CR 2003/29

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Friday 19 December 2003, at 3 p.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le vendredi 19 décembre 2003, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The Court meets this afternoon to hear the second round of oral argument of the United States of America, who will take the floor for two hours. Thus, I shall now give the floor to Mr. Taft, Agent of the United States of America.

Mr. TAFT: Thank you, Mr. President.

I. INTRODUCTION

1.1. Mr. President, Members of the Court, learned counsel. This afternoon, the United States will conclude its presentation. The framework for our approach to this case today remains what it has been. The Court should follow here its decision in the *LaGrand* case. That decision does not support or even allow for the results Mexico has sought in its submissions, even as they are now revised and curtailed. The remedy the Court identified in the *LaGrand* case, review and reconsideration of the conviction and sentence, taking account of any breach of Article 36, by means of the receiving State's own choosing, is flexible and effective. The Court should go no further here than it did in that case.

1.2. Mr. President, having regard to Practice Direction VI, the United States has limited its oral rejoinder only to those matters that it regards as essential at this stage of the proceedings. In all respects, however, I wish to reaffirm the statements that we made on behalf of the United States on Tuesday and in our Counter-Memorial. Our oralists this afternoon are, in order of appearance, Ms Brown, Mr. Philbin — and I know we are all pleased about this next — Mr. Thessin, Professor Zoller and Professor Weigend. I will speak last. In the interests of economizing the Court's time, I would suggest that we begin and that, Mr. President, you call now on Ms Brown. Thank you very much.

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

Ms BROWN: Thank you, Mr. President.

II. THE PROPER INTERPRETATION OF ARTICLE 36 (1)

2.1. Mr. President, Members of the Court, learned counsel, I am honoured to have the opportunity to speak to you again today about the proper interpretation of Article 36 (1) of the Vienna Convention. In doing so, I will also address Mexico's first, second, and eighth

submissions, taking the second up first, since it relates directly to the interpretation of "without delay".

2.2. Yesterday, Professor Dupuy reminded us that domestic law cannot be a defence to non-compliance with international obligations[1]. But it is important to remember that that is no answer to our fundamental point, which is that Mexico is asking this Court to rewrite Article 36 (1) and to give "without delay" a meaning it was never intended to have. The proper meaning of Article 36 (1) must be derived from its text considered in light of its context and its object and purpose. And whether pursuant to customary international law or because directed by paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties it must also take account of State practice. Drawing on Ambassador Gómez-Robledo's observation yesterday, we should expect the result in this case of such an analysis to be consistent with the obligations that the United States — and all other States parties to the Vienna Convention — voluntarily assumed when they joined the Convention.

2.3. Now, yesterday, Mr. Donovan conceded that the text of Article 36 (1) says nothing about interrogations, does not require that a consular officer be given access "without delay" and does not create a right to consular assistance[2]. These important concessions support our position that a breach of Article 36 (1) does not violate rights central to the criminal justice process. And that the requirement of subparagraph *(b)* for consular information and notification to occur without delay, cannot be read to require consular access to a detained foreign national before he is interrogated, or to require that a criminal investigation be stopped as consular notification procedures are completed.

2.4. Mr. Donovan therefore sought support in the object and purpose of Article 36[3]. In this respect he somewhat mischaracterized our position. We recognize, of course, that one purpose of Article 36 is to facilitate the performance of consular functions with respect to a person who is in detention pursuant to a criminal arrest, and that would include assisting him in obtaining legal

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[1]CR 2003/28, paras. 153-154.

[2]CR 2003/28, paras. 89, 91 (Donovan).

[3]*Id*., at para. 84.

representation, and it may undoubtedly be relevant to a criminal *prosecution*, as the Court noted in *LaGrand*[4].

2.5. But a prosecution is distinct from an investigation and Mr. Donovan failed to rebut our showing that the purpose of Article 36 is not to allow the consular officer to interject himself into the criminal investigation. It is not to have the consular officer participate in an interrogation, even as a witness. Nor did Mr. Donovan contest that the purpose of Article 36 is not to allow the consular officer to act as an attorney, or to advise the foreign national on the legal consequences of his actions or otherwise to assume the attorney's role. And to be clear, in the United States consular officers are not authorized as attorneys.

2.6. We also heard nothing yesterday to rebut our showing that the *travaux* give no support to Mexico's position. On State practice, no one yesterday, or indeed on Monday, contradicted our assertions that Mexico's own practice under Article 36 (1) regarding interrogations and investigations is not consistent with the interpretation it advances here. Nor did anyone contradict the findings of our State practice survey, which shows that the practice of other States does not support Mexico's interpretation. Mr. Donovan instead attempted again, as he did on Monday, to dismiss the relevance of State practice, and he engaged in a numbers game to cast doubt on the fact that we presented sufficient evidence of State practice directly contradicting Mexico's position[5].

2.7. Mr. President, Members of the Court, there can be no doubt that subsequent State practice "shall be taken into account", to quote from the Vienna Convention on the Law of Treaties, notwithstanding Mexico's claim that it is, to quote Mexico, "not a necessary part of treaty interpretation". Mexico cited Sinclair's standard that such practice must be "concordant, common, and consonant"[6]. But this, of course, does not mean that State practice must be unanimous, or demonstrated at the level of 100 per cent, which would seem to be the standard to which Mexico would hold the United States[7]. In any event, Mexico's invocation of that standard only reinforces our position, because we have clearly demonstrated that State practice is completely inconsistent

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[4] *LaGrand* Judgment, at para. 91.

[5] CR 2003/28, paras. 93, 98.

[6] CR 2003/24, para. 200 (Donovan) (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties* 137 (2d ed. 1984).

[7] See *id.*

with Mexico's idiosyncratic interpretation of "without delay". Mexico, conversely, has completely failed to show any practice — much less concordant, common and consistent practice — in support of its interpretation. Moreover, the fact that the practice of the United States and the practice of Mexico, in this regard, are identical, should be dispositive for purposes of this case.

2.8. If I could recap just briefly. Our State practice survey shows us that States today do not understand Article 36 to require consular information, notification, and access prior to interrogation or other steps in a criminal investigation. Therefore, Article 36 could not have been so understood in 1963. It is in fact inconceivable that it would have been understood in this manner. At that time — in fact, still today — a number of countries' domestic law provided for a period of incommunicado detention for investigatory purposes[8]. Further, the negotiators clearly understood that consular notification could not be provided immediately in all cases, and they were prepared to accommodate this[9]. Moreover, notification at the time might have been provided by letter or by diplomatic note, and in some cases that is still the practice. Thus, it could not have been expected that it would have been provided prior to interrogation or that interrogations and other steps would have been held in abeyance for however many days or weeks it might have taken for the consular officer to appear.

2.9. In its second submission Mexico proposes that the Court find that "notification of consular rights and a reasonable opportunity for consular access" must be provided "before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights". When the text of Article 36 is interpreted in context, in light of its object and purpose, and taking appropriate account of State practice, the only reasonable conclusion is that no State understood Article 36 (1) to have this meaning: and that cannot therefore be the proper meaning of Article 36 (1) today.

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[8] I *Yearbook* of the International Law Commission, *Summary Records of the Twelfth Session*, 47 (para.. 48) UN doc. A/CN.4/SER.A/1960 ("Mr. Matine-Daftary said . . . some allowance had to be made for the fact that the rules of criminal procedure of many countries made it possible to prevent all communication between the accused and outside persons for a specified period while the investigation was proceeding. During that time, even the consul could not have a private interview with the person").

[9] UN GAOR 2d Comm., 13th Session, 17th Meeting at 340, UN doc. A/Conf. 25/6 (1963).

2.10. Accordingly, Mexico's second submission must be rejected. It requests precisely the kind of wholesale rewriting of the treaty that the Court has said is not its function. Its proposed rule has no basis in Article 36 and it could only lead to confusion and to absurd results.

2.11. Mr. President, Members of the Court, to be clear on this point: if Article 36 (1) had been written as Mexico proposes, States parties would not have accepted it. More particularly, the United States could not have ratified the Convention without a significant reservation. As a practical matter, a country the size of the United States, with the diverse population of the United States, would never have accepted an obligation that would have put the ordinary conduct of criminal investigations and public safety at jeopardy. As a legal matter, grave constitutional issues would have been raised regarding the ability of our federal Government to enter a treaty with such potential consequences for the criminal justice processes of the states of the United States. And certainly other States parties — and particularly those with federal systems — would have had similar concerns. The United States would not have assumed — and if I can again quote Ambassador Gómez-Robledo — it did not voluntarily assume obligations anything like those that Mexico has asked this Court to impose upon it and, inherently, upon more than 160 other States parties.

2.12. Mr. President, I will now turn to the application of Article 36 (1) to the case at hand, and to Mexico's first submission.

2.13. First, as a preliminary matter, we stand on the burden of proof. On Mexico's theory, Article 36 is a kind of strict liability provision. Any breach of any element of Article 36 (1) in Mexico's view automatically results in a violation of fundamental due process guarantees and requires extreme remedies in the criminal justice system of a sovereign State. This is wrong, as a matter of causation, our position on that is clear. But, to the extent Mexico presses this point nonetheless, this cannot be a case governed by the burden of proof applicable in a case involving what Mexico yesterday called the ordinary principles of State responsibility. Mexico cannot expect to have the benefit of an ordinary burden of proof and at the same time argue that a violation, once

established, has such extraordinary, automatic and grave consequences for sovereignty. A heightened standard such as that used in the *Corfu Channel* case is clearly more appropriate[10].

2.14. We also stand on the elements of proof for establishing violations of Article 36 (1). On these, Mexico remain cavalier about substantial issues that should give this Court pause. It has asked in its first submission that the Court find that "in arresting, detaining, trying, convicting, and sentencing" all 52 of the Mexican nationals the United States violated all three subparagraphs of Article 36 (1). We explained in our Counter-Memorial why the Court has no jurisdiction to address the "arresting, detaining, trying, convicting and sentencing" of any of the Mexican nationals. Article 36 (1) establishes no obligations regarding these fundamental steps in the criminal justice process. We thought that Mexico had conceded that point on Monday. But even had Mexico simply, in its second submission, asked that the Court find that the requirements of Article 36 (1) were not observed in all of the 52 cases, the Court cannot do that unless it finds all of the elements necessary to a breach of each subparagraph in each of the cases. And the Court cannot do that.

2.15. For example, on the citizenship issue: in the case of defendant Ayala, case No. 2, we are close to certain that Ayala is a United States citizen. We could say so with absolute certainty if Mexico had produced facts about his mother solely in its or Mr. Ayala's possession. Unlike *LaGrand*, where Germany meticulously confirmed that the LaGrand brothers were not United States citizens by consulting with the competent United States authorities before it came to the Court, Mexico has not done that here, with respect to cases of possible US citizenship: and that confuses a central issue for the Court.

2.16. Mexico also fails to accept its responsibility for showing whether and when the arresting or detaining officers in fact knew that the person they were arresting was not a United States citizen but a Mexican national. We showed in the Counter-Memorial and on Tuesday that arresting officers *cannot* easily determine nationality if the individual does not provide that information accurately. It is not enough to stand before this Court, as Ms Babcock did yesterday, and say that the United States can easily determine what the arresting officers knew with a simple

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

phone call. It particularly cannot be a simple phone call in a case where Mexico knew about the claim years ago and yet failed to raise it with the United States promptly. With the passage of time, records are lost, memories dim and police officers change jobs. Our ability to investigate cases has been prejudiced by Mexico's failure to raise them with us on a timely basis. Nevertheless, we have identified many cases in which it appears that the arresting officers did *not* know they had arrested a Mexican national, often because the individual had misrepresented his place of birth, or given other information indicating that he was a United States citizen. Clearly in these circumstances, the inferences should be drawn against Mexico, not the United States.

2.17. With respect to the question of breaches of subparagraphs *(a)* and *(c)*, Mexico yesterday totally confused that issue with the question of whether breaches of subparagraph *(b)* may have led to prejudice to the individual. I explained on Tuesday that the Court in *LaGrand* expressly found that a breach of subparagraph *(b)* does not necessarily imply a breach of subparagraphs *(a)* and *(c)*. The Court also made clear in *LaGrand* that, even where subparagraphs *(a)* and *(c)* have been breached, whether the individual was prejudiced in relation to his conviction and sentence is an entirely separate question. Ms Babcock confused this issue yesterday. She erroneously asserted that *LaGrand* relieved Germany, and now Mexico, of any requirement to establish a particularized showing of causation and prejudice with respect to the individual in question once a violation of subparagraph *(b)* is established. But in fact, *LaGrand* did no such thing.

2.18. We did not hear it again yesterday, but on Monday Mexico also sought support for its position in this respect in the advisory opinion of the Inter-American Court of Human Rights in OC-16. But the Court will recall that that decision was before it in the *LaGrand* case: and that decision should not be given any more weight in this case than it was given in *LaGrand*. When the Court fashioned its remedy of review and reconsideration which allows prejudice to be considered on an individualized basis, it rejected OC-16's proposition that a breach of subparagraph *(b)* necessarily leads to an infirm conviction and sentence. Thus, to the extent that Ms Babcock's arguments yesterday were premised on a legal view that prejudice must be assumed from any violation of Article 36 (1) *(b)*, unless the United States proves otherwise, she was wrong; and to the extent that she was arguing prejudice in fact with respect to the individuals and their

convictions and sentences, she was making an appeal that should be addressed not to this Court, but to the competent United States authorities responsible for review and reconsideration.

2.19. Mr. President, Members of the Court, to summarize on the application of Article 36 (1) to the 52 cases: When the elements and the burden of proof are considered, the Court cannot find breaches of Article 36 (1) *(a)*, *(b)*, and *(c)* in all of the 52 cases, as Mexico has requested. At best, to address the Article 36 (1) issue it would have to parse each case individually. We suggest, however, that the Court need not undertake this function. This is because any breach of Article 36 (1) can be effectively cured as long as there is a mechanism for review and reconsideration of any conviction and sentence in light of the violation. And there is, in the judicial and clemency processes of the United States.

2.20. Finally, I would like to address Mexico's claim of systematic violations of Article 36 (1), and Mexico's eighth submission. Ms Babcock yesterday again asserted that Mexico has supported its claim of systematic violations of Article 36 (1) by showing 102 continuing violations[11] — it's a word that she used. That is simply wrong. Not one of those 102 alleged violations has been proven; we have shown that, in many of those cases, no violation of subparagraph *(b)* could have occurred because the individual concerned was a United States citizen, or concealed his nationality, or in fact received consular information. We conceded *none* of the alleged violations of subparagraph *(b)* because we were not able fully to investigate and resolve the relevant issues — including the issues of nationality[12].

2.21. Moreover, no breach of subparagraphs *(a)* or *(c)* occurred in any of the 102 cases, that is clear. And that clearly is evidence that the efforts of the United States to improve compliance with Article 36 (1), and to increase awareness of the importance of compliance, are bearing fruit. Mexican consular officers are learning of arrests more frequently and sooner after their nationals are detained, and they have gone so far as to tell us that they will soon be overwhelmed by the number of notifications they receive. Mexico, in fact, here, has claimed "substantial success" in recent years in persuading prosecutors to seek lesser penalties[13]; such success would be

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[11]CR 2003/28, paras. 38-40.

[12]Counter-Memorial, Annex 1, at A.33.

[13]CR 2003/24, para. 135 (Uribe); CR 2003/28, para. 64 (Babcock).

impossible, clearly, without "substantial compliance" by the United States with its information and notification obligations. In fact, we have co-operated to an extraordinary degree with Mexico itself to improve compliance, particularly in those geographic areas closest to the United States-Mexico border that are of greatest concern to Mexico. The United States is unquestionably acting in good faith.

2.22. The Court has before it the declaration of our Assistant Secretary of State for Consular Affairs, giving assurances of the continued commitment of the United States to improve compliance with its obligations under Article 36 (1). But, as this Court recognized in *LaGrand*, and as the negotiators of the Convention themselves recognized, Article 36 states an obligation that cannot be complied with perfectly. In this respect, the Court should take particular notice of the fact that Mexico was aware of cases of Mexicans sentenced to death who apparently had not been informed as required by Article 36 (1) *(b)* at least as early as 1983[14] and 1986[15]. But it failed to bring any such cases to the attention of the United States authorities until 1996[16]. If Mexico had acted promptly to call those cases to our attention, instead of waiting 13 years, the United States could have intensified its compliance efforts in the mid-1980s, rather than in the mid-1990s. We are confident that, when the Court reviews our declaration on this issue, it will conclude that there is no basis for Mexico's accusations of systematic violations or for Mexican submission No. 8 in so far as it relates to Article 36 (1).

2.23. Mr. President, that concludes my presentation. I thank you for your time and attention and I ask that you now call upon Mr. Philbin.

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

Mr. PHILBIN:

III. THE JUDICIAL PROCESS IN THE UNITED STATES PROVIDES REVIEW AND RECONSIDERATION CONSISTENT WITH *LAGRAND*

3.1. Mr. President, distinguished Members of the Court, it is my task to address the requirement of review and reconsideration as set out in this Court's Judgment in *LaGrand* and

[14](#45 Caballero Hernandez).

[15](Tristan Montoya, p. A.7).

[16]See Counter-Memorial, Ann. 1, at A.8.

Mexico's mistaken claims that the United States does not provide review and reconsideration in its judicial processes.

3.2. In its Memorial and in its presentations to the Court this week, Mexico has complained that judicial review in the United States cannot provide the review and reconsideration called for by *LaGrand*. In Mexico's view, judicial review in the US is deficient because, even when it is timely raised, courts will not provide a remedy for a claim labelled as a claim for relief under the Vienna Convention *as such*. Similarly, Mexico complains that the doctrine of procedural default often will preclude reviewing courts from providing relief for a Vienna Convention claim — again presented as a Vienna Convention claim — if the claim was not first raised at trial. It is irrelevant, according to Mexico, that whatever substantive harm a particular defendant points to as the result that flowed from the breach of Article 36 — for example, the inability to secure consular assistance before making a confession — may be fully evaluated by US courts under a different legal heading.

3.3. As Mr. Donovan emphasized yesterday, in Mexico's view the substantive analysis that US courts apply in conducting review and reconsideration is not what counts. Review that permits an assessment of whether any essential guarantee to a fair trial — such as protection of the right to silence — has been impaired is not enough. Rather, it is the labels that courts apply that count for everything. If a US court does not label its review as Vienna Convention review, anything else it does is irrelevant and by definition inadequate.

3.4. I will explain why these contentions are wrong and why the basic assumptions underpinning Mexico's claims are at odds with the approach the Court set out in *LaGrand*. I will do that by examining, first, what review and reconsideration under *LaGrand* actually means — that is, what the Court's decision in *LaGrand* shows us about what review and reconsideration should provide. Second, I will show how judicial review in the United States satisfies these standards.

A. Review and reconsideration under *LaGrand*

3.5. The starting point for analysis is this Court's Judgment in *LaGrand*. In paragraph 125 of that Judgment, the Court stated that, where there has been a breach of Article 36 (1) and a defendant has been convicted and sentenced to severe penalties, the United States must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the

rights set forth in the Convention"[17]. This part of the *LaGrand* Judgment plainly called for a *process*. It indicates that the remedy the Court had in mind was necessarily a mechanism for individualized consideration of the conviction and sentence that could assess *whether* the breach of Article 36 had any impact on the fundamental fairness of the proceeding and whether that impact might provide a basis for altering the conviction or sentence.

3.6. It does not assume that any breach of Article 36 necessarily will have an effect on the conviction and sentence that would warrant some relief. To the contrary, it reflects an assumption that it very well might not. The whole point is simply to examine the conviction and sentence in light of the breach to see whether, in the particular circumstances of the individual case, the Article 36 breach did have some consequence — some impact — that impinged upon fundamental fairness and to assess what action with respect to the conviction and sentence that might require. If it did not result in some prejudice to the defendant, certainly no further action within the criminal justice system is required.

3.7. What this shows is that in formulating the remedy in *LaGrand* the Court recognized that consular information and notification under Article 36 are not *in themselves* essential attributes of a fair trial process. The Court did not formulate a remedy based on the assumption that a breach of Article 36 must, in itself, impair an essential attribute of due process. And that makes perfect sense. As we noted the other day, it would be difficult indeed to treat consular information and notification in that manner. After all, even if consular information is provided to a detained foreign national and at his request his consulate is then notified of his detention, these actions may very well result in nothing further whatsoever. It is wholly at the discretion of the sending State to ignore the request for assistance for any reason or for no reason at all. And the decision of a particular consular official not to respond in a given case certainly cannot be said to impair any right of the defendant.

3.8. Instead, the *LaGrand* Judgment necessarily reflects a recognition that consular information and notification at most can have only an indirect effect on those guarantees that are fundamental to a fair trial. In other words, consular information and notification — and the

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[17] *LaGrand*, para. 125.

consular assistance that they may or may not produce — might help to *facilitate* the defendant's exercise of his rights. But the consular information and notification are not essential to a fair trial in themselves.

3.9. Indeed, if one examines Mexico's complaints about how the lack of consular information or notification has injured Mexican nationals, essentially all of the substantive harms that Mexico points to are injuries that fall into another legal category. They reflect harms to some essential trial right, such as the right to effective assistance of counsel, or the right to remain silent. It is the effect that the breach of Article 36 has on *those rights* that forms the gravamen of Mexico's complaint in any given case.

3.10. Thus, what really matters when there has been a breach of Article 36 is the impact, if any, that the breach has on those guarantees that *are* fundamental to a fair trial. And if a judicial process permits an assessment of that impact, it provides review and reconsideration fully consistent with *LaGrand*.

3.11. This understanding of *LaGrand* is confirmed if one examines what Germany requested of the Court in that case. In seeking review and reconsideration, even Germany recognized that it could not expect to secure more than a review that would assess *whether* a breach had had some effect on rights that are actually fundamental to a fair trial. Thus, what Germany asked for was "proceedings [that] allow for a reversal of the judgment and for either a retrial or a re-sentencing", "where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification"[18]. That proposal includes a rather ambitious standard of review with respect to assessing prejudice, and one that the Court did not adopt. But the essential point here is that even Germany acknowledged that the object of review and reconsideration is to provide a process for assessing whether the judgment had been "impaired" in some manner that warrants relief. Moreover, to the extent that Germany's requests went further and sought to have the Court declare that Article 36 provides a fundamental human right, this Court pointedly declined to rule on that issue in paragraph 126 of the Judgment.

[18] *LaGrand*, para. 118.

3.12. This understanding of *LaGrand* is also in keeping with the general approach in almost all criminal law systems, which, as Professor Weigend explained the other day, will not reverse a sentence or conviction unless an error has resulted in prejudice to some essential due process guarantees. It would have been extraordinary for the *LaGrand* Court to suggest a remedy that would require convictions and sentences duly imposed under the domestic law of a State to be reversed if there had been no showing that essential guarantees of due process had been prejudiced by the breach of the Convention. And the *LaGrand* Court, of course, did no such thing.

3.13. Mr. President, Mexico's position in this case and its requests for relief are flatly at odds with these principles of the *LaGrand* Judgment. In asking the Court to vacate all 52 of the convictions and sentences, Mexico is plainly asking for something far beyond a mere process of review and reconsideration. It is instead asking for an automatic presumption that any breach of Article 36 renders any subsequent proceedings fundamentally unfair and, on the basis of that presumption, a directed result from this Court. That is precisely the sort of approach the *LaGrand* Court refused to take.

3.14. Moreover, yesterday, Ms Babcock argued that any breach of Article 36 (1) is "inherently prejudicial". But this is nothing more than another attempt to treat the obligation of consular information and notification as if it were in itself a fundamental element of due process necessary for a fair proceeding. Again, as I have explained, that is not the approach the Court took in *LaGrand*. Nor can Mexico's position in this regard be bolstered by the *Artico* and *John Murray* decisions of the European Court of Human Rights, which were cited yesterday for the proposition that even an attenuated possibility of injury is sufficient to warrant a remedy where a fundamental right is involved. Even passing over other grounds for distinction, those cases are inapposite here because they did involve direct claims of violations to fundamental trial guarantees — the rights to counsel and the right to silence.

3.15. There is also another aspect of *LaGrand* that gave important guidance about review and reconsideration that I would like to emphasize. The *LaGrand* Court was careful to make it clear that the means of providing review and reconsideration must be left up to the United States. That careful limitation on the judgment reflected an application of a more general principle — namely, that the specific domestic law mechanisms a State uses to carry out its obligations under

international law are usually not of any concern for international law. What matters is that the substance of the international legal obligation is satisfied. The specifics of the mechanisms for compliance under a State's municipal law do not matter.

3.16. That same principle is relevant to understanding what review and reconsideration under *LaGrand* must provide. As I have explained, the touchstone for review and reconsideration under *LaGrand* is a mechanism that allows an individualized consideration of the conviction and sentence to assess the impact of the breach of the Vienna Convention on essential guarantees of a fair trial and permits a determination of whether some revision in the conviction and sentence should be required. In evaluating the United States compliance with its legal obligations under international law, it cannot matter what labels the United States uses as a matter of domestic law in providing a mechanism that lives up to those standards. What matters is whether the United States complies with the substance of its obligations. As long as the United States provides a mechanism that allows a conviction and sentence to be reviewed and reconsidered taking into account any breach of Article 36 and any impact that breach has had on essential elements of a fair trial, it has satisfied the standard described in *LaGrand*.

3.17. According to Mexico, this is not enough because under *LaGrand*, and particularly under paragraph 91 of the Judgment, the review must give legal significance to the failure of consular information and notification *in itself*. Apparently, in Mexico's view what this would require is for US courts to provide, above and beyond any review that would permit an assessment of any impact the Article 36 breach had on an essential trial right, a further, wholly independent review — against a standard not specified by the Court — to determine whether the sentence or conviction should be overturned in light of the Article 36 breach for some reason *other than* impairment of an essential guarantee of a fair trial.

3.18. Indeed, Mexico goes further — it makes it clear what it would like the standard to be. What Mexico would like to have is review and reconsideration to see if, under any hypothetical scenario, consular information or notification might have led to some difference in the course of events related to the trial. Not surprisingly, moreover, as Ms Babcock's presentation yesterday demonstrated, lawyers can be extremely imaginative in speculating about how things could have been, if only there had been no breach of Article 36. In Mexico's view, because there will always

be some way to imagine speculative scenarios where the Article 36 breach might have changed something, such a breach should be considered, as Ms Babcock said, "inherently prejudicial".

3.19. This approach surely cannot be correct. If the Court adopted that approach, it would, in effect, be treating consular information and notification as an essential due process right the breach of which *always* requires reversal of a conviction and sentence. But that cannot be reconciled with the fundamental premise of the review and reconsideration remedy — which is that the breach of Article 36 is not fatal in itself and that review exists to examine the conviction and sentence *for something else* and then to determine appropriate action. When the review occurs in the judicial process, that requirement is satisfied by assessing whether there has been some impact on an essential right that warrants taking action within the criminal justice system to vacate the sentence or conviction.

3.20. To be sure, there might be a less extreme approach than Mexico's. There might be an approach based on the view that review and reconsideration solely for injuries to essential due process rights is not sufficient for *LaGrand*. Instead, there must be some additional increment of review that permits examining the Article 36 violation and potentially providing relief in some subset of cases even where that violation resulted in no impairment of an essential due process guarantee — again under an unspecified standard of review. For reasons I have explained, this is not the best understanding of *LaGrand*. *LaGrand* should not be understood as suggesting some new standard that would contemplate reversal of a conviction or sentence where there has not been any impairment of an essential right. But even if this alternative understanding were correct, at most what it would suggest is that a judicial review system that limited itself to addressing substantive injuries to essential trial guarantees, while effective in a majority of cases, might not fully provide the review *LaGrand* contemplated 100 per cent of the time. But in the rare case that might fall into this incremental area of review that extends beyond an assessment of the impact on fundamental trial rights, another mechanism for review and reconsideration — such as clemency review in the United States, which has more expansive reasons and standards for providing redress — could apply.

B. The system of judicial review in the United States provides review and reconsideration of any conviction and sentence consistent with the Judgment in *LaGrand*

3.21. Now that I have set out the requirements of review and reconsideration under the best understanding of *LaGrand*, I think it should be clear that the judicial review process in the United States fully satisfies the international law obligation set out by this Court.

3.22. As we explained on Tuesday, the courts in the criminal process can entertain and provide relief for any claim that essential guarantees of due process have been violated as a result of a breach of the Vienna Convention. It is true that a court in the United States generally will not grant relief to an individual for a claim cast merely as a claim for a breach of the Vienna Convention, as such. But for the reasons I just explained, that is not a bar to satisfying the requirements of *LaGrand*. What matters is substance, not the label placed on judicial review. And the courts can entertain any and all claims alleging that a breach of the Convention has resulted in harm to a specified right that is essential to a fair trial.

3.23. It is also true that if a defendant fails to raise a claim under the Vienna Convention at the proper time, he will be barred by the procedural default rule from raising the claim on appeal. Here again, however, as long as the defendant has preserved his claim relating to the underlying injury, an injury to some substantive right — such as a claim that he did not understand that he was waiving his right to counsel in an interrogation — *that* claim can be addressed. As a result, an examination of the impact of the Article 36 violation on the trial and its fundamental fairness — which is at the core of review and reconsideration called for by *LaGrand* — is fully available. And even if the defendant has *not* properly preserved his claim, in addressing whether an exception to the procedural default rule applies, courts will still often address whether the defendant has suffered any prejudice from the injury he claims. Thus, even in technically deciding that they cannot entertain a claim, courts often provide a review that assesses whether the alleged error resulted in any prejudice to the defendant in any event.

3.24. Thus, the judicial process is fully sufficient to provide review and reconsideration that protects all fundamental rights. Indeed, as we pointed out on Tuesday, Mexico has not identified a single defendant among the 52 before the Court who, as a result of the breach of Article 36, has been denied an essential element of due process. Yesterday, Ms Babcock again identified *none*.

Instead, Mexico resorted to speculation — speculation about what consular officials *might* have done in a case and how it *might* have had some influence on a juror, particularly in a capital case. That is no response to our fundamental point: the US judicial system fully protects due process rights — precisely the rights that Mexico says its consular officials would ensure.

3.25. Finally, I should note that if the Court were to attempt to examine the operation of the US judicial system to determine whether it provided review and reconsideration in the particular cases raised by Mexico, it would find that it could not even undertake that enquiry. In 49 of the 52 cases presented here, the judicial review process has not yet been completed. In fact, in 23 of the cases the first, direct appeal from the conviction and sentence is still under way[19]. Each of these cases raises claims that, if successful, could result in new trials or sentencing proceedings at which the defendant would have a full opportunity to avail himself of any consular assistance that Mexico is willing and able to provide.

3.26. This is, of course, one of the reasons that Mexico's claims in this case are inadmissible. Before coming to this Court to seek relief as a matter of international law for a breach of an international law obligation, Mexico must exhaust the remedies provided by the domestic laws of the United States. It has not done so here.

3.27. Nor can Mexico claim that pursuing the judicial process is futile. As we explained on Tuesday, even where claims under the Vienna Convention have been procedurally defaulted, courts may still entertain claims raising the same underlying injury that constitutes the gravamen of any complaint concerning a breach of Article 36. In the case of *Valdez* v. *Oklahoma*[20], for example, the Vienna Convention claim had been defaulted, but an Oklahoma court entertained a claim of ineffective assistance of counsel. It overturned Mr. Valdez's sentence because it concluded that the trial counsel had been ineffective in failing to uncover significant mitigating evidence that was subsequently discovered through the intervention and assistance of Mexican consular officials. Thus, the court effectively granted relief based on the very same substance that underpinned the Vienna Convention claim — namely, the consequences that followed in that case from an absence

[19]These are cases Nos. 3, 5-14, 16-17, 19-27, and 29.

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

of consular assistance. In any of the 49 cases still undergoing review, a similar ruling could well result in vacating a conviction or sentence.

3.28. Mr. President, that concludes my presentation. I ask that you now call on Mr. Thessin.

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

Mr. THESSIN:

IV. CLEMENCY REBUTTAL

4.1. Mr. President, Members of the Court, learned counsel. I am very pleased to be here before you today.

4.2. Mr. Philbin has just explained how our judicial process protects the very rights that Mexico's consular officers also seek to protect.

4.3. I will address clemency, in particular why clemency meets the *LaGrand* standard to provide review and reconsideration of convictions and sentences in light of any Article 36 violations and why Mexico is wrong when it says that clemency cannot satisfy *LaGrand*'s mandate. Let us summarize what clemency is and what it is not.

4.4. First, clemency procedures are part of the criminal justice process. Mexico's argument that the United States characterizes clemency as part of the "judicial process"[21] is perplexing and wrong. The United States has characterized clemency as an important point of the criminal justice system; we have never claimed that it is part of the judicial process or that it needs to share judicial rules of procedure. Clemency is not designed to mirror the judicial process in every respect, with judges and hearings and rules of evidence. Instead, clemency is designed to supplement judicial proceedings. Clemency can also act independent of court review, unconstrained by court procedures and precedents. In these ways, the clemency process can fill in any gaps in the judicial process, address any issues not fully resolved by the courts, analyse any newly discovered evidence, and settle any questions that are not capable of court review. The clemency decision-maker can rely upon the rigorous, multiple levels of judicial review that will always precede it, but he or she is not required to do so. That is why the United States Supreme Court has

[21]CR 2003/28, para. 68 (statement of Ms Babcock).

described clemency as the "historic remedy for preventing miscarriages of justice when judicial processes have been exhausted"[22].

4.5. Second, clemency processes are established in law, protected in law, and have legal durability. Mexico argues that a clemency authority "could adopt a policy that it would never commute a death sentence based upon an undisputed, acknowledged violation of Article 36". Mexico also argues that a state "could even abolish clemency entirely, without running afoul of the United States Constitution"[23]. These claims are fanciful and do not deserve the Court's attention. Mexico has presented no evidence that any state is considering such a measure, much less that a state has ever done so. And indeed, given the historic role of clemency and its legal foundations, these hypothetical claims are completely unthinkable.

4.6. That clemency procedures are not enshrined in the US Constitution is also irrelevant. The key point that Mexico ignores is that each of the states at issue in this case has its clemency power enshrined in that state's Constitution and that each of these states in turn further implements the clemency power through its state laws and regulations.

4.7. Third, contrary again to Mexico's recent assertion, the clemency process is fully equipped to address both legal issues and factual questions. Clemency officials are not restricted by principles of procedural default, finality, prejudice standards, and other limitations on judicial review[24]. Mexico argues that clemency boards and governors "usually have no legal training", "do not apply precedents, and . . . do not routinely determine whether a conviction and sentence was reached in conformity with state and federal law".

4.8. I have several points in response. Of course, non-lawyers make legal determinations in a variety of settings, most notably, when they serve as Ministers or Governors sworn to faithfully execute the law or on juries. Some of these officials are attorneys themselves. But whether or not this is the case, government attorneys advise clemency officials in each of the nine states at issue[25]. For example, in Texas, both the clemency board and the governor act in consultation with their

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

[23] CR 2003/25, para. 274 (statement of Ms Babcock).

[24] Criminal Justice Declaration, Declaration of Christopher A. Wray, United States Counter-Memorial, Ann. 7, at paras. 71-72.

[25] See Counter-Memorial, Anns. 8-17.

general counsels on clemency decisions[26]. Indeed, this is precisely what happened in the Suárez case[27], and in the Valdez case in Oklahoma[28]. To suggest that clemency review is conducted solely by non-lawyers and without the benefit of all necessary legal counsel, in other words, is sheer fiction.

4.9. In addition, at this late date, Mexico really cannot argue with a straight face that judicial precedents and legal doctrines should be followed in reviewing and reconsidering convictions and sentences. Mexico has already made a frontal assault on the United States judicial process, claiming that precedents such as judicial default and finality prevent foreign nationals from obtaining their day in court. Because the clemency process is not limited by these very judicial rules of procedure, default doctrines, and evidentiary limitations, clemency officials can supplement or supersede judicial decisions when considering Article 36 breaches. Clemency thus clearly can provide review and reconsideration of legal issues when Article 36 violations occur. Let us examine, for example, what happened in California. Mexico claims without citation that the Governor has "repeatedly state[d] that [he] will not review legal errors"[29]. We are not sure to which Governor Mexico refers but each of Governor Schwarzenegger's two most recent predecessors reviewed the conviction and sentence of a foreign national in light of an alleged Article 36 breach in clemency and made specific legal judgments, which they set forth in their decisions[30]. Texas, also the target of Mexico's criticism, likewise can and has reviewed in clemency procedures allegations of a Vienna Convention breach[31].

4.10. Fourth, clemency is a process open to all, biased against none. Mexico claims that "not everyone will have equal access to the clemency process"[32]. Mexico goes on to list a parade of

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[26]See Counter-Memorial, Anns. 17.

[27]See Counter-Memorial, Ann. 23, Exhibit 195 (letter from Clemency Board Chairman stating that "[o]n August 8, 2002, along with the Board's General Counsel and Clemency staff, I met in my official capacity with Mexican Consular Officials and Ms Babcock").

[28]See Memorial, Ann. 26, A.359 (letter from Governor Keating explaining that "my legal staff, advisors and I have considered the arguments and evidence presented in this case with a particular view toward determining the effect of the Article 36 violation").

[29]CR 2003/28, para. 67 (statement of Ms Babcock).

[30]California Clemency Declaration, Ann. 10.

[31]See Counter-Memorial, Ann. 17. See also Counter-Memorial paras. 7.24-7.27 (Suárez Medina); *id.* at Ann. 1, Appendix 5, at A.41-45 (Irineo Tristan Montoya and Miguel Angel Flores).

[32]CR 2003/25, para. 275 (statement of Ms Babcock).

hypothetical cases, describing the inability of Mexicans with limited English proficiency to prepare clemency petitions because they supposedly lacked access to lawyers. This claim has no credibility. Mexico boasted at length about its far-reaching programme to provide legal assistance to indigent Mexicans at every stage of the criminal process[33]. Mexico claims that the Mexican Government at the highest levels has intervened for its nationals in a variety of clemency proceedings[34]. No one can seriously believe a Mexican national would be without counsel and without high-level Mexican Government support in preparing a clemency petition.

4.11. Fifth, clemency is a fair process. Mexico claims that the clemency process is strongly influenced by "political considerations". But what Mexico really attempts to do is distort this Court's understanding of clemency, by painting an erroneous picture of clemency as a chance audience with a monarch where a supplicant may beg for mercy and the monarch responds irrationally. This is not the clemency process in the United States, a republic. Every state at issue in this case fully permits these 52 individuals to have their clemency petitions heard. Every state has procedures for thoroughly investigating clemency applications raising significant claims. Each state allows all interested parties to present any arguments and information the individual or his country's consular representative considers desirable. Each clemency official is sworn to discharge his duties properly.

4.12. A principal Mexican criticism of clemency is that it involves the discretion of executive officers. But when one considers exactly how Mexican consular officers seek to provide aid to Mexican nationals, this criticism rings hollow. In particular, as Mexico has repeatedly stated, it seeks to influence the criminal process at three junctures: when the prosecutor decides whether or not to seek the death penalty; when the jury decides whether or not to impose the death penalty; and when the Governor decides whether or not to grant clemency. In each of these instances, it is the purpose of Mexican consular officials *to influence the exercise of discretion.* It simply cannot be, therefore, that the presence of discretion in the clemency process makes it, as Mexico asserts, *incapable* of providing "review and reconsideration". Quite the opposite.

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[33]See CR 2003/24 paras. 133-135 (statement of Ambassador Uribe).

[34]Memorial, Ann. 7, para. 311.

Clemency is ideally susceptible to the intervention of consular officials, and Mexico has repeatedly taken advantage of this fact.

4.13. Mexico also asserts that pardons of convictions, as opposed to commutations of sentences, are rarely granted in capital cases. This is hardly surprising, since guilt is rarely an issue when a capital conviction is reviewed in clemency. After all, by the time that these cases have reached the clemency stage, these defendants have been found "guilty beyond reasonable doubt" with their convictions affirmed at multiple levels of judicial review. In addition, the procedural default rule is not in issue, as that rule does not bar a claim by a defendant who is actually innocent[35].

4.14. Sixth, clemency provides review and reconsideration of convictions and sentences in light of any Article 36 violations. Mexico claims that the United States has distorted the role of the clemency review in the seven post-*LaGrand* cases that we have discussed. This assertion is just plain wrong.

4.15. Let me quickly summarize the main points of these reviews. In Illinois, after the Prisoner Review Board held hearings, examined Mexican submissions on the *LaGrand* Judgment, and made recommendations to the Governor, and after the Governor talked to President Fox, the Governor commuted the sentences of five foreign nationals. Mexico claims that the Illinois grants of clemency are irrelevant since "each would have received clemency regardless"[36]. This is belied by Governor Ryan's own statement in which he said that he was influenced by the Vienna Convention claims[37]. And it is belied by Mexico's earlier statements in this case itself. In its Memorial[38], Mexico has taken credit for influencing these clemency decisions. As Mexico stated, "in response [to Mexico's representations], Governor George Ryan commuted Mr. Flores Urban's sentence"[39].

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[35]*Bousley* v. *United States*, 523 US 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can demonstrate 'cause' and actual 'prejudice', or that he is 'actually innocent'.").

[36]CR 2003/28, para. 69 (statement of Ms Babcock).

[37]See Counter-Memorial, Ann. 12, para. 9.

[38]Mexican Memorial, Ann. 7, paras. 293, 298, pp. A.116–A.117.

[39]*Id.*, para. 298, p. A.117.

4.16. In Texas, the Board of Pardons and Paroles examined the Article 36 claim before deciding not to recommend clemency to the Governor. The Board had received advice from the Department of State to provide review and reconsideration in accordance with *LaGrand.* The Board chairman met with several representatives of the Mexican Government, a synopsis of the meeting prepared by Ms Babcock went to all Board members, and additional time was allotted for Board review. As the Texas Board member stated in his letter, "the Board members had before them and carefully evaluated information [from Mr. Suarez's attorneys and Mexican officials] on the requirement of consular notification under Article 36"[40].

4.17. In Oklahoma, the Pardon and Parole Board, having received advice from the Department of State to provide review and reconsideration in accordance with *LaGrand*, examined mitigation evidence collected with the help of the Mexican Government. After granting several postponements to allow full consideration, after discussing the matter with President Fox and after consulting on several occasions with the Department, Governor Keating denied the clemency request, describing his reasons with respect to the Vienna Convention at length in a letter to President Fox[41].

4.18. These facts clearly show that these clemency officials knew of the *LaGrand* principle that convictions and sentences should be reviewed and reconsidered in light of the Article 36 violations and that these clemency officials undertook that review carefully and conscientiously in the cases before them.

4.19. And these will not be isolated instances. There is now an eighth case. Last week the Oklahoma Pardon and Parole Board recommended clemency for Hung Thanh Le, a Vietnamese national convicted of murder. The clemency recommendation was based in part on the absence of consular information, notice, and assistance. Yesterday, Governor Henry granted a 30-day stay of execution to allow him time "to go through the same deliberative process as previous clemency recommendations"[42].

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[40]See Counter-Memorial, Ann. 23, A2470 (letter of clemency board chairman).

[41]See Memorial, Ann. 26, A359 (letter of Governor Keating).

[42]Associated Press State and Local Wire, "Governor grants 30-day stay to Vietnamese national", 17 December 2003. (Reproduced in judges' book at tab 1.)

4.20. In short, Mexico's rhetoric cannot distort the record. In these eight clemency cases, we have seen five commutations, one vacated death sentence, one continuance and one in which clemency was denied. In every case, the Article 36 claim had a central role in the decision-making process. Mexico's disparagement of the clemency process makes sense only if one accepts Mexico's premise that *LaGrand* mandates a substantive outcome, rather than a process of "review and reconsideration". That Mexico in every case does not achieve the result it seeks does not mean that it has not obtained the process that is required. Mexico asserts that nothing has happened since *LaGrand.* These cases, however, incontrovertibly refute this assertion. Everything has happened since *LaGrand.* Since *LaGrand,* every single death sentence in which a Vienna Convention claim has been raised in clemency, has received careful, reasoned, and deliberate "review and reconsideration". Every such clemency determination has been informed by the need to provide review and reconsideration.

4.21. In conclusion, Mr. President, as Mr. Philbin and I have explained, the United States has in place criminal justice systems and executive clemency proceedings that allow for the review and reconsideration of failures to provide consular information. These processes, both together and standing alone, plainly satisfy this Court's ruling in *LaGrand*. Mr. President, I now ask that you call upon Professor Zoller.

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

Mme ZOLLER :

V. REPARATIONS

Monsieur le président, Madame et Messieurs les juges.

5.1. Les conclusions du demandeur sur les réparations qui lui seraient dues ont quelque peu évolué depuis celles qu'il avait formulées dans sa requête introductive d'instance et dans son mémoire ampliatif. L'une a été abandonnée tout au moins dans la forme extrême que le Mexique lui avait initialement donnée; il s'agit de la demande de satisfaction judiciaire. L'autre est intégralement maintenue, mais elle est assortie d'une quasi-demande reconventionnelle dans l'hypothèse où la demande principale ne serait pas retenue. Il s'agit de la demande de *restitutio in*

integrum maintenant complétée par une demande de réparation à titre supplétif. La troisième, en revanche, est inchangée; il s'agit de la cessation et des garanties de non-répétition.

5.2. Ces ajustements de la dernière heure parlent d'eux-mêmes. Les demandes initiales du Mexique étaient excessives; elles allaient au-delà de ce que la Cour pouvait leur donner dans la meilleure des hypothèses. Pour les Etats-Unis, les nouvelles demandes mexicaines excèdent une fois encore les pouvoirs de la Cour, notamment pour ce qui touche à la seconde d'entre elles, en particulier le substitut à un retour au *statu quo ante*.

5.3. Nous examinerons les demandes de réparation du Mexique en suivant l'ordre que nous avions retenu dans notre défense mardi et qui a été repris par notre adversaire. Voyons tout d'abord la satisfaction.

A. Satisfaction

5.4. Le Mexique a abandonné sa démarche initiale de satisfaction judiciaire sous la forme d'une déclaration «[claire et précise] des obligations juridiques internationales auxquelles sont tenus les Etats-Unis en vertu de la convention de Vienne». A la place, le Mexique demande simplement de «commencer par le commencement»[43] et il requiert la Cour de «constater que cet Etat [c'est-à-dire les Etats-Unis] a manqué à ses obligations»[44]. Il ne s'agit donc plus de demander à la Cour d'exercer une justice préventive sous la forme de ce qui n'était pas loin de confiner à un véritable règlement d'intérêts entre les parties. Il s'agit maintenant d'obtenir, dans le prolongement de l'affaire du *détroit de Corfou* dont le demandeur se réclame d'ailleurs expressément[45], une déclaration emportant réparation du préjudice moral subi par l'Etat réclamant.

5.5. Monsieur le président, Madame et Messieurs les juges, les Etats-Unis sont d'avis que si, nonobstant tous les efforts par eux mis en œuvre pour satisfaire la jurisprudence *LaGrand*, la Cour devait les déclarer en violation des obligations posées par cette décision, pareille déclaration constatant la violation et tournée vers le passé constituerait une réparation adéquate.

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[43] Plaidoirie Dupuy, par. 149.

[44] Plaidoirie Dupuy, par. 150.

[45] Plaidoirie Dupuy, par. 150.

5.6. Le Mexique ne l'entend point ainsi et persiste dans ses conclusions sur un prétendu droit à la *restitutio in integrum*. C'est vers celles-ci qu'il nous faut à présent nous tourner.

B. *Restitutio in integrum*

Sur la demande de *restitutio in integrum*, deux points sont à examiner, la demande principale et la demande supplétive.

1. La demande principale

5.7. Le Mexique maintient intégralement à titre principal son droit à la *restitutio in integrum*. Il exige toujours l'annulation des cinquante-deux jugements et verdicts rendus. Pareille obstination avoisine l'entêtement à partir du moment où notre adversaire n'a rien de plus solide à apporter au débat que : 1) une interprétation erronée d'une importante et récente décision de la Cour; 2) un article du projet d'articles de la Commission du droit international sur la responsabilité de l'Etat, lui-même insuffisamment analysé.

5.8. La Cour se souviendra que mardi dernier, nous avions, pour écarter la demande mexicaine de restitution, développé l'idée selon laquelle la jurisprudence internationale ne fournit pas d'exemple convaincant où des jugements de droit interne ont été annulés par des instances juridictionnelles internationales. En réponse, le Mexique nous a opposé de nombreuses affaires relatives aux droits de l'homme où des juridictions internationales ont ordonné la nullité de jugements internes. Mais la Cour n'est pas une cour internationale des droits de l'homme; elle est une cour ouverte aux Etats seulement. Il en résulte qu'en l'espèce, ces décisions sont d'un caractère tout à fait différent, comme le professeur Weigend l'expliquera.

5.9. Le conseil du Gouvernement mexicain nous oppose l'affaire *Yerodia* dans laquelle selon lui, «le résultat final s'est précisément traduit par la décision judiciaire d'ordonner au défendeur d'annuler un acte juridique interne»[46]. Mais, dans cette affaire, c'est le mandat d'arrêt lui-même qui constituait le fait illicite et sa «mise à néant» était la seule manière d'exécuter le jugement de la Cour. La compétence de l'Etat était liée par le droit international. Aucun juriste averti du sens des mots se gardera bien de sauter à pieds joints — comme le professeur Dupuy le fit hier — sur la conclusion que «l'annulation est la voie normale de la restitution dans le cas de la réparation d'un

[46] Plaidoirie Dupuy, par. 171.

préjudice juridictionnel»[47]. Ceci n'est pas vrai lorsque le préjudice résulte, non pas directement de l'acte judiciaire lui-même comme dans l'affaire du *Mandat d'arrêt*, mais d'une formalité procédurale non substantielle, connexe et indirectement liée aux jugements rendus par le pouvoir judiciaire indépendant d'un Etat de droit.

5.10. La deuxième justification à laquelle s'est accroché le conseil du Mexique dans sa défense de la *restitutio* est l'article 32 du projet d'article de la Commission du droit international. Les Etats-Unis entretiennent sur ce projet des vues différentes de celles du Mexique. A supposer que l'article 32 soit pertinent, il ne dit pas ce que le conseil du Mexique veut y voir. Avec tout le respect dû à la Cour, on relèvera que ce n'est pas de l'Etat, sous-entendu les Etats-Unis, qu'il s'agit ici, mais de la Cour elle-même.

5.11. Les Etats-Unis ont dit qu'il y avait des décisions de la Cour qu'ils anticipaient avec la plus grande inquiétude — comme celle que le Mexique exige — parce qu'ils ne voient pas, si elles venaient à être rendues, comment ils pourraient s'y conformer. Mais ils ne sont pas les seuls dans ce cas. Aucun exécutif d'un Etat de droit ne serait à l'aise avec une décision de la plus haute juridiction internationale annulant d'un coup cinquante-deux jugements rendus par ses cours et tribunaux.

2. La demande supplétive

5.12. Faut-il que le Mexique soit averti du caractère excessif de sa demande sur l'annulation des cinquante-deux jugements rendus pour qu'il en arrive à suggérer à la Cour «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»[48]. De telles prétentions ne peuvent être accueillies, d'une part parce que les Etats-Unis appliquent et continuent d'appliquer la jurisprudence *LaGrand*, et d'autre part, parce que la demande mexicaine aboutit à inviter la Cour à exercer des fonctions exécutrices qui ne sont pas de son ressort.

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[47] Plaidoirie Dupuy, par. 170.

[48] Plaidoirie Dupuy, par. 179.

5.13. Monsieur le président, Madame et Messieurs les juges, il existe dans le droit des Etats-Unis un système qui permet le réexamen et la revision des verdicts et des peines pour des situations relevant de la jurisprudence *LaGrand*. Ce système de réexamen et de revision n'est pas celui que le Mexique cherche à faire croire à la Cour. Ce système a au moins un mérite. Il existe; il est tangible, il est concret et il fonctionne. Comme je l'ai dit mardi, sur les sept cas qui ont été traités par lui depuis *LaGrand*, cinq ont été commués et dans le sixième cas, le verdict a été annulé par un tribunal américain.

5.14. La principale critique du Mexique contre nos procédures de réexamen et de revision est que nous les mettrions en œuvre selon notre bon plaisir. M. l'ambassadeur Gómez-Robledo a déclaré hier que les Etats-Unis «partaient de l'hypothèse que le choix des moyens laissé par la Cour leur donnerait entière liberté»[49]. Nous n'avons jamais pensé que les choses étaient aussi simples que notre adversaire veut bien le dire. Les Etats-Unis n'ont jamais, comme l'a dit l'agent du Mexique hier, «adapt[é] *LaGrand* à leur conduite». Au contraire, les Etats-Unis ont pris toutes les mesures en leur pouvoir pour mettre en œuvre cet arrêt «dans le cadre des lois et règlements de l'Etat de résidence» pour reprendre les termes de l'article 36, paragraphe 2. Le Mexique n'a cessé de nous dire qu'il n'avait pas d'objection à laisser aux Etats-Unis le libre choix des moyens pour exécuter la décision de la Cour. Mais le type de remède qu'il attend de la Cour ne conduirait pas à un «libre choix de moyens», mais comme M. Dupuy l'a dit hier, à un «certain choix de moyens». A suivre le Mexique, le choix des moyens ne serait plus libre, mais imposé. Or, comme le dira le professeur Weigend, si les Etats-Unis étaient tenus de l'obligation de résultat consistant à donner au Mexique cette extravagante *restitutio in integrum* qu'il exige, quels autres moyens les Etats-Unis pourraient-ils envisager que celui-ci que la Cour n'a tout simplement pas le pouvoir de leur imposer ? Lorsqu'il s'agit d'exécuter une obligation de résultat comme celle posée dans la jurisprudence *LaGrand*, le droit international laisse toujours à l'Etat une marge de liberté, ce que la Cour a justement appelé «le libre choix des moyens». Les règles internationales qui définissent la licéité de ces moyens sont de nature coutumière, mais elles sont très claires. Dans l'affaire des *Réclamations britanniques au Maroc espagnol*, Max Huber soulignait : «Aucune administration de

[49] Plaidoirie Gómez-Robledo, par. 10.

la justice n'est parfaite et il faut sans doute accepter, même dans les pays les mieux administrés, une marge considérable où la tolérance s'impose.»[50] Dans l'affaire *James Pugh*, où était en jeu le comportement des autorités panaméennes vis-à-vis d'un ressortissant britannique pourtant décédé des suites de leur comportement à son égard, le tribunal a relevé que les autorités avaient fait «un usage raisonnable de leur compétence et de leurs pouvoirs»[51].

5.15. Monsieur le président, Madame et Messieurs les juges, les Etats-Unis attendent de la Cour qu'elle les juge à l'aune de ces principes établis de la jurisprudence internationale, ni plus, ni moins.

5.16. Si la Cour suit ces principes comme elle l'a fait jusqu'ici, elle ne pourra que rejeter la requête du Mexique tendant à imposer aux Etats-Unis la mise en place d'une procédure authentiquement judiciaire de réexamen et de revision.

5.17. A supposer, par impossible, que la Cour juge le système américain de revision et de réexamen incompatible avec la jurisprudence *LaGrand*, il est douteux, selon les Etats-Unis, qu'elle puisse à titre supplétif leur imposer la mise en place d'une autre procédure. Ordonner à l'Etat d'adopter des lois qui permettraient d'atteindre un certain résultat ne relève plus du règlement judiciaire des différends. Pareille mesure ressort de fonctions exécutrices parce qu'elles s'apparentent à des mesures d'exécution forcée et que, comme nous le disions mardi, la «specific performance» est étrangère aux techniques de droit international public.

5.18. Pour en finir avec la *restitutio in integrum*, il reste un dernier argument à réfuter. Dans sa plaidoirie hier, M. Donovan nous a expliqué que l'article 36, paragraphe 2, de la convention de Vienne, énonçait une obligation primaire contenant la revision et le réexamen. Et de poursuivre avec l'idée que la réparation appropriée pour violation de ladite obligation constituait une obligation secondaire dérivant du droit de la responsabilité internationale. A partir de là, une logique imparable, a conduit M[e] Donovan à nous suggérer que la réparation appropriée pour la prétendue violation par les Etats-Unis de l'article 36, paragraphe 2, serait la *restitutio in integrum*, interprété, bien sûr, en la circonstance, comme le retour au *statu quo ante*, lui–même défini comme l'annulation des cinquante-deux condamnations prononcées.

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[50] *UNRIAA*, t. II, p. 641 *in fine*.

[51] Grande-Bretagne/Panama, 6 juillet 1933, *UNRIAA*, t. III, p. 1439.

5.19. Cet argument ingénieux contient les germes de sa propre destruction, dans la mesure où, de l'avis même de la Commission du droit international dans son projet d'article : «la restitution ne doit pas donner à l'Etat lésé *plus* qu'il n'aurait eu droit si l'obligation avait été exécutée». Monsieur le président, «pas plus qu'il n'aurait eu droit si l'obligation (primaire) avait été exécutée», de sorte que la réparation à laquelle le Mexique pourrait prétendre n'est bien que cette obligation primaire elle-même, c'est-à-dire la revision des condamnations et des peines. La logique subtile de la Commission du droit international sur les enchaînements entre obligations primaires et secondaires ne sauve pas le Mexique. Elle ne le pousse qu'à tourner en rond. De quelque coté que l'on prenne la question de la réparation, le Mexique n'a bien droit qu'au réexamen et à la revision des cinquante-deux verdicts et condamnations rendus, et non pas à leur annulation.

B. Cessation et garanties de non répétition

5.20. Les Etats-Unis constatent que le Mexique n'a apporté aucun argument nouveau à ceux déjà développés à propos de leur demande tendant à la *restitutio*. Qu'il suffise de dire que s'agissant des travaux de la Commission du droit international, il ne s'agit que d'un droit en formation et il n'appartient pas à la Cour d'appliquer le droit avant que le législateur international l'ait édicté.

5.21. Au surplus, les demandes de cessation et de garanties de non-répétition sont sans objet dès lors que, encore une fois, les Etats-Unis appliquent raisonnablement et de bonne foi la jurisprudence *LaGrand*.

5.22. Monsieur le président, je vous prie de bien vouloir donner la parole au professeur Weigend.

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

Mr. WEIGEND: Thank you.

VI. COMPARATIVE JUSTICE

6.1. Mr. President, Members of the Court. I feel privileged to address the Court again today. Please do not fear that I am going to make you listen to another dissertation on comparative

criminal procedure. Mr. Donovan said yesterday that the question for the Court is not one of comparative criminal procedure but "what is the proper remedy as a matter of *international law*"[52]. I fully agree with this statement — and yet I hope to be able to show that the procedural practice of States is not altogether irrelevant. With respect to the question of what remedy is appropriate under international law when a State has breached Article 36 (1) it is our position, of course, that this Court has already given a conclusive answer when it ruled, in *LaGrand*, that a foreign national is entitled, under Article 36 (2), to "review and reconsideration" of his conviction and sentence taking account of the violation, and that review and reconsideration is to be granted by means to be chosen by the receiving State[53].

6.2. Now Mexico would want the Court to abandon the course it has wisely taken in *LaGrand*. In the latest version of its submissions, Mexico has seemingly softened its original insistence that the United States abandon certain established doctrines of its domestic procedure law with respect to Mexican defendants. But Mexico still demands that the Court impose on the United States several obligations, namely, "to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences" of the 52 Mexican nationals[54] and to make sure "that a prior violation of Article 36 shall not affect the subsequent proceedings"[55]. In the alternative, the United States is to provide review and reconsideration by means other than clemency, and in disregard of its domestic rules on procedural default[56]. Mexico has evidently sought to adapt its submissions to the Court's ruling in *LaGrand* that "the choice of means must be left to the United States", and the reformulation of Mexico's submissions purports to make it appear that the United States, should the Court rule as Mexico desires, had some leeway in adapting its municipal laws. But when one takes a closer look it is easily apparent that the choice left to the United States would not be a choice of means but at best a choice of words. How should the United States "deprive convictions and sentences of full force or effect" other than by having them annulled, vacated or quashed by some judicial ruling? And how should the United States

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[52]CR 2003/28, para. 116 (emphasis added).

[53]*LaGrand* at para. 125.

[54]CR 2003/28, para. 181, submission (5).

[55]CR 2003/28, para. 181, submission (6).

[56]Mexico submission (7), in connection with (3).

make sure that a prior violation of Article 36 cannot affect subsequent proceedings other than by restarting proceedings at the point where the violation occurred, if that were ever possible, excluding information previously gathered? So, when we take a closer look at Mexico's latest submissions it turns out that their substance has not changed, that they are old wine in new, and only slightly more elegant bottles.

6.3. Yet it is not for Mexico to determine what the appropriate remedies are for breaches of the Vienna Convention. It is this Court that must assume the difficult task of interpreting Article 36 (2) of the Convention, and it is for this Court to determine what is necessary to give full effect to the Convention, as a matter of international law, when a primary obligation has been breached. Although State practice is relevant to the interpretation of the Convention, the appropriate remedy cannot be inductively derived, in a quasi-mathematical fashion, from a survey of the divergent criminal procedure laws of States parties to the Convention.

6.4. But I submit that the Court, in its effort to find a just and equitable resolution, might be guided by two kinds of considerations: first, by the intentions of States parties at the time when the Convention was deliberated and concluded as well as by subsequent practice under the Convention; and second, by the effects any remedy would have on States parties' domestic legal systems. It is not my task to interpret the *travaux* of the Vienna Convention; Ms Brown has spoken to that subject already. I therefore limit myself to pointing out that since the time the Vienna Convention was drafted in the early 1960s criminal procedure laws in general and the importance accorded to the respect for individual rights of suspects in particular have, on an international scale, undergone dramatic changes. Individual procedural rights as well as procedural remedies that seem commonplace today would have appeared more like juristic science fiction 40 years ago, and violations that in our era of growing respect for human rights call for drastic sanctions were still shrugged at when the Vienna Convention was concluded. What can we infer from that fact? I think that it is fair to say that the diplomats and lawyers who drafted the text of the Vienna Convention would be more than surprised by the discussions we are conducting today, that they would be amazed by the far-reaching conclusions Mexico is seeking to draw from Article 36 (2) for the way in which domestic legal systems must react to a neglect of consular information or notification. The fact that only few States have taken steps to address breaches of Article 36 in

their criminal justice systems is certainly not without significance in this respect. Finally, while even international legal instruments may be subject to a certain amount of dynamic interpretation, we should not lose from sight the fact that States do not customarily volunteer to undertake international obligations that conflict with their domestic laws. Article 36 (2) reflects that assumption of harmony when it posits the rule that "the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State". It is therefore pertinent to ask whether the States parties to the Convention can in fact be assumed to have accepted far-reaching intrusions into their domestic legal systems as a consequence of any breach of one of the primary obligations under the Convention.

6.5. This observation leads me to my second point, the effect any ruling of this Court might have on domestic legal systems. The issue is not, as Professor Dupuy has argued yesterday, whether a State's internal legal traditions should, if there is a conflict, give way to international obligations. There is no serious dispute about that principle. But the very fact that this Court can make decisions that call for deep changes in States' domestic laws should perhaps counsel restraint. Whatever measures this Court demands to be taken for breaches of international law, whether they be termed *restitutio in integrum*, reparation, or remedies to give full effect to primary obligations, should not be defined in disregard of the affected States' internal order. To use a medical metaphor: the medication should be effective to cure the disease, but one should take care to minimize its negative side-effects.

6.6. Whether a remedy is appropriate depends on many factors, including the nature and gravity of the violation and the severity of the sanction. To make this determination, one task is to gauge the seriousness of the violation of international law, placing it in relation to comparable violations of domestic law, and to ask whether the remedy is in proportion with the violation. It is at this point that a comparison of various legal systems can be of help. If we can determine how a majority of legal systems react to certain types of violations then we can develop an idea of what the "normal" remedy for certain violations could be, and this Court could be confident in requiring such remedies of States when international breaches of a similar type and gravity have occurred.

6.7. My argument on Tuesday has been that the sanctions demanded by Mexico for breaches of Article 36 would be inappropriate. Not only do they go far beyond the "reconsideration and

review" standard set by this Court in *LaGrand*, but they also go beyond the "normal" reaction a procedural violation of the Article 36 kind would meet in most legal systems. Contrary to what Mr. Donovan has suggested yesterday, it is not important whether or not legal systems foresee, *in abstracto*, the possibility of suppressing evidence, of granting an appeal without a showing of individual prejudice, or the reopening of a closed case — what is relevant is for what *kinds of violations* they offer these procedural remedies.

6.8. I have tried to show that the categories of violations leading to these very strong procedural sanctions are, by their type and gravity, fundamentally different from the neglect of consular information or notification as has occurred in the cases before this Court. I certainly do not wish to belittle the importance of observing the rules and obligations under Article 36; but however crucial they may be for upholding proper consular functions, their legal impact on the fairness of the criminal process is at most tangential. Breaches of Article 36 are, in the context of the criminal process, not on the same footing as, for example, the use of torture to obtain a confession, the denial of access to legal counsel, or the participation of a disqualified judge in the trial[57]. I submit that breaches of Article 36 are comparable with violations of procedural rules such as a suspect's right to having a relative informed of his whereabouts when he is being taken into custody, or the right to have a physician present when a search of the body is being performed. I am not aware of any legal system that would in such cases exclude evidence, allow an appeal without a showing of prejudice, or permit retrial after the verdict has become final.

6.9. In sum, adopting Mexico's submissions with respect to remedies would involve this Court in an excessive interference with domestic law, not only of the United States but of all States parties potentially in breach of Article 36. I would therefore ask the Court to stay on the course it has taken in *LaGrand* and to leave the choice of the means to grant effective review and reconsideration to each State.

This concludes my part of the presentation. Mr. President, may I ask that you now call Mr. Taft again.

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[57]Egregious violations of this kind occurred in the cases cited by Mexico in support of its claim that "automatic" reversal is proper whenever Article 36 has been breached; see the decisions of the Inter-American Court of Human Rights in Castillo Petruzzi (Ser. C) No. 52 (1999) (trial held by "faceless" judges) and Cesti Hurtado (Ser. C) No. 56 (1999) (trial held before incompetent military court in violation of habeas corpus order); cf. Mexico Memorial, paras. 368-370.

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

Mr. TAFT: Thank you, Mr. President.

VII. CONCLUSION

7.1. Mr. President, Members of the Court, learned counsel. We end, where we began, with this Court's decision in *LaGrand*. We have explained in our two rounds of oral presentations that the facts of this case are vastly different in number and type from those of *LaGrand*, but that the legal issues are, in all essential respects, the same. We have shown that the remedy prescribed by this Court in *LaGrand* moved far from where we and other States parties to the Vienna Convention understood ourselves to be when we negotiated the Convention in 1963.

7.2. Allow me to summarize our view of this important case. *LaGrand* broke new ground in two respects. First, it called upon the United States to take actions to implement its obligations under the Convention by reviewing and reconsidering the results of criminal proceedings — something no State party had previously understood itself to be obligated to do, and something none had ever done. Then, it went further by directing a sovereign State to add a specific, targeted step within its domestic criminal legal system. The United States and presumably other States parties have been able to accommodate this Court's Judgment in *LaGrand* only because it left the implementation of this obligation to each State party "by means of its own choosing". The Court properly refrained, as it has always in the past refrained, from inserting itself directly into the legal systems of sovereign States to itself conform those systems to international legal obligations. While the Court did not accept the United States position in *LaGrand* when we argued that case, the United States has conformed its conduct to the Court's decision there.

7.3. Mexico now invites the Court to revisit and rewrite *LaGrand* to carry the States parties even further — to a place where none has yet gone by its own choice, and where few if any could yet go without making substantial changes in their domestic laws and practice. To that extent, Mexico's submissions ask this Court not merely to become a court of criminal appeals of last resort but, as well, a legislative and administrative body of ultimate authority, rewriting not only the Vienna Convention, but the laws of many States. The Court should emphatically refuse to perform this function.

7.4. It has been less than three years since this Court pronounced its *dispositif* in *LaGrand*. Now Mexico, without compelling reason or proof, has asked this Court to set that *dispositif* in significant measure aside, and to start again. Mexico has asked you to write into the Vienna Convention an extraordinary requirement that consular officers are entitled as a matter of international law to intervene directly in an ongoing criminal investigation almost at its outset. Mexico has asked for your agreement to a complex scheme whereby a foreign national detainee may be held by the receiving State, but not questioned, for a period of time that expands with the gravity of the criminal charge, and in inverse proportion to the consular resources of the sending State. This is because, Mexico asserts, the consular officer can, should, and must be permitted to participate in the foreign national's interrogation and defence as though he were an attorney. Not a single State has so far chosen to adopt such an approach in carrying out its international obligations under the Convention.

7.5. On the question of remedies, Mexico would have the Court intrude even more deeply. While its submissions have been rephrased, as Professor Weigend has shown, their substance is unchanged from what it has always been. Mexico asks this Court to decide not that States can, or should, but that they must, in all cases and under all circumstances, exclude evidence and void convictions and sentences in the event of a breach of the Convention without regard to age-old principles of finality of judgments, of causation and prejudice, and of evidentiary rules on reliability and probativeness. No State takes such an approach to its obligations under the Convention — for the very good reasons Professor Weigend has explained.

7.6. Professor Zoller has explained the defects of Mexico's case with respect to this Court's jurisdiction and its prudential customs on the admissibility of claims. Mexico's submissions, especially those seeking remedies, greatly overreach this Court's powers and responsibilities. Mexico's case is striking in that it proceeds in complete disregard of long-standing settled principles of exhaustion of local remedies and of finality of judgments. It is simply unprecedented for a case to be brought to this Court when, in significant measure, the first stage of appellate review in domestic courts has not yet even begun. Mexico's riposte — that it need not exhaust futile remedies — is belied by the fact that the remedies available to it are anything but futile. With respect to Mexico's argument about the application of amended Article 79 of the Rules of Court to

the Court's consideration of issues of jurisdiction and admissibility in this case, it is without merit. We have included in the judges' book at tab 2 the passage from the Court's Report to the General Assembly in which it notes that the amendment concerns "incidental proceedings".

7.7. Our courts have reviewed and reconsidered claims of breach of the Convention against a standard of prejudice, and will do so in any case in which defendants raise those claims in an orderly and timely manner in accordance with the rules of claim preclusion. Such rules find a comfortable home in all legal systems throughout the world.

7.8. We have reminded the Court of our unparalleled efforts to ensure that our law enforcement authorities provide consular information to every arrested person they know or have reason to know is a foreign national. We continue to work closely with our friends and neighbours, including particularly Mexico, to facilitate their efforts, and our own, to take seriously the system for facilitating consular protection created by the Convention. And to ensure review and reconsideration of convictions and sentences in the inevitable circumstances of the occasional breach. We will continue to do these things.

7.9. Mexico yesterday questioned whether there had been any change in the approach of the United States to its obligations under the Vienna Convention in the wake of *LaGrand*. On the one hand, Ambassador Robledo indicated we have not conformed our conduct to *LaGrand*, but instead conformed *LaGrand* to our conduct. By contrast, Ms Babcock complained that the things we have been doing since *LaGrand* we had actually started doing previously, thereby somehow implying that the Court should disregard conduct it has already recognized as constituting a "substantial" compliance programme. The fact remains that the United States has modified its conduct in two critical respects as a result of *LaGrand*. We have redoubled our efforts to ensure compliance by our law enforcement officers with our obligations under Article 36, and we have ensured that our legal system, including the clemency process, provides review and reconsideration of convictions and sentences taking account of any breach of Article 36. We have done what the Court's opinion in *LaGrand* required.

7.10. Ms Brown reviewed for you the proper understanding of Article 36 (1), which does not establish any right for a consular officer to inject himself into a criminal investigation, or to act as a duly licensed attorney, and which plainly does not require that a criminal investigation be held in

abeyance pending completion of Article 36 procedures. Mexico's earlier argument that "consular notification under the Vienna Convention is a human right"[58] has fallen away[59], and finds no place, I note, in Mexico's final submissions. No State understood the Convention when it was negotiated in 1963, and no State has understood it in the meantime, to require this. It is unsupported by the text, by the object and purpose, by the *travaux*, and by the practice of States. It is nothing less than a rewriting of the Vienna Convention. Mexico's radical reinterpretation of the Convention accordingly must be rejected.

7.11. Mr. Philbin explained that it is the fundamental purpose of the criminal justice systems of the United States to ensure the fair trial of all defendants, of whatever nationality, in accordance with universally recognized principles of due process of law. All defendants, regardless of nationality, income, or education must be given a fair trial on a level field. Our courts ensure to all defendants the assistance of competent counsel, interpreters and investigators, and they enforce the strictest standards of fundamental fairness. Ms Babcock yesterday offered that Mexico does not "stand in judgment of the United States criminal justice system". Perhaps not, but that is exactly what Ms Babcock asks this Court to do. Moreover, she wants the Court to judge our system not for what it is, and not for what it does, but for what it might be in a case where everything that can possibly be imagined has gone wrong.

7.12. In my conclusion on Tuesday afternoon, I observed that Mexico had not identified a single case amongst the 52 it has brought to this Court in which the right to a fair trial was compromised by a purported breach of Article 36. That challenge remains unanswered. In Mexico's rebuttal, Ms Babcock engaged in a parade of hypothetical horribles that might conceivably occur in the absence of a consular officer, but never succeeded in demonstrating a single concrete instance where the defendant's right to a fair trial was prejudiced. This is not surprising, because our courts sit to see that defendants are tried fairly. And they have done and will do that in these cases. Our courts have reviewed the potential consequences Ms Babcock conjures up related to Article 36, when they have been raised, and have found that they have not resulted in prejudice to essential attributes of a fair trial in any particular case, in so far as it has

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[58]Mexico Application, para. 281 (5).

[59]See CR 2003/24, para. 57 (Gómez-Robledo).

gone through the court process. This Court should not be looking over the shoulders of our judges, assuming things that might but didn't happen and then acting on those mistaken assumptions. Yet this is what Mexico wants it to do.

7.13. Mexico has, to this point, identified no question of fundamental fairness that is not protected in the United States criminal justice system, and no right central to the fairness of a criminal trial that cannot and will not be vindicated by our courts upon request. This is telling. While Mexico has trivialized the difficulty and consequence of successive trials of the same case, you as jurists and attorneys know that this is wrong. Professor Weigend explained clearly that the societal costs and legal consequences of multiple trials of the same matter are universally recognized. No State's system proceeds down that road without extremely good reason, and Mexico has not provided the Court with such justification in this case.

7.14. We recognize that the observance of Article 36 can contribute toward the fair trials of foreign nationals, if consular officers choose to assist in the defence. We welcome the efforts of Mexico and other States to facilitate the enjoyment of basic rights and protections by Mexican nationals, and to point out in a timely way if our criminal justice system sometimes stumbles, so that an error can be quickly corrected. But it cannot be the case that a fair trial for a foreign national can only be ensured by consular assistance under the Vienna Convention. As Mexico concedes, there is no obligation for the consular officer to respond. If he does not, the receiving State system must nonetheless be able to carry on and reach the necessary outcome — a fair trial and a just result.

7.15. Mr. Thessin has reviewed once more for the Court today the subject of clemency. Mexico has continued to focus considerable attention on the clemency process, trying in every possible way to divert your attention from the fact that the clemency process provides the ultimate fail-safe in our legal system, even as it stands apart from our judicial system as a separate avenue of relief. Ms Babcock has even attributed to the United States a description of the clemency process that it has never put forward. In your judges' book at tab 3 are what Ms Babcock presents to the Court as a quotation of the United States position and the passage in the United States Counter-Memorial to which she refers. As the Court knows, the United States is far from characterizing the clemency process as a piece of paper and a beg for mercy. Our view has always

been that the clemency process is a key factor in our efforts to conform our conduct to the *LaGrand* Judgment. Mexico's real quarrel is that the United States, like every other State, has rules and procedures that govern the timely raising of claims in the judicial process, and that these rules sometimes foreclose a defendant from raising particular issues in that forum. What Mexico cannot deny, however, is that the clemency process provides the answer to any and all complaints it may have about the procedural default rule, because there is no claim that cannot be heard and addressed via clemency. Clemency is unbounded by procedural default. Since Mexico cannot effectively rebut that point, it yesterday, once again, attacked the men and women who are vested with the legal responsibility to administer the clemency system. Counsel for Mexico asked the Court to imagine that clemency might in the future be abolished, or might be modified to exclude the Vienna Convention from future consideration. In other words, Mexico implies that the United States might act deliberately to make compliance with *LaGrand* more difficult. Perhaps it is because we are in Holland that we see so much tilting at windmills. The Court again is asked to base its decision on what *might* be, and on malicious intentions *alleged*, not on what *is*. The fact remains that the clemency process has worked, most recently on Tuesday of this week, as Mr. Thessin has told you, to review and reconsider convictions and sentences, taking account of alleged violations of the Vienna Convention and their consequences. The Court can have every confidence that this fail-safe will continue to be available to provide review and reconsideration taking account of any breach of Article 36 in the future.

7.16. Professor Zoller demonstrated that — as she had shown on Tuesday — whether viewed as a primary obligation under Article 36 (2), or as a remedial obligation under the law of State responsibility, review and reconsideration fits well within the Court's role. She explained the implications of Mexico's last minute adjustments to its submissions, including Mexico's apparent abandonment of its request for judicial satisfaction. And she made clear that Mexico is not entitled to cessation and assurances of non-repetition because guarantees of the type Mexico seeks are not available under general international law, and because the United States continues to apply *LaGrand* reasonably and in good faith.

7.17. Professor Weigend reminded us that the Convention and its interpretation have consequences that stretch far beyond Mexico and the United States. The Court is not called upon

here to decide a simple bilateral dispute. Whatever *dispositif* this Court ultimately issues must be capable of being honoured and applied — not just in the breach — by each and every State party to the Convention. Professor Weigend has made plain that no State in 1963 could have understood the Convention to require the vacation of convictions, the remittal of sentences or the exclusion of evidence whenever a breach of Article 36 occurred. He also pointed out that the imposition of these far-reaching consequences would lead to inexplicable differences between serious violations of domestic law, which do not require exclusion of evidence or granting a new trial, and breaches of Article 36, which only potentially affect the fairness of a criminal trial or the appropriateness of its outcome. Review and reconsideration, not automatic application of the most drastic remedies known to the criminal process, is the correct remedy here.

7.18. Mr. President, Members of the Court. With all this in mind, where do we stand with regard to Mexico's revised submissions? Ms Brown has explained why Mexico's first and second submissions — interpreting Article 36, paragraph 1, and claiming that the United States has breached this paragraph — cannot be accepted. Mr. Philbin and Mr. Thessin have explained why Mexico's third submission — that the United States does not provide review and reconsideration — is simply mistaken. Professor Zoller has explained why the Court should not agree to the fourth submission — that it is entitled to restitution, as it defines that term. Professors Zoller and Weigend have explained the inappropriateness of Mexico's fifth and sixth submissions. Mr. Philbin, Mr. Thessin and Professor Weigend have explained why Mexico's seventh submission, which would exclude clemency and certain municipal law doctrines from review and reconsideration, cannot be justified. And Ms Brown and Professor Zoller have explained, finally, why Mexico's eighth submission, requesting guarantees and assurances, fails. For all these reasons, as well as for the reasons we explained on Tuesday and in our Counter-Memorial, none of Mexico's submissions stand.

7.19. Mr. President, Members of the Court, before I conclude the United States presentation in this second round, I would like to make just one more point. Specifically, despite what we have said about the straightforward nature of the legal issues in this case — which is whether the Court should go further than its Judgment in *LaGrand* — I want to be clear that we recognize that in other ways this case is not an easy one. No case that touches on the question of whether another

human being shall live or die is easy. Judges, juries, prosecutors, clemency boards, governors and competent authorities of the United States involved in these 52 cases have thought long and hard about the decisions that they have been called upon to make, and they will struggle hard to make those decisions that, for them, lie ahead. The Judgment in *LaGrand* makes clear that, in the end, it is these persons, not this Court, that have the responsibility for these decisions as they carry out their different functions according to law, and the Court in that case left that responsibility where it belongs — to them. And in this respect also, I submit that this Court should follow the decision in *LaGrand*.

7.20. I would like, in closing, to thank the Court for its kind attention. I would also, in that connection, like to thank the interpreters, the Registrar's office and also thank, very much, Mexico's counsel for the co-operation that we have had in this case in agreeing to an accelerated schedule; and in this respect I think that has also placed a burden on the Court and the Registrar's office, and I thank them. I make the following submission on behalf of the United States.

7.21. On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court's Judgment in *LaGrand*, not only with respect to German nationals but, consistent with the declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed.

This concludes our presentation. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Taft. The Court takes note of the final submissions which you have read on behalf of the United States of America, as it took note yesterday of the final submissions of the United Mexican States. This brings to an end the second round of oral argument by the United States, as well as the end of this week of hearings devoted to the oral arguments on the merits of the case.

I should like to thank the Agents, counsel and advocates for their statements. In accordance with practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso I now declare closed the oral proceedings

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

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment. As the Court has no other business before it today, the sitting is closed.

The Court rose at 5.10 p.m.

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