté britannique ne saurait se disculper du manque de due diligence en alléguant l'insuffisance de moyens juridiques dont il pouvait disposer.» (La Pradelle et Politis, *Recueil des arbitrages internationaux*, t. II, 1856-1872, Paris, Pedone, 1923, p. 891.)

[73]Voir par exemple, parmi les plus anciennes, la sentence rendue dans l'affaire dite du *Montijo*, Moore, *International Arbitrations*, II, p. 1440-1441.

[74]J. Crawford, *op. cit. supra*, p. 255.

159. Or, pour citer le même auteur reprenant d'ailleurs les termes de la Commission elle-même, «la restitution n'est pas impossible du fait des difficultés juridiques ou pratiques, même si l'Etat responsable peut avoir à faire des efforts particuliers pour les surmonter».

160. Et de poursuivre : «l'Etat responsable ne peut pas se prévaloir des dispositions de son droit interne pour justifier un manquement à l'obligation de réparer intégrale»[75].

161. Il faut, en d'autres termes, pour se résigner à renoncer à l'*in integrum restitutio*, que l'impossibilité de l'application soit matérielle; par exemple parce que l'objet de la réparation a disparu, et c'était le cas de la forêt du Rhodope central[76]; ou parce que la personne dont les droits ont été bafoués a elle aussi disparu, comme c'était précisément le cas dans l'affaire *LaGrand*.

162. Mais pour le reste, les seules hypothèses dans lesquelles la *restitutio* devient impossible sont celles dans lesquelles sa mise en œuvre serait hors de proportion avec son coût pour l'Etat responsable. Le Mexique a déjà répondu à cela dans son mémoire ainsi que l'avait fait M^e^ Donovan l'autre jour dans sa plaidoirie. Or, au titre de ces coûts, on pourrait difficilement compter les efforts que les Etats parties à un instrument international doivent faire pour adapter leur législation interne au respect de leurs engagements internationaux. On m'excusera de citer mon propre pays, mais c'est ce qu'a fait la France, et qu'a opéré également l'Allemagne, précisément pour adapter leurs droits internes respectifs à l'application, par exemple, de la convention européenne des droits de l'homme[77]. Les «lois d'adaptation» telles qu'on les appelle dans ces cas-là, sont précisément faites pour cela; et l'on ne voit pas que les Etats-Unis, pas plus que

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[75]*Ibid.*, p. 259.

[76]Nations Unies, *Recueil des sentences arbitrales*, vol. III, p. 1432 (1933).

[77]Voir article 626-1 du code de procédure pénale «Du réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour européenne des droits de l'homme.»

> «Le réexamen d'une décision pénale définitive peut être demandé au bénéfice de toute personne reconnue coupable … lorsqu'il résulte d'un arrêt rendu par la Cour européenne des droits de l'homme que la condamnation a été prononcée en violation des dispositions de la convention de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles la «satisfaction équitable» allouée sur le fondement de l'article 41 de la convention ne pourrait mettre un terme.»

Voir article 359 n^o^ 6 de la Strafprozessordnung :

> *«Die … Wiederaufnahme eines durch rechtskräftiges Urteil abgeschlossenen Verfahrens (…) ist zulässig, wenn der Europäische Gerichtshof für Menschenrechte eine Verletzung der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten oder ihrer Protokolle festgestellt hat und das Urteil auf dieser Verletzung beruht.»*

d'autres pays, puissent s'autoriser de la complexité de leur structure fédérale pour échapper à leurs obligations internationales.

163. Pour le reste, la Cour aura pu observer que, lors de leur premier tour, les Etats-Unis n'ont pas vraiment attaqué de front la règle selon laquelle la restitution juridique passe par l'annulation ou la mise à l'écart de l'acte juridique interne à l'origine de la violation par l'Etat de ses obligations internationales.

164. Il est vrai que s'ils s'y étaient risqués, j'aurais pu vous fournir une nouvelle brassée de références confirmant la règle précitée, allant de Karl Strupp[78] à Bernhard Graefrath[79] en passant par Brigitte Stern[80] et Ian Brownlie[81], qui seraient venus se rajouter aux propos de Verdross et de Charles de Visscher que nous vous citions lundi. Tous convergent pour confirmer que l'annulation est décidément la voie normale de la restitution dans le cas de la réparation d'un préjudice juridique.

165. Sans compter, encore une fois, et la Cour, là encore, n'aura pas manqué de le remarquer, la prudente abstention de la partie américaine à l'égard de votre jurisprudence dans l'affaire *Yerodia*, où le résultat final s'est précisément traduit par la décision judiciaire d'ordonner au défendeur d'annuler un acte juridique interne.

166. Puisque tel était le cas d'un précédent aussi important, il est vrai que vous auriez pu tout aussi bien vous autoriser d'une très longue tradition puisque là encore, on en retrouve les origines en la jurisprudence de la Cour permanente, avec par exemple le procédé offert par l'affaire du *Groënland Oriental*, dans laquelle la Cour permanente avait déclaré «que la déclaration d'occupation promulguée par le Gouvernement norvégien en date du 10 juillet 1931 ainsi que

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[78] K. Strupp, Das völkerrechtliche Delikt, in : *Stier/Somlo* (éd.), Handbuch des Völkerrechts, vol. 3, 1920, p. 209 :

> *«Bei einer völkerrechtswidrigen Entscheidung besteht die Pflicht, dem Deliktssubjekt als Unrechtsfolge erwächst, … in der Aufhebung ... der Entscheidung der Gerichte. Auch soweit die Entscheidung formell rechtskräftig geworden ist, muss sie der Staat, sofern sie den völkerrechtlichen Verpflichtungen widerstreite, eventuell durch Gesetz wieder aus der Welt schaffen.»*

Ou encore *Lais*, Die Rechtsfolgen völkerrechtlicher Delikte, 1932, p. 33 : *«Es besteht die Pflicht zur Aufhebung eines inländischen Gerichtsurteils, das mit dem Völkerrecht nicht vereinbar ist. Der verantwortliche Staat muss das Urteil beseitigen, wenn nicht anders möglich, durch Gesetz.»*

[79] B. Graefrath, «Responsibility and Damages caused», *RCADI* 185 (1984-II), p. 74, limitant cette forme de restitution juridique uniquement par les exigences du droit des peuples à disposer d'eux-mêmes, donc en fait, excluant les lois de nationalisation.

[80] B. Boellecker-Stern, «Le préjudice dans la théorie de la responsabilité internationale», p. 49.

[81] I. Brownlie, *Principles of Public International Law*, 5th edition, p. 464.

toutes mesures prises à cet égard par ce gouvernement constituent une infraction à l'état juridique existant, et, par conséquent, sont illégales et non valables». Encore, dans cette affaire, votre devancière avait-elle déclaré elle-même la nullité de l'acte interne, alors que, comme nous du reste, le Congo dans l'affaire *Yerodia* ou le Mexique aujourd'hui vous demandent d'ordonner au défendeur de procéder à ces constats de nullité.

167. Aussi, sans doute conscients de l'autorité du principe ainsi évoqué par le Mexique à l'appui de sa demande en restitution juridique, les Etats-Unis ont-ils préféré tenter une sorte de sortie latérale, du coté de la spécificité des actes juridictionnels, lesquels seraient d'après eux, à raison même de leur nature, plus rebelles à l'annulation que d'autres actes juridiques internes.

168. On voit ici néanmoins que l'on retrouve l'obstacle tiré de l'inopposabilité du droit interne aux obligations internationales. Je renvoie donc ici à ce que je vous disais précédemment sur ce point. D'autant plus là encore que les exemples choisis par la partie américaine mardi dernier pour essayer d'illustrer son propos ne sont pas nécessairement parmi les plus heureux. En effet, dans le cas de la Cour européenne des droits de l'homme, si cette juridiction n'ordonne pas d'annulation de jugements internes, c'est tout simplement parce que cela ne lui est pas autorisé par son statut. Comme le manifeste la dernière chronique du doyen Cohen-Jonathan à l'*Annuaire français de droit international*, on connaît, certes, à l'heure actuelle, une expansion considérable du contentieux de la réparation devant la Cour de Strasbourg[82[11]]; mais il demeure que cette juridiction ne saurait agir *ultra vires*, et ordonner à un Etat partie de prendre des actes qu'elle n'est pas statutairement habilitée à lui ordonner. Non, Monsieur le président, décidément il n'y a pas, en droit positif, de pratique concordante pour ériger les jugements internes en exception à l'inopposabilité du droit interne à l'encontre des obligations internationales.

169. Alors, où en sommes-nous, Monsieur le président ? A ceci : 1) si les Etats-Unis ne peuvent s'autoriser de leur droit interne pour appliquer la *restitutio in integrum*; 2) si, par ailleurs, l'annulation est la forme que doit prendre normalement cette restitution dans le cas où l'acte illicite est un acte juridique, 3) la conséquence logique est alors inévitable : le défendeur devra, au titre de la réparation pleine et entière que lui impose sa responsabilité, annuler les actes ayant conduit au

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[82[11]] *Annuaire français de droit international*, 2002, XLVIII, CNRS, Paris, p. 675-693, spécial. p. 685 et suiv.

jugement et à la condamnation des ressortissants mexicains concernés. Le fait qu'il y en ait cinquante-deux est effectivement impressionnant. Mais on ne saurait retenir à la charge de l'Etat victime le nombre des violations du droit dont il a été l'objet, lui-même ou dans la personne de ses ressortissants. Sans même qu'il soit besoin d'invoquer l'adage *«Nemo propriam turpitudinem allegans…»*, on voit mal comment les Etats-Unis pourraient tirer parti, non plus seulement des rigidités de leur droit interne mais de l'ampleur comme du nombre de leurs exactions, une cause exonératoire de leur obligation de réparation.

170. Certes, le Mexique ne vous a jamais caché[83] que l'on pouvait classer les condamnés mexicains en catégories distinctes à raison du moment auquel les autorités consulaires ont pu finalement tenter de leur venir en aide, et Mme Babcock rappelait justement que, selon que ces autorités avaient pris connaissance de ce sort malheureux de leurs concitoyens alors que le jugement de condamnation à mort avait déjà été décidé, comme cela avait été le cas dans l'affaire *LaGrand* par les autorités allemandes, ou que les consuls du Mexique avaient appris la situation de leurs ressortissants quelque temps avant le jugement et la condamnation, on pouvait éventuellement établir des classifications.

171. Cependant, il faut bien voir que dans les deux cas, dans tous les cas, quelles que soient les hypothèses, les infractions ou faits illicites commis par les Etats-Unis demeurent exactement les mêmes, comme je vous le disais lundi dernier. Partout, la violation initiale de l'article 36, paragraphe 1 *b)*, avec les conséquences cumulatives et en cascade que j'ai analysées devant vous au début de la semaine. Partout, la prolongation, bien au-delà des «sans délais» énoncés à l'article 36, l'absence de notification des droits consulaires et, par voie de conséquence, l'impossibilité pour les services consulaires d'intervenir à temps. Partout, la «perte des chances» de faire valoir ses droits pour chacun de ces ressortissants afin de rétablir l'équité d'un procès faussé dès l'origine, pour des individus dont on vous rappelait lundi les handicaps sociaux et culturels. Partout, des procédures de recours efficaces déjà épuisées. Et, dans tous les cas, des individus concernés pouvant pourtant légitimement revendiquer le droit à la revision de leur procès au sens où je l'évoquais lundi.

[83] Mémoire du Mexique, p. 38 et 39.

172. Aussi, dans tous ces cas, la réparation adéquate, la réparation pleine et entière, c'est-à-dire celle qui redonne toutes ses chances perdues à chacun d'entre les cinquante-deux ressortissants mexicains de sauver sa tête, c'est l'organisation d'un nouveau jugement après annulation de celui qui l'a condamné. Et j'attire à nouveau respectueusement l'attention de la Cour sur ce «cumul massif d'infractions» engendrées les unes par les autres que j'analysais tantôt.

173. Cependant, on pourrait très éventuellement envisager et à titre purement supplétif, pour les cas où une restitution par annulation des condamnations originelles n'aurait pu être allouée, la mise en place alternative d'une procédure authentiquement judiciaire de réexamen et de revision, et par cela même en tous points distincte de ce qu'est aujourd'hui le recours en «clemency». On pourrait l'envisager afin de redonner au moins certaines chances aux personnes concernées de faire valoir leurs droits.

C. Cessation et garanties de non-répétition

174. J'en termine avec la cessation et les garanties de non-répétition et je serai à cet égard, Monsieur le président, Madame et Messieurs, très bref car les arguments en défense de la partie adverse à cet égard nous ont semblé parfaitement décalés par rapport à la réalité du droit positif. On m'excusera de le noter mais, enfin, tout se passait comme si le conseil des Etats-Unis avait quelques problèmes de mise à jour. Comme si la jurisprudence de cette Cour dans l'arrêt *LaGrand*, très précisément à propos des mêmes faits illicites, n'était pas intervenue. Comme si les travaux de la Commission du droit international, achevés quelques semaines sinon même quelques jours seulement après votre arrêt dans cette affaire, rendu le 27 juin 2001, n'avaient à leur tour, prenant acte de votre jurisprudence, consacré les propositions faites par les deux derniers rapporteurs spéciaux sur la base du droit positif, et ceci pour ce qui concerne la cessation des faits illicites continus et tout autant pour ce qui concerne l'obligation de ne pas répéter les mêmes manquements au droit dans l'avenir.

175. Comme si, enfin, l'attitude des Etats-Unis avait effectivement changé depuis l'arrêt *LaGrand*. Or, on vous l'a rappelé ce matin, tel n'est véritablement pas le cas[84]. Il est décidément difficile, Monsieur le président, comme le font pourtant les Etats-Unis, de se réclamer constamment

[84] Cour Suprême des Etats-Unis, *Osbaldo Torres* v. *Mullin*, 540 U.S._____ (2003) du 17 novembre 2003.

de l'arrêt *LaGrand* tout en trouvant qu'il est allé trop loin et d'accuser constamment leurs adversaires de vouloir l'outrepasser, lorsqu'ils refusent eux-mêmes d'en tirer toutes les conséquences du point de vue du droit de la réparation.

176. Par conséquent, je ne saurais ici, Monsieur le président, que réitérer la requête du Mexique visant à compléter la restitution par la cessation des faits illicites et par l'obligation faite à l'Etat responsable de ne plus les commettre à nouveau. Ceci termine ma plaidoirie et je vous prie de bien vouloir, Monsieur le président, donner la parole à M. l'ambassadeur Santiago Oñate, agent des Etats-Unis du Mexique pour le prononcé des conclusions qu'il vous soumettra.

The PRESIDENT: Thank you, Professor Dupuy. I now give the floor to Ambassador Santiago Oñate.

Mr. OÑATE: Mr. President, Members of the Court:

V. SUBMISSIONS

177. As announced by Ambassador Gómez-Robledo during his initial presentation last Monday, Mexico wishes to present to you, without any changes to their substance, a simplified formulation of its submissions to the Court.

178. In substance, these submissions are comprised, as before, of judicial satisfaction and *restitutio in integrum*, completed by the cessation of continuing wrongful acts and guarantees by the United States of America of the non-repetition of those acts.

179. In form, these submissions have been simplified in that Mexico considers, at this stage of the proceedings, that it is not necessary to delve into all of the implications of the reparations that it seeks. These implications are set forth in our Memorial, and they have been elaborated in our oral pleadings this week, each of which should be considered in the light of the other.

180. As a result, the final submissions of Mexico are expressed in the following way.

181. The Government of Mexico respectfully requests the Court to adjudge and declare:

(1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican

nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' rights to receive such protection as Mexico could provide under Article 36 (1) *(a)* and *(c)* of the Convention;

(2) That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;

(3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the "procedural default" doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum*;

(5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

(8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate

guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2).

Thank you, Mr. President.

The PRESIDENT: I thank you, Ambassador Oñate. The Court takes note of the final submissions which you have now read on behalf of the United Mexican States.

This brings to an end the second round of oral argument by the United Mexican States. The Court will meet again tomorrow at 3 p.m. to hear the second round of oral argument of the United States of America. Thank you. The Court is adjourned.

The Court rose at 12.10 p.m.

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